

Faculty of Law

The Legal Regime Applicable to Migrant Smuggling

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Introduction

The number of migrants approaching coastal states in Europe by sea is increasing every year. In June 2015, the number of migrants has already overreached 100,000¹. The aim of this thesis is to ascertain whether it is possible to deal with increasing migrant smuggling by sea within the existing legal framework of the law of the sea.

Migrant smuggling is considered to be an international crime along with crimes such as arms smuggling and illicit trafficking in narcotic drugs which can affect several countries – the state of origin, the flag state and the state of destination². As a topic of research, its significance grows when it is considered in a broader light than that of the human rights perspective alone, although it has always been an important issue in this context. However, because of the large number of migrants involved, there is also a need to take state security into account, as well as the relevant state's sovereign right to impose its immigration regulations. From the perspective of legal researchers, the topic of smuggling of people by sea has often been seen in the light of human rights. At the same time, the rights and duties of the coastal state and the flag state of rescuing vessel also form part of this issue. At present, it is becoming apparent that the current approach toward this problem could well be insufficient to resolve problems related to increasing immigration by sea that is taking place in violation of the immigration regulations of the coastal state. Therefore, an overview of the current international regulation of the law of the sea concerning migrant smuggling is included in this thesis.

New trends are also emerging. For example, situations in which people are smuggled on overloaded cargo vessels that approach the coast of another state without any crew on board (so-called “ghost ships”³). As interception at sea is increasing as well, smugglers often compel migrants to embark on their voyage alone because they are afraid of getting caught. They are using less expensive materials for vessels and overloading them with

¹ UNCHR The United Nations Refugee Agency. *Mediterranean crossings in 2015 already top 100, 000* <http://www.unhcr.org/557703c06.html> [Visited 14 June 2015].

² Coppens, Jasmine. *Migrant Smuggling by Sea: Tackling Practical Problems by Applying a High-level Inter-agency Approach*. In: *Ocean Yearbook 27*. Edited by Aldo Chircop, Scott Coffen – Smout, Moira McConnel. Leiden (Martinuss Nijhoff Publishers) 2013, p. 324.

³ At the beginning of this year, a Sierra Leone registered vessel “*Ezadeen*” approached to the coast of Italy. See, for example, Hooper, John. *Refugees give thanks after “ghost ship” Ezadeen rescued in Mediterranean*. In: *The Guardian* <http://www.theguardian.com/world/2015/jan/03/relief-syrian-refugees-ezadeen-docks-italy-moral-blackmail-smugglers> [Visited 15 June 2015].

people: “with no need to transport fuel for a return trip, migrants are making use of this extra space by loading their boats with more people”⁴. These are violations of both international and national regulations that also entail high costs to both rescuing vessels and coastal states.

The activity that is the subject of this research is people smuggling by sea. The 1982 UN Law of the Sea Convention⁵ (hereinafter, the LOSC) includes provisions dealing with the illegality of migration by sea without defining the term “people smuggling”. Therefore, in this thesis the term will be used as it is in Article 3 of the Protocol against Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime⁶ (hereinafter, the Smuggling of Migrants Protocol). This is also the source which most researchers refer to when seeking a definition⁷. According to the Smuggling of Migrants Protocol, this activity is defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State of which the person is not a national or a permanent resident”⁸. The definition also states that the activity takes place if there is a material benefit, thus excluding activities carried out for humanitarian reasons⁹. In addition, the definition distinguishes migrant smuggling from human trafficking which will not constitute a part of this research. While this thesis will cover the crime of migrant smuggling, human trafficking and migrant smuggling are related crimes. However, they are both regulated separately in international law.

This thesis is divided into three parts. Following the introduction, provisions in the Law of the Sea Convention in various maritime zones will be examined. Thereafter, different

⁴ Coppens, Jasmine. *Migrant Smuggling by Sea: Tackling Practical Problems by Applying a High-level Inter-agency Approach*. In: Ocean Yearbook 27. Edited by Aldo Chircop, Scott Coffen – Smout, Moira McConnel. Leiden (Martinuss Nijhoff Publishers) 2013, p. 325.

⁵ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

⁶ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, opened for signature 15 November 2000, UN Doc. A/RES/55/25 (2000) of 15 November 2000, Annex III (entered into force 28 January 2004).

⁷ United Nations Office on Drugs and Crime. *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications* www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html [Visited 15 May 2015].

⁸ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime. United Nations, Treaty Series, vol. 2241, No. 39574.

⁹ Coppens, Jasmine. *Migrant Smuggling by Sea: Tackling Practical Problems by Applying a High-level Inter-agency Approach*. In: Ocean Yearbook 27. Edited by Aldo Chircop, Scott Coffen – Smout, Moira McConnel. Leiden (Martinuss Nijhoff Publishers) 2013, p. 353.

international instruments dealing with this issue will be analyzed. The aim of these two chapters is to discuss whether there are possibilities for coastal states to advocate their position against the growing number of migrants approaching to their coasts. Finally, part three will offer an insight into the current situation involving illegal immigration (in particular, smuggling of migrants by sea) in Italy as a case study of the topic. Italy is currently one of the European countries with the highest rates of immigration – the number is over half of the total number of migrants this year¹⁰.

The aim of this research is to discuss the possibilities how to deal with migrants smuggled to different maritime zones of a state under the current legal framework. The methods used during the research are case study of the situation of migrant smuggling in Italy and statistical data analysis of the number of migrants involved as well as the number of search and rescue operations performed. The thesis will include assessment of various legal sources: legislative sources of law of the sea (such as the Law of the Sea Convention¹¹, International Convention on Maritime Search and Rescue¹² and International Convention for the Safety of Life at Sea¹³), the European Union regulations and the International Maritime Organization's instruments. Some of previous court decisions will be included, for example, the *Hirsi v. Italy* case, *Saiga No. 2* case¹⁴, as well as assessment of some previous incidents covered by this topic.

¹⁰ Index Mundi. *Italy Demographics Profile 2014* <http://www.indexmundi.com/italy/> [Visited 15 May 2015].

¹¹ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

¹² International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985).

¹³ International Convention for the Safety of Life at Sea, opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980).

¹⁴ *M/V Saiga 2* case – Saint Vincent and the Grenadines v. Guinea. International Tribunal for the Law of the Sea, Hamburg, 1 July 1999.

1 The Law of the sea and rights and duties of states in different maritime zones concerning migrant smuggling

When dealing with questions that are related to the law of the sea, migrant smuggling can be discussed within different maritime zones. According to the LOSC, coastal, flag and other states have different rights and duties depending on the maritime zone where the smuggling of migrants actually takes place. This is important in this context, because from the vicinity of the migrant ship to the coast, both the coastal, port and flag state's rights and duties are affected. Among the issues that need to be resolved are whether a coast guard vessel of the coastal state may stop the vessel that is engaged in migrant smuggling and whether national immigration regulations are applicable. Usually, the coastal state has more rights in maritime zones that are closer to its coast than other states, which, therefore, enjoy fewer rights in same maritime areas. In practice, states try to prevent migrants from reaching their territory. Prevention takes various forms of interception as it "occurs when mandated authorities representing a state prevent embarkation of persons on an international journey, prevent further onward international travel by persons who have commenced their journey, or assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law"¹⁵. These activities are taken by coastal states such as Italy or Australia that are principal main destinations for migrant ships.

This chapter will address issues of the law of the sea connected with people smuggling such as the right of a migrant smuggling vessel to access the port of a coastal state, the rights of coastal states to impose their national immigration regulations and to intercept vessels in their territorial sea and contiguous zone, and, last but not least, the question of whether provisions concerning high seas and freedom of navigation are applicable to migrant ships. Other international legal sources will be dealt with in subsequent chapters of this thesis¹⁶.

¹⁵ Coppens, Jasmine. *Migrant Smuggling by Sea: Tackling Practical Problems by Applying a High-level Inter-agency Approach*. In: *Ocean Yearbook 27*. Edited by Aldo Chircop, Scott Coffen – Smout, Moira McConnell. Leiden (Martinus Nijhoff Publishers) 2013, p. 324.

¹⁶ See chapter 2.

1.1 Internal waters

As mentioned above¹⁷, in its internal waters the coastal state enjoys more rights than in its other maritime areas, because it is a maritime zone located closer to its coast. According to Article 2 of the LOSC, in internal waters a coastal state has the same sovereignty as within its land territory. That means that national immigration regulations are applicable to a situation in which a migrant vessel is located within this maritime area and the coastal state may intercept this vessel. The same can actually be said about the territorial sea, but with the exception of the innocent passage regime, which will be discussed in the following sub-chapter¹⁸.

The coastal state, to which migrants are to be smuggled, can actually decide whether to let this vessel approach its port. It also has rights to expel such a vessel from its internal waters, because the state can decide whether to allow a vessel to proceed to its port which is part of its internal waters. The exception to the aforementioned right is a situation where a vessel carrying migrants is approaching the port of this coastal state and is in a state of distress. The right to enter to port in case of distress forms a part of customary international law¹⁹. Therefore, it can be argued that the coastal state has a duty to allow a vessel in distress to enter its ports. It is also based upon Articles 98 and 18 (2) of the LOSC and, in fact, is also stipulated in the 1974 International Convention for the Safety of Life at Sea²⁰ (hereinafter, the SOLAS Convention). Therefore, the vessel that is smuggling migrants can refer to this provision of international law. The state of distress is common in this context. Oftentimes, conditions of these vessels are poor and are not fit for passengers (such as the overloaded cargo vessels that approach Italy)²¹. For example, at the beginning of this year, the vessel *Ezadeen* was towed to an Italian port by the Italian coast guard. It was carrying

¹⁷ See chapter 1.

¹⁸ See chapter 1.2.

¹⁹ Mallia, Patricia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Boston (Martinus Nijhoff Publishers) 2010, p. 44.

²⁰ International Convention for the Safety of Life at Sea, opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980), Regulation 33 (a).

²¹ Masco, Manuela. *Dozens of Migrants Die Trying to Reach Italy; Nearly 2,000 migrants have died in the Mediterranean so far this year*. In: Wall Street Journal. 24 July 2015.

about 450 migrants without the ship's crew on board and in this context constituted a vessel in distress²².

However, the LOSC itself does not contain any provisions as to how the situation of distress is to be evaluated. Another example from state practice indicates that in itself the fact that a vessel is carrying rescued migrants during its voyage may not be classified as a state of distress by a coastal state. In the *Tampa* incident in 2001²³, Australia denied entry to its port in the Christmas Islands to a Norwegian flagged vessel *Tampa*. It was carrying previously rescued migrants from their vessel at sea. The *Tampa* was claiming that it does not have enough safety equipment and adequate sanitary conditions to proceed after the rescue operation. Therefore, it considered this situation to constitute a state of distress. However, the coastal state denied that this was the case and duly the *Tampa* access to its port. As the LOSC does not have any particular criteria, the meaning of "distress" can be also interpreted within state practice and in this case unseaworthiness does not mean the same as the state of distress but "it is only where such unseaworthiness gives rise to a threat to human life that the vessel may claim a right to refuge"²⁴. The state which decides upon this between all states involved in the search and rescue and the state of departure is the coastal state. As the right to make the definitive judgment on this is given to the coastal state along with the right to expel the vessel from its internal waters, it can be, therefore, argued that coastal state has only minor restrictions to its sovereign rights and jurisdiction within its internal waters.

²² Zampano, Giada, Stevis, Matina. *Italian Forces Rescue Ship Abandoned With 450 Migrants Aboard; Incident Marks Second Time This Week Ship Was Headed for Collision Course With Coast*. In: Wall Street Journal. 02 January 2015.

²³ Tauman, Jessica E. *Rescued at Sea, but Nowhere to Go: the Cloudy Legal Waters of the Tampa Crisis*. In: Pacific Rim Law & Policy Journal. Vol. 11 No. 2 (2002), pp. 461 – 496.

²⁴ Mallia, Patricia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Boston (Martinus Nijhoff Publishers) 2010, p. 52.

1.2 Territorial sea

The rights of a coastal state in the case of people smuggling in the territorial sea are limited by the innocent passage regime. The right for a coastal state to impose its immigration regulations is the same as it is within internal waters, because national regulations within this maritime area can be applied the same just as they can be within the state's land territory. The duty to render assistance in case of distress²⁵ also applies. However, a vessel cannot be expelled from this maritime zone if its passage is innocent. The LOSC prescribes that as long as the vessel flying a foreign flag acts within the limits that can be considered as innocent²⁶, the coastal state cannot hamper this passage (for example, by expelling a vessel from its territorial sea). Therefore, the sovereignty of the coastal state is not equivalent to that which it has in respect to its internal waters²⁷ where navigation by a vessel flying a foreign flag is possible only with the consent of the coastal state.

The question that must be answered is whether the passage of a migrants' ship can be considered to constitute an innocent passage. In the case of people smuggling, the coastal state may refer to Article 19 (2) (g) of the LOSC. It directly states that "the loading or unloading of any [...] person contrary to the [...] immigration [...] laws and regulations of the coastal state"²⁸ is "prejudicial to peace, good order or security of the coastal state"²⁹. Therefore, passage which involves activities that a coastal state may construe to constitute people smuggling is not considered to be innocent passage. "The right of innocent passage is therefore conditional upon the foreign ship not engaging in acts which pose a threat to the adjacent coastal state"³⁰. As a result, the coastal state may expel a migrant smuggling vessel from of its territorial sea on the said grounds. For example, it is argued that Australia "can rightfully rely on the law of the sea to justify the interdiction of vessels carrying irregular migrants in its territorial sea and the removal of those vessels beyond the

²⁵ See Article 98 of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

²⁶ That means, in accordance with Article 19 (2) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

²⁷ Rothwell Donald R., Stephens Tim. *The International Law of the Sea*. Oxford (Hart Publishing Ltd) 2010, p. 70.

²⁸ Article 19 (2) (g) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

²⁹ Article 19 (2) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

³⁰ Rothwell Donald R., Stephens Tim. *The International Law of the Sea*. Oxford (Hart Publishing Ltd) 2010, p. 216.

territorial sea”³¹. Moreover, the state has the sovereign right to impose its national legislation on this vessel, because the territorial sea forms part of state’s territory. Therefore, territorial jurisdiction is extended to it. The coastal state is empowered to exercise its criminal jurisdiction prior to this vessel entering its internal waters, because the consequences of this crime extend to the coastal state³². People smuggling is a transnational crime and its consequences directly affect the coastal state. This is the reason why the coastal state’s regulations may be imposed outside its land territory. It is not, however, how the coastal state will respond to the activities of a vessel engaged in people smuggling. Without looking deeper into this question, it can be argued from previous judicial decisions that this response must be subject to the general principles of international law, i.e. necessity and proportionality³³ which are left to coastal states to decide upon.

³¹ Klein, Natalie. *Assessing Australia’s Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*. In: *Melbourne Journal of International Law*. Vol 15 (2014), p. 11.

³² Mallia, Patricia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Boston (Martinus Nijhoff Publishers) 2010, p. 52.

³³ See the *M/V Saiga 2* case – Saint Vincent and the Grenadines v. Guinea. International Tribunal for the Law of the Sea, Hamburg, 1 July 1999. The International Tribunal for the Law of the Sea concluded that activities taken against a ship must be reasonable and necessary in particular circumstances.

1.3 Contiguous zone

According to the LOSC, a contiguous zone is a maritime area that can be claimed by coastal states. If a coastal state decides not to claim one, the provisions included in the LOSC Part II Section 4 (“Contiguous zone”) do not apply. Article 33 of the LOSC even extends a coastal state’s rights to impose also its national immigration regulations beyond the territorial sea (up to 24 nm, while the territorial sea can be established up to 12 nm)³⁴.

However, possible measures taken by the coastal state depend upon whether the ship that is engaged in people smuggling is moving inwards or outwards. The most likely situation is that the smuggling ship is moving towards the coast of a state in order for the persons on board to disembark. In this situation, even if the migration is illegal, the coastal state cannot in fact impose any of its regulations. As it is only a protective area, the coastal state can only interdict such a vessel further away from its coast (outside the contiguous zone). This is in contrast to the fact that this ship was engaged in people smuggling and subsequently moves from the territorial sea of the coastal state towards high seas or the maritime areas of another state, the coastal state can impose its national legislation as the ship has been violating its national law.

There may, however, be a question of whether the coastal state may act if the vessel is engaged in people smuggling and has unloaded people in other boat(s) in the contiguous zone. Subsequent to this action, the vessel may further approach the coast of the state by entering its territorial waters and then turn back to the high seas. In this outward movement, the coastal state would appear not to be in a position to impose its legislation as the activity (people smuggling) has taken place beyond its territorial sea. There is no clear answer to this situation either in international regulations or in legal writings, although the issue itself has been mentioned previously³⁵. It might be argued that, in this case, in part of the coastal state, the vessel unloading migrants may constitute a mother ship. Therefore, it is subject to the coastal state’s criminal laws. However, this situation is only hypothetical, as there are no examples of state practice to be found.

³⁴ See Article 33 of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

³⁵ See, for example, Mallia, Patricia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Boston (Martinus Nijhoff Publishers) 2010, p. 50.

1.4 Exclusive economic zone and the high seas

In the case of people smuggling by sea, the legal regime in the exclusive economic zone and on the high seas is similar. Differences that are otherwise applied for exclusive economic zone (e.g. resource exploitation) are not relevant to this topic. Both maritime areas are subject to freedom of navigation. This means that ships are allowed to navigate freely throughout these zones (according to Article 90 of the LOSC). It stipulates that this right is afforded to ships flagged in every state (i.e. applied to each state equally). However, there are some activities that cannot be understood to equate to freedom of navigation – these are situations in which other (non-flag) states have enforcement jurisdiction³⁶. However, none of the aforementioned provisions deal with people smuggling and are not applicable to this topic. There have also been opinions stating that in recent times states have used their exclusive economic zones by emphasizing their security basis³⁷. This approach is not developed according to international law where the aim of the exclusive economic zone is strictly resource-orientated. Otherwise, all high seas freedoms apply³⁸.

One issue in relation to which a coastal state does have jurisdiction in the case of people smuggling is a situation when it exercises its right to hot pursuit. In this case, this would be a situation when a vessel has been smuggling migrants to a maritime zone of a coastal state (e.g. the territorial sea) and after that the coastal state arrests this vessel, which is flying a foreign flag on the high seas. However, the right to exercise hot pursuit does not mean that the state can enforce its laws and regulations on the high seas as a maritime zone. These provisions are created to punish vessels that have engaged in an illegal activity and exited the maritime zone of a coastal state by means of escape.

Another possibility is not exactly related to an enforcement jurisdiction, but rather to a right to board and inspect vessels that are not flying the flag of any state. This also applies to a case where a ship is navigating under two flags (according to Article 110 of the

³⁶ Articles 99, 100, 108 and 109 of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994) dealing with slave trade, piracy, and unauthorized broadcasting.

³⁷ Rothwell Donald R., Stephens Tim. *The International Law of the Sea*. Oxford (Hart Publishing Ltd) 2010, p. 83.

³⁸ See Article 58 (1) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

LOSC). As it is possible that there could be vessels navigating without a flag, the aforementioned provision may be applicable. It can also be seen from previous research into the topic that “this is especially relevant in the case of migrant smuggling, as many boats used by migrant smugglers are stateless vessels”³⁹. However, its aim is not to preclude people smuggling. Rather it is focused on the fact that ships should be under the jurisdiction of a particular state (flag state) while exercising the freedom of navigation. This provision is further expounded in Article 8 (1) of the Smuggling of Migrants Protocol. A State Party which considers that another vessel “is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of a nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other State Parties in suppressing the use of the vessel for that purpose”⁴⁰. By stopping stateless vessels on the high seas, such action is taken by Australia against migrant smuggling from Indonesia. The Australian coast guard boards such vessels and tows them back to Indonesia. However, there is a further question, i.e. whether these vessels can be pushed back to Indonesia’s territorial waters. Therefore, it has been argued that Australian coast guard officers should be limited to directing these vessels to “just outside Indonesia’s territorial sea”⁴¹. In practice, states have sought to extend these provisions of interception by creating bilateral treaties between coastal states and embarkation states (for example, Spain has concluded bilateral treaties with Mauritania, Senegal and Cape Verde)⁴². However, it is important to take obligations under Article 98 of the LOSC into account, i.e. the obligation to render assistance. Therefore, the condition of migrant vessels must be taken into account when deciding whether they can be pushed back (for example, lifeboats or other seaworthy vessels) or if any assistance is needed. The provisions of other international conventions regarding the duty to render assistance will be analyzed in the next chapter of this thesis⁴³.

³⁹ Mallia, Patricia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Boston (MA, USA: Martinus Nijhoff Publishers) 2010, p. 69.

⁴⁰ Article 8 (1) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, opened for signature 15 November 2000, UN Doc. A/RES/55/25 (2000) of 15 November 2000, Annex III (entered into force 28 January 2004)

⁴¹ Klein, Natalie. *Assessing Australia’s Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*. In: *Melbourne Journal of International Law*. Vol 15 (2014), p. 11.

⁴² *Ibid.*, p. 11.

⁴³ See chapter 2.

2 Legal instruments regulating rescue operations at sea

The Law of the Sea regime discussed above contains provisions that allow a coastal state to deal with migrants' vessels by means of interception and through the expulsion of these ships from particular maritime zones. As mentioned previously, such a right depends on exactly where the migrant smuggling vessel is located off the coast of the particular state. However, provisions under the LOSC are not the only regulations of international law to be taken into account when assessing situations involving people smuggling.

Alternatively, justification for any actions taken by coastal states can be based on the search for and rescue of vessels in distress according to search and rescue obligations. Terms of "interception" and "rescue" must be delineated. The aim of rescue is to assist people in case of distress, while the objective of interception is to "prevent, interrupt or stop the movement of persons"⁴⁴. However, both terms may also overlap. For example, the vessel of coastal state authorities may take the passengers on board their vessel.

The framework principle of search and rescue is covered by Article 98 of the LOSC. It includes both the duty for the master of a ship to "render assistance to any person"⁴⁵ and the duties of coastal states to promote a search and rescue service and co-operate with other states⁴⁶. Such provisions are extended through various legally binding and non-binding international instruments as "the humanitarian law of the sea dealing with Search and Rescue is covered by various maritime laws, soft laws, and traditions, which are put into practice by various actors"⁴⁷. These are, for example, the SOLAS Convention⁴⁸, the SAR Convention⁴⁹ and the Smuggling Protocol⁵⁰. Moreover, several legally non-binding

⁴⁴ UNHCR The United Nations Refugee Agency. *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, EC/50/SC/CRP.17 (9 June 2000)* www.unhcr.org/4aa660c69.pdf [Visited 31 July 2015].

⁴⁵ Article 98 (1) (a) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

⁴⁶ Article 98 (2) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

⁴⁷ Klepp Silja. *A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea*. In: *International Journal of Refugee Law* Vol. 0 (2011) p. 6.

⁴⁸ International Convention for the Safety of Life at Sea, opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980).

⁴⁹ International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985).

instruments such as the International Maritime Organization's (hereinafter, the IMO) resolutions contain these provisions⁵¹. The regime is also implemented by the IMO. After the *Tampa* incident, IMO's Maritime Safety Committee in 2004 adopted amendments to the SAR Convention⁵² and the SOLAS Convention⁵³. Both amendments are similarly reflected in both conventions:

Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.⁵⁴

Prior to these amendments, therefore, there was a lack of regulations concerning the duties of coastal states and provisions for rescuing ships, since only the duty to render assistance was included. Furthermore, the SOLAS Convention Regulation 33 obliges vessels to render assistance and also obliges a state to ensure co-ordination and co-operation⁵⁵. The SAR Convention deals with several issues concerning rescue operations and the obligations of states to establish a functioning maritime search and rescue system.

These amendments in the SOLAS Convention and the SAR Convention were developed with a view to obliging coastal states in particular to both co-operate and co-ordinate. At

⁵⁰ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, opened for signature 15 November 2000, UN Doc. A/RES/55/25 (2000) of 15 November 2000, Annex III (entered into force 28 January 2004)

⁵¹ See, for example, IMO Res. A. 773 (18), 4 November, 2004; IMO Res. A.867(20), 27 November, 1997; IMO MSC/Circ. 896/Rev.1, 12 June, 2001; and IMO Res. A.920(22), 22 January 2002.

⁵² IMO, MSC. 153 (78), 20 May, 2004.

⁵³ IMO, MSC. 155 (78), 20 May, 2004.

⁵⁴ International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985), para. 3.1.9.

⁵⁵ International Convention for the Safety of Life at Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994), Regulation 33.

the same time, the master of the rescuing ship is entitled to be released from obligations while engaging in rescue operations. However, apart from these amendments, the IMO has only a few enforcement capacities so “it is the coastal states that have a leading role in realizing and implementing the regime: as members of the IMO, and as signatories to crucial conventions on the law of the sea and of shipping”. The search and rescue system cannot be exclusively based on these provisions as “the international SAR regime relies on the naval security forces or the coast guards of the coastal states. It also relies on the commitment of all seamen to the longstanding maritime tradition of rescuing people in distress”⁵⁶. Therefore, the duty to render assistance forms part of customary international law. All vessels (both private and public) are part of this system.

Search and rescue obligations are equally applicable to all persons in distress at sea. Therefore, migrant ships in distress form only part of all possible situations. “The duty to rescue persons in distress at sea has been universally recognized from time immemorial. It is an age-old practice based on moral considerations which predate laws and which no one ever saw fit to challenge”⁵⁷. As these provisions are developed so that they are applicable to all situations, they may differ in each particular case.

Therefore, when search and rescue provisions are applied to migrant ships, several other questions arise about interpretation of these new provisions. The Norwegian delegation suggested that they “were not precise and, moreover, certain key terms [...] remained undefined, thus leading to the risk of different interpretations being given to the same terms”⁵⁸. Firstly, in several situations, a coastal state may question whether there is a situation in which the vessel approaching the coast finds itself in a situation where it needs to be rescued. In other words, the question is whether this is a “distress” situation in which a duty to render assistance applies.

⁵⁶ Klepp Silja. *A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea*, International Journal of Refugee Law Vol. 0 (2011) p. 7.

⁵⁷ Luis B. Sohn, John E. Noyles. *Cases and Materials on the Law of the Sea*. New York (Transnational Publishers, Inc.) 2004, p. 98.

⁵⁸ Mallia Patricia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Boston, MA, USA (Martinus Nijhoff Publishers), 2010, p. 133

Secondly, if the people are rescued, according to international regulations, they need to disembark in a “place of safety”⁵⁹. This may raise the question of whether a state that is involved in rescuing migrants is also bound by the duty to bring them to its coast or whether it is also entitled to choose to have them disembark in the state of which the migrants are citizens. And there is also the question of whether other coastal states in the vicinity are bound by any legal duty to allow the ship to let these migrants disembark at their ports.

Finally, it is also debatable whether a state, whose duty it is to render assistance to the ship, is bound by an exact duty to receive those people on board their ship or provide them with any other form of assistance (e.g. supply fuel for the vessel or supply food). In this case, no further questions would arise about the place where migrants should disembark.

The aforementioned questions will be dealt with in further sub-chapters⁶⁰.

⁵⁹ International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985), para. 3.1.9.

⁶⁰ See chapter 2.1. – 2.3.

2.1 Meaning of “distress” in international law

The LOSC does not specifically define “distress” in its Article 98. Instead, it broadly expounds a duty to “render assistance to any person found at sea in danger of being lost”⁶¹. “Uncertainties linked to the concept of “distress”, which is not clearly defined in international law, leave room for interpretation on whether particular boat migrants should be rescued or not”⁶². The term “distress” is included in the SOLAS Convention, Regulation 33⁶³. However, it does not explain the meaning of this concept.

The importance of understanding this concept has been previously highlighted in the practice of states. One example is the 2001 *Tampa* incident near the coast of Australia. The Norwegian flagged cargo vessel M/V *Tampa* “rescued 438 passengers from a sinking ferry in the Indian Ocean”⁶⁴. As the *Tampa* was a cargo ship designed for a crew of 27 people⁶⁵, the master of this ship recognized that it was “in violation of safety standards”⁶⁶. Therefore, disembarkation of the rescued migrants was necessary. The master of the *Tampa* was about to resume the voyage towards Singapore with a view to having the migrants disembark in Indonesia, but migrants insisted that they should disembark on nearby Christmas Island (Australia). At the same time, Australian authorities denied that this situation constituted distress and therefore, did not allow the vessel entry to its ports. Moreover, they warned the master of the *Tampa* that “if he continued toward Australian soil, he would be liable for fines or imprisonment”⁶⁷ which are usually applied to people smugglers in Australia. After a week, the rescued migrants were transferred to an Australian naval vessel. It is argued that circumstances such as those in the *Tampa* case or similar situations “involve a significant loss of time and money for ship owners and create uncertainties regarding consequences of rescue operations”⁶⁸. Indeed, in addition to the duty to render assistance to persons in distress at sea, shipmasters have other duties, for

⁶¹ Article 98 (1) (a) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

⁶² Klepp Silja. *A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea*, International Journal of Refugee Law Vol. 0 (2011) p. 7.

⁶³ International Convention for the Safety of Life at Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994), Regulation 33.

⁶⁴ Tauman, Jessica E. *Rescued at Sea, but Nowhere to go: the cloudy legal waters of the Tampa crisis*, Pacific Rim Law & Policy Journal Vol. 11 No. 2 (2002) p. 461.

⁶⁵ *Ibid.*, p. 462.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, p. 485.

⁶⁸ Klepp Silja. *A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea*, International Journal of Refugee Law Vol. 0 (2011) p. 7.

example, those to the ship owner. Although the *Tampa* had a duty to render assistance to people in distress which was actually transferred by the Rescue Coordination Centre of Australian Maritime Safety Authority⁶⁹, the situation itself raises the question as to what constitutes a distress situation. “There was a general recognition that lacunae existed in both the SOLAS and SAR Conventions in relation to the disembarkation of those rescued”⁷⁰. This case was subsequently discussed by the IMO, which further led to several IMO resolutions and finally to the aforementioned amendments to the SOLAS Convention and the SAR Convention. However, even these amendments are broad and leave room for interpretation as they did not define the term of distress more clearly. Apparently in this case, Australia had its own understanding of the term in question. In European Union, there is a certain criterion as to how the situation should be evaluated. They are included in the regulation No 656/2014 of 15 May 2014⁷¹. The aim of this regulation is to establish rules for the surveillance of the external sea borders. In the Article 9 (2) (f) it contains criteria how to determine the situation by taking into account various factors:

- i. the existence of a request for assistance, although such a request shall not be the sole factor for determining the existence of a distress situation;
- ii. the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination;
- iii. the number of persons on board in relation to the type and condition of the vessel;
- iv. the availability of necessary supplies such as fuel, water and food to reach a shore;
- v. the presence of qualified crew and command of the vessel;
- vi. the availability and capability of safety, navigation and communication equipment;
- vii. the presence of persons on board in urgent need of medical assistance;
- viii. the presence of deceased persons on board;
- ix. the presence of pregnant women or of children on board;
- x. the weather and sea conditions, including weather and marine forecasts.⁷²

Mentioned regional regulation is not binding to Australia. However, it contains several factors how the European Union Member States should evaluate the situation, for example the seaworthiness of the ship and the fact whether there are any crew on the board.

⁶⁹ Tauman, Jessica E. *Rescued at Sea, but Nowhere to go: the cloudy legal waters of the Tampa crisis*, Pacific Rim Law & Policy Journal Vol. 11 No. 2 (2002) p. 461.

⁷⁰ Mallia Patricia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Boston, (Martinus Nijhoff Publishers) 2010, p. 133

⁷¹ 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 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0656> [Visited 20 August 2015].

⁷² Ibid.

The meaning of “distress” is specified in the SAR Convention 1.3.3. as a “situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance”⁷³. It also appears in 4.4. of the SAR Convention as one of the emergency phases (along with the uncertainty phase and the alert phase). There, it is defined as a situation when there is either direct information concerning danger and the need for immediate assistance or in which it was not possible to make contact with a person after an alert phase, or “when information is received which indicates that the operating efficiency of a vessel [...] has been impaired to the extent that a distress situation is likely”⁷⁴. Apparently, this definition would not add much to the *Tampa* case in 2001 if these amendments had been in force at that time. The SAR Convention contains a broad formulation and it must be evaluated in each particular case. Therefore, both the coastal state and the vessel carrying rescued migrants could have their own basis to argue whether it is a distress situation. It is also said in other legal writings that “this definition leaves room for interpretation in favor of non-intervention. Customarily, ship masters are expected to be best placed to exercise their own judgment and reach an autonomous decision on rescues”. However, there may be situations (as evident in the *Tampa* case) in which not only ship masters have their opinion on distress, but so do coastal states in which the migrants are to disembark.

However, the room left in this case may not merely be seen as the inability of states to reach agreement in this situation, although this also may be the case. The other and most likely explanation in my opinion is that this gap may be left for states to evaluate and respond to each different situation. It should be taken into account that these regulations are drafted with the objective of covering all distress situations and migrant ships in distress forms only part of them. It is even argued that “it is in regard to migrants [...] that states show the most reluctance”⁷⁵.

⁷³ International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985), para. 1.3.13.

⁷⁴ *Ibid.*, para. 4.4.3.

⁷⁵ Testa, David. *Safeguarding Human Life and Ensuring Respect for Fundamental Human Rights: A Consequential Approach to the Disembarkation of Persons Rescued at Sea*. In: Ocean Yearbook 28. Edited by Aldo Chircop, Scott Coffen-Smout, Moira McConnell. Leiden (Martinus Nijhoff Publishers) 2014, p. 556.

What makes the discussion more difficult is the negotiation process over migrant smuggling and protection of a state's immigration policy and that the likely "gap" in the search and rescue regulation may be filled with state practice. However, this also differs from state to state. For example, while Australia exercises its internal policy according to the Operation Sovereign Borders (which is aimed at preventing "the passage of vessels carrying irregular migrants so they are unable to reach Australian territory"⁷⁶), the European Union has listed several factors that should be taken into account when assessing a distress situation including: "the seaworthiness of the vessel, the number of passengers relative to the size of the vessel and those passengers with special needs, the presence of qualified crew and the availability of navigation and other equipment"⁷⁷. Of course, the European Union's regulations do not apply to Australia; therefore, it is not bound by this list. However, it is a different story in regard to other states such as Italy and Greece which are both destination points for migrants' ships⁷⁸.

To sum up, as can be seen in international regulations; in each particular case, separate evaluation is required as to whether or not it constitutes a distress situation. However, the duty to render assistance as a long standing custom is applicable to every dangerous situation. Although there cannot be a particular answer to or definition of the concept of "distress", this must in no way affect the duty to render assistance *per se*.

⁷⁶ Klein, Natalie. *Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*. In: *Melbourne Journal of International Law*. Vol 15 (2014), p. 11.

⁷⁷ *Ibid.*, p. 13.

⁷⁸ See chapter 3.1.

2.2 The concept of a “place of safety”

After the aforementioned *Tampa* case, resolutions of the IMO were directed at subjecting the responsibilities of coastal states to better regulation. Because of various national interests, the decision-making concerning the “place of safety” was “the most thorny issue”⁷⁹. States that faces more illegal migration by sea (such as Spain and Australia), maintained a view that national efforts to combat illegal migration should not be affected. At the same time, other states (such as Norway – which is more interested in ensuring that rescued persons disembark from the rescuing vessel within a reasonable time) took the opposite view, i.e. that providing a place of safety should be an obligation for particular states⁸⁰. The following amendments in the SOLAS Convention and the SAR Convention prescribed the following duty for the coastal state:

The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization⁸¹.

Similarly, the SAR Convention defines rescue as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”⁸². It is said that because of two competing interests of states “the new provision thus represented the best possible compromise for the time being”⁸³. Therefore, it can be concluded from the text of the SOLAS Convention that the states that are responsible for the search and rescue operation are also responsible for ensuring that rescued people (including migrants) disembark at a place of safety.

However, even after these amendments, there are diverging views as to the meaning of these new provisions. It is said that the aforementioned regulations clearly state that “each particular SAR-state needs to provide a harbor on its own territory where people can be

⁷⁹ Mallia Patricia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Boston (Martinus Nijhoff Publishers) 2010, p. 136.

⁸⁰ Ibid.

⁸¹ International Convention for the Safety of Life at Sea, opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980), Regulation 33 (a).

⁸² International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985), para. 1.3.2.

⁸³ Mallia Patricia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Boston (Martinus Nijhoff Publishers) 2010, p. 137.

safely disembarked”⁸⁴. On the other hand, there is also a school of thought that “there is no duty for a state to accept individuals who are rescued at sea just because it is the nearest port. Nor is there an obligation on the state that undertakes the rescue operation to receive those rescued into its territory”⁸⁵. Therefore, the question is whether a state is bound not only by the duty to render assistance but also to allow access to its land territory for disembarkation.

The SAR Convention regulates that “the rescue co-ordination center or rescue sub-center concerned shall initiate the process of identifying the most appropriate place(s) for disembarking such persons found in distress at sea”⁸⁶. It is a location where rescue operations are terminated and a survivor’s safety of life is not threatened (including the fact that basic human needs can also be met).

As one may conclude from the regulations in the SOLAS Convention and the SAR Convention, the answer to the question whether a state has a direct obligation to accept migrants is negative. The state is responsible for co-ordination and co-operation in the event of the disembarkation of rescued people. However, there is nothing mentioned about the effectiveness of such cooperation. It is said that even after amendments to both the SOLAS and SAR Conventions “what has been imposed upon a State is an obligation to cooperate rather than on to ensure that a place of safety is provided”⁸⁷.

On the other hand, the IMO Guidelines stress the opposite opinion:

As realized by the MSC in adopting the amendments, the intent of new paragraph 1-1 of SOLAS regulation V/33 and paragraph 3.1.9. of the Annex to the International Convention on Maritime Search and Rescue, 1979, as amended, is to ensure that in every case a place of safety is provided within a reasonable time. The responsibility to

⁸⁴ Klepp, Silja *A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea*. In: *International Journal of Refugee Law* Vol. 0 (2011) p. 11.

⁸⁵ Klein, Natalie. *Assessing Australia’s Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*. In: *Melbourne Journal of International Law*. Vol 15 (2014), p. 14.

The same opinion that „no duty to accept disembarkation presently exists under international law” is mentioned by Testa, David. *Safeguarding Human Life and Ensuring Respect for Fundamental Human Rights: A Consequential Approach to the Disembarkation of Persons Rescued at Sea*. In: *Ocean Yearbook* 28. Edited by Aldo Chircop, Scott Coffen-Smout, Moira McConnell. Leiden (Martinus Nijhoff Publishers), 2014, p. 555.

⁸⁶ International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985), para. 4.8.5.

⁸⁷ Mallia Patricia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Boston (Martinus Nijhoff Publishers) 2010, p. 129.

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 survivors are recovered⁸⁸.

Therefore, it is clear that the state that is responsible for the search and rescue region⁸⁹ has either a duty to provide access to its land territory or to provide it in another territory. Although this does not mean that the answer to the question whether the state has a duty to provide a place of safety in its territory is positive, it still has a duty to actually find a place where people can disembark.

The IMO Guidelines were drawn up in 2004 and are referred to in Regulation 33 of the SOLAS Convention. The same year, amendments to the SOLAS and SAR Convention were ratified⁹⁰. The purpose of the Guidelines is to “provide guidance to Governments and to shipmasters with regard to humanitarian obligations and obligations under the relevant international law relating to treatment of persons rescued at sea”⁹¹. As a soft-law instrument, these Guidelines are not itself legally binding on states. However, as contracting states of the SOLAS and SAR Conventions, these Guidelines provide a context within which these regulations should be understood⁹². Moreover, the SOLAS Convention includes a direct reference to the Guidelines in its Regulation 33.

There may be an unclear situation as to whether it is possible to disembark rescued persons in the place of embarkation. Provisions of the law of the sea⁹³ do not deny such an option. However, situation can be affected by the each different case. If the rescued people are migrants, provisions of human rights and refugee law apply. Rescued people should be disembarked in a place where their life and security is not threatened. Often this evaluation can be challenging and have led to violations of human rights and refugee law⁹⁴.

⁸⁸ IMO, MSC. 167 (78), 20 May, 2004.

⁸⁹ Defined as „an area of defined dimensions associated with a rescue co-ordination centre within which search and rescue services are provided”. International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985), para. 1.3.4.

⁹⁰ IMO, MSC. 155 (78), 20 May, 2004 and IMO, MSC. 153(78), 20 May, 2004.

⁹¹ IMO, MSC. 167 (78), 20 May, 2004.

⁹² According to Article 31 of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (entered into force 27 January 1980).

⁹³ Regulation in, for example, the LOSC, the SOLAS Convention and the SAR Convention.

⁹⁴ See, for example, *See Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012. This case is more discussed further in this thesis (see chapter 3.2.1).

It may be concluded that there is no legally binding obligation for a state to offer “a place of safety” to migrants. However, the states of the relevant search and rescue region are responsible for cooperating in finding such a place for disembarkation. As will be seen in the next chapter, this may cause problems in particular regions where there are a large number of incoming migrants every year.

2.3 Duty to render assistance

The SAR Convention defines “rescue” as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”⁹⁵. Therefore, the duty to effect rescue is dependent on the fact whether the vessel is actually in a state of distress. This evaluation is left to ship masters. However, the fact itself that the ship is carrying migrants does not constitute a state of distress. Therefore, this chapter will discuss whether rendering assistance at sea can include other kinds of help without rescuing migrants from their ships.

For example, such a situation had occurred near the coast of Thailand on 15 May 2015⁹⁶. A boat carrying 300 migrants was located near the southern Thai island of Lipe. The migrants came from Rohingya which is Myanmar’s persecuted minority. According to the information available, it had a broken engine and had “been abandoned by its captain but with two crew onboard”⁹⁷. There is no further information about conditions on the ship. It is also not clear whether Thailand’s authorities considered that this migrant’s vessel was in fact in distress. However, the migrants’ desired destination was Malaysia and, therefore, they decided to proceed by re-entering Malaysian waters. The Thai Navy had fixed the vessel’s engine and provided food and water so it could continue on Malaysian waters⁹⁸.

In this example, assistance was rendered without providing search and rescue services. However, this may also cause problems in state practice. It has been mentioned previously that it may become problematic for states and masters of the ship to decide whether the rescue should take place. This is because of ambiguities linked to the concept of “distress”, which is not clearly defined. Therefore it “leaves room for interpretation as to whether

⁹⁵ International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985), para. 1.3.2.

⁹⁶ Hume, Tim, Watson, Ivan, Olarn Kocha. *Migrant boat re-enters Malaysian waters after refusing offer to land: Thai officials* edition.cnn.com/2015/05/15/asia/thailand-malaysia-rohingya-refugees [Visited 3 August 2015].

⁹⁷ Information was given by the governor of Thailand’s Satun Province. Hume, Tim, Watson, Ivan, Olarn Kocha. *Migrant boat re-enters Malaysian waters after refusing offer to land: Thai officials*.

edition.cnn.com/2015/05/15/asia/thailand-malaysia-rohingya-refugees [Visited 3 August 2015].

⁹⁸ Ibid.

particular boat migrants should be rescued or not”.⁹⁹ In this context – the question arises as to whether assistance or rescue should take place.

In practice, it is the master of the rescue vessel that decides whether the ship is in distress. This can be both – a private ship or a coast guard vessel. In some cases it may be argued that this decision is not justified. For example, the UNHCR representative Neil Falzon “identified the weak points of this method. He was aware of several incidents where migrants’ boats had been identified or approached by the AFM [The Armed Forces of Malta] but subsequently appear to have sunk”¹⁰⁰. This case is about the situation in Malta. It is an overpopulated country that has a large SAR area (about 250,000 km²). It is affected by illegal migration because all migrant boats that cross the Mediterranean Sea from Africa to the coast of Italy have to go through the Maltese SAR area. Taking into account the large number of migrants, it is argued that “Malta has actually become a “maritime rescue organization””¹⁰¹. As in the previous example, migrants often decide to continue their journey. In these cases “AFM provide food, water and sometimes fuel for the boat migrants and let them continue their journey to Italy. They inform the Italian SAR authorities and accompany the boat up to Italian SAR waters”¹⁰². This approach is criticized because of an argument that Malta does not sufficiently evaluate the situation concerning the migrants’ ship as it is interested in transferring the boat migrants to Italy which may then become responsible for providing a place of safety.

However, the possibility of rendering assistance by, for example, supplying food and fuel, is not in itself considered to be an erroneous option. At the same time, the situation of the vessel must be evaluated, but, currently, lacking any particular criteria how to define the distress situation, it is hard to say whether the master of ship has fully taken into account the particular circumstances. On the other hand, if appropriate, without taking migrants on board, such assistance can help to avoid further costs for the rescue vessel if other help is available. This assistance cannot replace search and rescue services in the event of distress.

⁹⁹ Klepp Silja *A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea*, *International Journal of Refugee Law* (Vol. 0) 2011, p. 7.

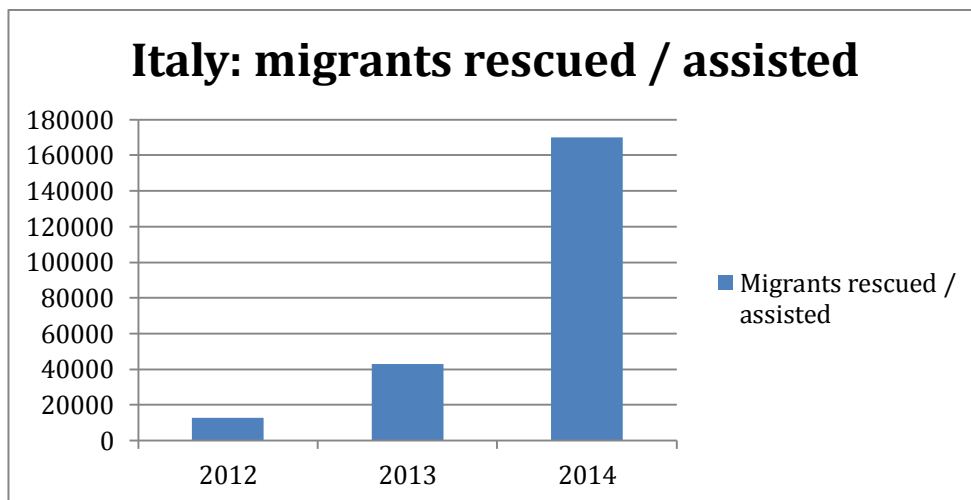
¹⁰⁰ *Ibid.*, p. 16.

¹⁰¹ *Ibid.*, p. 15.

¹⁰² *Ibid.*, p. 16.

3 Case study: Italy

According to statistical information, the Mediterranean Sea, in particular the maritime zones around the coast of Italy, is the area where recently the most of migrant smuggling cases were reported as a part of search and rescue operations¹⁰³. The Mediterranean Sea itself has been described as “the main clandestine gateway to the European Union”¹⁰⁴. The number of search and rescue operations connected with migrant vessels in Italy is increasing during last three years (see 1. chart). Since 1991 until 31 December 2014 there were 484 594 migrants rescued and assisted at the sea area near Italy¹⁰⁵. Almost half of this number consists of migrants rescued last years – during a period from 1 January 2012 until 31 December 2014, although it has been a destination for illegal organizations since the beginning of the 1990s¹⁰⁶. In 2014, the most popular routes to Italy were “from Libya to Italian islands such as Lampedusa and Sicily”¹⁰⁷.



1. chart. Italy: migrants rescued/assisted¹⁰⁸.

¹⁰³ FRONTEX. *FRONTEX Annual Risk Analysis 2015* <http://frontex.europa.eu/publications/> [Visited 10 August 2015].

¹⁰⁴ Monzini, Paola, Pastore, Ferruccio, Sciortino, Giuseppe. *Human Smuggling to/through Italy*. Trento (Centro Studi di Politica Internazionale) 2004, p. 32.

¹⁰⁵ Italy: Migration flows in the Mediterranean Sea and search and rescue. [http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-\(March-2015\).aspx](http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-(March-2015).aspx) [Visited 11 August 2015]

¹⁰⁶ Monzini, Paola, Pastore, Ferruccio, Sciortino, Giuseppe. *Human Smuggling to/through Italy*. Trento (Centro Studi di Politica Internazionale) 2004, p. 33.

¹⁰⁷ Zampano, Giada, Stevis, Matina. *Italian Forces Rescue Ship Abandoned With 40 Migrants Aboard; Incident Marks Second Time This Week Ship Was Headed for Collision Course With Coast*. In: Wall Street Journal. 02 January 2015.

¹⁰⁸ Data from: FRONTEX. *FRONTEX Annual Risk Analysis 2015* <http://frontex.europa.eu/publications/> [Visited 10 August 2015].

The Mediterranean Sea area consists of 46,000 km of coastline and 22 coastal states while Italy alone has about 16% (or 8 000 km) of this coastline. Its search and rescue region therefore is around 500 000 km² ¹⁰⁹.

New trends concerning migrant smuggling in this region are emerging. Since September 2014, there has been an “increasing use of large cargo ships to transport migrants directly from the Turkish coast near Syria to Italy”¹¹⁰. Later on, this practice was exacerbated by the fact that the ships approaching to the coast of Italy were crewless. In the aforementioned *Ezadeen* case, a Sierra-Leone-flagged ship was floating about 50 miles off the Italy’s coast. It had no crew and was carrying 450 migrants¹¹¹. Some days later, the same situation repeated itself when a vessel named *Blue Sky M* was set “on a course that would have crashed into the shore”¹¹². In practice, such vessels have been called “ghost ships”¹¹³. These migrant smuggling cases also constitute a threat to the maritime safety. However, they are usually hard to solve as most of the possible proceedings are “against unknown persons, and the documentation lacks detailed information”¹¹⁴. The complete lack of evidence and the fact that smuggled migrants do not want to collaborate makes potential proceedings impossible.

Therefore, the questions raised within the IMO are: the growing number of migrants approaching to the European Union (hereinafter, the EU) Member States through the Mediterranean Sea; use of unseaworthy, crewless ships; and the growing number of merchant vessels involved in rescue operations in the Mediterranean Sea¹¹⁵. Search and rescue of migrants involve high expenses for private ships. Therefore, such ships “may have an interest in not further delaying the voyage by landing at an unforeseen port to

¹⁰⁹ FRONTEX. *FRONTEX Annual Risk Analysis 2015*. <http://frontex.europa.eu/publications/> [Visited 10 August 2015]

¹¹⁰ Zampano, Giada, Stevis, Matina. *Italian Forces Rescue Ship Abandoned With 40 Migrants Aboard; Incident Marks Second Time This Week Ship Was Headed for Collision Course With Coast*. In: Wall Street Journal. 02 January 2015.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ See, for example: Squires, Nick *Italy finds second 'ghost ship' with no crew but 450 migrants* <http://www.telegraph.co.uk/news/worldnews/europe/italy/11322289/Italy-finds-second-ghost-ship-with-no-crew-but-450-migrants.html> [Visited 20 August 2015].

¹¹⁴ Monzini, Paola, Pastore, Ferruccio, Sciortino, Giuseppe. *Human Smuggling to/through Italy*. Trento (Centro Studi di Politica Internazionale) 2004, p. 35.

¹¹⁵ The International Maritime Organization. *High-level Meeting to Address Unsafe Mixed Migration by Sea. IMO Headquarters, London, 4 and 5 March 2015. Speech by Koji Sekimizu Secretary-General, International Maritime Organization*. [http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-\(March-2015\).aspx](http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-(March-2015).aspx) [Visited 30 July 2015].

disembark them”¹¹⁶. This chapter will further cover the description of regional regulations in the European Union concerning migrant smuggling by sea and activities involving migrant smuggling in Italy. The aim of this chapter is to describe the situation in this area and to discuss actions taken concerning the smuggling of migrants to the coast of Italy.

¹¹⁶ Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: *Human Rights and Immigration*. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 230.

3.1 European Union measures concerning smuggling of migrants

The EU has addressed the question of illegal immigration (including smuggling of migrants) in its regulations since 2002. The European Council Directive 2002/90/EC¹¹⁷ deals with illegal immigration. However, there are no particular provisions on migrant smuggling as the directive mainly stresses its objective for border control – “one of the objectives of the European Union is the gradual creation of an area of freedom, security and justice, which means, *inter alia*, that illegal immigration must be combated”¹¹⁸. In the context of EU law, migrant smuggling is seen as an international crime against maritime safety and, according to the Lisbon Treaty, the EU has a competence in the area of freedom, security and justice which includes immigration laws¹¹⁹. As far as the law of the sea is concerned, in the case of migrant smuggling in the EU, the same international rules apply which were discussed previously, e.g. the LOSC, the SOLAS Convention and the SAR Convention¹²⁰.

However, in practice, Member States of the EU have a common implementation policy. In 2004, the EU established a common border control mechanism FRONTEX. It is designed to “help Member States in implementing community legislation on surveillance of EU borders and to coordinate their operational cooperation”¹²¹. This also includes maritime borders of EU Member States. The FRONTEX has been used in the Mediterranean Sea for interception operations on the high seas to deal with irregular immigration. The basis for these operations remains the same international regulations (i.e., the LOSC and the Smuggling Protocol).

The FRONTEX has been used for a number of maritime operations, including those on high seas and also in the territorial seas of third states (for example, Mauritania or Senegal)¹²². In a case in which the FRONTEX is operating beyond the maritime borders of

¹¹⁷ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

¹¹⁸ Ibid.

¹¹⁹ European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.

¹²⁰ See chapters 1 and 2.

¹²¹ Papastavridis, Efthymios. *Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Sea*. In: The International Journal of Marine and Coastal Law. Vol 25 (2010), p. 572.

¹²² Papastavridis, Efthymios. *Fortress Europe and FRONTEX: Within or without international law?* In: Nordic Journal of International Law. Vol 79 (2010), p. 75.

EU Member States (e.g. in the territorial sea of Senegal), a bilateral agreement must be concluded. The FRONTEX itself “has not, as a matter of European Union law, a mandate to operate beyond the external borders of the Union”¹²³.

The situation when the FRONTEX is used for interception on the high seas is criticized. It is said that “the act of carrying migrants on the high seas is not an international crime as such; the only conduct that is criminalized is the smuggling of migrants”¹²⁴ and “it is submitted that these persons should not be subject to any detention or arrest, so long as they have not entered the territorial sea or contiguous zone of the coastal state and thus violated its immigration laws”¹²⁵ because no one can be considered as an immigrant without crossing a boarder¹²⁶. Indeed, the applicable law or legal basis for activities done by the FRONTEX remains the provision of the LOSC. Therefore, cases in which a vessel can be intercepted on the high seas are still limited. Migrant smuggling is not a basis for interception if it does not take place in the territorial sea¹²⁷ or contiguous zone¹²⁸ of the coastal state. The migrant vessel can be visited only if the vessel has the same flag, because migrant smuggling is not listed as an activity that justifies a visit. Therefore, “a ship that is suspected of engaging in migrant smuggling cannot be visited by a warship flying a flag that is different from the flag of the ship in question”¹²⁹. Another possibility to board a suspected vessel is with the consent of the flag state. However, the FRONTEX can still board the vessel if there are other legal grounds included in the LOSC. For example, if the migrant vessel is without a flag or has two or more flags¹³⁰. The absence of flag is considered as “the most relevant ground that the EU Member States could invoke to

¹²³ Papastavridis, Efthymios. *Fortress Europe and FRONTEX: Within or without international law?* In: Nordic Journal of International Law. Vol 79 (2010), p. 88.

¹²⁴ Papastavridis, Efthymios. *Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Sea*. In: The International Journal of Marine and Coastal Law. Vol 25 (2010), p. 585.

¹²⁵ Ibid. See also chapter 1 of this thesis.

¹²⁶ Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: Human Rights and Immigration. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 217.

¹²⁷ Article 19 (2) (g) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

¹²⁸ Article 33 (1) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

¹²⁹ Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: Human Rights and Immigration. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 217.

¹³⁰ Article 110 (1) (d) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

intercept vessels carrying migrants or asylum seekers on the high seas”¹³¹. In that case, the FRONTEX does not have any enforcement powers concerning the fact that a vessel is carrying migrants. While negotiating the Smuggling protocol, Italy and Austria made a proposal that there have to be provisions “allowing a state to intervene on the high seas if a vessel having no nationality is involved in the trafficking of migrants and “based on its route the vessel is undoubtedly bound for its coasts” or if “the vessel is armed or governed or manned by nationals”. The proposal was not adopted”¹³².

Therefore, although the FRONTEX was designed as an external border control mechanism, it does not have any broader powers concerning detection of migrant smuggling vessels beyond those of states under the law of the sea. The EU has raised a question on irregular migration in 2015 after the increase in migrant numbers in 2014. In 13 May 2015, it adopted the European Agenda on Migration where it stressed the importance of the fight against migrant smuggling according to the European Agenda on Security of 28 April 2015. In the latest one, cooperation against smuggling of migrants inside the EU is emphasized. Both of these documents were followed by the EU Action plan against migrant smuggling (2015 – 2020) which “sets out the specific actions necessary to implement the two agendas in this area, and incorporates the key actions already identified therein”¹³³. These actions do not cover law of the sea issues. Instead, they include opening of a safer, legal way into the EU and “efforts to crack down on migrant smuggling”¹³⁴ with “strong action to return the migrants that have no right to stay in the EU to their home countries”¹³⁵. It does not give any information as to, for example, how the EU Member States understand previously discussed terms of the international law of the sea, such as “place of safety”, “distress” and others. These can be evaluated in the practice of EU Member States. Therefore, actions taken by Italy concerning smuggling of migrants to the coast of Italy will be further discussed.

¹³¹ Papastavridis, Efthymios. *Fortress Europe and FRONTEX: Within or without international law?* In: Nordic Journal of International Law. Vol 79 (2010), p. 88.

¹³² Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: Human Rights and Immigration. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 219.

¹³³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *EU Action Plan against Migrant Smuggling (2015-2020)* http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/eu_action_plan_against_migrant_smuggling_en.pdf [Visited 5 August 2015].

¹³⁴ Ibid.

¹³⁵ Ibid.

3.2 Italy's actions against migrant smuggling

For some considerable time, Italy has been dealing with irregular migrants approaching its coast by sea using various methods. These will be discussed in the following sub-chapters.

3.2.1 Push-back of migrant boats in 2009

The actions taken by Italy during 2009 were similar to those of Australia¹³⁶. In other words, Italy has been implementing the same push-back of migrant vessels as Australia. For example, during a period of six months (from 6 May until 6 November 2009), 834 persons were sent back to Libya and 23 to Algeria after intervention by Italian vessels¹³⁷. It is said that these activities taken by Italy has been “harshly criticized within Italy for being excessively oriented towards public order/security concerns, exclusion and marginalization, instead of towards inclusion and integration”¹³⁸. As concluded previously, the coastal state has no legal obligation to accept migrants that are approaching its coasts¹³⁹. That does not affect the duty to render assistance. It has been argued that “there is no individual “right to be rescued” under the LOSC and other maritime conventions, the sole implicit reference within these instruments to the rights of the persons in distress may be that the latter should be put ashore in a “place of safety”¹⁴⁰. However, it can be concluded from human rights obligations and “states cannot turn a blind eye to their obligations under the human rights law”¹⁴¹. As discussed previously, the duty to render assistance to persons in distress forms a part of customary international law¹⁴².

It cannot be argued that the state is acting in violation of the law of the sea if it denies entry of a vessel into its territorial waters or does not allow disembarkation of rescued migrants, because states have such rights under the LOSC. Therefore, it can be argued that Italy's policy in 2009 was in accordance with the law of the sea. However, it was criticized, because of the fact that migrants were returned to Libya which was either their state of transit or the state of origin without evaluation of some provisions concerning human

¹³⁶ Activities taken by Australia concerning migrant smuggling is more discussed in the chapter 2.1.

¹³⁷ Giuffrè, Mariagiulia. State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya? In: *International Journal of Refugee Law*. Vol. 24 No. 4 (2013), p. 697

¹³⁸ Nicosia, Emanuele. *Massive immigration flows management in Italy between the fight against illegal immigration and human rights protection*. In: *QIL* 5 (2014), p. 29

¹³⁹ See chapter 2.

¹⁴⁰ Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: *Human Rights and Immigration*. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 247.

¹⁴¹ *Ibid.*

¹⁴² See chapter 2.

rights and refugee law of those migrants seeking asylum. The status of migrants can and does actually vary, which makes search and rescue operations more complicated – “the legal status of the human beings (...) varies according to whether they are to be considered illegal migrants, persons in distress at sea, or refugees”¹⁴³. After rescue operations, these persons are often in no fit condition to immediately apply for asylum. Therefore, asylum applications usually cannot be processed on the ship which is involved in search and rescue.

In the decision by the European Court of Human rights (hereinafter, the ECtHR), Italy’s push-back of migrant boats was considered to be against international law, because migrants were returned to Libya without an opportunity to apply for asylum¹⁴⁴. In the case concerned, the vessel carrying migrants was intercepted on the high seas on 6 May 2009 and returned to Libya. This judgement does not completely cover law of the sea issues, because a state has the right to expel a migrant vessel from its territorial sea and this fact was not under discussion in this case. Even if the migrants’ vessel is navigating through the territorial sea to the port of a coastal state, this state “has the right to close its ports to ships carrying illegal immigrants, except in case of distress”¹⁴⁵. However, if these migrants were taken to the Italian vessel, the obligation to put them ashore in a place of safety still applies. As was discussed previously¹⁴⁶, the concept of “place of safety” is broad¹⁴⁷. On the one hand, it can be argued that the Italian ship is putting rescued people ashore in the place of embarkation, which itself does not constitute any breach of law of the sea. On the other hand, it is also argued that “Libya clearly cannot be considered in any manner whatsoever, a “place of safety” because of well-documented inadequacy of response to flows of migrants and asylum seekers”¹⁴⁸. However, this applies only to refugees seeking asylum. It does not include persons who immigrate, because of conflicts in their state or poverty¹⁴⁹.

¹⁴³ Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: Human Rights and Immigration. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 212.

¹⁴⁴ See *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012 <http://www.refworld.org/docid/4f4507942.html> [Visited 10 August 2015]

¹⁴⁵ Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: Human Rights and Immigration. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 214.

¹⁴⁶ See chapter 2.

¹⁴⁷ See also Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: Human Rights and Immigration. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 233.

¹⁴⁸ Giuffrè, Mariagiulia. State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya? In: *International Journal of Refugee Law*. Vol. 24 No. 4 (2013), p. 706.

¹⁴⁹ See Art. 1 (a) (2) of the United Nations Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, vol. 189 (entered into force 22 April 1954).

Therefore, provisions of refugee law could only be evaluated in this case concerning asylum seekers which in fact was done by the ECtHR in the *Hirsi v. Italy* case. If provisions of refugee law are not applicable but illegal migrants are among the persons rescued, “as a general rule they should be returned to the state of which they are nationals or permanent residents”¹⁵⁰.

Italy had explained its push-backs by referring to search and rescue measures, migration control in accordance with the Smuggling Protocol and “police operations carried out by Italy on behalf of Libya to return to the country of departure those who had irregularly evaded border control”¹⁵¹. During the period since 13 December 2000, Italy and Libya have concluded several bilateral agreements concerning migrant smuggling. Conclusion of such agreements is possible under both the LOSC¹⁵² and the Smuggling Protocol¹⁵³. These agreements are concluded less than those concerning drug trafficking, nevertheless a number of treaties are concluded concerning smuggling of migrants¹⁵⁴. In 2007, the Protocol and Additional Operating and Technical Protocol on cooperation in the fight against irregular immigration were concluded. They contained arrangements for practical operability of previously concluded agreements, e.g. common operations with Libya to deal with irregular migration (e.g. organizing of patrolling activities by six ships)¹⁵⁵. The Protocol “acknowledges in the Preamble that Libya faces great problems due to the fact that it is a transit country for migrants and it has to control more than 5,000 km of land borders in the desert and more than 2,200 km of sea borders”¹⁵⁶. In 2009, another protocol between both states was concluded. It implements the cooperation through joint maritime patrols in both Libyan and Italian territorial waters and on the high seas.

¹⁵⁰ Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: Human Rights and Immigration. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 237.

¹⁵¹ Giuffrè, Mariagiulia. State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya? In: International Journal of Refugee Law. Vol. 24 No. 4 (2013), p. 705.

¹⁵² Article 311(2) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1834 UNTS 397 (entered into force 16 November 1994).

¹⁵³ Article 17 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime. United Nations, Treaty Series, vol. 2241, No. 39574.

¹⁵⁴ Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: Human Rights and Immigration. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 221.

¹⁵⁵ Scovazzi, Tullio. *Human Rights and Immigration at Sea*. In: Human Rights and Immigration. Edited by Ruth Rubio-Marin. Oxford (Oxford University Press), 2014, p. 223.

¹⁵⁶ Ibid.

It has been argued that these agreements formed a legal basis for push-backs – “although push-backs do not have a clear legal basis, the agreements between Italy and Libya constitute a fundamental component of the multifaceted legal and political framework underpinning Italy’s practice of interdiction and return”¹⁵⁷. However, after the *Hirsi v. Italy* judgement, there has been no continuation of cases in which migrant vessels are intercepted and then returned to Libya. Even so, the law of the sea regime itself does not prohibit putting rescued migrants ashore in their state of embarkation unless their life or safety could be threatened there. The situation further leads to the provisions of refugee law.

3.2.2 Maritime operations in 2013 and 2014

According to the FRONTEX Annual data, in 2014 illegal border crossings reached a new record of 280,000 and most of those detections formed part of search and rescue operations in the Central Mediterranean area¹⁵⁸ (including Italy’s search and rescue region). However, Italy has long been a destination for migrants. Therefore, several maritime search and rescue operations have taken place.

The first maritime search and rescue operation was “Mare Nostrum”. It was developed after the incident near the coast of the Italian island of Lampedusa on 3 October 2013. A vessel with more than 500 migrants from Libya began taking on water when its engine had stopped. After that “some passengers set fire to a piece of material to try to attract the attention of passing ships. The fire spread to the rest of the boat”¹⁵⁹. After an emergency response from the Italian Coast Guard, there were 155 survivors. This situation was repeated on 11 October 2013 when a boat carrying migrants capsized about 120 kilometers from Lampedusa. Therefore, the “Mare Nostrum” was established in October 2013 by the Italian Navy to deal with the increase of migrants approaching the coast of Italy (especially island of Lampedusa) – a total area of approximately 70,000 km²¹⁶⁰. This area consisted of the territorial sea and contiguous zone of Italy, as well as Maltese and Libyan search and

¹⁵⁷ Giuffré, Mariagiulia. State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya? In: *International Journal of Refugee Law*. Vol. 24 No. 4 (2013), p. 692.

¹⁵⁸ FRONTEX. *FRONTEX Annual Risk Analysis 2015*. <http://frontex.europa.eu/publications/> [Visited 10 August 2015].

¹⁵⁹ Coppens, Jasmine. *The Lampedusa Disaster: How to Prevent Further Loss of Life at Sea*. In: *The International Journal on Marine Navigation and Safety of Sea Transportation*. Vol. 7, No. 4 (2013), p. 589.

¹⁶⁰ Ministero della Difesa. *Mare Nostrum Operation*. www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx [Visited 10 August 2015].

rescue areas, and most search and rescue operations actually took place closer to the Libyan territorial waters than those areas that were covered by the FRONTEX operations “Hermes” and “Aeneas”¹⁶¹. It involved naval vessels, airplanes, drones and helicopters¹⁶². A number of other cases with migrant ships had occurred both before and after the establishment of the operation. After a year of operation, 810 persons were reported as having been rescued by the Italian Navy under the “Mare Nostrum” operation¹⁶³.

The “Mare Nostrum” operation took place for a year and was followed by another operation “Triton” which started on 1 November 2014¹⁶⁴. It is coordinated by the FRONTEX and consists of 21 participating EU Member States, but with a much smaller budget compared to “Mare Nostrum” (while the monthly budget of the “Mare Nostrum” was €9 million, Triton has only one third of that amount)¹⁶⁵.

The “Triton” is an upgraded operation of the “Hermes” that took place from 2011. The aim of the current operation is to “ensure effective surveillance of maritime borders and to provide assistance to any person on board a vessel in distress”¹⁶⁶. However, it is said that “Triton” is not replacing the previous operation “Mare Nostrum” because “the operational area covers part of the international waters to the south and southeast of Italy”¹⁶⁷. It does not carry out searches in the territorial sea of Libya, because the FRONTEX is not covering areas of third states despite the fact that this area was the one where the most search and rescue operations took place.

As mentioned previously¹⁶⁸, since May 2014 a new regulation has been drafted that covers the common understanding of the EU on maritime surveillance, search and rescue

¹⁶¹ Carrera, Sergio, den Hertog Leonard. *Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean*. In: CEPS Paper in Liberty and Security in Europe. No. 79 (2015), p. 4.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ European Commission Press Release Data base. *Questions and Answers: Smuggling of Migrants in Europe and the EU Response* europa.eu/rapid/press-release_MEMO-15-326/_en.html [Visited 7 August 2015].

¹⁶⁵ Hartmann, Jacques, Papanicolopulu Irini. *Are Human Rights Hurting Migrants at Sea?* <http://www.ejiltalk.org/are-human-rights-hurting-migrants-at-sea/> [Visited 20 August 2015].

¹⁶⁶ Ibid.

¹⁶⁷ European Commission Press Release Data base. *Questions and Answers: Smuggling of Migrants in Europe and the EU Response* europa.eu/rapid/press-release_MEMO-15-326/_en.html [Visited 7 August 2015].

¹⁶⁸ See chapter 2.1.

operations and disembarkation¹⁶⁹. It is applicable to operations that are carried out by the EU Member States “on their external sea borders”¹⁷⁰. It is significant in this context as it includes binding provisions to the EU Member States. Mostly, they refer to international law and contain the same provisions. For example, the flag state’s ability to inspect the vessel on the high seas is referred to similarly to the provisions in the law of the sea. However, it includes a definition of the “place of safety” and criteria as to how the situation of distress should be evaluated, which in practice can help to understand each particular situation. It also contains provisions of *non-refoulement* and situations with asylum seekers¹⁷¹: “when considering the possibility of disembarkation in a third country, in the context of planning a sea operation, the host Member State, in coordination with participating Member States and the Agency, shall take into account the general situation in that third country”¹⁷². These provisions are in the context of the *Hirsi v. Italy* case¹⁷³. However, it is argued that the provisions of this regulation cover only the territorial sea of the EU Member States and the high seas leaving situations with third states uncodified¹⁷⁴. Therefore, this regulation contains more detailed provisions concerning EU Member States. Member States are cooperating in the external border surveillance through surveillance systems. One of these systems is the European Border Surveillance System¹⁷⁵ (hereinafter, the Eurosur). Its purpose is to function as a cooperation network between Member States for “detecting, preventing and combating illegal immigration”. It was designed following the aforementioned Lampedusa case in 2013¹⁷⁶. It collects information from national coordination centers of Member States and the EU agencies to “improve situational awareness and to increase reactional capability at the external borders of the Member States”¹⁷⁷. Along with this FRONTEX led system, the other information exchange systems are working. The Maritime Surveillance System is working outside the

¹⁶⁹ 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.

¹⁷⁰ *Ibid.*, Article 1.

¹⁷¹ *Ibid.*, Article 4.

¹⁷² *Ibid.*, Article 4 (2).

¹⁷³ See chapter 3.2.1.

¹⁷⁴ Carrera, Sergio, den Hertog Leonard. *Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean*. In: CEPS Paper in Liberty and Security in Europe. No. 79 (2015), p. 11.

¹⁷⁵ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

¹⁷⁶ See page 36.

¹⁷⁷ Article 1 of the Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

EU legislature and can be considered as a “naval information exchange system”¹⁷⁸. The Common Information Sharing Environment will be another information system that will contain all EUROSUR and MARSUR information and will entail “sharing between military and civilian actors”¹⁷⁹. It will start in 2020¹⁸⁰. The existence of these various systems can be understood as a try to increase maritime safety near the external borders of member states. However, the practice shows that maritime accidents are still taking place.

Among the recent trends covered by the IMO and the FRONTEX is the practice whereby smugglers use overcrowded unseaworthy vessels to increase profits¹⁸¹. Another trend is the increasing number of merchant ships involved in rescuing of migrants¹⁸². At the IMO Meeting to Address Unsafe Mixed Migration by Sea, it was stated that in 2014, “more than 650 merchant ships were diverted from their routes to rescue persons at sea, and a similar number were diverted even though they did not, in the event, participate directly in a rescue operation”¹⁸³ and because of that, it “has an obvious detrimental impact on the shipping industry, and a knock-on effect on trade, the economy and the global supply chain”¹⁸⁴. Therefore, the situation in Mediterranean cannot be considered to have been resolved.

¹⁷⁸ Carrera, Sergio, den Hertog Leonard. *Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean*. In: CEPS Paper in Liberty and Security in Europe. No. 79 (2015), p. 18.

¹⁷⁹ *Ibid.*, p. 19.

¹⁸⁰ *Ibid.*

¹⁸¹ According to the FRONTEX Annual Risk Analysis 2015, „the gross income for a single journey can be as high as EUR 2.5 or even 4 million depending on the size of the vessel and the number of migrants on board”. FRONTEX. *FRONTEX Annual Risk Analysis 2015*. <http://frontex.europa.eu/publications/> [Visited 10 August 2015].

¹⁸² *Ibid.*

¹⁸³ The International Maritime Organization. *High-level Meeting to Address Unsafe Mixed Migration by Sea. IMO Headquarters, London, 4 and 5 March 2015. Speech by Koji Sekimizu Secretary-General, International Maritime Organization* [http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-\(March-2015\).aspx](http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-(March-2015).aspx) [Visited 11 August 2015].

¹⁸⁴ *Ibid.*

3.2.3 Conclusions concerning the situation

The two recent cases involving the “ghost ships” of the *Ezadeen* and the *Blue Sky M* in 2015 were described previously (see chapter 3). These situations were stressed by IMO as denoting a new trend in migrant smuggling activities. After recent situations, it was concluded by the IMO that “there is a real concern here that the well-established legal system, which is based on the centuries-old tradition of rescue at sea, is under threat”¹⁸⁵ because of the large number of migrants that have to be rescued. As a solution, the duty of coastal states of departure to control migration was emphasized.

In the case of Italy, it is evident that it has dealt with increasing migrant smuggling using various methods that were discussed previously. However, a complete solution may not have been found, either by Italy itself or within the EU and the IMO, because the number of search and rescue operations continues to grow. At the IMO Meeting in March 2015, Italy stressed the same fact that “a more effective port state control activity by countries of departure is needed in order to prevent the use of sub-standard ships for illegal immigration”¹⁸⁶.

The measures implemented by Italy are not in violation of the provisions of the law of the sea, because it has the jurisdiction to deal with situation in which a vessel is in breach of regulations dealing with non-innocent passage or which is contrary to its contiguous zone regime. In 2015, a national court judgement of Italy has been published¹⁸⁷. It is said that it shows Italy’s “determination to punish people who deliberately put migrants’ lives at risk”¹⁸⁸ as in this case smuggler has been sentenced life imprisonment by the national court of Italy. This person was assisting another migrant smuggler that was manning migrants’

¹⁸⁵ The International Maritime Organization. *High-level Meeting to Address Unsafe Mixed Migration by Sea. IMO Headquarters, London, 4 and 5 March 2015. Speech by Koji Sekimizu Secretary-General, International Maritime Organization* [http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-\(March-2015\).aspx](http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-(March-2015).aspx) [Visited 11 August 2015].

¹⁸⁶ The International Maritime Organization. *Italy: Migration flows in the Mediterranean Sea and search and rescue* [http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-\(March-2015\).aspx](http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-(March-2015).aspx) [Visited 11 August 2015].

¹⁸⁷ Cassazione penale, (Sex. I), 23 gennaio 2015, n 3345 – Pres.Chieffi- Rel. Rocchi – Procuratore della Repubblica press oil Tribunale di Catania – Radouan Hai Hammouda.

¹⁸⁸ Stated by Giovanni Salvi the prosecutor of the case. See, for example, Martel, Frances. *Italy Hands Smuggler Unprecedented Life Sentence as Europe Prepares for Migrant Deluge* <http://www.breitbart.com/national-security/2015/05/28/italy-hands-smuggler-unprecedented-life-sentence-as-europe-prepares-for-migrant-deluge/> [Visited 30 August 2015].

ship that capsized resulting in death of approximately 200 migrants¹⁸⁹. This decision apparently was made with a hope to further deter smugglers from these activities.

At the same time, the duty to render assistance remains. The measures taken by Italy in 2009 have been evaluated as contrary to other international regulations including human rights and refugee law provisions.

¹⁸⁹ Martel, Frances. *Italy Hands Smuggler Unprecedented Life Sentence as Europe Prepares for Migrant Deluge* <http://www.breitbart.com/national-security/2015/05/28/italy-hands-smuggler-unprecedented-life-sentence-as-europe-prepares-for-migrant-deluge/> [Visited 30 August 2015].

Conclusions

The aim of this thesis is to discuss whether it is possible to deal with increasing migrant smuggling by sea within the existing legal framework of the law of the sea. By discussing various bodies of international law, it was clarified that both the LOSC and other international regulations concerning the interception of and search and rescue operations of irregular migrants' boats provide a basis for coastal states to impose their national criminal and immigration regulations. The aforementioned activities vary in regard to the nationality of the vessel, location and condition of the ship. For example, under the LOSC, there is a duty for a coastal state to allow access to its ports for vessels in distress and to respect freedom of navigation outside its territorial waters and contiguous zone. However, it may intercept ships that are breaching the innocent passage regime or alternatively prohibit access to its ports and internal waters if the vessel is not in distress. However, these national regulations contain several broad provisions such as the state of distress and place of safety that are subject to further clarification, because in practice a number of disputes arisen due to their ambiguous nature.

Throughout the third chapter of this thesis, I have stressed the different arguments that Italy had relied upon to deal with increasing smuggling of people to its coasts and search and rescue area. All of these activities were based on the international law of the sea. However, all these actions must be in accordance with other provisions as the law of the sea cannot be seen as being isolated from other branches of international law.

From the current viewpoint, the situation concerning smuggling of people cannot be considered as having been resolved, because there are new trends emerging that have been discussed by the IMO. The possibilities of how to deal with migrants smuggled to different maritime zones of a state under the current legal framework remain open to discussion. For example, states involved in rescue operations could provide other forms of assistance (supply of food or fuel). However, each situation must be evaluated. Furthermore, in reference to cases involving migrant smuggling, both the IMO and Italy stressed the need for state control of ports in the country of departure.

However, it can be argued that several revisions of international law of the sea are needed – especially those that would further clarify currently ambiguous concepts that have already given rise to several disputes since 2004. Although designed to fit different situations (as migrant smuggling forms only part of search and rescue operations), they do not prescribe the responsibilities of states involved in a way that would allow for a timely response.

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