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University of Southampton

Faculty of Social Sciences

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Adrift in international law: towards a place of safety for sea migrants

by

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Supervised by Professor Andrew Serdy and Dr Claire Lougarre

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Abstract

Maritime search and rescue of sea migrants embarked on irregular crossings raises complex and multifaceted considerations that exceed the search and rescue operational system originally designed to respond to situations of distress following accidents at sea and to the needs of maritime traffic. Singular approaches to search and rescue in the context of irregular crossings and differing biases shaped by the priorities sought at sea inevitably result in differing constructions of specific concepts key to define the contours of maritime search and rescue obligations. This highlights the need to scrutinise the maritime search and rescue international legal framework to assess its potential to adequately foster considerations of humanity.

This thesis takes a firm stance on the urgent need to safeguard and advance considerations of humanity in the maritime search and rescue international legal framework in the context of irregular crossings. This thesis aims at assessing whether the International Convention on Maritime Search and Rescue, 1979, as amended (SAR Convention) can foster an integrating reading grounded in international human rights law and international refugee law considerations. Crucially, it explores this interpretative approach with regards to the concepts of persons in distress and delivery to a place of safety, that respectively mark the beginning and the end of a search and rescue operation, invoking considerations of humanity. Ultimately, this thesis scrutinises whether the search and rescue system can be more responsive to the needs of sea migrants.

To this end, this thesis undertakes an interpretative legal reasoning that is underpinned by the vulnerability reasoning, underscoring the specific needs at stake among sea migrants and calling for a mechanism of redress at the very stage of the interpretative process. This interpretative reasoning draws on the principle of systemic integration. This guiding interpretative mechanism is studied and its functionality assessed to invoke international human rights law and international refugee law considerations to better address the specific needs of sea migrants.

The interpretative reasoning proposed here strives to contribute to the on-going discussion for a common understanding of the notions of persons in distress and place of safety. It fundamentally seeks to propose an innovative approach to the reading of this maritime legal instrument that addresses the specific needs among sea migrants and enhances considerations of humanity for a more responsive approach to maritime search and rescue in the context of irregular crossings.

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https://www.ohchr.org	UN Human Rights Office of the High Commissioner.
https://openmigration.org	Open Migration informative project on migration.
https://www.oxfam.org	Oxfam International.
https://papers.ssrn.com	Social Science Research Network's eLibrary.
https://www.proasyl.de	Pro Asyl.
https://www.refugeesinternational.org	Refugees International.
https://www.refworld.org	Refworld database.
https://repository.law.umich.edu	Michigan Law University of Michigan Scholarship Repository.
https://sea-watch.org	Sea-Watch.
https://www.statewatch.org	Statewatch.
https://treaties.un.org	UN Treaty collection.
https://undocs.org	UN Documents.
www.unhcr.org	UN Refugee Agency.
https://www.unicef.org	UN Children's Fund.
https://unsmil.unmissions.org	UN Support Mission in Libya.
https://vesseltracker.com	Vessel Tracker data.

List of Selected We

<https://watchthemed.net>

WatchTheMed online mapping platform.

Research Thesis: Declaration of Authorship

I, Ainhoa Campàs Velasco, declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

Adrift in international law: towards a place of safety for sea migrants

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Parts of this work have been published as:

Campàs Velasco, A, 'The International Convention on Maritime Search and Rescue: Legal Mechanisms of Responsibility Sharing and Cooperation in the Context of Sea Migration?' in in F de Londras and S Mullally (eds) (2015) volume 10, *The Irish Yearbook of International Law* (Bloomsbury Hart Publishing 2017) 57-86.

Signature:Date: 7 September 2020

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I wish to dedicate this thesis to my beloved parents, *Ama*, *Aita*, who could not see it completed, for their immense love and endless source of encouragement, enthusiasm, care and inspiration in all my endeavours. Words cannot convey the sheer void you have left.

It is also dedicated to my dearest Alaitz and Marc, my now teenage kids, who have seen the highs and lows of this journey. Their understanding of my commitment to this project, their care and encouragement throughout the process and their skilful ability to detach me from it have been amazing. It is also devoted to Jordi, my beloved brother and friend, a constant source of positive energy and encouragement with a remarkable tenacity to recurrently ask: ‘are you there yet?’. He has doubtless also kept me going. Finally, to Oriol, my port of refuge, for his relentless support and his stubborn belief in my capacity to finalise the writing of this thesis, for his companionship, generosity, sense of humour and his love.

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A heartfelt thank you to my family and friends for accompanying me in this endeavour.

This thesis is written for all those compelled to embark on life-threatening journeys to reach safety.

List of Selected Abbreviations

ASGI	Association for Juridical Studies on Immigration.
CEPS	Centre for European Policy Studies.
CJEU	Court of Justice of the European Union.
DTM	IOM's Displacement Tracking Matrix.
EEAS	European External Action Service.
ECHR	European Convention on Human Rights.
ECtHR	European Court of Human Rights.
ETS	European Treaty Series.
FIR	Flight Information Region.
FRA	EU Agency for Fundamental Rights.
GISIS	IMO Global Integrated Shipping Information System.
GLAN	Global Legal Action Network.
GMDAC	IOM's Global Migration Data Analysis Centre.
HCR	UN Human Rights Committee.
IAMSAR	International Aeronautical and Maritime Search and Rescue.
ICAO	International Civil Aviation Organization.
ICCPR	International Covenant on Civil and Political Rights, 1966.
ICJ	International Court of Justice.
ICS	International Chamber of Shipping.
ILA	International Law Association.

List of Selected Ab

ILC	International Law Commission.
IMCO	Inter-Governmental Maritime Consultative Organization.
IMO	International Maritime Organization.
IMO MSC	Maritime Safety Committee.
IMOSAR	International Maritime Organization SAR.
IOM	International Organization for Migration.
ITLOS	International Tribunal for the Law of the Sea.
MERSAR	Merchant Shipping Search and Rescue.
MOAS	Migrant Offshore Aid Station.
MRCC	Maritime Rescue Coordination Centre Rome.
MSF	Médecins sans Frontières.
Nm	Nautical miles.
OHCHR	UN Office of the High Commissioner for Human Rights.
OXFAM	Oxford Committee for Famine Relief.
PACE	Parliamentary Assembly of the Council of Europe.
RCC	Rescue Coordination Centre.
SAR Convention	International Convention on Maritime Search and Rescue, 1979.
SOLAS Convention	International Convention for the Safety of Life at Sea, 1974.
SRR	Search and Rescue Region.
UNCAT	UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
UNCLOS	United Nations Convention on the Law of the Sea, 1982.
UNDOALOS	UN Division for Ocean Affairs and the Law of the Sea.

List of Selected Abbreviations

UNGA	UN General Assembly.
UNHCR	United Nations High Commissioner for Refugees.
UNODC	UN Office on Drugs and Crime.
UNSMIL	UN Support Mission in Libya.
UNTS	UN Treaty Series.
VCLT	Vienna Convention on the Law of Treaties, 1969.
WTM	WatchTheMed.
WTO	World Trade Organization.

It's midnight. Completely dark. The formidable waves beat the body of our splitting boat without interruption. The smashing waves engender a mixture of terror and lament in our thoughts. The front tip of the boat ruptures and water bursts out from under the family members, still lying entangled. The sealed hole in the engine room resigns itself to the pressure of the waves, and the water rises again. The other passengers all wake suddenly from sleep, to be confronted with death. We are all damp and numb, but we all continue bailing, knowing we could be dead in a blink of an eye.

Starvation is such a powerful force. It pervades everything. A single pistachio, a single date, might determine whether one lives or dies. This was something I have realised during days at sea, starving.

A prisoner is reduced to a useless piece of meat to be destroyed. Would the Kyriarchal System want it any other way? To see a defenceless piece of meat and then destroy it by subjecting it to a predetermined system, subjecting it to the system until swallowed up by it, subjecting it to the system until what is left is thrown away, back to the country or homeland from which the refugee fled.

B Boochani, *No Friend but the Mountains* (translated by O Tofighian).

INTRODUCTION

1. Overview of the research problem, relevance, *rationale* of the project, aim and methodology.

The number of fatalities during irregular sea crossings remains unabated worldwide. The Mediterranean continues to be at present the deadliest region for irregular sea crossings, followed by Southeast Asia, particularly the Bay of Bengal and the Andaman Sea. In this region, however, fatality rates in irregular sea crossings (that is the number of deaths at sea *versus* the number of departures) were reported to be in 2015 ‘three times higher’ than in the Mediterranean.¹

The year 2016 remains the deadliest on record for sea migrants crossing the Mediterranean Sea trying to reach Europe. The term sea migrants is used in this thesis to refer to persons travelling irregularly by sea.² The number of reported deaths in 2016 reached 5,143,

¹ See the United Nations High Commissioner for Refugees (UNHCR) Report ‘Mixed Maritime Movements in South East Asia 2015’ (2015) UNHCR Regional Office for South East Asia <<https://unhcr.atavist.com/mmm2015>>. Deaths were mostly caused by starvation, dehydration, disease and abuse by smugglers. See also IOM, ‘Mixed Migrations Flows in the Mediterranean and Beyond. Compilation of Available Data and Information’ <<http://doe.iom.int/docs/Flows%20Compilation%202015%20Overview.pdf>>. See further figures reported by the International Organization for Migration (IOM) <http://missingmigrants.iom.int/mediterranean>>. On the situation in the Bay of Bengal and Andaman Sea, see Bríd Ní Ghráinne, ‘Left to Die at Sea: State Responsibility for the May 2015 Thai, Indonesian, and Malaysian Pushback Operations’ (2015) Vol 10, *Irish Yearbook of International Law*, eds F de Londras and S Mullally (2015 Bloomsbury, Hart Publishing) 109 to 131. All websites have been last accessed in July 2020.

² This term includes refugees, asylum-seekers and economic migrants, among which persons with specific needs such as trafficked persons, stateless persons and unaccompanied or separated children, in what has been called ‘mixed migration movements’. See UNHCR Background Paper on Refugees and Asylum-Seekers in Distress at Sea - how best to respond? Expert Meeting in Djibouti, 8-10 November 2011 <www.unhcr.org/4ec1436c9.html>. The IOM defines the term ‘migrant’ as a person moving or having moved

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according to the data compiled by the International Organization for Migration (IOM) Global Migration Data Analysis Centre.³ This is despite the number of recorded sea arrivals in Europe being significantly lower than the previous year.⁴ Since 2017, IOM figures show a gradual decrease in number of sea arrivals to Europe every year, accompanied by a decrease in the number of reported fatalities at sea. Nonetheless, in the Mediterranean routes, the fatality rate, i.e., the number of fatalities at sea *versus* the number of attempted crossings, as recorded by the IOM, has increased.⁵ Hence, despite being a well-known irregular

either internationally or within the territory of a State, regardless of the person's legal status and motivations. Consequently, this term includes refugees, in accordance with the definition contained in Art 1 of the Convention relating to the Status of Refugees, Geneva, 28 July 1951 and its Protocol, New York, 31 January 1967. See IOM migration terms at <https://www.iom.int/key-migration-terms>.

³ Also according to the data compiled by IOM's Global Migration Data Analysis Centre, the number of recorded sea arrivals in that same year reached 363,504. This information is contained in IOM, UN Migration, 'Mediterranean Migrants Arrivals Reached 171,635 in 2017; Deaths Reach 3,116' 1 May 2018 <<https://www.iom.int/news/mediterranean-migrant-arrivals-reached-171635-2017-deaths-reach-3116>>. See also the IOM Missing Migrants Project, which constitutes a global migration data analysis centre that tracks migrants' deaths and migrants who have gone missing along migratory routes across the world. This project obtains data from local authorities, interviews with survivors conducted by IOM field officers, United Nations High Commissioner for Refugees (UNHCR), non-governmental organisations (NGOs) and media reports, for which see <<https://missingmigrants.iom.int>>.

⁴ The number of recorded sea arrivals to Europe in 2016 amounts to 363,348. This contrasts starkly with 2015, where arrivals to Europe by sea reached 1,011,712 and deaths reported amounted to 3,770.

⁵ For an overview of the factors to take into consideration when calculating and interpreting fatality rates, and the difficulties in calculating these rates, see K Dearden, M Sánchez Dionis, J Black and F Laczko, 'Calculating "Death Rates" in the Context of Migration Journeys: Focus on the Central Mediterranean', 3 April 2020, IOM's Global Migration Data Analysis Centre (GMDAC) 'Briefing Series: Towards safer migration in Africa: Migration and Data in Northern and Western Africa' <<https://publications.iom.int/system/files/pdf/mortality-rates.pdf>>. IOM calculates the mortality rate dividing the number of fatalities recorded each year by the number of sea migrants embarked on a particular route in the respective year. For instance, attempted crossings in this central Mediterranean route include the number of people arriving to Italy and Malta, the number of people intercepted at sea and returned to Libya and Tunisia and the number of people reportedly deceased or missing during these crossings, in accordance with IOM's Missing Migrants data. In 2017, the mortality rate in the central Mediterranean route was 1.96%, in 2018 it reached 3.11% and as at October 2019, the mortality rate in this route has increased to 3.63%. See IOM press release, 'Mediterranean Migrant Arrivals Reach 76,558 in 2019; Deaths reach 1,071', 11 October 2019 <<https://www.iom.int/news/mediterranean-migrant-arrivals-reach-76558-2019-deaths-reach-1071>>. See also Amnesty International Report, 'Between the Devil and the Deep Blue Sea: Europe Fails Refugees and Migrants in the Central Mediterranean' August 2018, p 5 <<https://www.amnesty.org/en/documents/eur30/8906/2018/en/>>

migratory route, the crossings, crucially in the central Mediterranean route, currently present higher risks for those attempting them.

The above, one may safely argue, indicates limitations and flaws in the maritime search and rescue system, articulated in the International Convention on Maritime Search and Rescue, 1979, as amended (SAR Convention),⁶ the United Nations Convention on the Law of the Sea, 1982 (UNCLOS)⁷ and the International Convention on Safety of Life at Sea, 1974, as amended (SOLAS Convention).⁸

The operative mechanisms in the SAR Convention were designed to provide search and rescue services in the context of regular maritime navigation, as it transpires from its preamble where it refers to ‘an international maritime search and rescue plan *responsible to the needs of the maritime traffic for the rescue of persons in distress at sea*’,⁹ and it has proved to be inefficient to respond to large scales of unsafe migration flows. Yet this instrument is intended for coastal States to establish adequate and effective arrangements for search and rescue services in compliance with their obligation under Article 98.2 of UNCLOS, whose wording contains an element of continuity and dynamism when referring to the duty of ‘maintenance of an adequate and effective search and rescue service’. The SAR Convention presents both adaptability aspects and functional limitations. It is thus in this dichotomy that the primary objective of the present research sits, namely, to elaborate on existing mechanisms of interpretation that would allow enhancing the construction of the existing wording of the SAR Convention in order to advance the needs of sea migrants in the SAR system. This interpretative strategy ultimately seeks to improve the effectiveness and adequacy of a system initially designed for the needs of maritime traffic. This legal reasoning advocates to further international human rights law and refugee law considerations in key concepts of the SAR Convention, namely ‘persons in distress’ and ‘place of safety’,

⁶ Hamburg, 27 April 1979, 1405 UNTS 19. It entered into force on 22 June 1985.

⁷ Montego Bay, 10 December 1982, 1833 UNTS 3. It entered into force on 16 November 1994. Art 98.

⁸ London, 1 November 1974, 1184 UNTS 278. It entered into force on 25 May 1980. Ch V Regs 7 and 33.

⁹ SAR Convention, 3rd preambular paragraph (emphasis added).

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with the purpose of enabling this instrument to become more responsive to the needs of sea migrants.

Maritime search and rescue of sea migrants in the context of irregular crossings raises serious concerns regarding, *inter alia*, the delivery of survivors to a place of safety. Unlike maritime search and rescue in the context of regular maritime traffic, the last stage of rescue operations remains highly controversial and unsolved when authorising the disembarkation on land of sea migrants, which entails an array of protracted measures, such as reception facilities, screening and asylum application procedures. This has, in turn, a well-recognised negative impact on the construction and the assessment of what constitutes a situation of distress at sea, that will trigger a search and rescue operation.

States' restrictive migration and security policies seem to prioritise their presence at sea for maritime external borders surveillance and security driven military operations. In the Mediterranean Sea region, this is to be put in context with the recent gradual depletion of the presence of humanitarian driven search and rescue operations, primarily led by non-governmental organisations (NGOs) search and rescue vessels. This is mainly due to widespread institutional hostility ranging from not allowing or delaying disembarkation of survivors from NGO vessels, removing the flag, administrative procedures to avoid NGO vessels leaving the port, the detention of a number of vessels, to the criminalisation of their interventions, intimidation and even threatening acts at sea. Also in the Mediterranean Sea, the official declaration by Libya of its Search and Rescue Region, with a prospective fully functional Libyan Rescue Coordination Centre in 2020, raises further concerns regarding international human rights and international refugee law considerations with regards to migrants retrieved from the sea off the coast of Libya, within its search and rescue region. This has become particularly alarming considering abundant reports on the appalling conditions of the detention centres in Libya and the consistent violations of international human rights law.¹⁰

¹⁰ See for instance, Parliamentary Assembly of the Council of Europe, Resolution 2215 (2018) 'The Situation in Libya: Prospects and Role of the Council of Europe', paras 7, 8 and 11.5, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24738>. Reference is therein made to other reports and studies by the UNHCR, the UN Support Mission in Libya, reports of non-governmental

The sea hence becomes a theatre of operations where fundamental considerations and concerns pertaining to different functional systems and operation spheres concur.

In the complex and multi-layered context of search and rescue of sea migrants, where there is an increasing call for comprehensive approaches and solutions, a variety of considerations come together and often conflict. These involve among others sovereignty principles, security motivations against smuggling and other international crimes, policing and border surveillance for migration restriction purposes, and humanitarian concerns. This thesis seeks to safeguard and advance the latter. The existing tensions among the different priorities involved have introduced ‘pull factor’ narratives in the sphere of humanitarian search and rescue operations leaving the SAR Convention exposed to pressures that inevitably have an impact on the adequacy and the effectiveness of the search and rescue services in the context of irregular crossings, where the needs among sea migrants need to be furthered.

organisations and various new reports providing evidence on human rights violations, including slavery. Among these see UN Support Mission in Libya, “‘Detained and Dehumanised’ Report on Human Rights Abuses against Migrants in Libya’, 13 December 2016 <https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf>. See also the UN Security Council, Report of the Secretary-General, United Nations Support Mission in Libya, UN Doc S/2019/682. Paras 50 to 54. See further on this matter, the Statement by the President of the Security Council, 7 December 2017, UN Doc S/PRST/2017/24 <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_prst_2017_24.pdf>. See also UNHCR, ‘UNHCR Position on returns to Libya’ (Update II), September 2018 <<https://www.refworld.org/docid/5b8d02314.html>>. UNHCR, ‘Joint Statement: Government of Rwanda, UNHCR and African Union agree to evacuate refugees out of Libya’ 10 September 2019 <<https://www.unhcr.org/news/press/2019/9/5d5d1c9a4/joint-statement-government-rwanda-unhcr-african-union-agree-evacuate-refugees.html>>. See further Oxfam International press release, ‘One year on from Libya migration deal, people still in captivity and suffering abuses’, 1 February 2018 <<https://www.oxfam.org/en/press-releases/one-year-libya-migration-deal-people-still-captivity-and-suffering-abuses>> and ‘Libya migration deal: Two years on, thousands drowned in the Mediterranean and sent back to human rights abuses’, 1 February 2019 <<https://www.oxfam.org/es/node/10827>>.

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Against this backdrop, advancing considerations of human rights law and international refugee law in the realm of search and rescue of sea migrants is crucial. It becomes therefore relevant to develop a legal interpretation argument for a more integrating reading of the SAR Convention where safety and protection considerations could converge, in order to protect humanitarian considerations in the assistance and safety of sea migrants from existing pressures. In this context, it appears urgent to explore the viability of an integrating reading of the SAR Convention, grounded in international human rights law and international refugee law, for an interpretative approach that addresses the needs sea migrants experience during crossings and upon disembarkation.

To this end, the present research strives to develop a legal interpretative reasoning of the SAR Convention, anchored in the Vienna Convention on the Law of Treaties (VCLT),¹¹ Articles 31 to 33, that is underpinned by the vulnerability reasoning. Vulnerability reasoning marks the start of the interpretative legal reasoning and constitutes the underlying thread throughout the interpretative process.

Vulnerability reasoning is drawn to this interpretative reasoning as an additional layer of consideration to the widely accepted elementary considerations of humanity existing in maritime law and international law of the sea, as will be seen in chapter 5, or to a dignity-based approach to maritime search and rescue. Both dignity and vulnerability constitute key components in the recognition and the promotion of human rights, as will be considered in chapter 1. The former presents an inherent feature to all human beings and is therefore universal, as acknowledged in the same chapter. The latter is presented in this thesis as situations of lived vulnerability among sea migrants during irregular transits. It is linked to the navigational perils and it underscores particularly their exposure to coercion, exploitation and to violations to human rights. This, therefore, constitutes a narrower approach that focuses specifically on the lived experiences among sea migrants and addresses the specific protection needs that arise therefrom.

¹¹ 23 May 1969, 1155 UNTS 331.

The specific needs among sea migrants are brought to the forefront of the interpretative process where vulnerability reasoning calls for a substantive equality approach that focuses on the results rather than in a sameness of treatment, in order to correct initial inequalities by adapting levels of protection and heightening the duty of care for effective and tailored responses, as will be further considered in chapter 1.

In the interpretative reasoning proposed, vulnerability reasoning aims at redressing the position of lived vulnerability among sea migrants and points towards human rights law and refugee law protection considerations; a bridge, as it were, between the different legal arenas that paves the way to explore a mechanism of interpretation that allows the integration of these rules in the reading of the SAR Convention.

The interpretative reasoning proposed rests upon the formula of systemic integration formulated in Article 31(3)(c) of the VCLT to advance considerations of humanity and achieve a more integrating reading of the SAR Convention, particularly with regards to the concepts of persons in distress and place of safety. The principle of systemic integration is presented in this thesis as a mechanism of redress within the vulnerability reasoning in the interpretation process, as will be seen in chapters 4, 5 and 6, for a more tailored response within the existing positive obligations in the maritime search and rescue legal framework.

Incorporating vulnerability reasoning considerations in the integrating interpretative reasoning proposed allows an innovative approach to the reading of this maritime legal instrument that aims at contributing to the on-going discussions for a common understanding of the key terms of persons in distress and place of safety where considerations of humanity are furthered.

The integrating interpretative mechanism is part of the general rule of interpretation, contained in Article 31 of the VCLT, relied upon in the initial steps concerned with the interpretation of the terms defining ‘distress’ and ‘place of safety’, and their construction within the context of the SAR Convention.

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This integrating interpretative approach invokes and scrutinises specific provisions in the realm of international human rights law, relevant to the protection of the physical and mental integrity of sea migrants during the crossings and upon their disembarkation and delivery to a place of safety. The same process follows for the last stage of the rescue operation, where protection considerations within the arena of international refugee law are also invoked. The legal research of these provisions mainly focuses on primary authorities to understand their meaning and scope and the standards applied thereto. In both instances, the requirements of relevance of the norms invoked and their applicability in the relations between the parties are analysed to assess the functionality and the viability of this integrating interpretative guiding mechanism contained in Article 31(3)(c) of the VCLT.

This integrating interpretative reasoning proposes that the notion of persons in distress at sea, and its defining term danger, for the purpose of maritime search and rescue, is construed to include the exposure to, or risk of, or actual subjection to cruel, inhuman or degrading treatment, that international rules pertaining to human rights law safeguard against. The scope of protection is examined in chapter 5. It is equally suggested in chapter 6 that the concept of place of safety is construed to incorporate human rights law considerations for the protection of the physical and mental integrity of sea migrants upon disembarkation, including the safeguard against all forms of ill-treatment, particularly pressing with regards to reception or detention conditions and processing centres, and the safeguard against arbitrary detention. It further intends to incorporate in the construction of this term of safety, where relevant, protection considerations in the realm of international refugee law, notably the safeguard against threats to the lives and freedoms of those alleging a well-founded fear of persecution on refugee law grounds, access to fair and efficient status determination procedures and safeguards against penalization on irregular entry grounds. The obligation of non-refoulement is also examined as an overarching protection consideration both in human rights law and refugee law realms.

Ratcovich has also examined the notion of place of safety in the wider context of international law, notably refugee law and human rights law, drawing on the interpretative

mechanism of systemic integration.¹² However, the author opts for a more restrictive view than the one proposed here regarding the requirement of applicability of the norm in the relations between the parties to the treaty being interpreted. According to Ratcovich, the rules invoked are to be applicable to all the parties to the treaty being interpreted, and hence, where no identity of parties to the treaties exists, the author relies solely on rules of international law that hold the status of customary international law. Further differences transpire in Ratcovich's emphases on the rules invoked. For instance, the author invokes the protection against torture, inhuman or degrading treatment or punishment only through the prohibition of refoulement instead of stand-alone interdictions in human rights law, giving more weight in his reasoning to the obligation of non-refoulement, and its status of customary law. In contrast with the present reasoning, Ratcovich does not give specific consideration to the protection from arbitrary detention, considered a norm of customary international law.

The approach given in chapter 6 of this thesis to the requirement of applicability of the norms invoked in the relations between the parties goes further. The notion of applicability is extended to rules of international law widely accepted among the parties to the SAR Convention, evidencing the existence of a common understanding of protection considerations. This approach therefore also contributes to the existing debate and takes it further to integrate, in the reading of the SAR Convention, rules that do not hold the status of customary international law but convey a wide acceptance and a common understanding of the protection considerations invoked. This thesis also proposes a test, based on the findings of the integrating interpretative reasoning and grounded in the principle of non-refoulement, to discard locations as places of safety for the purpose of disembarkation.

The integrating interpretative reasoning proposed, grounded in Article 31(3)(c) of the VCLT, differs from the harmonization approach developed by Klein where the central focus is on

¹² M Ratcovich, 'The Concept of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants rescued at Sea?' (2016) vol 33, Australian Yearbook of International Law, 81; M Ratcovich, International Law and the Rescue of Refugees at Sea, Doctoral Thesis, University of Stockholm 2019 <<http://su.diva-portal.org/smash/get/diva2:1323140/FULLTEXT02.PDF>>.

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maritime interdictions in the context of external border controls and the weight is primarily on the actual application of international human rights law and refugee law in maritime interceptions.¹³ The author relies on the requirement of effective control and the consideration to other rules of international law based on the principle of elementary considerations of humanity to reconcile different bodies of law and contrasting underlying policy pursuits.

The integrating interpretation mechanism suggested here also differs from the cumulative approach proposed by V Moreno-Lax in her examination of the interplay between humanitarian law, international human rights law and international refugee law.¹⁴ The author offers a procedural role of conduct grounded in Article 31 of the VCLT based on a cumulative model for a holistic inter-regime relation. As Moreno-Lax considers the concurrent application of these three regimes, Article 31(3)(c) plays a less significant role, given that it is not the appropriate mechanism to establish what body of law is to be considered as the main reference in a given case. Only once this is determined, the guiding interpretative tool can assist in its reading taking into account its external normative environment.

The methodology proposed in this thesis further differs from the integrative interpretation approach Moreno-Lax puts forward within the realms of human rights law and refugee law in the context of EU law, where interpretation guidance provisions, notably in the Charter of Fundamental Rights of the EU¹⁵ and the Treaty of the Functioning of the EU,¹⁶ offer an interaction with applicable international instruments of human rights and refugee protection for a harmonious and integrative construction that support an interpretative methodology of ‘aggregate standards’ regarding the levels of protection to be afforded.¹⁷

¹³ N Klein, ‘A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants’ (2014) 63 *International and Comparative Law Quarterly*, 787.

¹⁴ V Moreno-Lax, ‘Systematising Systemic Integration: “War Refugees”, regime Relations, and a Proposal for a Cumulative Approach to International Commitments’ (2014) 12 (N 5) *Journal of International Criminal Justice*, 907.

¹⁵ [2010] OJ 83/389.

¹⁶ [2010] OJ C 83/47.

¹⁷ V Moreno-Lax, *Accessing Asylum in Europe* (Oxford University Press 2017) Ch 7 ‘The Fundamental Rights *Acquis*: An “Integrative Approach” to Interpretation – The “Aggregate Standards” Model’.

This thesis is concerned with the interpretative and qualitative analysis of the SAR Convention against the background of UNCLOS and particular provisions of the SOLAS Convention as the relevant international legal framework for the maritime search and rescue system. The doctrinal research methodology is therefore suitable and central to conduct such a conceptual analysis in order to evaluate its limitations and also its potential for a more integrating reading to achieve a more responsive approach to maritime search and rescue with due consideration to the protection needs among sea migrants.

The interpretative reasoning proposed further relies on a dynamic and evolving approach in the construction of the relevant legal instruments, with the teleological view of maintaining an adequate and effective search and rescue service that adapts to evolving scenarios.

This interpretative reasoning can be seen as having a threefold purpose. Firstly, it has a purpose of clarification of what the treaty provision actually means.¹⁸ Secondly, it allows a more coherent approach to the construction, or otherwise the legal application, of the definition of ‘distress phase’, in particular the notion of persons in distress at sea, and the notion of place of safety.¹⁹ Thirdly, this process of interpretation by reference to other international law obligations allows a dialogue between specialised fields of international law,²⁰ which in the present argument aims at enhancing the protection of sea migrants. It is the latter purpose that this research gives particular emphasis to.

The preparatory work of the SAR Convention is drawn on this interpretative process primarily to contextualise the making of the SAR Convention, with the purpose of underscoring its sectoral approach in the design of the SAR system. It is not brought in the

¹⁸ D French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’ (2006) 55 *International and Comparative Law Quarterly*, 281, 282.

¹⁹ *Ibid*, 282 and 285, where reference is made to the promotion of coherence within the international legal system.

²⁰ C McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly*, 279, 284 and 318 to 319.

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interpretative reasoning as a supplementary means of interpretation, formulated in Article 32 of the VCLT, as the interpretative guidance in Article 31 clarifies the meaning of the terms examined. Furthermore, the preparatory work does not provide evidence in the construction of the terms persons in distress and place of safety.

The sectoral approach is considered in the light of the fragmentation of international law, outside the context of normative conflict. Basic considerations of underlying social and political tensions are only touched upon to underscore difficulties and biases that arise in the context of irregular crossings. Consequently, this research assesses the functionality of the principle of systemic integration, formulated in Article 31(3)(c) of the VCLT, as regards the construction of the notions of persons in distress and place of safety in the context of the fragmentation of international law, where no normative conflict arises, but a sectoral approach to maritime search and rescue exists and underlying tensions accrue.

This research draws on fieldwork organisation reports solely to illustrate situations of lived vulnerability, including crossing conditions and detention conditions in a context of generalised violence.

The interpretative reasoning developed through the chapters of this thesis is primarily addressed to States parties to the SAR Convention, and to the wider international community to the extent that the obligation to render assistance at sea constitutes an obligation of customary international law.

The writing of this thesis was completed in January 2020 and therefore predates the COVID-19 pandemic. Although some recent events have been incorporated in footnotes as illustrative examples to existing propositions, this thesis does not consider the operating challenges maritime search and rescue faces due to COVID-19. In the context of irregular unsafe sea crossings, the adverse effects are readily noticeable. In the Bay of Bengal and Andaman Sea, for instance, there have been a number of reports of stranded Rohingya refugees aboard fishing trawlers, in life-threatening conditions, not allowed to disembark or pushed back by authority officials, coupled with the absence of search and rescue operations,

on grounds of the risks of infections.²¹ In the Mediterranean, refusals to allow disembarkation of rescued sea migrants and the closure of ports, notably of Italy and Malta, declaring themselves not safe given the COVID-19 outbreak, are to be coupled with the decrease of maritime search and rescue capacity at sea to respond to situations of distress and the delays or lack of response to distress calls.²² The present state of affairs highlights the relevance and the urgency of the interpretative legal reasoning proposed in this thesis for a more integrating reading of the SAR Convention. Having said that, its already disastrous effect in the context of irregular crossings calls for a thorough scrutiny of the responses given at sea and on land in compliance with search and rescue duties where inter-regime dialogues remain crucial.

²¹ UNHCR, IOM and UNODC joint statement on protection at sea in the Bay of Bengal and Andaman Sea' 6 May 2020 <<https://www.unhcr.org/news/press/2020/5/5eb15b804/joint-statement-unhcr-iom-unodc-protection-sea-bay-bengal-andaman-sea.html>>; UN news, 'Amid COVID-19 pandemic, thousands stranded in Bay of Bengal "unable to come ashore"', 6 May 2020 <<https://news.un.org/en/story/2020/05/1063402>>; Médecins sans Frontières (MSF) 'Rohingya refugees left to starve at sea' 22 April 2020 <<https://www.msf.org/rohingya-refugees-left-starve-sea>>; MSF open letter 'MSF ready to support the government of Malaysia with safe disembarkation of people in distress at sea' 7 May 2020 <<https://www.msf.org/msf-ready-support-malaysia-safe-disembarkation-people-sea>>.

²² UN news, 'UN rights office concerned over migrant boat pushbacks in the Mediterranean', 8 May 2020 <<https://news.un.org/en/story/2020/05/1063592>>; The New Humanitarian news, 'In the news: COVID-19 port closures leave migrants stranded at sea', 13 April 2020 <<https://www.thenewhumanitarian.org/news/2020/04/13/mediterranean-italy-malta-migrants-coronavirus>>; MSF 'Mediterranean migration: EU states use COVID-19 to shirk search and rescue obligations as MSF ends Ocean Viking partnership', 17 April 2020 <<https://www.msf.org/eu-states-use-covid-19-shirk-search-and-rescue-obligations>>; Statewatch Analysis by Y Maccanico 'Mediterranean: As the fiction of a Libyan search and rescue zone begins to crumble, EU states use the coronavirus pandemic to declare themselves unsafe', May 2020 <<https://www.statewatch.org/analyses/no-360-malta-italy-eu-libya-pushbacks.pdf>>. IOM press release, 'COVID-19 Control Measures, Gap in SaR Capacity Increases Concerns About "Invisible Shipwrecks"', 12 May 2020 <<https://www.iom.int/news/covid-19-control-measures-gap-sar-capacity-increases-concern-about-invisible-shipwrecks>>.

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2. Central question and related queries outlining the scope of this thesis

This thesis aims to assist in furthering the considerations of humanity in the maritime search and rescue system in the on-going discussions on the reading of the SAR Convention and its role in the context of irregular crossings.

This thesis assesses the viability of such an interpretative endeavour by asking the following question:

Is an integrating reading of the SAR Convention viable for an interpretative approach that addresses the needs among sea migrants during sea crossings and upon disembarkation? In particular, can the construction of the concepts persons in distress and place of safety be grounded in international human rights law and international refugee law considerations for a more responsive approach to these needs?

This central question spurs a number of connected queries that mark each chapter throughout the legal reasoning, contributing to the shaping of the answer to the central question.

Chapter 1 explores the potential role vulnerability reasoning can play in the reading of the SAR Convention and related instruments in the context of search and rescue of sea migrants. In particular, it considers the relevance of vulnerability reasoning in addressing the specific needs of migrants at sea enduring irregular and unsafe crossings in order to incorporate particular concerns in the interpretative reasoning of the maritime legal instruments. Vulnerability reasoning is proposed to underpin the interpretative reasoning of the SAR Convention and related instruments in search of a corrective mechanism to render the SAR system more responsive to the needs of sea migrants. The SAR Convention therefore needs to be examined with the vulnerability lens to underscore its potential to consider particular needs in the context of search and rescue of sea migrants, and its limitations in the operative design to adequately respond to these needs.

Chapter 2 scrutinises the SAR Convention. It explores its universality and adaptability to changing circumstances that allow an inclusive and dynamic approach to the reading of the SAR Convention where considerations of humanity readily stand out. It underscores how this contrasts with a sectoral approach to the operative design to maritime search and rescue, predominantly concerned with the needs of regular maritime traffic. In this dichotomy, this chapter explores what functional limitations the SAR Convention may present in the context of irregular and unsafe migration by sea. It further purports to identify areas where the interpretation of this legal instrument ought to invoke international human rights law and international refugee law considerations, as a starting point to accommodate the specific needs among sea migrants. These functional limitations call for a scrutiny of the sectoral approach to maritime search and rescue in the light of the fragmentation of international law and underlying tensions in the context of irregular migration.

Chapter 3 introduces the concept of ‘underlap’ to refer to what is presented as an underdevelopment of the SAR Convention against the backdrop of Article 98 of UNCLOS, within the sectoral approach given to the operative design of the SAR Convention to maritime search and rescue. It inquires whether this ‘underlap’ can be considered as a component in the process of fragmentation of international law, where no apparent normative conflict exists, to underscore how compelling it is to introduce in the reading of the SAR Convention further considerations of humanity and to identify appropriate guiding interpretative mechanisms that allow a more integrating reading of the SAR Convention. This chapter also draws on basic insights of social and political approaches to fragmentation to underscore the underlying tensions in the wider context of irregular migration, where policy strategies and society-wide rationalities co-exist. This emphasises the importance of a legal interpretative argument that contributes to a consistent reading of the SAR Convention and related instruments, and the need to advance human rights law and refugee law considerations to respond to protection needs among sea migrants in the SAR system. It sets the course to the study of the doctrinal formula of systemic integration within the interpretative reasoning to invoke human rights law and refugee law considerations in the construction of the notions of persons in distress and place of safety. The following chapter is therefore devoted to the initial stages of the construction of the terms defining ‘persons in distress’.

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Chapter 4 undertakes the interpretative process of the notion of distress phase focusing on ‘persons in distress’, anchored in the VCLT. The first stage of this interpretative process involves scrutinising the semantic meaning of the terms defining ‘distress phase’ and the construction or legal application of these terms. The question this chapter focuses on is whether the semantic content and the construction of the terms defining ‘persons in distress’ allow for a more responsive maritime search and rescue system to ensure adequate protection to the integrity and ultimately the lives of sea migrants. To this end, the construction of the key terms defining ‘distress phase’, namely, the generic term danger and its qualifying words grave and imminent, with reference to ‘persons in distress’ draws on a particular aspect of vulnerability reasoning and it further relies on a dynamic interpretative approach. Initial considerations of the principle of systemic integration are also brought at this stage.

Chapter 5 continues elaborating on the legal interpretative reasoning proposed to allow for a more integrating reading of the notion of persons in distress. It scrutinises the functionality of the principle of systemic integration as an interpretative guiding mechanism and its relevance in this interpretative reasoning to address the specific needs among sea migrants during sea crossings. The question this chapter strives to answer is whether the principle of systemic integration, formulated in Article 31(3)(c) of the VCLT, allows the construction of the notion of danger and hence ‘persons in distress’ in the SAR Convention to take into account international human rights law considerations for the protection of the physical and mental integrity of sea migrants. This chapter explores whether an integrating construction of the notion of persons in distress and its defining word danger, can incorporate the risk of, or the actual subjection to, what constitutes cruel, inhuman or degrading treatment, given the untenable crossing conditions widely imposed upon sea migrants and the suffering resulting therefrom.

Chapter 6 draws on the findings of the previous chapters, building upon an integrating interpretative reasoning with regards to the term place of safety for the purpose of disembarkation of survivors at the end of a rescue operation. The question this chapter strives to answer is whether an integrating construction of the notion of place of safety, grounded in international human rights law and international refugee law is achievable and can foster an interpretative scope of the notion of safety that addresses specific protection needs. To

this end, this chapter suggests the construction of the concept of place of safety to incorporate human rights law considerations for the safeguard against torture, cruel, inhuman or degrading treatment or punishment, for the protection of the physical and mental integrity of sea migrants upon disembarkation. The safeguard against arbitrary detentions is also contemplated. It further proposes a construction that fosters refugee law protection considerations, primarily the safeguard against threats to the lives and freedoms of those alleging a well-founded fear of persecution, access to fair and efficient status determination procedures and safeguard against penalization on irregular entry grounds. This chapter assesses the viability for such an integrating reading. It also explores and suggests practical considerations for the identification of locations that do not offer effective protection for the purpose of disembarkation and delivery to a place of safety.

Chapter 1 Sea migrants embarked on irregular crossings: a vulnerability reasoning approach to maritime search and rescue

Introduction

Irregular crossings by sea are overwhelmingly marked by unsafe and inhumane conditions. Sea migrants¹ embark on life-threatening journeys by sea to flee persecution or untenable living conditions. These journeys undeniably raise among sea migrants, aspects of vulnerability widely acknowledged among international, regional, governmental and non-governmental institutions, as highlighted later in this chapter.

Against this background, this chapter argues that these journeys call for a scrutiny of the obligations to render assistance at sea and to proceed to the search and rescue in the applicable legal instruments, where vulnerability reasoning is relevant to the interpretative process.

This chapter proposes the introduction of vulnerability reasoning primarily in the reading of the International Convention on Maritime Search and Rescue, 1979, as amended (SAR Convention),² alongside the United Nations Convention on the Law of the Sea, 1982

¹ The term ‘sea migrants’, as established in the Introduction, is used in this thesis to refer to persons travelling irregularly by sea. It includes refugees, asylum-seekers and economic migrants, among which persons with specific needs such as trafficked persons, stateless persons and unaccompanied or separated children, in what has been called ‘mixed migration movements’. See UNHCR Background Paper on ‘Refugees and Asylum Seekers in Distress at Sea – how best to respond?’ Expert Meeting in Djibouti, 8-10 November 2011, in particular para 1, <www.unhcr.org/4ec1436c9.html>.

² Hamburg, 27 April 1979, 1405 UNTS 19. The SAR Convention entered into force on 22 June 1985. The number of Contracting States to the Convention comes to 113 as at 7 June 2020. This information is available at <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf>>. The Annex to the SAR Convention was amended in 1998 by Resolution MSC.70(69), 18 May 1998, on the adoption of amendments to the International Convention on Maritime Search and Rescue, 1979, <http://folk.uio.no/erikro/WWW/SAR_1998.pdf>. For an overview of these amendments, see IMO website <<http://www.imo.org/en/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/SARConvention.aspx>> and Z Özçayır, ‘The International Convention on Maritime Search and Rescue (SAR)’ (2006) 12 JIML 282, 285 and 286. Further amendments were introduced in 2004 by Resolution MSC.155(78), 20 May 2004, on the adoption of amendments to the International Convention on Maritime

(UNCLOS),³ and the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS Convention).⁴ The aim is to address the specific needs among sea migrants not foreseen or represented in a maritime legal instrument not originally designed nor intended to respond to large flows of unsafe migration by sea.⁵

Vulnerability reasoning becomes especially significant in the context of search and rescue of sea migrants in migration flows characterised by the life-threatening conditions of the crossings against a generalised background of violence and coercion, with particular emphasis made here on their exposure to physical, psychological and moral harm.

This chapter therefore draws on some basic aspects of vulnerability theory as well as case law, chiefly the European Court of Human Rights (ECtHR) case law, to introduce the vulnerability reasoning to the reading of the SAR Convention and related instruments.

The purpose of this endeavour is to integrate in a consistent manner the specific concerns and needs of sea migrants, and present a legal argument that favours a more responsive approach to maritime search and rescue services tailored to the specific needs arising in these journeys in order to enhance protection at sea. This is in fact the underlying motivation and backdrop to the legal reasoning developed in this thesis: achieving a more integrating reading of the SAR Convention as an initial stage for a more responsive implementation of the SAR services in the context of irregular sea migration. The reasoning developed in this thesis commences thus with the consideration of the vulnerability reasoning.

Search and Rescue, 1979, as amended <[http://www.imo.org/blast/blastDataHelper.asp?data_id=15528&filename=155\(78\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15528&filename=155(78).pdf)>. These amendments will be dealt with when discussing the notion of place of safety in Ch 6.

³ Montego Bay, 10 December 1982, 1833 UNTS 3. It entered into force 16 November 1994. T Koh, who served as the President of the Third United Nations Conference on the Law of the Sea from March 1981 until its conclusion in 1982, at the final session of the Conference at Montego Bay (6 to 11 December 1982) described UNCLOS as a ‘comprehensive constitution for the Oceans.’ See the contribution adapted from his statements in M Nordquist (ed), *United Nations Convention on the Law of the Sea 1982 a Commentary*, Center for Oceans Law and Policy, University of Virginia (the Virginia Commentary) vol I, (Martinus Nijhoff Publishers 1985). His remarks are available at <http://un.org/depts/los/convention_agreements/texts/koh_english.pdf>. Currently, there are 168 States parties to UNCLOS <<https://www.itlos.org/the-tribunal/states-parties/>>.

⁴ 1 November 1974, 1184 UNTS 278. It entered into force 25 May 1980. The number of States parties currently amount to 166 <www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

⁵ See below Mr Koji Sekimizu’s words quoted below, as International Maritime Organization (IMO) Secretary-General at the time.

This chapter explores what potential role vulnerability reasoning can play in the reading of the SAR Convention and related instruments in the context of assistance to and search and rescue of sea migrants. This question therefore constitutes the starting point in the building of an interpretative reasoning that seeks to advance a more integrating interpretation of the SAR Convention to allow considerations of humanity to permeate further in the maritime search and rescue system. The scope of this integrating interpretative reasoning will be assessed in this thesis, in the endeavour to answer the central question herein proposed.⁶

To this end, this chapter firstly makes some introductory considerations on the legal instruments relevant to maritime assistance and search and rescue services in order to set the initial scene and underscore the pertinence of bringing the vulnerability reasoning to the interpretation of this legal framework, primarily the SAR Convention.⁷

Secondly, this chapter considers the notion of vulnerability, with an approach that prioritises the focus on situations of vulnerability rather than inherent vulnerabilities, and its applicability to sea migrants.

Thirdly, this chapter illustrates situations of lived vulnerability among sea migrants, characterised by the harm-based notion of vulnerability, due to their continuing exposure to harm or actual harm suffered during irregular crossings. The examples given assist in addressing specific needs arising in these journeys.

Against this background, this chapter considers the relevance of the vulnerability reasoning in the context of irregular sea migration flows. It scrutinises legal implications of the vulnerability reasoning in the reading of the SAR Convention in search of a correcting mechanism in the interpretative reasoning that allows a more integrating reading of the SAR Convention to enhance protection, and its potential role as a link between maritime and international human rights considerations.

⁶ The central question is whether an integrating reading of the SAR Convention is viable for an interpretative approach that addresses the needs among sea migrants during sea crossings and upon disembarkation. More specifically, the question this thesis strives to answer is whether the construction of the concepts persons in distress and place of safety can be grounded in international human rights law and international refugee law considerations for a more responsive approach to these needs.

⁷ These instruments will be further examined in chapter 2.

1. Assistance and Search and rescue: initial considerations of its international legal framework and its relevance in the context of irregular migration by sea

The duties to engage in rendering assistance at sea to those in danger, and the involvement in the search and rescue operations in situations of distress fall within the SAR Convention, UNCLOS, and the SOLAS Convention.

The SAR Convention frames an international system of cooperation and coordination between States parties with the purpose of ensuring common and efficient procedures to guarantee that assistance is rendered to any person in distress at sea.⁸ The purpose of the SAR Convention is to provide a worldwide system covering search and rescue operations, so that, according to the International Maritime Organization (IMO) ‘no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a SAR organization and, when necessary, by co-operation between neighbouring SAR organizations’.⁹ It is therefore an operational instrument that frames a global maritime search and rescue system.

The SAR Convention is complemented with the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual).¹⁰ It is further complemented with the

⁸ SAR Convention, fourth preambular paragraph. See A Campàs Velasco, ‘The International Convention on Maritime Search and Rescue: Legal Mechanisms of Responsibility Sharing and Cooperation in the Context of Sea Migration?’ in Vol 10 *The Irish Yearbook of International Law*, eds F De Londras and S Mullally, (Hart Publishing, 2017) 58. The differentiation between assistance at sea and search and rescue services is considered in chapter 2 s 1.2.1.

⁹ IMO publication: Focus on IMO, March 1999, for background information <<http://www.imo.org/en/OurWork/Safety/Regulations/Documents/GMDSSandSAR1999.pdf>>. See also <<http://www.imo.org/en/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/SARConvention.aspx>>

¹⁰ The IAMSAR Manual is jointly published by the IMO and the International Civil Aviation Organization (ICAO). It provides guidelines for a common aviation and maritime approach to search and rescue services. It promotes co-operation between the two Agencies, among neighbouring States and between maritime and aeronautical authorities. It aims to ‘assist State Authorities to economically establish effective SAR services, to promote harmonization of aeronautical and maritime SAR services, and to ensure that persons in distress will be assisted without regard to their locations, nationality or circumstances’. See IAMSAR Manual Vol 1, Organization and Management, 2013 edn, p 1-1, para 1.1.3. See also

Guidelines on the Treatment of Persons Rescued at Sea,¹¹ and with agreements between States parties.

The SAR Convention is underpinned by the customary obligation of shipmasters to render assistance at sea, that crystallised in the 1910 International Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea,¹² replaced by the 1989 International Convention on Salvage,¹³ whose Article 10 provides for this obligation.¹⁴ It was also codified in the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, as amended (hereafter the 1910 Collisions Convention).¹⁵ This duty, also contained in the SOLAS Convention, establishes obligations and procedures both for the master and the relevant coastal State in situations of distress.¹⁶

<<http://www.imo.org/en/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/IAMSARManual.aspx>>.

¹¹ Maritime Safety Committee Resolution MSC.167(78), 20 May 2004 <[http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf)>. These Guidelines will be discussed in detail with regards to disembarkation and delivery of survivors at a place of safety in chapter 6.

¹² Brussels, 23 September 1910, 212 CTS 187. Art XI reads: ‘Every master is bound, as far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost. The owner of a vessel incurs no liability by reason contraventions of the above provision’.

¹³ London, 28 April 1989, 1953 UNTS 165.

¹⁴ Art 10, regarding the duty to render assistance, provides: ‘1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea. 2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1. 3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1’.

¹⁵ Brussels, 23 September 1910, 212 CTS 178. Art 8 states: ‘After a collision, the master of each vessel in collision is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to the other vessel, her crew and her passengers. He is likewise bound so far as possible to make known to the other vessel the name of his vessel and the port to which she belongs, and also the names of the ports from which she comes and to which she is bound. A breach of the above provisions does not of itself impose any liability on the owner of a vessel’.

¹⁶ SOLAS Convention, 1 November 1974, entered into force 25 May 1980, 1184 UNTS 278. See Ch V, Reg 33, dealing with obligations and procedures in distress situations. Its para 1 provides: ‘The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. If the ship receiving the

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These obligations were articulated in the 1958 Convention on the High Seas,¹⁷ and presently in its successor UNCLOS. Article 98 of UNCLOS repeats Article 12 of its predecessor almost verbatim. It addresses the obligations to States parties to ensure masters of vessels flying their flags provide assistance at sea and to establish and maintain search and rescue services at sea.

Article 98 of UNCLOS provides as follows:

'Duty to render assistance

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

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

distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization, to inform the appropriate search and rescue service accordingly'. Ch V, Reg 7, dealing with search and rescue services, provides: 'Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons. 2. Each Contracting Government undertakes to make available information to the Organization concerning its existing search and rescue facilities and the plans for changes therein, if any. 3. Passenger ships to which chapter I applies shall have on board a plan for co-operation with appropriate search and rescue services in event of an emergency. The plan shall be developed in co-operation between the ship, the company, as defined in regulation IX/1 and the search and rescue services. The plan shall include provisions for periodic exercises to be undertaken to test its effectiveness. The plan shall be developed based on the guidelines developed by the Organization'.

¹⁷ Geneva, 29 April 1958, 450 UNTS 11, Art 12, which reads: '1. Every State shall require the master of a ship sailing under its flag, insofar as he can do so without serious danger to the ship, the crew or the passengers: (a) To render assistance to any person found at sea in danger of being lost; (b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as such action may reasonably be expected of him; (c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call. 2. Every coastal State shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and — where circumstances so require — by way of mutual regional arrangements cooperate with neighbouring States for this purpose'.

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

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

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

The SAR Convention, which will be examined in the next chapter, was however neither intended nor designed to respond to large flows of mixed migration by sea.¹⁸

Undeniably, the scale, the complexity and the multifaceted nature unsafe migration by sea presents, reaches beyond the scope of the SAR Convention. According to the United Nations High Commissioner for Refugees (UNHCR), the majority of migrants crossing the Mediterranean Sea are refugees fleeing conflict and persecution at home, and also fleeing from ‘deteriorating conditions in many refugee-hosting countries’.¹⁹ The scarcity or even lack of legal and safe avenues to seek protection, despite numerous calls for humanitarian visas,²⁰ has doubtless contributed to the staggering numbers of irregular sea crossings where

¹⁸ See Mr Koji Sekimizu’s words quoted below. The term ‘mixed migration’ reflects the heterogeneous nature of these migration flows, for which see UNHCR Background Paper on ‘Refugees and Asylum Seekers in Distress at Sea – how best to respond?’ (n 1) para 1.

¹⁹ Created in 1950, the UNHCR is mandated by the United Nations ‘to lead and coordinate international action for the world-wide protection of refugees and the resolution of refugee problems’. Its primary purpose is ‘to safeguard the rights and well-being of refugees’ and ‘to seek permanent solutions for their problems’. See UNHCR, ‘The sea route to Europe: The Mediterranean passage in the age of refugees’ 1 July 2015, <www.unhcr.org/5592bd059.html>.

²⁰ Humanitarian visas are one of the so-called Protected Entry Procedures that can be processed through diplomatic representations. See U Jensen, ‘Humanitarian visas: option or obligation?’ (2014) No 68 Centre for European Policy Studies (CEPS) Paper in Liberty and Security in Europe <<https://www.ceps.eu/wp-content/uploads/2015/01/No%2068%20Humanitarian%20visas.pdf>>. See G Goodwin-Gill, ‘Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action’

sea migrants have turned in great numbers to smuggler networks,²¹ or even traffickers.²² As a result, the majority of sea migrants embark on life-threatening journeys on board unseaworthy boats, rickety and ill-fitted craft, in unsafe and inhumane conditions, setting course to a safe haven in search of international protection or better life conditions. In words of Mr Koji Sekimizu, at the time Secretary-General of the International Maritime Organization (hereafter referred to as the IMO)²³:

‘There is clear recognition among IMO Member States that using the SAR system to respond to mass mixed migration was neither foreseen nor intended, and that although Governments and the merchant shipping industry will continue rescue operations, safe, legal, alternative pathways to migration must be developed, including safe, organized migration by sea, if necessary’.²⁴

Notes for a Presentation Jean Monnet Centre of Excellence of Excellence on Migrants’ rights in the Mediterranean University of Naples ‘L’Orientale’ Pallazzo du Mesnil, 11 May 2015, 10 <<http://www.jmcmigrants.eu/jmce/wp-content/uploads/2015/06/GSGG-Naples-Final-May2015.pdf>>.

²¹ Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by UN General Assembly resolution of 15 November 2000, defines smuggling of migrants as: ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’ (Art 3(a)). See EUROPOL-INTERPOL joint report ‘Migrant Smuggling Networks’, executive summary, May 2016 <<https://www.europol.europa.eu/publications-documents/europol-interpol-report-migrant-smuggling-networks>>. According to this report ‘90% of all migrants reaching Europe use facilitation services of a migrants smuggling network at some point throughout their journeys’, 2.

²² ‘Trafficking in persons’ is defined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Crime, adopted by UN General Assembly resolution of 15 November 2000. Art 3(a) defines it as: ‘the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’.

²³ The IMO is a technical UN agency primarily focused on the shipping industry. It is defined as ‘the global standard-setting authority for the safety, security and environmental performance of international shipping’ <www.imo.org/en/About/Pages/Default.aspx>.

²⁴ IMO press briefings ‘IMO Secretary-General welcomes UN Security Council resolution on migrant smuggling’ Briefing 45, 14 October 2015 <<http://www.imo.org/en/MediaCentre/PressBriefings/Pages/45-UNSC-resolution-.aspx>>.

The SAR Convention was ‘designed to improve existing arrangements and provide a framework for carrying out search and rescue operations *following accidents at sea*’.²⁵ Its preamble defines the aim of the Convention, in the widest possible way, as the rescue of persons in distress at sea.²⁶ However, the mechanisms of cooperation and coordination for this purpose are narrowly depicted as ‘an international maritime search and rescue plan *responsible to the needs of the maritime traffic for the rescue of persons in distress at sea*’.²⁷

The central position the shipping community has in the maritime SAR system, as it transpires from the preamble of the SAR Convention is undisputable.²⁸ The scope of the IMO mandate,²⁹ its main purposes and functions as architect and depositary of the SAR Convention can explain the predominant place shipping has in the SAR organisational plan and hence assist in understanding the legal design of the SAR Convention and the difficulties resulting in its interpretation and further implementation in the context of irregular crossings.³⁰

Notwithstanding the above, the SAR Convention remains a key instrument in the promotion and maintenance of adequate and effective maritime search and rescue services by coastal States parties for the safety of life at sea,³¹ which unquestionably includes the lives of those who embark on irregular crossings.

In this setting, attention is drawn to the notion of vulnerability, with a preference to the approach to situations of vulnerability experienced by sea migrants during their journeys. The common and central element of harm-based vulnerability is also examined in the context

²⁵ Emphasis added. See IMO publication ‘SAR Convention: International Convention on Maritime Search and Rescue, 1979, as amended by resolutions MSC.70(69) and MSC.155(78)’, 3rd edn (IMO, 2006), p. iii, first paragraph.

²⁶ SAR Convention, 2nd and 3rd preambular paragraphs.

²⁷ SAR Convention, 3rd preambular paragraph (emphasis added). The term ‘responsible’ in this paragraph substituted the word ‘responsive’ originally chosen in the drafting process of the SAR Convention, and presents a sense of entrustment of a duty towards the needs of maritime traffic as it is further explained in ch 2, s 2.1 and fns 83-86 thereto.

²⁸ This will also be examined in more detail in ch 2, s 2.1.

²⁹ See the Convention on the International Maritime Organization (IMO Convention) Geneva, 6 March 1948, 289 UNTS 3. The IMO Convention entered into force on 17 March 1958. This will be outlined in ch 2, s 2.1.

³⁰ These will be highlighted in Ch 2, ss 2.2 and 2.3.

³¹ SAR Convention, first preambular paragraph, and Ch 2 of its Annex, UNCLOS, Art 98.2 and SOLAS Convention, Ch V, Reg 7.

of irregular sea crossings. The role vulnerability reasoning can play in the reading of the SAR Convention is scrutinised in the remainder of this chapter.

2. Notion of vulnerability: identifying approaches to this concept and assessing their relevance in the context of sea migrants

The notion of vulnerability has been considered in diverse disciplines and from different perspectives. Ethical and anthropological approaches, bioethical, medical, sociological perspectives, philosophical, political, or legal theory and practice are but some examples.³²

In the political and legal arenas, the concept of vulnerability has been studied, shaped and developed as an argumentative tool to promote, to reinforce or to guarantee protection by societal institutions and States in a more responsive and tailored way to the particular needs addressed, in order to redress substantive inequalities.

The categorisation in terms of which population groups and hence members thereto or individuals can be considered inherently vulnerable, or in a vulnerable position, is influenced by, and has implications for, the nature, the scope and the level of State response and protection pursued. In this sense, the term vulnerability is broadly used but its meaning is considered imprecise, with no clear-cut conceptualisation,³³ and even ‘grossly under-theorized’, as Fineman claims.³⁴

Legal debates on vulnerability range from a universal notion of vulnerability,³⁵ to a particular group or individual based concept of vulnerability, which appears more as a notion that captures the particular.³⁶ These will be outlined in the following sub-sections, with a view

³² See for instance, A Masferrer and E García-Sánchez, eds, *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Springer 2016).

³³ L Peroni and A Timmer, ‘Vulnerable Groups: the Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11 *International Journal of Constitutional Law*, 1056 (Peroni and Timmer) 1058. See further R Andorno, ‘Is Vulnerability the Foundation of Human Rights?’ in A Masferrer and E Garcia-Sanchez, eds, *Human Dignity of the Vulnerable in the Age of Rights* (n 32) (hereafter Andorno) ch 11, 258. Andorno refers to the etymological meaning of vulnerability and its Latin origin in ‘vulnus’ meaning “wound” related to the human capability of suffering harm, 257.

³⁴ M Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) Vol 20 (N 1), *Yale Journal of Law & Feminism*, Article 2, 9.

³⁵ *Ibid.*

³⁶ Peroni and Timmer (n 33) 1064

to emphasising the consistent relevance of the concept in the present reasoning and to presenting the preferred approach to vulnerability when referring to sea migrants embarked on irregular crossings.

2.1 A universal approach

At the wider end, Fineman in her seminal work develops a notion of vulnerability understood as ‘universal and constant, inherent in the human condition’,³⁷ as well as particular to each subject,³⁸ and characterised as ‘a state of constant possibility of harm’.³⁹ Fineman addresses forms of inequalities and needs and she argues for a more egalitarian society.⁴⁰ Fineman’s understanding of the notion of equality involves a substantive equality, rather than the narrow notion of formal equality,⁴¹ the latter understood as a ‘sameness of treatment’ that presupposes equivalent conditions and opportunities as a starting point and disregards the context and the specific circumstances involved.⁴² Vulnerability reasoning in Fineman’s argument aims for changes in policymaking and brings into consideration the role societal

³⁷ M Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (n 34) 1. See also p 8: ‘(...) I want to claim the term “vulnerable” for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility’. See M Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’, in M Fineman and A Grear, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013) ch 1, 13 and 17. See also M Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Journal*, *Emory Public Law Research Paper* No 10-130, 33 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1694740>. See further, A Grear, ‘Human Rights – Human Bodies? Some Reflections on Corporate Human Rights Distortion, The Legal Subject, Embodiment and Human Rights Theory’ (2006) 17 *Law Critique*, 171. According to Grear, ‘[h]uman beings (...) are embodied, incarnate, physically vulnerable’, 192. The author further argues: ‘Embodiment is arguably of central importance to the theory of human rights. Focusing on the empirical reality of the incarnate nature of human beings brings us into direct connection with our basic vulnerability, and it is precisely our vulnerability that gives embodiment its ethical force’, 194.

³⁸ M Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (n 34) 10.

³⁹ *Ibid*, 11.

⁴⁰ Fineman’s vulnerability thesis originally focused on the American society and its state model, in her argument for a more responsive State. See ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (n 34) 1 and 2.

⁴¹ *Ibid*, 1. Fineman’s vulnerability approach contrasts with the discrimination-based approach to vulnerability, in her words, as anti-discrimination tool, focused on gender, race and ethnicity, 3.

⁴² M Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ (n 37) 13 and 14. M Fineman, ‘The Vulnerable Subject and the Responsive State (n 37) 1 and 2.

institutions, including the state, ought to play providing coping mechanisms.⁴³ Ultimately, according to Fineman, the objective of a ‘vulnerability analysis is to argue that the state must be more responsive to, and responsible for, vulnerability’.⁴⁴

Vulnerability is presented as a human condition linked to the recognition and respect of human dignity.⁴⁵ The conceptualisation of human dignity has been the subject of extensive study from legal and philosophical perspectives with particular intensity after the horrors of the Second World War.⁴⁶ The notion of human dignity presents a myriad of legal and philosophical nuances the study of which falls outside the scope of the present research. For the purpose of the present discussion, it seems sufficiently illustrative to refer to Kant’s formulation of human beings’ ‘inner worth, referred to as ‘dignity’.⁴⁷ This intrinsic worth or innate dignity, extensively commented in legal and philosophical literature,⁴⁸ constitutes, together with vulnerability, two key components in the recognition and the promotion of human rights.⁴⁹ Human dignity is further presented as the foundation of international human rights law, as explicitly recognised in the preamble of the Universal Declaration of Human Rights, 1948.⁵⁰ Subsequently, both the International Covenant on Civil and Political Rights, 1966,⁵¹ and the International Covenant on Economic, Social and Cultural Rights, 1966,⁵² recognise in their respective preambles the inherent dignity of the human person.⁵³

⁴³ M Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (n 34); M Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ (n 37) 22.

⁴⁴ M Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (n 34), p 13. See also M Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ (n 37) 13, 19 and 20.

⁴⁵ A Masferrer and E Garcia-Sanchez, eds, *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (n 32).

⁴⁶ A Masferrer, ‘Taking Human Dignity More Humanely: A Historical Contribution to the Ethical Foundations of Constitutional Democracy’, in A Masferrer and E Garcia-Sanchez, eds, *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (n 32) ch 10. Masferrer refers in particular to Kant’s doctrine on human dignity revival, 227 and 228.

⁴⁷ I Kant, *Groundwork for the Metaphysics of Morals*, edited by L Denis (Broadview editions 2005) 93.

⁴⁸ See as one illustrative example, A Masferrer and E Garcia-Sanchez, eds, *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (n 32).

⁴⁹ Andorno (n 33) 265.

⁵⁰ Adopted 10 December 1948, UNGA Res 217 A(III), Preamble, paras 1 and 5, and Art 1.

⁵¹ Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

⁵² Adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

⁵³ First preambular paragraphs. See R Andorno (n 33) 266.

Dignity indisputably presents a universal and inherent feature to all human beings, characterised as their intrinsic worth. In contrast, vulnerability is presented, as stated earlier, both as universal, and, with a narrower scope, as a notion that captures the particular. As the notion of vulnerability is considered here in the context of irregular crossings, narrower approaches appear more relevant for the purpose of the reading of the SAR Convention.

2.2 A population group approach to vulnerability for sea migrants?

At this narrower end, the approach to the notion of vulnerability regards particular population groups, and group member's vulnerability on grounds of specific group-based experiences.⁵⁴ This is for instance the vulnerability reasoning approach taken by the ECtHR and the United Nations Human Rights Committee (HRC). Peroni and Timmer have studied the ECtHR approach to the concept of vulnerability and vulnerability considerations in its legal reasoning through a number of cases and highlighted the Court's focus on specific vulnerability.⁵⁵ Peroni and Timmer consider the notion of 'vulnerable groups' to be an emerging concept in the ECtHR practice. Among these groups recognised as vulnerable by the ECtHR, the authors refer, *inter alia*, to children,⁵⁶ persons with mental disabilities,⁵⁷

⁵⁴ Peroni and Timmer (n 33) 1064. See further A Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', in A Fineman, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013) (Timmer) chapter 9, 152.

⁵⁵ Timmer states: 'the Court does not, like Fineman, conceptualize vulnerability as universal and constant. Instead, 'vulnerable' is an epithet that the Court attaches to some (groups of) applicants but not to others', 169. See also Peroni and Timmer (n 33).

⁵⁶ See for example *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, App No 13178/03 (ECtHR, 12 January 2007), where the vulnerability of the five-year-old applicant is implicitly articulated in para 51. In this case another ground of vulnerability arises with the child being held in an asylum-seeker centre. See also *Pontes v Portugal*, App No 19554 (ECtHR, 10 April 2012); *Fernández Martínez v Spain*, App no 56030/07 (ECtHR, 15 May 2012). See A Beduschi, 'Vulnerability on Trial: Protection of Migrant Children's Rights in the Jurisprudence of International Human Rights Courts' (2017) 36 Boston University International Law Journal, 55.

⁵⁷ See for example *Keenan v United Kingdom*, App No 27229/95 (ECtHR, 3 April 2001), para 111; *Alajos Kiss v Hungary*, App No 38832/06 (ECtHR, 20 May 2010); *Stanev v Bulgaria* (GC) App No 36760/06 (ECtHR, 17 January 2012) para 153; *Zagidulina v Russia*, App No 11737/06 (ECtHR, 2 May 2013).

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Roma people,⁵⁸ people in detention or in custody,⁵⁹ people living with HIV,⁶⁰ women victims of domestic violence.⁶¹ A broadening approach to the notion of vulnerable group has stemmed from the ECtHR's decision in the case of *MSS v Belgium and Greece*,⁶² with regards to asylum-seekers. The Court's reasoning initially suggests a lived or situational vulnerability approach.⁶³ However, the emphasis lays on the inherent vulnerability of the applicant as an asylum-seeker, considered 'a member of a particularly underprivileged and vulnerable population group in need of special protection'.⁶⁴ This broadening approach met some resistance by Judge Sajó, according to his partly concurring and partly dissenting Opinion.⁶⁵

The increasing use of the concept of vulnerability by the ECtHR, has also been studied by Al Tamimi. The author scrutinises whether vulnerability has played an increasing role in the

⁵⁸ See for example *Chapman v United Kingdom* (GC) App No 27238/95 (ECtHR, 18 January 2001); *D.H. and Others v the Czech Republic* (GC) App No 57325/00 (ECtHR, 13 November 2007); *V. C. v Slovakia*, App No 18968/07 (ECtHR, 8 November 2011).

⁵⁹ See for example *Kurt v Turkey*, App No 24276/94 (ECtHR, 5 December 1996) para 201; *Salman v Turkey* (GC) App No 21986/93 (ECtHR, 27 June 2000), para 99; *Denis Vasilyev v Russia*, App No 32704/04 (ECtHR, 17 December 2009) para 115.

⁶⁰ See for example *Kiyutin v Russia*, App No 2700/10 (ECtHR, 10 March 2011).

⁶¹ See for example *Opuz v Turkey*, App No 33401/02 (ECtHR, 9 June 2009) paras 132 and 160; *Hajduová v Slovakia*, App No 2660/03 (ECtHR, 30 November 2010) paras 41, 46 and 50.

⁶² *MSS v Belgium and Greece* (GC) App No 30696/09 (ECtHR, 21 January 2011). This case involved the expulsion of an Afghan national by the Belgian authorities to Greece for the examination of the applicant's asylum request, and the examination of the living conditions and the conditions of detention as well as the asylum procedure in Greece. The ECtHR identified the applicant, being an asylum seeker, as being particularly vulnerable. The expulsion was made under the Council Regulation (EC) No 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the member States by a third-country national, OJ L 050, 25/02/2003, 1 to 10, ("Dublin Regulation"). See in particular Art 10 para 1, and Arts 17, 18 and 19.

⁶³ *MSS v Belgium and Greece* (GC) para 232. See also the case of *Abdullahi Elmi and Aweys Abubakar v Malta*, App Nos 25794/13 and 281551/13 (ECtHR, 22 November 2016) regarding the applicants' detention and the detention conditions in Malta upon their irregular arrival by boat. The Court reiterated that 'the applicants, as asylum-seekers, were particularly vulnerable because of everything they had been through during their migration and the traumatic experiences they were likely to have endured previously'. In this case the applicants were sixteen and seventeen years old respectively and the Court acknowledged that they 'were even more vulnerable than any other adult asylum-seeker detained at the time because of their age' (para 113).

⁶⁴ *MSS v Belgium and Greece* (GC) paras 233 and 251.

⁶⁵ *Ibid*, pp 100 to 109. See, for further analysis on this judgment, Peroni and Timmer (n 33).

Court's case law, and explores the role that vulnerability plays in human rights law protection.⁶⁶ Importantly, Al Tamimi analyses the legal implications deriving from the categorisation of vulnerability by the Court, either individually or as a group.⁶⁷ In particular, the author highlights how the ECtHR places special positive obligations on the relevant States' authorities,⁶⁸ predominantly under Articles 2, 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights, as amended (ECHR),⁶⁹ and corresponding responsibilities deriving from the non-compliance with these enhanced positive obligations.⁷⁰

Al Tamimi observes the use of the concept of vulnerability by the ECtHR, highlighting the difference between cases where the Court has deemed individuals vulnerable, other cases where the situation or the position of a person is deemed vulnerable, or "particularly vulnerable", or even cases whether the subject feels vulnerable.⁷¹ In his concluding remarks, Al Tamimi considers that the Court increasingly relies on this group approach for different categories in its vulnerability reasoning.⁷²

⁶⁶ See Y Al Tamimi, 'The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights' (2016) 5 *European Journal on Human Rights*, 561 (Al Tamimi) 567, 568, 571 and 575.

⁶⁷ *Ibid*, 576 to 582.

⁶⁸ As examples of the Court's doctrine of positive obligations, see *MSS v Belgium and Greece* (n 62) para 263. See also *Opuz v Turkey* (n 61) paras 128 to 130, 145, and 160 to 176. See *Timmer* (n 54) 165 to 167.

⁶⁹ Council of Europe, 4 November 1950, ETS 5. Art 2 of the ECHR on the right to life provides: '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.' Art 3 on the prohibition of torture reads: 'No one shall be subjected torture or to inhuman or degrading treatment or punishment'; Art 8 on the right to respect for private and family life, provides: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

⁷⁰ Al Tamimi (n 66) 576 to 582.

⁷¹ *Ibid*, 26.

⁷² *Ibid*, 26 to 32.

The group based approach reasoning based on the vulnerable / non-vulnerable binomial reasoning presented by the ECtHR⁷³ appears difficult to reconcile, if not irreconcilable, with the vulnerability theory characterised by its universality and inherent to the human condition.⁷⁴ The differing implications sought or involved in each approach could explain these seemingly opposing views. On the one hand, Fineman's vulnerability theory seeks policy-making changes with a more responsive State and a more egalitarian society. On the other hand, the ECtHR adopts a narrower and more rigid approach, at any rate a more contained opening of its vulnerability reasoning whose immediate legal implications for States include more stringent positive obligations towards particular group members or individuals, as well as a narrower margin of appreciation when a State adopts measures that limit their fundamental rights.⁷⁵ The Court is ultimately scrutinising the State's responsibility on the grounds of a wrongful act when considering whether a State has provided adequate protection to an applicant categorised as vulnerable. Furthermore, the risk associated with this vulnerable group approach, which relies heavily on historically identity-based discrimination, as claimed by vulnerability theorists, is that it focuses on, and it reinforces, the stigmatisation or the stereotyping of the population groups characterised as vulnerable.⁷⁶

⁷³ This reasoning is presented clearly in cases regarding detainees and ex-prisoners, where vulnerability is acknowledged for the former, while in custody or prison, and rejected when the applicant has been released. See for example *Ayan v Turkey*, App No 24397/03 (ECtHR, 12 October 2010), and *Stummer v Austria* (GC) App No 37452/02 (ECtHR, 7 July 2011). See commentaries on this narrow approach by Timmer (n 54) 154. The Court's vulnerability reasoning in these cases is grounded in the detainee's dependence on the authorities. See *Al Tamimi* (n 66) 564 and 565. There are other cases where the ECtHR explicitly refers to not-vulnerable subjects, for which see *Al Tamimi*, 576.

⁷⁴ *Ibid*, 576. Contrast with Peroni and Timmer (n 33) 1060 and 1061, where the authors argue that the Court's approach does not necessarily imply rejecting Fineman's vulnerability theory.

⁷⁵ *Al Tamimi* 576 to 582.

⁷⁶ *Ibid*. See M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 34) 8. See also M Fineman, 'The Vulnerable Subject and the Responsive State' (n 37) 2, where Fineman identifies a further risk when referring to the need of accumulating 'a sufficiently lengthy history' of discrimination and the group's pressure 'to exclude or include people in order to protect a narrative of long-standing discrimination'. See further Peroni and Timmer's analysis of the risks associated with the labelling of vulnerable groups (n 33) 1057, and 1070 to 1073.

2.3 The present approach: shifting the focus to situations of vulnerability in the context of sea migrants

The preferred approach to vulnerability, for the present interpretative reasoning, addresses the particularly vulnerable situations migrants face during irregular transits, as opposed to a narrative of an inherent vulnerability that would characterise a population group or a category of migrants. The purpose of this approach is to leave aside a labelling or categorisation approach and to steer away from further stigmatisation and negative connotations generally attached to the notion of vulnerable population groups,⁷⁷ and bring attention to institutional responses to situations of vulnerability among sea migrants.⁷⁸ External factors hence determine the vulnerable situations, such as the dangerous conditions in which they endure irregular journeys on board overcrowded and unseaworthy craft, or the conditions they encounter upon arrival.⁷⁹ These external factors also include the reliance on smuggling networks or other types of facilitators, who in the vast majority of cases exhibit a total disregard for the safety and wellbeing of sea migrants, and the exposure to coercion, situations of exploitation or other forms of abuse, including trafficking, in a context of generalised violence.⁸⁰ Goodwin-Gill points out the institutional recognition of the particular vulnerability of migrants at different multilateral institutional levels, regardless of their status, because of their exposure to harm, more prominently undocumented migrants relying

⁷⁷ M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 34) 8.

⁷⁸ *Ibid*, 13.

⁷⁹ United Nations Human Rights Office of the High Commissioner and Global Migration Group, 'Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations', 18 March 2018 (Principles and Guidelines). The practical guidance is regularly updated. It is available at <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>. See in particular pp 2 and 5. See also the UN General Assembly Resolution adopted on 19 September 2016, 'New York Declaration for Refugees and Migrants' UN Doc A/RES/71/1, 3 October 2016 (New York Declaration) addressing large movements of refugees and migrants <<http://undocs.org/a/res/71/1>>. In particular, see paras 27 and 28.

⁸⁰ See for instance Principles and Guidelines (n 79) 6 and 7 and the New York Declaration (n 79) paras 26 to 29 and para 35. Some of the risks referred to in these paragraphs are framed in the context of migrants or refugees in transit. While this term has been ascribed the following meaning: 'temporary stay of migrants in one or more countries, with the objective of reaching a further and final destination', as per OHCHR's Report 'Situation of migrants in transit', UN Doc A/HRC/31/35, 2016, it would seem to be used in these paragraphs with broader meaning, namely, the journey from the country of origin to the country of destination (paras 28 and 29) <https://www.ohchr.org/Documents/Issues/Migration/StudyMigrants/OHCHR_2016_Report-migrants-transit_EN.pdf>.

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on smuggling networks or victims of trafficking, and consequently their need for protection.⁸¹ Some examples of this institutional acknowledgment are outlined below for a better view of the approach taken and the grounds on which vulnerability is recognised.

The situation of vulnerability among sea migrants derives largely from their exposure to violations to human rights such as the right to life, and the prohibition of cruel, inhuman or degrading treatment.⁸² Their vulnerable situation may furthermore be perpetuated, if not exacerbated, by institutional policies and responses.⁸³ François Crépeau,⁸⁴ as Special Rapporteur in the human rights of migrants, in his report after conducting a visit to Malta in December 2014,⁸⁵ emphasised ‘the extreme vulnerability of migrants at sea’ and underlined ‘the importance of Malta upholding its obligations under international law in relation to search and rescue’.⁸⁶ This stemmed from Malta’s reported inability at times to respond effectively to distress calls and to the refusal to allow rescued migrants to disembark on Maltese territory.⁸⁷

⁸¹ G Goodwin-Gill, ‘Setting the Scene: Refugees, Asylum Seekers, and Migrants at Sea – The Need for a Long-Term, Protection-Centred vision’, in V Moreno-Lax and E Papastavridis, eds, *‘Boat Refugees’ and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*, International Refugee Law Series, Volume 7 (Brill Nijhoff 2016) ch 1.

⁸² United Nations High Commissioner for Human Rights Report to the Human Rights Council, ‘Promotion and protection of the human rights of migrants in the context of large movements, 13 October 2016, UN Doc A/HRC/33/67, paras 9 to 12 <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/layouts/15/WopiFrame.aspx?source=/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A_HRC_33_67.docx&action=default&DefaultItemOpen=1>.

⁸³ See as an example of a reference to this in the United Nations General Assembly Resolution on Protection of Migrants, dated 19 December 2017, UN Doc A/RES/72/179, <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/72/179> para 3(c).

⁸⁴ The Human Rights Commission established a specific mandate of the Special Rapporteur addressing the issue, among others of the human rights of migrants. This mandate was created by the Commission on Human Rights Resolution 1999/44. The main functions involving the Special Rapporteur can be found at <<https://ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx>>.

⁸⁵ Human Rights Council, ‘Report by the Special Rapporteur on the human rights of migrants, François Crépeau, Mission to Malta (6-10 December 2014) 12 May 2015, UN Doc A/HRC/29/36/Add.3 <<https://undocs.org/pdf?symbol=en/A/HRC/29/36/Add.3>>.

⁸⁶ Ibid, para 50.

⁸⁷ Ibid. This has recently been the case where search and rescue operations are undertaken by NGO vessels. Reference can for instance be made to the incident regarding the German flagged *Sea Watch 3* with 32 migrants, on board since 22 December 2018, rescued off the coast of Libya. They were only allowed to disembark the

This lived vulnerability approach and the importance of shifting the focus on institutional responses are present both in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 2000,⁸⁸ and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000.⁸⁹ Both instruments recognise the exposure to the dangers associated with these criminal activities and the situations of vulnerability arising therefrom.⁹⁰ They both articulate, according to the vulnerability reasoning, the obligation of States parties to undertake measures within their international obligations to preserve and protect the rights of those subjected to smuggling or trafficking, a protection that appears tailored to the particular needs involved in these cases.⁹¹

Additionally, the concept of ‘migrants in vulnerable situations’ has been considered jointly by the United Nations Office of the High Commissioner for Human Rights⁹² and the Global Migration Group⁹³ by means of Principles and Guidelines.⁹⁴ The term ‘migrants in vulnerable situations’ therein is defined as ‘persons who are unable to effectively enjoy their human rights, are at increased risk of violations and abuse and who, accordingly, are entitled to call on a duty bearer’s heightened duty of care’.⁹⁵ These situations of vulnerability are

survivors in Malta on 9 January, after their relocation was negotiated among some EU member States. See UN News on this specific incident <<https://news.un.org/en/story/2018/12/1029582>>.

⁸⁸ See n 22.

⁸⁹ See n 21.

⁹⁰ Protocol against the Smuggling of Migrants by Land, Sea and Air (n 21), preambular para 6 and Art. 6. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (n 22), preambular para 3 and Arts 2(a) and 2(b).

⁹¹ Protocol against the Smuggling of Migrants by Land, Sea and Air, Art 16 and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Arts 6 and 7.

⁹² The Office of the High Commissioner for Human Rights (OHCHR) is mandated ‘to promote and protect the enjoyment and full realization, by all people, of all rights established in the Charter of the United Nations and in international human rights laws and treaties’, for which see <https://www.ohchr.org/EN/AboutUs/Pages/Mandate.aspx>. See also UN GA Resolution 48/141 A/RES/48/141, 7 January 1994 <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/48/141>.

⁹³ The Global Migration Group is an inter-agency group whose work includes promoting ‘the wider application of all relevant international and regional instruments and norms relating to migration’. More information on their work is available at <http://www.globalmigrationgroup.org/>.

⁹⁴ These have already been referred to above (n 79).

⁹⁵ Principles and Guidelines (n 79) 5.

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characterised as lived or experienced vulnerability and undoubtedly as harm-based vulnerability. The situations of vulnerability are marked, as stated earlier, by the exposure to human rights violations, which may amount to cruel, inhuman or degrading treatment or even torture.⁹⁶

This follows the New York Declaration for Refugees and Migrants that addresses the question of what has been named ‘large movements of refugees and migrants’ and the political declaration deriving therefrom by the UN General Assembly by means of a Resolution adopted by the General Assembly.⁹⁷ Against this backdrop of large movements, the UN Secretary-General’s report to the UN General Assembly describes situations of extreme vulnerability in the context of clandestine journeys and the experiences endured, when referring to: ‘rickety boats piled high with people seeking safety; women, men and children drowning in their attempts to escape violence and poverty; fences going up at borders where people used to cross freely; and thousands of girls and boys going missing, many falling prey to criminal groups’.⁹⁸ In the absence of safe passages or safe ways to move, the Secretary-General addresses this vulnerability while en route when he acknowledges that ‘people suffer and die in search of safety while crossing the Sahara desert, the Andaman Sea, the Mediterranean and dozens of other dangerous places around the world’.⁹⁹ He further emphasises the suffering when he states: ‘[m]any migrants and refugees undergo traumatic experiences during their journeys, including imprisonment and physical and mental violence’,¹⁰⁰ and when highlighting ‘psychological stress and trauma, health complications, physical harm and injury and risks of exploitation’ among many migrants

⁹⁶ Principles and Guidelines, 6 and 7.

⁹⁷ New York Declaration (n 79). “Large movements” may be understood to reflect a number of considerations, including: the number of people arriving, the economic, social and geographical context, the capacity of a receiving State to respond and the impact of a movement that is sudden or prolonged. The term does not, for example, cover regular flows of migrants from one country to another. “Large movements” may involve mixed flows of people, whether refugees or migrants, who move for different reasons but who may use similar routes’, para 6. See also Report of the Secretary-General, ‘In safety and dignity: addressing large movements of refugees and migrants’, UN Doc A/70/59, 21 April 2016 <<https://refugeesmigrants.un.org/report-secretary-general-safety-and-dignity-addressing-large-movements-refugees-and-migrants-a7059>> para 11.

⁹⁸ United Nations, Report of the Secretary-General, ‘In Safety and dignity: addressing large movements of refugees and migrants’, UN Doc A/70/59, 21 April 2016, para 1.

⁹⁹ Ibid.

¹⁰⁰ Ibid, para 32.

and refugees whilst travelling, with specific reference to women and girls en route.¹⁰¹ Hence, inherent vulnerability continues to matter in the vulnerability reasoning, identifying personal characteristics, such as age, gender identity, disability or health condition.¹⁰² These overlapping layers or multiple grounds of vulnerability are often recognised as ‘extreme vulnerability’ or ‘particular vulnerability’ or ‘compounded vulnerability’.¹⁰³

In the distinction between inherent vulnerability and vulnerable situations, however, the vulnerability reasoning remains the same. The specific needs are addressed, primarily the exposure to human rights violations, to ensure the protection sought is tailored to the particular needs the situations or the persons present in order to uphold the safety and to ‘ensure the protection, dignity and human rights of refugees and migrants’ within the existing international and regional legal frameworks.¹⁰⁴ This is articulated in the New York Declaration for Refugees and Migrants:

‘We recognize and will address, in accordance with our obligations under international law, the special needs of all people in vulnerable situations who are travelling within large movements of refugees and migrants, including women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants’.¹⁰⁵

This is further exemplified in a number of United Nations General Assembly Resolutions. For instance, the United Nations General Assembly adopted a Resolution on Protection of

¹⁰¹ Ibid.

¹⁰² Principles and Guidelines (n 79) 1. See also the recognition of particular vulnerability, based on personal characteristics in the New York Declaration (n 79) paras 29 to 32.

¹⁰³ See Timmer (n 54) 161 and 162. See V Moreno-Lax and E Papastavridis, ‘Tracing the Bases of an Integrated Paradigm for Maritime Security and Human Rights at Sea’, Introduction to V Moreno-Lax and E Papastavridis (eds) *‘Boat Refugees’ and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*, International Refugee Law Series, Volume 7 (Brill Nijhoff 2016) 5 and 6. See also G Goodwin-Gill, ‘Setting the Scene: Refugees, Asylum Seekers, and Migrants at Sea – The Need for a Long-Term, Protection-Centred Vision’ (n 81) 18.

¹⁰⁴ UN, Report of the Secretary-General, ‘In safety and dignity: addressing large movements of refugees and migrants’ (n 97) para 100(a).

¹⁰⁵ New York Declaration (n 79) para 23. See also UN, Report of the Secretary-General, ‘In safety and dignity: addressing large movements of refugees and migrants’ (n 97) paras 53 to 59.

Migrants, dated 19 December 2017,¹⁰⁶ acknowledging the need to provide assistance to migrants in vulnerable situations, irrespective of their status, and calling upon States' obligation to protect their human rights.¹⁰⁷ It highlights the particular vulnerability of migrants in transit and the 'need to ensure full respect for their human rights'.¹⁰⁸ It further recognises the importance of coordinated efforts in the international community to promote the respect for human rights to assist migrants in vulnerable situations.¹⁰⁹ Such vulnerable situations include the reliance on smuggling and trafficking networks, and other transnational and national crime organisations 'who profit from crimes against migrants, especially migrant women and children, without regard for dangerous and inhumane conditions in flagrant violations of national laws, and international law and contrary to international standards'.¹¹⁰ Among migrants, particular vulnerability is assigned to women and children, and more particularly, unaccompanied children or children separated from their parents.¹¹¹ This Resolution recognises that crimes such as trafficking and smuggling expose migrants to dangers to their lives and the exposure to 'harm, servitude, exploitation, debt bondage, slavery, sexual exploitation or forced labour',¹¹² as well as 'kidnapping, extortion, (...) physical assault, (...) and abandonment'.¹¹³ The vulnerable position of migrants whilst travelling is hence outlined and the exposure to an array of dangers is acknowledged. Following the vulnerability reasoning, the Resolution encourages States to take measures to respond to the specific needs addressed and calls upon them for the protection of migrants'

¹⁰⁶ United Nations General Assembly Resolution on Protection of Migrants, 19 December 2017, UN Doc A/RES/72/179 (n 83). See previous Resolutions on this same topic, for example, Resolution of 18 December 2014, Protection of migrants, UN Doc A/RES/69/167 <http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_69_167.pdf> and Resolution adopted by the UN General Assembly on 17 December 2015, Protection of migrants, UN Doc A/RES/70/147, in particular p 4, and paras 1 and 4(i), <http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_147.pdf>.

¹⁰⁷ United Nations General Assembly Resolution on Protection of Migrants, 19 December 2017, UN Doc A/RES/72/179 (n 83) 4, and paras 1 and 4.

¹⁰⁸ Ibid, p 4 and para 4(i).

¹⁰⁹ Ibid, para 4(j).

¹¹⁰ Ibid, para 5(a).

¹¹¹ Ibid, para 5(a). See also paras 5(h) and 5(l), 7.

¹¹² Ibid, para 8.

¹¹³ Ibid, last preambular paragraph, 4.

human rights and fundamental freedoms.¹¹⁴ The Resolution reaches beyond States' intervention and encourages all stakeholders, including relevant international organisations, civil society, including non-governmental organisations and the private sector, to further the dialogue in relevant fora 'with a view to strengthening and making more inclusive public policies aimed at promoting and respecting human rights, including those of migrants'.¹¹⁵

UNHCR has pointed out the significance of differentiating between migrants' and refugees' status.¹¹⁶ This differentiation is based on the specific legal refugee protection regime afforded to the latter category in the 1951 Convention relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol relating to the Status of Refugees (1967 Protocol),¹¹⁷ where their plight is motivated by a fear of persecution based on specific grounds¹¹⁸ and they are therefore in need of international protection, on account of their specific legal status.¹¹⁹ Consequently, in the context of rescue at sea, UNHCR focuses, among those rescued, on asylum-seekers and refugees, in accordance with the scope of its mandate.¹²⁰ The clarification of status is again considered crucial among those rescued for the purpose of ensuring prompt access to adequate asylum procedures¹²¹ and the safeguard of the principle of non-refoulement.¹²²

¹¹⁴ Ibid, operative paras 1 to 13.

¹¹⁵ Ibid, para 12.

¹¹⁶ UNHCR, *The United Nations High Commissioner for Refugees: Handbook for Emergencies*, 2nd edn (United Nations High Commissioner for Refugees, 2000) XI and 12 <<https://emergency.unhcr.org>>.

¹¹⁷ Geneva 28 July 1951, 189 UNTS 137, and the 1967 Protocol, 31 January 1967, 606 UNTS 267.

¹¹⁸ Art 1 of the Refugee Convention as amended by its 1967 Protocol includes fear of persecution for the following reasons: 'race, religion, nationality, membership of a particular social group or political opinion'.

¹¹⁹ UNHCR Contributions, 'Report to the General Assembly on the Implementation of Resolution A/RES/69/167 on the Protection of Migrants', Asylum and Migration Unit, 16 June 2015, <<https://ohchr.org/Documents/Issues/Migration/GA70thSession/IOs/UNHCR.pdf>>.

¹²⁰ UNHCR, Annex 1, 'Background Note Concerning the Competence of the United Nations High Commissioner for Refugees (UNHCR), in relation to rescue at sea matters', 18 February 2002 <<http://www.unhcr.org/protection/globalconsult/3e5f34ef4/background-note-concerning-competence-united-nations-high-commissioner.html>>.

¹²¹ UNHCR, 'Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea', 18 March 2002, 5 <<http://www.unhcr.org/protection/globalconsult/3e5f35e94/background-note-protection-asylum-seekers-refugees-rescued-sea.html>>.

¹²² Ibid, para 42.

Having said that, the UNHCR acknowledges the vulnerability of ‘boat people’ referring not only to the Vietnamese exodus, but also to large-scale departures from Albania, Cuba and Haiti, including both asylum-seekers and economic migrants.¹²³ UNHCR furthermore acknowledges the existence of incidences of violence, exploitation, abduction and trafficking en route or on arrival, which occurrence is common to refugees, asylum seekers, stateless persons and economic migrants, who, regardless of their specific legal status, are exposed to the same risks in these perilous journeys at sea. UNHCR was in fact instrumental, as will be explained in chapter 2,¹²⁴ in the re-drafting of paragraph 2.1.10 of the Annex to the SAR Convention, cited later in this chapter.¹²⁵

Sea migrants, regardless of their status, share the same dangers, the same risks of human rights violations and harm-based vulnerability during irregular crossings.¹²⁶ Hence, the vulnerability reasoning for the purpose of the present discussion regarding retrieving sea migrants involved in irregular crossings from situations of danger at sea does not need differentiating according to legal status. Only at the last stage of the rescue operation, namely, disembarkation at a place of safety according to the SAR Convention,¹²⁷ does the clarification of the specific status matter. This allows to trigger mechanisms of protection that apply solely to those who qualify as refugees under the 1951 Refugee Convention and the 1967 Protocol, and thus entitled to special protection under international refugee law.

As referred to earlier, particular vulnerability attaches to women, children, especially if unaccompanied or separated during their journeys and other categories such as elderly, ill, or disabled, among others. Additional grounds of vulnerability may converge, such as victims of trafficking or abuse.

Regardless of the different accounts of and approaches to vulnerability referred to above, harm-based vulnerability appears central and common to all of them.¹²⁸ The following section illustrates situations of vulnerability among sea migrants, determined by harm-based

¹²³ United Nations General Assembly Resolution on Protection of Migrants, dated 19 December 2017, UN Doc A/RES/72/179 (n 83) 1.

¹²⁴ Ch 2, s 2.1.

¹²⁵ See s 4.2.

¹²⁶ See Principles and Guidelines (n 79) in particular 2, and paras 9 to 12.

¹²⁷ Annex to the SAR Convention, para 1.3.2 defines ‘rescue’ as: ‘[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety’.

¹²⁸ Timmer (n 54) 162. Peroni and Timmer (n 33) 1058 and 1065 to 1068

vulnerability experienced in the context of irregular migration by sea. This is achieved by drawing on fieldwork organisation reports. These are brought to the vulnerability reasoning scrutinised in this chapter in order to underscore some of the specific needs that generally arise among those embarked on irregular sea journeys.

3. Harm-based vulnerability: exposure to physical, psychological and moral harm and suffering during irregular crossings by sea

The notion of harm for the purpose of determining vulnerability comprises all its possible manifestations, be it physical, psychological, moral and economic, among others.¹²⁹ Violence, whether inflicted or the threat of violence, presents an aspect of vulnerability that can appear as a cause and as a manifestation of vulnerability.¹³⁰ The element of dependency on others also recurs throughout the reasoning of vulnerability.¹³¹ A combination of factors appears recurrently in the vulnerability reasoning, that is, the exposure to any of these elements or risks and the ability of the individuals or group members to cope with them.¹³² Fineman refers to resilience as a counterpoint to vulnerability and focuses attention onto societal institutions and their potential role in providing means and mechanisms aiming at

¹²⁹ Peroni and Timmer (n 33) 1058, and 1063 to 1065.

¹³⁰ P Kirby, *Vulnerability and Violence: The Impact of Globalisation* (Pluto Press 2006) preface, viii. Kirby presents violence as ‘the threat or use of physical force causing damage or injury to people [as] one major way in which vulnerability is being manifested in the lives of states, communities, and individuals in the globalised world’, 10.

¹³¹ M Fineman, ‘The Vulnerable Subject and the Responsive State’ (n 37) 33. See also M Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (n 34). With regards to vulnerability associated with the individual’s dependence, situations of detention or custody create dependence of the detainees on the authorities, which according to the ECtHR is a determinant of vulnerability. See for example, *Salman v Turkey* (GC) App No 21986/93 (ECtHR, 27 June 2000) para 22. See also *Bubnov v Russia*, App No 76317/11 (ECtHR, 5 February 2013) para 60.

¹³² P Kirby, *Vulnerability and Violence: The Impact of Globalisation* (n 130) 13. See also the UN Department of Economic and Social Affairs ‘Report on the World Social Situation, 2003. Social Vulnerability: Sources and Challenges’ Un Doc A/58/153/Rev.1 ST/ESA/284. The definition of vulnerability therein reads: ‘In essence, vulnerability can be seen as a state of high exposure to certain risks and uncertainties, in combination with a reduced ability to protect and defend oneself against those risks and uncertainties and cope with their negative consequences (...)’ para 49 <<https://www.un.org/esa/socdev/rwss/docs/2003/fullreport.pdf>>. See further P Kirby, ‘Theorising Globalisation’s Social Impact: Proposing the Concept of Vulnerability’ (2006) 13 (N 4) Review of International Political Economy, 632, 636.

lessening or compensating for vulnerability.¹³³ The focal interest for the purpose of the present discussion is however narrower than Fineman's vulnerability theory based on its universality. The vulnerability reasoning developed in the following section is based on the experienced vulnerability lived by sea migrants as a heterogeneous group embarked on irregular crossings. Their situation of vulnerability is firmly anchored in the harm-based notion of vulnerability due to their continuing exposure to harm before and during the crossings coupled with their limited capability to cope with it.¹³⁴

The lived vulnerability during irregular sea crossings, in other words, the exposure to harm or actual harm sea migrants are widely faced with, is illustrated here with fieldwork organisation reports and the findings therein, as examples of the conditions and the treatment sea migrants are repeatedly subjected to.

The reference to these reports does not aim to be a quantitative or qualitative data collection and analysis to present findings regarding the extent of levels of harm during these journeys worldwide or regionally. The use of examples presents limitations in terms of the number of surveys considered and the surveys' own limitations in terms of sample size regarding population interviewed and the information provided in these interviews.¹³⁵ In the examples chosen, there is a predominance of incidents relating to sea crossings in the Mediterranean Sea and more particularly in the Central Mediterranean Route.¹³⁶ The *rationale* is based on its relevance in terms of high density in migration flows along that route and the indications shown that it remains the deadliest route in terms of recorded migrant deaths.¹³⁷

¹³³ M Fineman, 'The Vulnerable Subject and the Responsive State' (n 37) 33, and M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 34) 10.

¹³⁴ I Truscan, 'Considerations of vulnerability: From Principles to Action in the case law of the European Court of Human Rights' (2013) 36 (N 3/142) *Nordic Journal of Law and Justice*, Retfærd Årgang, 64, 70.

¹³⁵ See for instance United Nations Children's Fund (UNICEF) and IOM Report, 'Harrowing Journeys: Children and Youth on the Move Across the Mediterranean Sea, at Risk of Trafficking and Exploitation', UNICEF and IOM, September 2017, p 14, under heading 'Survey limitations' <https://www.unicef.org/publications/files/Harrowing_Journeys_Children_and_youth_on_the_move_across_the_Mediterranean.pdf>.

¹³⁶ The Central Mediterranean route is from North Africa to Italy.

¹³⁷ See IOM, tracking deaths along migratory routes in its Missing Migrant Project, <<https://missingmigrants.iom.int/>> as at 26 February 2020. See IOM Report, *Fatal Journeys Volume 2: Identification and Tracing of Dead and Missing Migrants*, eds T Brian and F Laczko, IOM 2016, 23, <https://publications.iom.int/system/files/fataljourneys_vol2.pdf>. Having said that, mention is also to be made of migratory flows by sea in South East Asia where fatality rates appear higher than in the Mediterranean,

These examples do not purport to deliver a complete representation at a global scale of sea migrants' actual exposure or threat of exposure to specific dangers during the sea crossings, including the unsafe practices and the ill-treatment throughout the journeys. The information delivered in these reports, however, provides insights into the lived experiences of sea migrants during their sea transit. It underscores recurrent practices and patterns in the treatment inflicted on migrants along irregular migration journeys, particularly sea crossings. This enables to highlight the dangers they very often face at sea, the risks specific to their irregular crossings, overwhelmingly reliant on smugglers' networks. This allows in turn to raise, with a 'reasonable certainty', in accordance with the definition of distress phase in the SAR Convention,¹³⁸ concerns about the conditions sea migrants on board these flimsy boats endure during these treacherous crossings, and their exposure to physical and mental suffering. Ultimately, it allows to have a better understanding of their specific needs, and to consider addressing them within the SAR system, from the construction of the scope of the obligations therein, to the design and operation of the global search and rescue system.

The utterly unsafe conditions of the crossings on board substandard, unseaworthy, flimsy and overcrowded wooden boats, rubber dinghies or other unstable craft unfit for the sea crossings, are to be put in a context of widespread violence inflicted on the persons attempting to reach safer shores, before embarkation and aboard these boats.¹³⁹

Violence against undocumented migrants is endemic at all stages of their journeys, and the sea leg is no exception.¹⁴⁰ The ramming and deliberate sinking of a migrant boat by

at any rate up to 2016. According to the UNHCR, whereas deaths in the Mediterranean have been mainly attributed to capsizes and drownings, deaths in the Bay of Bengal and Andaman Sea 'were largely due to smuggler abuse and deprivation', 8.

¹³⁸ Annex to the SAR Convention para 1.3.13. '*Distress Phase*. A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.

¹³⁹ As an illustration, see the testimonial of a trained nurse from Somalia, in the MSF Frontline Stories, 'Italy: "The journey to Europe was worse than what I left behind in Somalia"', 6 July 2015 <<https://www.msf.org.uk/article/italy-the-journey-to-europe-was-worse-than-what-i-left-behind-in-somalia>>. He describes the ill-treatment suffered by him and his fellow travellers at the hands of smugglers throughout the migration journey and the conditions of the sea crossing. It was during the sea journey that he lost consciousness due to dehydration and lack of food.

¹⁴⁰ See for example the testimonials of survivors during interviews carried out by Amnesty International and contained in Amnesty International Report, 'Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean', Amnesty International, September 2014

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smugglers because migrants refused to be transferred and board an unseaworthy boat in the Mediterranean Sea in September 2014, according to two survivor testimonials, causing the death of up to 500 persons, is only one example.¹⁴¹ Further illustrative cases will follow.

The widespread violence is observed in the surveys conducted within IOM's research framework on populations on the move through the Mediterranean and Western Balkan Routes to Europe. These surveys are part of IOM's Displacement Tracking Matrix (DTM) flow monitoring activities in the Mediterranean,¹⁴² to 'process and disseminate information to provide a better understanding of the movements and evolving needs of displaced populations, whether on site or en route'.¹⁴³ This report analyses the responses provided by 4,712 migrants, including refugees, travelling along the Central Mediterranean route,¹⁴⁴ during interviews held in Italy.¹⁴⁵ This survey was conducted between mid-February and

<<https://www.amnesty.org/download/Documents/8000/eur050062014en.pdf>>. See in particular Mohamed Janil's testimonial on p 17. The violence could even take place among fellow passengers, according to another account on p 19. See also MSF Report, 'The Illness of Migration: Ten years of medical humanitarian assistance to migrants in Europe and in transit countries. A report by Médecins sans Frontières' (A publication by the German Section of Médecins sans Frontières, 2013) p 8 (MSF 'The Illness of Migration') <https://www.msf.org.uk/sites/uk/files/migration_english_july_2013_0.pdf>. See further Refugees International Field Report "'Hell on Earth": Abuses Against Refugees and Migrants Trying to Reach Europe from Libya', by Izza Leghtas, June 2017 <<https://www.refugeesinternational.org/reports/2017/libya>>. See also United Nations Children's Fund (UNICEF) and IOM Report, 'Harrowing Journeys: Children and Youth on the Move Across the Mediterranean Sea, at Risk of Trafficking and Exploitation' (n 135).

¹⁴¹ IOM, *Fatal Journeys: Tracking lives lost during Migration*, eds T Brian and F Laczko (International Organization for Migration, 2014) 5, <https://publications.iom.int/system/files/pdf/fataljourneys_countingtheuncounted.pdf>. See also on this same tragic incident, IOM Missing Migrants: Tracking Deaths along Migratory Routes, 'IOM Investigates Reports of Deliberate Drowning of 500 Migrants in Mediterranean' <<http://missingmigrants.iom.int/iom-investigates-reports-deliberate-drowning-500-migrants-mediterranean>>.

¹⁴² IOM, DTM 'Flow Monitoring Surveys: The Human Trafficking and Other Exploitative Practices Indication Survey. Migrants interviewed Along the Central and the Eastern Mediterranean Routes Compared October 2017', <http://migration.iom.int/docs/FMS_human_trafficking_and_other_exploitative_practices_Central_and_Eastern%20Med_November_2017.pdf>.

¹⁴³ See IOM, Displacement Tracking Matrix website <<http://www.globaldtm.info>>.

¹⁴⁴ IOM, DTM 'Flow Monitoring Surveys: The Human Trafficking and Other Exploitative Practices Indication Survey. Migrants interviewed Along the Central and the Eastern Mediterranean Routes Compared October 2017' (n 142) 3 to 6.

¹⁴⁵ *Ibid*, 2 and 3.

mid-August 2017. One of the questions included aimed at capturing information as to whether the interviewees had directly experienced during their journeys physical violence of any sort.¹⁴⁶ From this specific sample, the findings were that 79 per cent of the migrants answered having experienced physical violence of any sort during their journey, describing it as ‘severe physical mistreatment (...). In some cases migrants showed to data collectors scars and visible signs of this violence on their bodies’.¹⁴⁷

Another DTM Flow Monitoring Survey, focusing on Nigerian migrants having undertaken the Central Mediterranean route, and sampling 1,175 interviewees in 2016 and 584 in 2017 in different locations in Italy, revealed that 83.5 per cent of them had experienced physical violence of any sort during their journey.¹⁴⁸ It further showed that approximately 94 per cent of these violent events had been reported to have taken place in Libya, followed by Niger (5 per cent) and Algeria (1 per cent).¹⁴⁹ These findings, compared with 77 per cent of Nigerian migrants having replied affirmatively to this question in a survey in 2016, has led IOM to conclude that violence is on the rise for Nigerian migrants travelling to Italy.¹⁵⁰

The conditions of the crossings imposed on them only compound the brutality inflicted before embarking.

As examples outside the Central Mediterranean route, IOM reported in August 2017 two instances where the smugglers in charge of each boat forced the migrants on board into the sea, off the coast of Yemen, as they were approaching the coast of Shabwa (a governorate of Yemen along the Arabian Sea). The first incident took place on 9 August 2017 and it involved 120 Somali and Ethiopian migrants. According to the information gathered by IOM

¹⁴⁶ Ibid, 3.

¹⁴⁷ Ibid, 4.

¹⁴⁸ IOM, DTM ‘Flow Monitoring Surveys: The Human Trafficking and other Exploitative Practices Indication Survey. Analysis on Migrants and Refugees from Nigeria travelling along the Central Mediterranean Route September 2017’, 2 to 4, <http://migration.iom.int/docs/Analysis_Flow_Monitoring_and_Human_Trafficking_Surveys_in_the_Mediterranean_and_Beyond_Nigerian_nationals.pdf>. Two figures are shown regarding the percentage of migrants having experienced some sort of physical violence, although both figures are very close, i.e. 84 per cent and 83.5 per cent.

¹⁴⁹ Ibid, 4.

¹⁵⁰ See IOM Press Release, ‘Violence on the Rise for Nigerian Migrants Travelling To Italy, UN Migration Agency Report Reveals’, posted 9 December 2017 <<https://www.iom.int/news/violence-rise-nigerian-migrants-traveling-italy-un-migration-agency-report-reveals>>.

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while attending and providing medical assistance and emergency relief to the survivors stranded on the beach, twenty-two were reportedly still missing and unaccounted for. The estimated average age on the boat was 16.¹⁵¹ The second incident involved 160 Ethiopian migrants who were also violently forced into the sea off the coast of Shabwa, Yemen, on that occasion, closer to the shore.¹⁵²

The survivors' account to IOM in both incidents depicts the brutality endured at the hands of smugglers during the journey and the conditions of the sea crossing before they were thrown into the sea:

‘Throughout the journey, migrants had been brutally treated by the smugglers. They were forced to squat down for the entirety of the trip from Ambah Shore in Somalia, which sometimes takes between 24-36 hours, so that the smugglers could increase the number of people in the boat. The migrants were not allowed to move inside the boat. They were not allowed a private or separate space to use the bathroom and had to urinate on themselves. In some cases, the smugglers tied their hands so if something did happen, they would not be able to run or swim or save their lives. If one of the migrants accidentally moved, he would be beaten or even killed. The migrants were not allowed to take enough food or water on the journey to fulfil their basic needs. They were only allowed to take one to two litres of water and one small meal.’¹⁵³

The international medical humanitarian organisation Médecins sans Frontières (MSF)¹⁵⁴ has recurrently observed common physical symptoms associated with the hardships during

¹⁵¹ IOM Press Release ‘Up to 50 Somali, Ethiopian Migrants Deliberately Drowned by Smugglers off Yemen’, posted 8 October 2017 <<http://www.iom.int/news/50-somali-ethiopian-migrants-deliberately-drowned-smugglers-yemen>>.

¹⁵² IOM Press release ‘160 Ethiopian Migrants Forced into the Seas off Yemen by Smugglers Today, Following Death of up to 50 Yesterday’, posted 11 August 2017 <<http://www.iom.int/news/160-ethiopian-migrants-forced-seas-yemen-smugglers-today-following-death-50-yesterday>>.

¹⁵³ Ibid. See also Amnesty International, ‘Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean’ (Amnesty International, 2014) (n 140), 19.

¹⁵⁴ MSF delivers emergency aid to people affected by armed conflicts, epidemics, healthcare exclusion and natural disasters. For more information on their work and ethos, see <<http://www.msf.org/en/about-msf>>.

irregular journeys, including sea crossings, such as traumas and traumatic lesions often resulting from abuse by smugglers.¹⁵⁵

Furthermore, violence against migrants en route to Yemen, across the Gulf of Aden and the Red Sea, was reported to be on the rise already in 2011 by the UN.¹⁵⁶ Sexual violence and sexual exploitation linked to human trafficking¹⁵⁷ relentlessly mark these journeys. IOM has reported ‘an almost 600 per cent increase in the number of potential sex trafficking victims arriving in Italy by sea’ and this trend seemed to continue during 2017, based on data collected by IOM at landing sites in reception centres for migrants in southern Italy.¹⁵⁸ IOM has reported ‘an increase in cases of sexual violence perpetrated in Libya on women and children, with a consequent increase in cases of women arriving in Italy pregnant’.¹⁵⁹ Bearing in mind that according to IOM records, in 2016 most migrants arriving in Italy by sea were from Nigeria, IOM estimates in its report that ‘about 80 per cent of Nigerian women and girls arriving in Italy by sea [were] likely to be victims of trafficking for sexual

¹⁵⁵ See MSF, ‘The Illness of migration: Ten years of medical humanitarian assistance to migrants in Europe and in transit countries. A report by Médecins sans Frontières’ (n 140) 8.

¹⁵⁶ See UN News, ‘Record number of refugees, migrants risked lives to reach Yemen in 2011’, 20 January 2012 <<http://www.un.org/apps/news/story.asp?NewsID=40987#.WlYGvLT7ww>>.

¹⁵⁷ Human trafficking is defined in Art 3 of the Protocol to the United Nations Convention Against Transnational Organized Crime, to Prevent, Suppress and Punish Human Trafficking, in Particular Women and Children, New York 2000, 2237 UNTS 319. Art 3 reads: (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) "Child" shall mean any person under eighteen years of age.

¹⁵⁸ IOM Report, ‘Human Trafficking through the Central Mediterranean Route: Data, Stories and Information Collected by the International Organization for Migration’, 2017, <http://www.italy.iom.int/sites/default/files/news-documents/IOMReport_Trafficking.pdf>.

¹⁵⁹ Ibid, 10.

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exploitation in Italy or in other countries of the European Union'.¹⁶⁰ Sexual violence is an ever-present reality along irregular migration routes with women and girls being at highest risk.¹⁶¹ The physical and psychological consequences are devastating.¹⁶² In particular, IOM refers in its report to psychological disorders, high trauma and pathologies observed, which 'provide an increasing dramatic picture of the brutality with which young women are sent off on journeys to Europe'.¹⁶³

The experiences illustrated above underscore situations of vulnerability and, as seen earlier, added layers or multiple grounds of lived vulnerability among sea migrants.

Against this backdrop, attention is drawn to the role vulnerability reasoning plays in addressing the particular needs among sea migrants and in laying a legal interpretative path for a SAR system more responsive to the needs arising in the context of irregular crossings.

¹⁶⁰ Ibid, 9.

¹⁶¹ MSF, 'The Illness of migration' (n 140) 9. See also UNICEF Report, 'A Deadly Journey for Children: The Central Mediterranean Migration Route', February 2017 <https://www.unicef.org/publications/files/EN_UNICEF_Central_Mediterranean_Migration.pdf>.

¹⁶² MSF Report 'The Illness of migration' (n 140) 9. See also IOM press release 'UN Migration Agency Issues Report on arrivals of Sexually Exploited Migrants, chiefly from Nigeria', 21 July 2017 <<https://www.iom.int/news/un-migration-agency-issues-report-arrivals-sexually-exploited-migrants-chiefly-nigeria>>.

¹⁶³ See IOM Report, 'Human Trafficking through the Central Mediterranean Route: Data, Stories and Information Collected by the International Organization for Migration', 2017, 29 and 30, <http://www.italy.iom.int/sites/default/files/news-documents/IOMReport_Trafficking.pdf>. See also the Report of the UN Secretary-General, 'Conflict Related Sexual Violence', S/2019/280 of 29 March 2019 <<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/04/report/s-2019-280/Annual-report-2018.pdf>>. In particular, the reporting on Libya, paras 54 to 59, show the scale of sexual violence in detention centres. See further Refugees International Field Report "'Hell on Earth": Abuses Against Refugees and Migrants Trying to Reach Europe from Libya' (n 140) 11 and 12. See also MSF Dr Simon Bryant's blog, Moving Stories, 'Medical Matters', 7 August 2015 <<https://blogs.msf.org/bloggers/simon/some-medical-matters>>.

4. Vulnerability reasoning in the reading of the SAR Convention: considering the specific needs among sea migrants to enhance protection at sea

The interpretative reasoning proposed draws on the vulnerability reasoning in order to influence the reading of the SAR Convention and related instruments and enhance protection at sea, in particular among sea migrants. It is in this context of irregular crossings where the responses appear erratic and influenced by migration and security policies that have proved to hamper safety at sea.¹⁶⁴ This section examines the role vulnerability reasoning may have in addressing the particular needs among sea migrants, underlined in the previous sections. It further assesses its role in laying a legal interpretative path for a more integrating and responsive SAR Convention and SAR system to the needs arising in the context of irregular crossings, to ultimately ensure the maintenance of adequate and effective maritime SAR services.¹⁶⁵

4.1 Vulnerability reasoning: laying a legal interpretative path in the reading of the SAR Convention that addresses the specific needs of sea migrants

Vulnerability reasoning brings into consideration specific needs of population groups or individuals considered to be inherently vulnerable or in situations of vulnerability. It aims at redressing that characteristic or position of vulnerability by ensuring adequate protection tailored to the needs involved. In the present research, vulnerability reasoning is proposed to call for a more responsive and tailored protection, to enhance existing positive obligations.¹⁶⁶

¹⁶⁴ This is developed in ch 3, s 3, where tensions between border control, security concerns and humanitarian considerations are highlighted.

¹⁶⁵ SAR Convention, first preambular paragraph, and Ch 2 of its Annex. UNCLOS, Art 98.2 and SOLAS Convention, Ch V, Reg 7.

¹⁶⁶ See as an example of the articulation of the vulnerability reasoning by the ECtHR, in *Chapman v United Kingdom* (GC) App No 27238/95 (ECtHR, 18 January 2001), regarding the refusal of planning permission to station caravans and the service of an enforcement notice because of the occupation of the land. The Court in its reasoning stated that: ‘(...) the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different style of life both in the relevant regulatory planning framework and in reaching decisions in particular cases’ (para 96). Concerning also the Roma Community, see also the vulnerability reasoning developed by the ECtHR in *Yordanova and Others v Bulgaria*, App No 25446/06 (ECtHR, 24 April 2012). The Court acknowledges the applicants as ‘part of an underprivileged community whose problems are specific and must be addressed accordingly’ (para 128). The

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The text of the SAR Convention does not expressly refer to vulnerability and yet it offers a system of protection for those in a situation of difficulty and exposure to harm at sea where the capabilities for those involved to redress the situation of such a risk are limited or non-existent. These difficulties are graded and they translate into emergency situations among which ‘distress phase’ constitutes the highest degree of risk and triggers a search and rescue operation.¹⁶⁷

The SAR Convention recognises specific needs that arise at sea and provides a system for search and rescue services to redress a given situation of danger, for the protection of lives at sea. It would therefore be safe to say that vulnerability reasoning implicitly informs the search and rescue system defined in the SAR Convention, in the obligation to render assistance at sea, and to proceed to the search and rescue of any person in distress, also contained in UNCLOS,¹⁶⁸ and SOLAS Convention.¹⁶⁹

Vulnerability in the context of irregular sea crossings is linked to the utterly unsafe crossing conditions on board; substandard, overcrowded and unseaworthy wooden boats, rubber dinghies or flimsy craft. Vulnerability is hence grounded in the undeniable exposure of sea migrants to risks to their integrity and their lives, with little capacity to cope and none to

Court adds that disadvantaged social groups ‘may need assistance in order to be able effectively to enjoy the same rights as the majority population’ (para 129). See also *MSS v Belgium and Greece* (GC) App No 30696/09 (ECtHR, 21 January 2011) (n 62) where the Court considered the applicant’s need of special protection as ‘an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group (...)’ (para 251). See further the UNHCR, United Nations Fund (UNFPA) and Women’s Refugee Commission (WRC), ‘Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis – Greece and the Former Yugoslavia Republic of Macedonia, 2016 <<https://www.unhcr.org/569f8f419.pdf>>.

¹⁶⁷ Annex to the SAR Convention, para 1.3.13: ‘Distress phase. A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance’. The meaning of ‘search’ according to para 1.3.1 is: ‘[a]n operation, normally co-ordinated by a rescue co-ordination centre, using available personnel and facilities to locate persons in distress’ and ‘rescue’, is defined as: ‘[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety’ (para 1.3.2). The other emergency levels are the “uncertainty phase” defined as: ‘[a] situation wherein uncertainty exists as to the safety of a vessel and the persons on board’ (para 1.3.9), and the “alert phase” defined as: ‘[a] situation wherein apprehension exists as to the safety of a vessel and of the persons on board’ (para 1.3.10).

¹⁶⁸ Art 98, cited above.

¹⁶⁹ Ch V, Reg 33 (n 16).

redress such a state of exposure to danger without external assistance. These unsafe journeys also need to be put in the context of widespread violence, both prior to embarkation and during the crossings. The exposure to risks during the crossings and the hardships related to these crossings are therefore not only related to navigational hazards, but also to the coercion, violence and abuse involved in them. This reality underscores specific needs and concerns that are particular to migrants who have embarked on irregular journeys by sea. A more responsive maritime search and rescue system is certainly needed, that addresses and accommodates the widespread conditions of irregular crossings.

It is in this context that the present research endeavours to consider the vulnerability reasoning further, as a mechanism to address under-represented needs in the maritime search and rescue system and to enhance the protection of migrants at sea. The risks and the suffering involved in irregular crossings, it is argued here, need to be taken into account in the interpretation of the legal framework devoted to maritime search and rescue. In particular, they have to be taken into consideration when assessing the emergency phases at sea and the operative procedures that follow.

4.2 Vulnerability reasoning and substantive equality

The vulnerability reasoning brings an asymmetry that characterises substantive equality, which aims at redressing inequalities by requiring a level of protection that is more responsive and tailored to the particular needs involved. Vulnerability reasoning and its element of substantive equality focuses on the result rather than on a formal equality, or sameness of treatment, and seeks to correct inequalities through different treatment, or different levels of response.¹⁷⁰ As Andorno presents it: ‘insisting on equal treatment of persons in unequal situations invariably operates to perpetuate, rather than to eradicate injustices’.¹⁷¹

Vulnerability reasoning is articulated globally and regionally as an integrating part of institutional narratives, within the realm of their respective mandates, to adopt levels of protection, response efforts, programmes or services adequate to the particular needs addressed.¹⁷² This vulnerability reasoning is here proposed in order to give special

¹⁷⁰ *Yordanova and Others v Bulgaria* (n 166) para 129. See also Peroni and Timmer (n 33) 1075 and 1076.

¹⁷¹ Andorno (n 33) 258.

¹⁷² See for example Peroni and Timmer (n 33) within the ECtHR realm, 1074 to 1076.

consideration to the specific needs among sea migrants during the crossings and upon disembarkation, within the present international legal framework, to enhance their protection at sea and on land.

The SAR Convention takes a formal equality approach to the treatment of persons in distress at sea. According to paragraph 2.1.10 of the Annex to the SAR Convention: ‘[p]arties shall ensure that assistance be provided to *any* person in distress at sea. They shall do so *regardless of the nationality or status of such a person or the circumstances in which that person is found*’ (emphasis added).¹⁷³

This apparent aspect of sameness of treatment does not however guarantee a sameness of result or of effective protection. This can readily be illustrated with the existence of inconsistent interpretations of the notion of distress in the context of irregular crossings. The coexistence of narrow and wide readings of its definition in terms of assessing the degree of danger and the urgency and the immediacy involved to reach the threshold of the emergency level of distress that triggers a search and rescue operation, results in erratic and inadequate responses at sea.¹⁷⁴

Against this backdrop, vulnerability reasoning is instrumental as guidance in the reading of the obligations and recommendations contained in the SAR Convention and related legal instruments, to adapt the levels of protection to the specific needs arising in these irregular crossings and thus enhance the protection of migrants at sea.¹⁷⁵

¹⁷³ It was the UNHCR, at the International Conference on Maritime Search and Rescue in 1979, that proposed to add in the draft of this provision the words “or status”. With this proposal, the UNHCR sought to establish that the Convention would also be applicable to matters of their concern. See in this respect International Conference on Maritime Search and Rescue, 1979, Agenda item 6, SAR/CONF/6/2, the IMO Archives.

¹⁷⁴ This will be further discussed in ch 3, s 3.1 and ch 4, introduction and s 1.5.2 therein, and the legal interpretative reasoning developed in Ch 5. See for instance Parliamentary Assembly of the Council of Europe, ‘Lives Lost in the Mediterranean Sea: Who is responsible?’ Report of the Committee on Migration, Refugees and Displaced Persons, Doc 12895 of 5 April 2012 <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18095&lang=en>>. The Assembly recommended member States to ‘avoid differing interpretations of what constitutes a vessel in distress, in particular as concerns overloaded, unseaworthy boats, even if under propulsion, and render appropriate assistance to such vessels. Whenever safety requires that a vessel be assisted, this should lead to rescue actions’ (para 13.3).

¹⁷⁵ Al Tamimi (n 66) 576 to 582 regarding the impact of vulnerability reasoning in the ECtHR case law.

4.3 Vulnerability reasoning and the integration of human rights considerations in the SAR Convention

The vulnerability reasoning is proposed in this research as a mechanism that underscores under-represented needs and concerns in the SAR system and its legal framework. It is further offered to call for a correcting mechanism that supports an interpretative reasoning of this legal framework that allows a more responsive SAR system tailored to the particular needs sea migrants face during the crossings, in order to enhance their protection.

This research presents vulnerability reasoning in relation to the harm or the exposure to harm to the physical or mental integrity sea migrants are widely subjected to during sea crossings, and also before embarking. This reasoning is hence based on lived vulnerability, that is, vulnerability determined by the exposure to harm or actual harm experienced in the context of irregular crossings by sea.

The risks and the suffering involved in irregular crossings become therefore central to argue in favour of a more integrating reading of the SAR Convention and thus a more inclusive SAR system as a corrective tool or a mechanism of redress. In this context, this research envisages the role of the vulnerability reasoning within the SAR Convention, and the wider maritime SAR system, as a guiding mechanism that underpins the interpretative process of the SAR Convention where the specific needs among sea migrants are duly considered.

In the on-going discussion on the role of the SAR Convention and the obligations of the States parties to it, the relentless losses of lives at sea in these unsafe irregular migration flows remains central. Additionally, particular needs require urgent consideration, namely, the inhumane and undignified crossing conditions which add suffering and further risks to these already perilous journeys, and the human rights considerations which arise therefrom. Accordingly, the interpretative reasoning proposed seeks invoking international human rights rules that safeguard against cruel, inhuman and degrading treatment for the purpose of interpreting the notion of persons in distress. Equally, specific protection needs are to be taken into account when survivors are disembarked at a place of safety. These include protection of survivors' integrity in the realm of human rights law and, where applicable, in the realm of refugee law, primarily the safeguard against threats to the lives and freedoms of those alleging a well-founded fear of persecution on refugee law grounds and the access to fair and efficient status determination procedures availing effective protection.

A reading of the SAR Convention that allows considering specific needs among sea migrants undoubtedly contributes to a more robust search and rescue response that complements the

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initial design of the SAR system to respond to the needs of maritime traffic, for the rescue of persons in distress at sea.

The interpretative reasoning proposed seeks to re-invigorate the on-going discussion on the interpretation of the SAR Convention, striving to introduce legal interpretative arguments for an integrating reading of the SAR Convention, where its terms incorporate human rights law and international refugee law considerations, to favour a more responsive SAR system to the needs of sea migrants.

Vulnerability reasoning can play a determinant role in the present reasoning, as a link between a maritime instrument and international human rights law and refugee law considerations; a bridge between these legal arenas that needs to be built with interpretation legal mechanisms, in particular the principle of systemic integration, as will be examined in chapters 4 to 6.

Conclusion

The proposed approach to the SAR Convention and related instruments concerning search and rescue at sea through the vulnerability lens brings the specific needs among sea migrants to the forefront of the interpretative process.

The particular needs identified during the irregular crossings are linked to the unsafe and inhumane conditions of these crossings and the dangers related thereto. The exposure to harm or the actual harm, be it physical, psychological or moral, during these journeys, determine the situation of lived vulnerability among sea migrants that would not occur in a context of regular maritime traffic.

Vulnerability, presented here chiefly as a situational vulnerability among sea migrants, brings under scrutiny the obligations under the SAR Convention, the design of the SAR services and the levels of response and protection therein. This scrutiny is framed within the duty of coastal States parties to the SAR Convention, UNCLOS and SOLAS Convention to promote the establishment, operation and maintenance of adequate and effective search and rescue services.¹⁷⁶

¹⁷⁶ UNCLOS, Art 98.2, SOLAS, Ch V Reg 7 and SAR Convention, first preambular paragraph.

In this context, vulnerability reasoning plays an instrumental role in the reading of the SAR Convention, where the consideration of specific needs among sea migrants has a resonance in the reading of the obligations relating to search and rescue services, and to rendering assistance at sea. Vulnerability reasoning is a key tool in the interpretative reasoning of the SAR Convention and related instruments as it brings into consideration the risks and the needs particular to the conditions endured by sea migrants in irregular crossings within a SAR system originally designed to respond to the needs of maritime traffic in regular navigation.

Vulnerability reasoning becomes the legal articulation for an interpretative process motivated by the need for a more robust response at sea, tailored to needs originally under-represented, if not unseen, in order to enhance efforts of protection that buttress existing obligations.

Vulnerability reasoning paves the way to explore guiding mechanisms in the interpretative process of the relevant legal instruments that allow for the integration of human rights law and refugee law considerations. The aim of such an interpretative reasoning is to enable a more responsive SAR system, tailored to the risks and the needs involved in these journeys. Vulnerability reasoning therefore acts as a bridge between different legal arenas.

Vulnerability reasoning could ultimately contribute to future debates on capacity building and advancing cooperation among States for search and rescue purposes. It could further promote discussions for the design of a more solid response at sea, and effectively, have an impact in the implementation of the SAR Convention in view of the changing circumstances at sea. It could reinvigorate the debate of the role of the SAR services and the relevance of the SAR Convention in the current state of affairs and the needs presently accruing at sea.

To this end, the following chapter will scrutinise the SAR Convention and will endeavour to underscore in the process, difficulties and shortcomings with regards to the search and rescue of sea migrants, that point towards the need to address specific needs arising in unsafe mixed migration flows by sea.

Chapter 2 Search and rescue at sea: contrasting a universal duty with its sectoral operative design

Introduction

As pointed out in the previous chapter, the International Convention on Maritime Search and rescue, 1979, as amended (SAR Convention) was not designed, nor intended, to respond to large mixed migration flows by sea.¹ However, the SAR Convention remains a key instrument in the promotion of the establishment and maintenance of adequate and effective maritime search and rescue (SAR) services by States parties for the safety of life at sea.² This chapter considers some relevant aspects of the design of SAR services that reveal their inadequacy in the complex context of sea migrants embarked on irregular crossings, in the majority of cases life-threatening journeys on board unseaworthy boats, rickety and ill-fitted craft, in inhuman and degrading conditions.

This chapter underscores the duality existing in the SAR Convention, by outlining first characteristics of universality and adaptability to changing circumstances that allow an inclusive and a dynamic approach to search and rescue, where considerations of humanity

¹ Mr K Sekimizu, the International Maritime Organization (IMO) Secretary-General at the time, stated: ‘There is clear recognition among IMO Member States that using the SAR system to respond to mass mixed migration was neither foreseen nor intended, and that although Governments and the merchant shipping industry will continue rescue operations, safe, legal, alternative pathways to migration must be developed, including safe, organized migration by sea, if necessary.’ IMO press briefings ‘IMO Secretary-General welcomes UN Security Council resolution on migrant smuggling’ Briefing 45, 14 October 2015, <<http://www.imo.org/en/MediaCentre/PressBriefings/Pages/45-UNSC-resolution-.aspx>>.

² SAR Convention, first preambular paragraph. See also UNCLOS, Art 98.2, and SOLAS Convention Ch V, Reg 7. Search and rescue service is defined in para 1.3.3 of the Annex to the SAR Convention as: ‘[t]he performance of distress monitoring, communication, coordination and search and rescue functions, including provision of medical advice, initial assistance or medical evacuation, through the use of public and private resources including cooperating aircraft, vessels and other craft and installations’. In order to understand the scope of the service, the definitions of both search and rescue are also cited: ‘*Search*. An operation, normally coordinated by a rescue co-ordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress’, paragraph 1.3.1, and ‘*Rescue*. An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety’, para 1.3.2.

readily stand out.³ This contrasts with a sectoral⁴ approach to the operative design to maritime search and rescue, primarily concerned with the needs of maritime traffic. In this dichotomy, this chapter examines what functional limitations the SAR Convention may present in the context of irregular sea crossings, where further considerations of humanity in the reading of key concepts are called for to address the specific needs among sea migrants. To this end, the first section considers the international customary duties to render assistance at sea and to proceed to the search and rescue, based on considerations of humanity. It defines the scopes of these duties for a better understanding of their contours and their wide application. It further considers the dynamic aspects of the SAR system based on the duty to maintain adequate and effective SAR services and on the very nature of a due diligence obligation. The second section considers the initial motivations and the priorities in the operative design of the maritime SAR system. It outlines the remit of the International Maritime Organization (IMO) in an attempt to explain its sectoral approach, contrasting the widely conceived duty to render assistance at sea with the compartmentalised treatment given in the SAR Convention and its narrow development as an operational tool. Special reference is made to the intervention of the United Nations High Commissioner for Refugees (UNHCR) at the International Conference on Maritime Search and Rescue and other refugee law considerations introduced at a later stage. Against this backdrop, a suggestion is made to further considerations of humanity, in particular regarding the reading of the notions of persons in distress and place of safety, both in the realms of human rights law and refugee law. This section finally examines the responsibility-sharing system and the operational mechanisms of cooperation developed by the SAR Convention to reveal the main considerations in the SAR system, and to highlight limitations in the context of search and rescue of sea migrants.

³ Parts of this chapter have been published as A Campàs Velasco, 'The International Convention on Maritime Search and Rescue: Legal Mechanisms of Responsibility Sharing and Cooperation in the Context of Sea Migration?' in F de Londras and S Mullally (eds) (2015) vol 10 *The Irish Yearbook of International Law* (Bloomsbury Hart Publishing 2017) 56, following a paper presented at the University College Dublin, at the 18th Irish European Law Forum 'Europe's Shared Burden: Collective Responsibility for Migrants at Sea – An Interdisciplinary Conference' held in October 2015.

⁴ The terms sectoral, segmented and compartmentalised will be used indistinctively to describe the narrowly delimited approach to problem-solving by highly specialised norms, particularly the SAR Convention.

1. Assistance and Search and rescue at sea: extracting initial considerations from the legal framework

1.1 A duty enshrined in tradition and engrained in humanity

The duty to render assistance at sea is considered a moral duty and a fundamental obligation under international law,⁵ enshrined in tradition among seafarers,⁶ and recognised as a norm of customary international law.⁷ It is present in a number of court judgments in the context of salvage and in the context of charterparty disputes on grounds of deviation. For instance, in the case of *Scaramanga & Co v Stamp and Another*,⁸ a charterparty dispute regarding whether the master had proceeded to a justifiable deviation, i.e. to save human life, both the first instance and the Court of Appeal decisions devoted some passages to this duty enshrined

⁵ See IMO Doc C 54/17(d) IMO Council, 1985 and Addendum to the Report of the UNHCR, 40 GAOR, Supplement No.12A (A/40/12/Add.1), para 115(3)

<<https://www.unhcr.org/excom/unhcrannual/3ae68c900/addendum-report-united-nations-high-commissioner-refugees.html>>. See also M Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 International Journal of Refugee Law, 329, 334.

⁶ Vattel described the duty to render assistance at sea as 'one of the most ancient and fundamental features of the law of the sea', E Vattel, *The Law of the Nations* (J Chitty, trans) (London 1834), 170, cited in R Barnes, 'Refugee Law at Sea' (2004) 53 International and Comparative Law Quarterly 47, 49 (fn 10 thereto). See also V Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 (N 2) International Journal of Refugee Law, 174, 194. See further International Law Commission 'Commentary on Draft Article 12 of the United Nations Convention on the High Seas' (1956) UN Doc. A/3179, cited by J Coppens and E Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25 International Journal of Marine and Coastal Law, 377 and fn 1 thereto.

⁷ States' general and consistent practice accepted as law (*opinion juris*) are the two constituents of customary international law. See United Nations General Assembly (UNGA) International Law Commission (ILC) Third Report on Identification of Customary International Law, by Michael Wood, Special Rapporteur, Geneva 4 May to 5 June and 6 July to 7 August 2015, UN Doc A/CN.4/682. See in particular paras 13 to 17. See also the ILC 'Draft Conclusions on Identification of Customary International Law' adopted by the ILC at its seventieth session, in 2018, and submitted to the GA as a part of the Commission's report covering the work of that session, UN Doc A/73/10. See further M Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 International Journal of Refugee Law, 329, 334; S Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 (N 4) International Journal of Marine and Coastal Law, 523, 527; J Coppens and E Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (n 6).

⁸ *Scaramanga & Co v Stamp and Another* (1879) IV CPD 316, and (1880) V CPD (CA) 295.

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in tradition and engrained in humanity, highlighting its uniform and universal practice.⁹ The persons whose assistance at sea justifies deviation are described in this judgment in a broad manner, as ‘persons (...) in danger of their lives’,¹⁰ ‘fellow creatures in distress’,¹¹ human life when in peril’,¹² ‘those, who, exposed to destruction from the fury of winds and waves would perish if left without assistance’,¹³ and ‘others who are in danger’.¹⁴

According to the judgment, saving lives at sea is prioritised over contractual obligations and commercial considerations on grounds of morality and, in its words, ‘the promptings of humanity’.¹⁵ Succouring those in danger at sea is further depicted as a universal and uniform practice ‘of the maritime world’ and ‘founded on the common interest of all who are exposed to the perils of the seas’.¹⁶

⁹ See (1879) IV CPD 316, 318 and 319. See also the Court of Appeal decision (1880) V CPD (CA) 295 at 304 and 305: ‘Moreover, the uniform practice of the mariners of every nation (...) of succouring others who are in danger, is so universal and well known, that there is neither injustice nor hardship in treating both the merchant and the insurer as making their contracts with the shipowner as subject to this exception to the general rule of not deviating from the appointed course. Goods owners and insurers must be taken (...) as acquiescing in the universal practice of the maritime world, prompted as it is by the inherent instinct of human nature, and founded on the common interest of all who are exposed to the perils of the seas’.

¹⁰ (1879) IV C.P.D. 316, at 318 and 319. The judgment further states: ‘On grounds of humanity, it may be taken as established that a master of a ship is at liberty to deviate from his course in order to save, and so far as it may be necessary to save, persons found by him, when prosecuting his voyage, to be in danger of their lives. (...) The reasons for holding the master justified in deviating to save life are overwhelming. To deny him this liberty would be to shock the moral sense of every right-minded person, and to ignore the clear moral duty of assisting fellow creatures in distress.’

¹¹ Ibid.

¹² (1880) V CPD (CA) 295 at 304.

¹³ Ibid.

¹⁴ Ibid. The notion of danger will be considered in more detail further when dealing with the concept of distress in ch 4.

¹⁵ (1879) IV CPD 316, 318 and 319; and (1880) V CPD (CA) 295, 304: ‘The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and it is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences, which may result to a ship or cargo from rendering of the needed aid.’

¹⁶ (1880) V CPD (CA) 295, 305 (n 9).

These considerations are valid and applicable today. They inform the international law of the sea and the maritime legal arena, as will be seen in more detail in chapter 5.¹⁷

The SAR Convention is hence underpinned by the customary obligation of shipmasters to render assistance at sea. As mentioned in chapter 1, this customary duty crystallised in the 1910 Convention for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea (1910 Salvage Convention),¹⁸ succeeded by the International Convention on Salvage, 1989 (Salvage Convention),¹⁹ and the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, as amended.²⁰ It was further codified in the 1958 Convention on the High Seas,²¹ where a land based obligation was added to coastal States in order to promote the establishment and maintenance of adequate and effective search and rescue services, and further echoed in its successor, the 1982 United Nations Convention on the Law of the Sea (UNCLOS).²² This duty is also contained in the 1974 International Convention for the Safety of Life at Sea, as amended (SOLAS Convention).²³ The SAR Convention is mindful of ‘the great importance attached in several conventions to the rendering of assistance to persons in distress at sea and to the establishment by every coastal State of adequate and effective arrangements for coast

¹⁷ Ch 5, s 1.

¹⁸ Brussels, 23 September 1910, 212 CTS 187. Article XI reads: ‘Every master is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost. The owner of a vessel incurs no liability by reason of contraventions of the above provision’.

¹⁹ London, 28 April 1989, 1953 UNTS 165, Art 10 ‘Duty to render assistance’ provides: ‘1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea. 2. The States parties shall adopt the measures necessary to enforce the duty set out in paragraph 1. 3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.’

²⁰ Brussels, 23 September 1910, 212 CTS 178. Article 8 provides: ‘After a collision, the master of each vessel in collision is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to the other vessel, her crew and her passengers. He is likewise bound so far as possible to make known to the other vessel the name of his vessel and the port to which she belongs, and also the names of the ports from which she comes and to which she is bound. A breach of the above provisions does not of itself impose any liability on the owner of a vessel.’

²¹ Geneva, 29 April 1958, 450 UNTS 11, Art 12.

²² Montego Bay, 10 December 1982, 1833 UNTS 3, Arts 98.1(a) and (b), and 98.2.

²³ 1 November 1974, 1184 UNTS 278, Ch V, Regs 7 and 33.

watching and for search and rescue services’,²⁴ and it is intended to develop and promote these services by providing a framework for an international maritime search and rescue plan.

Among these conventions, UNCLOS was acknowledged as a comprehensive Constitution for the Oceans, in T Koh’s words, ‘covering every aspect of the uses and resources of the sea’.²⁵ The Convention focuses on topics related to the regimes of the maritime zones, the peaceful use of the seas and the oceans, the equitable and efficient utilisation and conservation of the marine resources, the protection and preservation of the marine environment and scientific research, as well as settlement of disputes.²⁶ The Convention, although heavily focused on the use and conservation of natural resources, further addresses traditional human rights considerations, such as the duty to render assistance at sea,²⁷ the duty to promptly release arrested vessels and their crews upon presentation of reasonable security,²⁸ or the prohibition of the transport of slaves.²⁹ In his statement, Koh referred to a celebration of ‘human solidarity and the reality of interdependence which is symbolized by the United Nations Convention on the Law of the Sea’. Presumably the term solidarity was chosen in the context of an equitable international economic order sought to be achieved with this Convention according to its fifth preambular paragraph, and the universal economic and social justice reflected in its seventh preambular paragraph. One of the pillars was the

²⁴ SAR Convention, first preambular paragraph.

²⁵ T Koh, who served as the President of the Third United Nations Conference on the Law of the Sea from March 1981 until its conclusion in 1982, at the final session of the Conference at Montego Bay (6 to 11 December 1982). See the contribution adapted from his statements in M Nordquist (ed) *United Nations Convention on the Law of the Sea 1982 a Commentary*, Center for Oceans Law and Policy, University of Virginia (the Virginia Commentary) vol I (Martinus Nihjoff Publishers 1985).

²⁶ UNCLOS, fourth and fifth preambular paragraphs. See the statement by H. Shirley Amerasinghe at the Third United Nations Conference on the Law of the Sea, in Myron Nordquist (ed), the Virginia Commentary, vol I (Martinus Nihjoff Publishers 1985). See also B Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (1997) 36 *Columbia Journal of Transnational Law* 399, 401.

²⁷ UNCLOS, Art 98. See S Cacciaguiddi-Fahy, ‘The Law of the Sea and Human Rights’ (2007) 19 (No1) *Sri Lanka Journal of International Law*, 85.

²⁸ UNCLOS, Art 73.2. See T Treves, ‘Human Rights and the Law of the Sea’ (2010) 28 (N 1) *Berkeley Journal of International Law*, 3. Chapter 5, s 1 will deal in more detail with the considerations of humanity in the provisions of UNCLOS.

²⁹ UNCLOS, Art 99. See B Oxman, ‘Human Rights and the United Nations Convention on the law of the sea’ (n 26) 401 and 402.

declaration that the deep seabed resources, beyond the limits of national jurisdiction, were the ‘common heritage of mankind’.³⁰ However, it is here argued, this celebrated solidarity cannot be understood only in the context of economic justice but it is to be stretched to its widest application in all areas of international cooperation, where all needs of mankind have a space for consideration, including the need of being rendered assistance at sea. It is therefore in this spirit of human solidarity that the duty to render assistance, the duty to proceed to the rescue and the duty to provide adequate search and rescue services need to be read.

1.2 The duty to render assistance and the duty to proceed to the rescue of persons in distress at sea: outlining their scopes

1.2.1 The difference between the duty to render assistance at sea and the duty to proceed to the rescue

The duties contained in Article 98 of UNCLOS are both sea and land based. At sea, the duty to render assistance is addressed to the flag State to require all the masters of ships flying its flag to act in accordance with paragraph 1, provided they do not entail ‘serious danger to the ship, the crew or the passengers’.³¹ The scope and the nature of the duty of rendering assistance to any person found at sea in danger of being lost³² will vary and will depend on the type and severity of the emergency accrued, the danger and the needs involved as well as the circumstances of each case.³³ The assessment of the need, nature and viability of the

³⁰ UNCLOS, sixth preambular paragraph. This was based on the concept proposed by Maltese ambassador A. Pardo in his speech on 1 November 1967 to the United Nations, and seen as a trigger to the Third United Nations Conference on the Law of the Sea. See M Nordquist (ed), *the Virginia Commentary* (Martinus Nihjoff Publishers 1985), vol I, the Introduction, xxv and xxvi. For a sceptical view on the aspect of an economic and social justice, see B Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (n 26) 411 to 414.

³¹ UNCLOS, Art 98.1.

³² UNCLOS, Art 98.1(a).

³³ These could be for example, towing a ship to a port, firefighting, standing by a ship in need of advice, providing medical assistance, providing food and supplies, etc. See F Kenney, Jr and V Tasikas, ‘The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea’ (2003) 12 (N 1) *Pacific Rim Law & Policy Journal Association*, 143, 152; J Coppens, ‘The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin’ (2013) 44 *Journal of Maritime Law and Commerce* 89, 90.

assistance is left to the discretion of the master. The duty to render assistance also arises after a collision among the ships involved.³⁴

The duty to rescue is required under a different sub-paragraph, arguably, as a specific procedure and degree of intervention or assistance, in a situation where persons are in distress at sea.³⁵ In this scenario, the master is to proceed to the rescue ‘with all possible speed’ if he has been informed of their need of assistance, provided ‘such action may reasonably be expected of him’. This proviso appears open to many different considerations relating to the master’s obligation for the safety of his ship, its crew and passengers, and the assessment falls once more under the discretion of the master.³⁶

The concept of rendering assistance in Article 98 UNCLOS³⁷ bears a more generic meaning than the term rescue. The latter may have a narrower connotation and constitute a specific type of assistance that applies to situations of distress at sea, relating both to persons and to ships. This interpretation would allow a consistent reading of the SAR Convention, wherein the trigger of a rescue operation lies in a situation of distress, which requires by definition a particular and immediate assistance.³⁸ Consequently, the phrase ‘in danger of being lost’, which triggers the duty to render assistance, has a broader meaning than, and comprises, the situation of ‘distress’. Otherwise it would seem difficult to understand the need of a distinction between sub-paragraphs 98.1(a) and 98.1(b) and what the latter adds to the former.

The term ‘assistance’ is also used as a generic term in Article 18 of UNCLOS, when referring to the ‘rendering of assistance to persons, ships or aircraft in danger or distress’.³⁹ It is further used to refer to the actual rescue in works such as *United Nations Convention on the Law of the Sea 1982: A Commentary*⁴⁰ where it is stated: ‘(...) the master of a ship flying the flag

³⁴ UNCLOS, Article 98.1(c).

³⁵ UNCLOS, Article 98.1(b).

³⁶ Ibid. See Satya N Nandan and Shabtai Rosenne (vol eds) Neal R Grandy (assist ed) the Virginia Commentary, vol III (Martinus Nihjoff Publishers 1995) para 98.11(c): ‘This obligation is a matter for the discretion of the master, considering all the circumstances of the situation in which assistance is required’.

³⁷ This concept provides the title to Article 98 and is contained in paras 98.1(a) and 98.1(c).

³⁸ Annex to the SAR Convention, paras 1.3.2, 1.3.13, and 4.4.3.1. See J Coppens, ‘The essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin’ (n 33), 90 and 91.

³⁹ UNCLOS, Art 18 defining the ‘meaning of Passage’ to include stopping for these reasons.

⁴⁰ Satya N Nandan C.B.E. and Shabtai Rosenne (vol eds) Neal R Grandy (assist ed) the Virginia Commentary, vol III (Martinus Nihjoff Publishers 1995).

of a State is required to provide assistance to individuals or ships in distress'.⁴¹ This can also be found in the Annex to the SAR Convention, considered an integral part of the Convention,⁴² for instance in paragraph 2.1.10, whereby: 'Parties shall ensure that assistance be provided to any person in distress at sea', or paragraph 3.1.9, which states: 'Parties shall coordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation (...)'. Having said that, the term rescue is defined in paragraph 1.3.2 of the Annex to the SAR Convention as '[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety'. The rescue operation is therefore triggered by a situation of distress and it is considered completed with the delivery of survivors at a place of safety. These two key components of a rescue operation, namely distress and delivery at a place of safety will be dealt with in turn, in the context of sea migration.⁴³

Some commentators favour an interpretative legal distinction between the duty to render assistance and the duty to rescue, where the former would be an obligation upon the masters of merchant ships to honour whereas the latter would be the obligation of States parties to the Convention.⁴⁴ This distinction is based on the wording used in the SOLAS, the SAR and the Salvage Conventions, where, it has been argued, the term 'rescue' is not associated with merchant ships. However, the term 'search and rescue facility', defined in the SAR Convention as: '[a]ny mobile resource, including designated search and rescue units, used to conduct search and rescue operations'⁴⁵ would include merchant ships if in the vicinity of a distress situation. This would be in fact one of the purposes of the ship reporting system, namely, to 'determine availability of ships to assist with search and rescue operations'.⁴⁶ The coordination of the rescue operation is the duty of the State responsible for the Search and Rescue Region (SRR) where the distress situation arises,⁴⁷ however, it is the duty of the

⁴¹ Ibid, para 98.11(a).

⁴² SAR Convention, Art I.

⁴³ Ch 4 to ch 6.

⁴⁴ F Kenney, Jr and V Tasikas, 'The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons rescued at Sea' (n 33) 156 to 158. See also S Cacciaguideri-Fahy, 'The Law of the Sea and Human Rights' (2007) 19 (N 1) Sri Lanka, *Journal of International Law* 85, 93.

⁴⁵ Annex to the SAR Convention, para 1.3.7.

⁴⁶ Annex to the SAR Convention, para 5.1.2.

⁴⁷ Annex to the SAR Convention, chapter 2.

master of a ship ‘to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him’, according to UNCLOS, Article 98.1(b).

The delivery at a place of safety is what characterises the rescue operation and what marks its completion.⁴⁸ It will be undertaken, either by the assisting ship, or, if timely released from its obligations, it will be carried out by the State party in charge of the SRR where the assistance takes place, in accordance with paragraph 3.1.9 of the Annex to the SAR Convention and the Guidelines on the Treatment of Persons Rescued at Sea (hereafter referred to as the Guidelines).⁴⁹

1.2.2 The duty to render assistance and to proceed to the rescue at sea: considerations of universality

The duty to render assistance to any person in danger of being lost at sea and the duty to proceed to the rescue of persons in distress at sea bear no geographical limitations. Although Article 98 is within Part VII of UNCLOS devoted to the high seas, the wording of this provision sets the duty to render assistance ‘at sea’, with no spatial delimitations. This has drawn the attention of commentators as a technical omission in the drafting of the Convention on the basis of the absence of an express correlative provision in the territorial sea.⁵⁰ However, the duty to render assistance to persons, ships or aircraft in danger or distress is considered in territorial waters as one of the exceptions to continuous and expeditious passage or navigation through the territorial sea in accordance with UNCLOS.⁵¹ The duty to

⁴⁸ For a different view on the distinction between the duty to assist and the obligation to rescue, see F Kenney, Jr and V Tasikas, ‘The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons rescued at Sea’ (n 33) 157. The concept of place of safety will be dealt with in ch 6.

⁴⁹ Adopted by the Maritime Safety Committee Resolution MSC.167(78), 20 May 2004, <[www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf)>. ‘The purpose of these amendments and the current guidelines is to help ensure that persons in distress are assisted while minimizing the inconvenience to assisting ships and ensuring the integrity of the SAR services’, Annex 34 to the Resolution MSC.167(78), para 2.3.

⁵⁰ See for example, B Oxman, ‘Human Rights and the United Nations Convention on the law of the sea’ (n 26) 401 and 414. See also M Pallis, ‘Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes’ (n 7) 336 to 338.

⁵¹ UNCLOS, Art 18 reads: ‘2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation, or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in

render assistance is further present in the exclusive economic zone by reference in Article 58 to Article 98.⁵²

Despite differing views as to the technical drafting of the duty to assist, it is doubtless accepted that it applies in all maritime areas. Commentators such as Nandan and Rosenne even declare that: ‘... the duty to render assistance exists throughout the ocean, whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the exclusive economic zone or in the high seas. Assistance is to be given to any person, ship or aircraft in distress.’⁵³

The duty to render assistance is further based on the application of the duty to protect life at sea, without discrimination, in favour of ‘*any* person found at sea in danger of being lost’ and ‘persons in distress’. It is further contained within the consideration of the needs of mankind, highlighted in the preamble of UNCLOS. This evolves from, and is consistent with the early codification of the duty in, the 1910 Salvage Convention which referred to the duty to render assistance ‘to *everybody*, even though an enemy, found at sea in danger of being lost’.⁵⁴

The emphasis is therefore here laid upon the inclusiveness and universality of these obligations, both in geographical terms and in terms of the beneficiaries to whom these obligations are owed. It is against this background that the operational mechanisms designed in the SAR Convention are outlined later on, in order to assess whether the SAR Convention provides an inclusive response to this widely conceived duty.

1.3 A duty to maintain an adequate and effective search and rescue service and a duty of conduct: dynamic components

On land, coastal States are required under UNCLOS to ‘promote the establishment, operation and maintenance of an adequate and effective search and rescue service’ for ‘safety

danger or distress.’ Satya N Nandan C.B.E. and Shabtai Rosenne (vol eds) Neal R Grandy (assist ed) the Virginia Commentary, para 98.11(g).

⁵² UNCLOS, Art 58.2 states that: ‘Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.’

⁵³ Satya N Nandan C.B.E. and Shabtai Rosenne (vol eds) Neal R. Grandy (assist ed), the Virginia Commentary, para 98.11(g) *in fine*. See also S Trevisanut, ‘Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?’ (n 7) 526.

⁵⁴ 1910 Salvage Convention, Art XI (emphasis added). See above, s 1.2.1.

on and over the sea', and to this end, where circumstances so require, cooperation among neighbouring States is mandatory.⁵⁵ The notion of the 'maintenance of an adequate and effective search and rescue service' indisputably attracts an evolving and dynamic process of interpretation where the search and rescue services are required to adapt to the changing circumstances at sea, in terms of capacity and in terms of the needs of the people in distress at sea.⁵⁶ The adaptability to new challenges has prompted the characterisation of UNCLOS as a 'living treaty', in the words of Wood.⁵⁷ Barnes has further analysed this concept with special emphasis on UNCLOS' ability to adapt to realities and challenges not envisaged when it was negotiated, and its capacity to 'become relevant to a wider range of issues that simply were not conceived at the time of its adoption',⁵⁸ such as irregular maritime migration.⁵⁹ In this adaptability process, the SAR Convention, articulating the duties to provide search and rescue services, plays an instrumental part.

The duties to render assistance at sea and to provide search and rescue services, contained in UNCLOS, Article 98, and articulated in the SAR Convention amount to obligations of conduct. The duty of States parties to the SAR Convention 'to ensure that assistance is rendered to any person in distress at sea', 'to ensure that the necessary assistance is provided'⁶⁰, or to 'ensure that assistance be provided to any person in distress at sea (...) regardless of the nationality or status of such a person or the circumstances in which that

⁵⁵ UNCLOS, Art 98.2.

⁵⁶ See also SOLAS Convention, Ch V, Reg 7. The wording of this provision also reflects a dynamic approach to the necessary arrangements for search and rescue services 'to include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons'. See further the preamble of the SAR Convention and para 2.1.1. of its Annex.

⁵⁷ M Wood, 'Reflections on the United Nations Convention on the Law of the Sea: A Living Instrument' in J Barrett and R Barnes (eds) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) p lxxvii.

⁵⁸ R Barnes, 'The Continuing Vitality of UNCLOS', in J Barrett and R Barnes (eds) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) 482.

⁵⁹ *Ibid*, 473 and 474.

⁶⁰ Annex to the SAR Convention, para 2.1.1.

person is found’,⁶¹ amounts to a standard of conduct, an obligation of due diligence,⁶² that is, ‘an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result’⁶³.

Without delving into the concept of due diligence as it is not the purpose of the present research to consider the legal accountability of States where they have not duly discharged the obligations under the SAR Convention, it is however relevant to the present discussion to highlight the variable nature of the concept of due diligence.⁶⁴ It has been characterised as an evolving principle of international law where certain factors can contribute to shape the standards of care or due diligence in order to adapt to the circumstances in which the efforts are to be deployed.⁶⁵ These factors, although considered in other specific legal arenas in a sectoral approach study,⁶⁶ are relevant to maritime search and rescue. For instance, the reasonableness of efforts and capacity deployed on the ongoing management process of the search and rescue services, or the knowledge of particular risks and situations of vulnerability, generated or exacerbated by facilitators in the present scale of unsafe migration

⁶¹ Annex to the SAR Convention, para 2.1.10.

⁶² Both terms ‘obligation of conduct’ and ‘obligation of due diligence’ are connected according to the reading of the International Court of Justice judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment, ICJ Reports 2010, 20 April, 14, para 187, by the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area*, case No 17, 1 February 2011, ITLOS Reports 2011, 10, para 111.

⁶³ *Ibid*, para 110, where the parity between the obligation of conduct and the obligation of due diligence is also visible: ‘[t]o utilize the terminology current in international law, this obligation may be characterized as an obligation “of conduct” and not “of result”, and as an obligation “of due diligence”’. See also the International Law Association (ILA) Study Group on Due Diligence in International Law First Report, Duncan French (Chair) and Tim Stephens (Rapporteur), March 2014, 29. See further ILA Study Group on Due Diligence in International Law Second Report, Duncan French (Chair) and Tim Stephens (Rapporteur), July 2016.

⁶⁴ Seabed Dispute Chamber of ITLOS, Advisory Opinion, case No 17 (n 62) para 117.

⁶⁵ ILA Study Group on Due Diligence in International Law First Report (n 63). See also G Goodwin-Gill, ‘Setting the Scene: Refugees, Asylum Seekers, and Migrants at Sea – The Need for a Long-Term Protection-Centred Vision’, in V Moreno-Lax and E Papastavridis (eds) *Boat Refugees’ and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*, volume 7 (Brill Nijhoff 2016) 25.

⁶⁶ ILA Study Group on Due Diligence in International Law First Report, and Second Report (n 63) 1.

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flows, are factors which arguably call for the increase of standards of conduct and due diligence requirements.⁶⁷

This variable concept of due diligence is to be linked to the role of the SAR Convention in articulating UNCLOS' principles and enabling its adaptability and its relevance, as a living instrument, to the present unsafe migration flows by sea. Aspects like the risks involved for the persons enduring these crossings and their position of vulnerability take a different dimension to what was envisaged when considering the needs of regular maritime traffic.⁶⁸ This therefore reinforces the dynamic approach to the interpretation of the SAR Convention, such as the notion of distress, or the concept of place of safety, in order to reflect evolving circumstances and the specific needs among sea migrants, and to enable the maintenance of effective search and rescue services to respond effectively to challenges not initially envisaged.

These wide and dynamic conceived duties need to be contrasted with the operational system contained in the SAR Convention, designed to respond to situations of distress following accidents at sea⁶⁹ and to the needs of maritime traffic.⁷⁰ Altogether this creates a compartmentalised approach to maritime search and rescue which limits its effectiveness in the context of unsafe irregular crossings, in the search and rescue of sea migrants.

⁶⁷ ILA Study Group on Due Diligence in International Law First Report (n 63) 26 and 27 in the context of international environmental law, and 29 and 30 in the arena of international law of the sea.

⁶⁸ R Barnes, 'The Continuing Vitality of UNCLOS' in J Barrett and R Barnes (eds) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) 472, 474 and 479.

⁶⁹ See IMO, *SAR Convention: the International Convention on Maritime Search and Rescue, 1979, as Amended by Resolutions MSC.70(69) and MSC.155(78)* 3rd edn, 2006, p iii, first paragraph.

⁷⁰ SAR Convention, third preambular paragraph.

2. A sectoral approach to the operative design to search and rescue at sea: outlining biases to the SAR Convention

2.1 A search and rescue plan focused on maritime traffic: a retrospective look at the SAR Convention

The SAR Convention was ‘designed to improve existing arrangements and provide a framework for carrying out search and rescue operations *following accidents* at sea’.⁷¹

The International North Atlantic Air and Surface Search and Rescue Seminar in 1970 (hereafter referred to as the 1970 Seminar)⁷² was convened by the Inter-Governmental Maritime Consultative Organization, since renamed International Maritime Organization (IMO),⁷³ to consider the need for, and the feasibility of, providing for worldwide organisational plans for the search and rescue of persons in distress at sea.⁷⁴ It thus provided the initial step for an exploratory study on the viability of an ‘International Organizational Plan for Search and Rescue Operations’. This overlapped a more immediate subject for discussion at the 1970 Seminar on the feasibility study of a Multilateral North Atlantic Search and Rescue Plan.⁷⁵ The initial goals were to define areas of responsibility for

⁷¹ IMO publication, *SAR Convention: International Convention on Maritime Search and Rescue, 1979, as amended by resolutions MSC.70(69) and MSC.155(78)* 3rd edn, 2006, Foreword to the SAR Convention, iii, first paragraph (emphasis added).

⁷² This seminar was held from 26 to 28 October 1970 in New York. It was organised around plenary sessions dealing with general subjects, and through four workshops focusing on search and rescue operations, search and rescue communications, search and rescue incidents and search and rescue safety programmes. Each workshop concluded its work and presented a report to the plenary for adoption and further action, if needed. Note by the Secretariat on the International North Atlantic Air and Surface Search and Rescue Seminar 1970, IMCO Maritime Safety Committee, 23rd session, Agenda item 11, 27 January 1971, MSC XXIII, Vol. 2 (the IMO Archives).

⁷³ The title Inter-Governmental Maritime Consultative Organization (IMCO) was changed to ‘International Maritime Organization’ by virtue of amendments to the Convention on the Inter-Governmental Maritime Consultative Organization, UNTS Vol. 1276, p. 468; and Vol. 1285, p. 318. These amendments entered into force on 22 May 1982. For style consistency purposes reference is made to IMO.

⁷⁴ The Secretariat submitted a proposal to the 1970 Seminar ‘that consideration should be given to the need for an international organizational plan for SAR’ (Report of the IMO Maritime Safety Committee on its twenty-fourth session, Agenda item 19, 21 September 1971, IMCO MSC XXIV/19 (the IMO Archives) para 77.

⁷⁵ Note by the Secretariat on the International North Atlantic Air and Surface Search and Rescue Seminar 1970, (n 72) para 4.

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maritime search and rescue operations, to assist with the communications between rescue services and to provide guidelines for the development and organisation for the search and rescue.⁷⁶

The principal motivation for this initiative was determined by the lack of a formal international agreement delineating the geographical areas to ascertain responsibilities over coordination of maritime SAR operations. The term ‘responsibility’ used in the preparatory work and in the text of the SAR Convention, refers to the primary obligations or duties therein contained, rather than to any secondary obligation or accountability for an international wrongdoing.⁷⁷ It is here therefore used in this thesis with the same meaning when referring to States’ duties under SAR Convention, for consistency purposes.

The absence of an international legal framework resulted in the application of the existing International Aviation Search and Rescue Plan, under the 1944 Convention on International Civil Aviation,⁷⁸ also known as the ICAO SAR Plan, both to aeronautical and maritime incidents.⁷⁹ However, as it was highlighted during the 1970 Seminar, this *de facto* organisation was not well known among the wide maritime community. This involved predominantly shipmasters and ship operators, either in need of assistance or engaged in a SAR operation. They were not fully aware of the geographical divisions for SAR coordination responsibilities, and would hence encounter operational difficulties to coordinate with the responsible rescue authorities ashore, or seek technical advice or assistance, in accordance with the guidelines provided to seafarers during emergencies at sea.⁸⁰ It thus became vital to clarify international coordination responsibilities among shore organisations around the world for surface, namely maritime, SAR incidents.

⁷⁶ Ibid, para 1.

⁷⁷ This also applies to the term ‘responsibilities’. On the breach of an obligation under international law, see ILC report ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) UN Doc A/56/10, (2001) Yearbook of the International Law Commission, Vol II, Part Two. In particular see Art 1.

⁷⁸ Chicago, 7 December 1944, 15 UNTS 295. See Annex 12 on search and rescue, applicable according to its foreword, to: ‘the establishment, maintenance and operation of search and rescue services in the territories of Contracting States and over the high seas, and to the coordination of such services between States’.

⁷⁹ Although this observation made during the Seminar discussions focused on the SAR areas in the deep ocean areas of the North Atlantic, the same applied to other geographical regions.

⁸⁰ These guidelines were at the time the Merchant Shipping Search and Rescue Manual (MERSAR Manual). Another SAR Manual also prepared by the IMO was the International Maritime Organization SAR Manual

The 1970 Seminar framed the work towards the formalisation of a worldwide maritime SAR plan where the IMO was considered the ‘*only* organization responsible to deal with the problem’.⁸¹

According to the first conclusion formulated by the participants at the 1970 Seminar,⁸² the IMO was to take action to formalise a SAR Plan ‘responsive to the needs of the maritime traffic’.⁸³ This proved to be central in the preparatory work and the fundamental *raison d’être* of the international maritime search and rescue plan. It was, in fact, to remain in the preamble of the draft Convention submitted to the Conference for consideration.⁸⁴ The preamble defines the aim of the Convention as the rescue of persons in distress at sea.⁸⁵ However, the mechanisms of cooperation and coordination for this purpose are described as ‘an international maritime search and rescue plan *responsible to the needs of the maritime traffic*’.⁸⁶

(IMOSAR), which contained guidelines for Governments wishing to establish or develop their search and rescue organizations, and for personnel involved in the provision of search and rescue services. Both MERSAR and IMOSAR were superseded in 1998 by the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual. This Manual is jointly published by the IMO and the International Civil Aviation Organization (ICAO), and provides guidelines for a common aviation and maritime approach to search and rescue services. It promotes cooperation between the two Agencies, among neighbouring States and between maritime and aeronautical authorities. It aims to ‘assist State Authorities to economically establish effective SAR services, to promote harmonization of aeronautical and maritime SAR services, and to ensure that persons in distress will be assisted without regard to their locations, nationality or circumstances’. See IAMSAR Manual Vol 1, Organization and Management, 2013 edn, p 1-1, para 1.1.3.

⁸¹ Annex II to the international North Atlantic Air and Surface Search and Rescue Seminar, 1970, IMCO Maritime Safety Committee, 23rd session, Agenda 11, 27 January 1971, MSC XXIII/11, Vol 2, Workshop ‘A’, SAR Operations, in ‘Conclusion 0-3’, 2 (the IMO Archives) (emphasis added).

⁸² Ibid.

⁸³ MSC XXIII, vol 2, Annex II, the International North Atlantic Air and Surface Search and Rescue Seminar 1970. workshop ‘A’, SAR Operations, Conclusion 0-1, para 5 (the IMO Archives). Although this conclusion referred to the North Atlantic Ocean, which was considered a priority area due to the large amount of maritime traffic, it was to be extrapolated to worldwide organisational plans.

⁸⁴ International Conference on Maritime Search and Rescue, 1979, SAR/V/6, Annex II (the IMO Archives). The word ‘responsive’ in the preamble of the draft presented by the Drafting Committee was substituted with the term ‘responsible’ (SAR/CONF/D/2, 19 April 1979, the IMO Archives).

⁸⁵ SAR Convention, second and third preambular paragraphs.

⁸⁶ Emphasis added. SAR Convention, third preambular paragraph.

The term ‘maritime traffic’ is not however defined in the SAR Convention. Nor is it outlined in the Convention on Facilitation of International Maritime Traffic, 1965, as amended (FAL Convention).⁸⁷ Nonetheless, in the latter, the term can be readily associated with the concept of ‘ships engaged in international voyages’, in the context of regular navigation within the shipping community.⁸⁸ The central position of the shipping community in the maritime SAR system, as it transpires from the preamble of the SAR Convention, is undisputable. A number of considerations can explain this predominant place in the SAR organisational plan and hence assist in understanding the limitations in the legal design of the SAR Convention. A closer look at the scope of the IMO mandate, its main purposes and functions as architect and depositary of the SAR Convention, become therefore relevant in the present discussion.

The IMO is a technical UN agency primarily focused on the shipping industry. It is defined as ‘the global standard-setting authority for the safety, security and environmental performance of international shipping’.⁸⁹ Its main role is further described as creating ‘a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented’, in order to provide a ‘safe, secure and efficient international shipping industry’. It hence covers all aspects of international shipping, including ship design, construction, equipment, manning, operating and disposal, to ensure the shipping sector ‘remains safe, environmentally sound, energy efficient and secure’.⁹⁰

⁸⁷ London, 9 April 1965, 591 UNTS 265. The FAL Convention aims to prevent unnecessary delays in maritime traffic, namely, to ships and to persons (either crew members or passengers) and property (either cargo or baggage) on board ships engaged in international voyages, by way of facilitating and reducing all formalities on their arrival at port, stay and departure, as well as cooperation among States. See further FAL Circular, IMO Doc FAL.3/Circ.194.

⁸⁸ FAL Convention, first preambular paragraph. Outside the shipping community, recreational navigation seems to have been also contemplated *ab initio* in the planning of the SAR system. This emerges from the very early considerations on search and rescue communications where recommendations were made that all aircraft and ships, including yachts, be required to carry emergency beacons appropriate for their area of operations. This is extracted from the International North Atlantic Air and Surface Search and Rescue Seminar 1970, workshop ‘B’ and the Note by the Secretariat, Maritime Safety Committee, 23rd session, Agenda item 11, 27 January 1971, as well as the report on workshop ‘B’ in Annex I thereto, IMCO MSC XXIII/11, vol 2, the IMO Archives.

⁸⁹ See <www.imo.org/en/About/Pages/Default.aspx>.

⁹⁰ *Ibid.*

According to the Convention on the International Maritime Organization (hereafter the IMO Convention),⁹¹ shipping engaged in international trade and shipping services in general are at the very core of the IMO's work. For instance, one of the purposes of the IMO is to facilitate cooperation among Governments with regards to national regulation and practice relevant to shipping engaged in international trade.⁹² The improvement of maritime safety and the safeguarding of life at sea have been, since its origin, among the IMO's most important objectives. One of its main organs, the Maritime Safety Committee (MSC), is concerned with all aspects of safety of shipping, according to the IMO's own description,⁹³ including rescue at sea.⁹⁴

The focus on maritime traffic in the SAR Convention is a consistent response to the initial motivation of establishing a maritime SAR plan, allowing the shipping community to become aware of shore responsibilities over coordination of maritime search and rescue operations. It is therefore coherent to highlight in its preamble the needs of the maritime traffic, as merchant ships have been and continue to be very frequently the nearest source of rescue facility and play a crucial role in search and rescue operations worldwide. Additionally, the central attention to the needs of the maritime traffic here referred to is a response to the foreseeable needs of the shipping community when requiring assistance in the event of a maritime incident in the course of navigation. A good illustration of this would be the priority given to the North Atlantic region by the calling of the North Atlantic Seminar held in 1970, due to the density of maritime traffic in the area.⁹⁵

This sectoral approach shaped the Terms of Reference which then guided the drafting process setting analogies and parallelisms with aeronautical search and rescue, where the design of the responsibility-sharing and cooperation system was conceived as a response to cases of maritime accidents in regular navigation.

The Terms of Reference set by the IMO Secretariat for the consideration of the Maritime Safety Committee in the preparation of the International SAR Plan were conveyed to the

⁹¹ Geneva, 6 March 1948, 289 UNTS 3. The IMO Convention entered into force on 17 March 1958.

⁹² IMO Convention, Art 1. See also Art 2 on the functions of the IMO in order to achieve its purposes.

⁹³ The MSC also deals with piracy issues, as well as maritime security issues and armed robbery against ships. See IMO brochure, *IMO, what it is* <www.imo.org/en/About/Documents/What%20it%20is%20Oct%202013_Web.pdf>.

⁹⁴ IMO Convention, Article 28(a).

⁹⁵ See n 83.

Group of Experts as a guide in the preparation of the international SAR Plan.⁹⁶ They defined the purpose and the parameters of the IMO's work, namely, the preparation of an International Organisational Plan for search and rescue 'responsive to the needs of maritime traffic or (*sic*) persons in distress at sea',⁹⁷ based on cooperation between shore organisations around the world, and between rescue facilities participating in rescue operations at sea.⁹⁸ The Terms of Reference outlined, in a non-exhaustive list, a number of aims of the SAR Plan as a guide for the Group of Experts in their working sessions. According to this open list, the SAR Plan should define areas of national responsibility for search and rescue. It should provide standardised procedures as far as practicable. It should facilitate direct contact between maritime and aeronautical rescue units, as well as provide guidelines and a frame for the development and the organisation of SAR services.⁹⁹

Three aspects were provided for consideration in the Terms of Reference: a) the coincidence of geographic areas of responsibility for the coordination of SAR operations, wherever possible, with the geographical areas established by the International Civil Aviation Organization (ICAO),¹⁰⁰ b) a parallelism in the definitions of the operational emergency

⁹⁶ Annex III to the international North Atlantic Air and Surface Search and Rescue Seminar, 1970, IMCO Maritime Safety Committee, 23rd session, Agenda 11, 27 January 1971, MSC XXIII/11, Vol 2 (the IMO Archives).

⁹⁷ The drafts of the Convention on the International Maritime Search and Rescue Plan evidence the misprint in the Terms of Reference when consistently referring in the fifth preambular paragraph to a plan 'responsive to the needs of maritime traffic *for* the rescue of persons in distress at sea' (emphasis added). See Report of the Second Session of the Group of Experts on Search and Rescue, IMCO Group of Experts on Search and Rescue, 2nd session, SAR II/9, 31 December 1974, Annex II, draft of the Convention on the International Maritime Search and Rescue Plan, 1978 (the IMO Archives).

⁹⁸ Annex III to the international North Atlantic Air and Surface Search and Rescue Seminar, 1970, IMCO Maritime Safety Committee, 23rd session, Agenda 11, 27 January 1971, MSC XXIII/11, Vol. 2 (the IMO Archives) para 1.

⁹⁹ Annex III to the international North Atlantic Air and Surface Search and Rescue Seminar, 1970, IMCO Maritime Safety Committee, 23rd session, Agenda 11, 27 January 1971, MSC XXIII/11, Vol. 2 (the IMO Archives) para 2.

¹⁰⁰ Annex III to the international North Atlantic Air and Surface Search and Rescue Seminar, 1970, IMCO Maritime Safety Committee, 23rd session, Agenda 11, 27 January 1971, MSC XXIII/11, Vol. 2 (the IMO Archives) para 4(a).

phases, known as uncertainty, alert and distress,¹⁰¹ and c) coordination of the maritime or surface services and the aeronautical services, where different authorities exist.¹⁰²

Whereas the coordination between the maritime and aeronautical search and rescue services is crucial for the reinforcement of search and rescue services in all contexts, the responsibility-sharing system based on geographical areas for coordination of SAR operations puts extraordinary pressure on States when confronted with large numbers of unsafe migration flows by sea in their vicinity. This readily prompts the question of the adequacy of such a system in the context of mass migration flows by sea, not considered at that time. Consequently, as will be seen in subsection 2.2 below, the responsibility-sharing system shaped in the Terms of Reference inevitably becomes extremely reliant on cooperation between States as a balancing mechanism. The coincidence of maritime and aeronautical areas of responsibility for coordination of SAR operations has proved, for instance in the particular case of Malta, inadequate, given the vast Flight Information Region (FIR)¹⁰³ that Malta covers. This therefore results in an extremely heavy share of responsibility for the coordination of search and rescue operations at sea, in turn aggravated by the geographical location of Malta in the Mediterranean along the Central Mediterranean route which makes it a front-line State in a particularly complicated sea route in the present sea migration flows, especially for a country with limited human and economic resources given its limited dimension. This undoubtedly has a very negative impact on the adequacy of Malta's search and rescue services.¹⁰⁴ The sectoral approach to search and rescue is further

¹⁰¹ Annex III to the international North Atlantic Air and Surface Search and Rescue Seminar, 1970, IMCO Maritime Safety Committee, 23rd session, Agenda 11, 27 January 1971, MSC XXIII/11, Vol. 2 (the IMO Archives) para 4(d).

¹⁰² Annex III to the international North Atlantic Air and Surface Search and Rescue Seminar, 1970, IMCO Maritime Safety Committee, 23rd session, Agenda 11, 27 January 1971, MSC XXIII/11, Vol. 2 (the IMO Archives) para 4(h).

¹⁰³ Flight Information Region (FIR) is defined in Art 1 of Annex 2 to the Convention on International Civil Aviation as '[a]n airspace of defined dimensions within which flight information service and alerting services are provided'. FIRs can extend beyond national airspace.

¹⁰⁴ See Human Rights Council, 'Report by the Special Rapporteur on the human rights of migrants, François Crépeau, Mission to Malta (6-10 December 2014) 12 May 2015, UN Doc A/HRC/29/36/Add.3 regarding Malta's reported inability at times to respond effectively to distress calls and to the refusal to allow rescued migrants to disembark on Maltese territory <<https://undocs.org/pdf?symbol=en/A/HRC/29/36/Add.3>>. The particular circumstances of Malta have been extensively discussed among scholars. In particular, see P Mallia, *Migrant Smuggling at Sea: Combating a Current Threat to Maritime Security through the Creation of a*

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exemplified in the Terms of Reference, when outlining the need to give special guidance for particular types of rescue operations involving special technical complexities,¹⁰⁵ where no consideration was given at the time to rescue operations in the context of unsafe irregular crossings with the operational complexities these entail. These were perhaps not envisaged in the early nineteen-seventies despite them becoming a reality towards the mid-seventies with the Indochinese crisis, referred to below.

The drafting process also had a sectoral approach. The sessions of the working groups were attended by representatives of a number of countries and by observers from various non-governmental organisations, in consultative status with the IMO, that belonged to the shipping or broader maritime community and the oil industry.¹⁰⁶ The absence of observers with consultative status linked to human rights or refugee organisations during the working group sessions is to be here highlighted, as it reflects the primary concern in the maritime search and rescue within a specific field and for a particular pursuit, namely, to respond to the needs of maritime traffic.

Cooperative Framework (Martinus Nijhoff Publishers 2010) 78; S Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (n 7); J Coppens, 'The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin' (n 33) 89.

¹⁰⁵ These include the rescue of persons from ditched aircraft, drilling and production platforms and other special cases, the rescue of persons from space vehicles making emergency landings, or persons trapped in submerged vehicles or underwater structures. See Annex III to the international North Atlantic Air and Surface Search and Rescue Seminar, 1970, IMCO Maritime Safety Committee, 23rd session, Agenda 11, 27 January 1971, MSC XXIII/11, Vol 2, the IMO Archives, paras 4(l) (m) and (n).

¹⁰⁶ Although not all present at every session, the observers were: the International Chamber of Shipping (ICS), the International Shipping Federation, the International Association of Lighthouse Authorities (IALA), the International Association of Ports and Harbors (IAPH), the International Radio-Maritime Committee (CIRM), the International Association of Classification Societies (IACS), the International Cargo Handling Co-ordination Association (ICHCA), and connected industries such as, the International Confederation of Free Trade Unions (ICFTU), the Oil Companies International Marine Forum (OCIMF), the Oil Industry International Exploration and Production Forum (OCIMF), and the Oil Industry International Exploration and Production Forum (E&P Forum) (Report of the second session of the group of experts on search and rescue, SAR II/9, 31 December 1974 (the IMO Archives); Report of the third session of the group of experts on search and rescue, SAR III/9, 5 January 1976 (the IMO Archives); Report of the fourth session of the group of experts on search and rescue, SAR IV/6, 19 October 1976 (the IMO Archives) and Report of the fifth session of the group of experts on search and rescue, SAR V/6, 15 June 1977 (the IMO Archives).

An additional focus was only brought to the last stage of the drafting process, at the International Conference on Maritime Search and Rescue, 1979, with the participation of the UNHCR, and it is relevant to put this intervention in its historical context. The Indochina crisis in the mid-1970s caused very large numbers of predominantly Vietnamese people, as well as Cambodians and Laotians, to flee their States by sea.¹⁰⁷ They were known as the boat people. If 1978 was marked by a dramatic increase of refugees fleeing Vietnam, Laos and Cambodia on board ill-fitted and overcrowded boats, 1979 saw the highest numbers of boat people, and push-back practices by coastal States became increasingly recurrent. This had a deterrent effect on merchant ships, with masters reluctant to rescue boat people at sea due to the fear of not being allowed to disembark them, and consequently a devastating effect on the rescue of lives at sea.¹⁰⁸ In this particular context, the Office of the UNHCR proposed re-wording what was then paragraph 2.1.7 of the Annex to the SAR Convention, which initially read: '[i]n providing assistance to persons in distress at sea, Contracting States shall

¹⁰⁷ The fall of the South Vietnamese capital, Saigon, in April 1975 to the North Vietnamese forces, the prolonged armed conflicts in Vietnam and Laos, as well as the dictatorial regime of the Khmer Rouge in Cambodia, caused the fleeing of large numbers of people from the former French colonies of Indochina. The UNHCR reported more than three million people fled these countries in the following two decades. Many fled by sea <<http://www.unhcr.org/3ebf9bad0.pdf>>. See also A Lakshmana Chetty, 'Resolution of the Problem of Boat People: The case of A Global Initiative' (2001) 1 ISIL Yearbook of International Humanitarian and Refugee Law, <<http://www.worldlii.org/int/journals/ISILYBIHRL/2001/8.html>>. See UNHCR publication: 'State of the World Refugees, 2000', ch 4: 'Flight from Indochina' <<https://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=3ebf9bad0&query=flight%20from%20Indochina>>.

Three International Refugee Conferences were held in July 1979 in Geneva, Switzerland, to deal with this refugee crisis: the International Council of Voluntary Agency Consultation on the Indo-China Refugee problem, the United Nations Meeting on Refugees and Displaced Persons in South-East Asia, and the World Council of Churches Consultation on Indochinese Refugees. See B Stein, 'The Legislative and Judicial Developments: The Geneva Conferences and the Indochinese Refugee Crisis' (1979) vol 13 (N 4) International Migration Review, 716.

¹⁰⁸ This resulted on a joint appeal made by the Secretary-General of the IMO and the High Commissioner for Refugees to the IMO Member States, for the rescue of people fleeing the Indo-Chinese peninsula in small boats and found in distress at sea. See Report of the United Nations High Commissioner for Refugees, UNHCR Reports to the General Assembly, 11 October 1979. United Nations General Assembly Official Records: thirty-fourth Session, Supplement No 12 (A/34/12), para 269 <www.unhcr.org/3ae68c370.html>. A similar joint appeal had been issued on 3 October 1977, in that occasion to shipowners, to rescue boat people in distress at sea. See United Nations Juridical Yearbook 1977, Part Two, Legal Activities of the United Nations and related Intergovernmental Organizations, ch III, 59 and 60 <https://legal.un.org/unjuridicalyearbook/pdfs/english/by_volume/1977/chpIII.pdf>.

do so regardless of the nationality of such persons’, to state as follows: ‘[i]n providing assistance to persons in distress at sea, Contracting States shall do so regardless of the nationality or status of such persons or the nationality of the ship on which such persons find themselves’. With this proposal the UNHCR sought to ensure that ‘the Convention would also be applicable to matters of concern to this Office’.¹⁰⁹ The wording was finally re-considered and approved by the Drafting Committee to read as it is at present under paragraph 2.1.10 of the Annex to the SAR Convention, that is, ‘[p]arties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found’.¹¹⁰

However, to what extent can the SAR Convention be responsive to matters of concern to the UNHCR? And to what extent can it be responsive to matters of concern to the Office of the United Nations High Commissioner for Human Rights (OHCHR), bearing in mind the specific needs among sea migrants during these irregular crossings, as seen in the previous chapter? A further consideration is present in the Guidelines with regards to the disembarkation and delivery of refugees and asylum-seekers to a place of safety where the fundamental principle of non-refoulement, engrained in international refugee law and international human rights law,¹¹¹ has been introduced in the reading of the concept of place

¹⁰⁹ International Conference on Maritime Search and Rescue, 1979, Agenda item 6, SAR/CONF/6/2 (the IMO Archives).

¹¹⁰ International Conference on Maritime Search and Rescue, 1979, Drafting Committee, Agenda item 4, SAR/CONF/D/3/Corr.2 (the IMO Archives).

¹¹¹ The Guidelines (n 49) para 6.17. According to Art 33(1) of the 1951 Convention relating to the Status of the Refugees, Geneva, 28 July 1951, 189 UNTS 137, and its 1967 Protocol, New York, 31 January 1967, 606 UNTS 267: ‘No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. See further the UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligation under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007 <www.refworld.org/docid/45f17a1a4.html>. See G Goodwin-Gill and J McAdam, *The Refugee in International Law*, 3rd edn (Oxford University Press 2007) 201 to 284. See also Art 3(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, 1465 UNTS 85: ‘No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’. See also Arts 6 and 7 of the 1966 International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 UNTS 171. The scope of applicability of this principle was a central issue in the European Court of Human Rights decision in the *case Hirsi Jamaa and Others v Italy*, App No 27765 (ECtHR, 23 February 2012) (*The Hirsi case*) discussed below in n 180, where the principle

of safety. The Guidelines have drawn on international refugee law considerations when stating ‘the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution could be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea’.¹¹²

The applicability and integration of this principle in the realm of maritime search and rescue,¹¹³ further examined in chapter 6, needs to be followed, it is here argued, by considerations equally relevant to the protection not only of refugees and asylum-seekers, but of all undocumented migrants recovered at sea, in accordance with the vulnerability reasoning and international human rights law.

This reasoning equally applies to the interpretation of another key notion in the SAR Convention, namely, the concept of distress, which triggers the start of a rescue operation.¹¹⁴ Although uncontroversial in search and rescue operations of vessels involved in maritime traffic, it has given rise to inconsistent interpretations in the context of search and rescue of

was examined in the context of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950, ETS 5. Art 3 reads: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’ and Art 4 of Protocol 4 to the Convention: ‘Collective expulsion of aliens is prohibited’.

¹¹² The Guidelines (n 49) para 6.17. The principle of non-refoulement has been further echoed in the FAL Circular, Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, 22 January 2009, IMO Doc FAL.3/Circ.194, para 2.5 and fn 1 thereto, <http://www.imo.org/en/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/FAL_3-Circ.194.pdf>.

¹¹³ The obligation of non-refoulement has been thoroughly examined both in the realm of maritime search and rescue and in the context of external maritime border surveillance activities. See, for example, V Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (n 6) 200 to 220; R Barnes, ‘Refugee Law at Sea’ (2004) 53 (N 1) *International and Comparative Law Quarterly*, 47, 62 to 64; J Coppens and E Somers, ‘Towards New Rules on Disembarkation of Persons Rescued at Sea?’ (n 6); P Mallia and J P Gauci, ‘Irregular Migration and the International Obligation of Non-Refoulement: the Case of the MV Salamis from a Maltese Perspective’ (2014) 20 *Journal of International Maritime Law* 50, 52 and 53; S Trevisanut, ‘The principle of non-refoulement and the de-territorialisation of border control at sea’ (2014) *Leiden Journal of International Law*, 661.

¹¹⁴ The concept of distress phase is defined in the Annex to the SAR Convention, para 1.3.13, as ‘[a] situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance’. The meaning of ‘rescue’, is defined as: ‘[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety’ (para 1.3.2).

sea migrants as will be further examined in chapter 4. This concept was not considered in the 2004 amendments to the SAR Convention. Neither was it addressed in the Guidelines. Yet the lack of uniformity on the very aspect that triggers a search and rescue operation has been acknowledged¹¹⁵ and debated,¹¹⁶ and it is here argued, needs to be considered closely in the light of international human rights law rules. The intervention of the UNHCR in the final drafting of paragraph 2.1.10 of the Annex to the SAR Convention would seem of limited value if the notion of a person in distress was left to be defined within the four corners of the SAR Convention and related maritime instruments. The inhuman and degrading conditions endured in these crossings, the suffering resulting therefrom, and the risks to the physical and mental integrity involved in these journeys, where situations of vulnerability arise, if not compound, need to be considered when interpreting and assessing the concept of a person in distress at sea, and the notion of place of safety. These concerns should in turn reflect in the operational search and rescue procedures.

In the dichotomy initially highlighted, the remainder of this chapter draws attention to this narrow approach in the development of the SAR operational framework. The responsibility-sharing system, conceived as a response to cases of maritime accidents in regular navigation, is examined below to highlight its shortcomings in the context of irregular migration flows by sea.

2.2 A responsibility-sharing system based on defined geographical areas: functional difficulties in the context of irregular crossings

The development of the SAR system worldwide is based on a responsibility-sharing system among States parties, for coordination of search and rescue services, whose origins and design are outlined below. This geographical distribution of responsibility reveals functional limitations in the context of large migration flows concentrated along specific sea routes, as illustrated below.

¹¹⁵ See for instance, the Parliamentary Assembly of the Council of Europe highlighting this in the aftermath of the ‘left-to-die boat’ case, Parliamentary Assembly of the Council of Europe, ‘Lives Lost in the Mediterranean Sea: Who is responsible?’ Report of the Committee on Migration, Refugees and Displaced Persons, Doc 12895, 5 April 2012 <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

¹¹⁶ Calls for a review of the definition of distress and its interpretation were made at the 2015 IMO High-Level Meeting to Address Unsafe Migration by Sea. See the Maritime Safety Committee 95th session, Agenda item 21, Outcome of the inter-agency High-Level Meeting to address unsafe mixed migration by sea, MSC 95/21/4/Rev.1 of 17 April 2015, p 3, para 9.1.

Following the adoption of the SAR Convention, the IMO Maritime Safety Committee divided the world's oceans into thirteen search and rescue Areas.¹¹⁷ Within each search and rescue Area, the States concerned were to delineate Search and Rescue Regions (SRRs), the purpose of which was to clearly identify primary responsibilities among States for coordinating responses to distress situations in every area of the world. The delineation of SRRs would further enable rapid distribution of distress alerts to the appropriate rescue coordination centre,¹¹⁸ based on the location of the person, vessel or craft in need of assistance.

SRRs for maritime SAR coordination were made to coincide as far as possible with those agreed for aeronautical search and rescue services and published by ICAO, on the basis that the ICAO areas of responsibility appeared to be largely suitable for maritime purposes. Consequently, the Maritime Safety Committee invited IMO member States to indicate whether they could accept the FIRs¹¹⁹ established by ICAO in its regional Air Navigation Plans becoming geographical areas of responsibility for SAR coordination for maritime incidents. Member States were also invited to indicate their acceptance as to whether any other areas not considered for aeronautical purposes should be covered for maritime purposes.¹²⁰

Additionally, the SAR Convention requires that the exact dimensions of SRRs be established by agreement between the parties concerned, in order to ensure coordinated SRRs. In the absence of such an agreement, a secondary dictate is addressed to neighbouring countries, requiring them to use their best endeavours in reaching an agreement to enable necessary arrangements that would guarantee an adequate coordination of search and rescue services in the area, ensuring contiguity and avoiding overlaps.¹²¹ This has, nevertheless, proved a conflicting point where SRRs have been claimed on territorial and economic motivations.¹²²

¹¹⁷ IMO, 'SAR Convention' <www.imo.org/en/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/SARConvention.aspx>.

¹¹⁸ IAMSAR Manual Vol 1, Organization and Management, 2013 edn, para 2.3.15.

¹¹⁹ See n 103.

¹²⁰ Report of the Maritime Safety Committee on its 28th session (17-21 Sept 1973) on Search and Rescue, item XII, MSC XXVIII/12 (the IMO Archives). See also Annex to the SAR Convention, para 2.1.8.

¹²¹ Annex to the SAR Convention, paras 2.1.3 to 2.1.7.

¹²² As an example, Malta claimed a SRR that mirrors its FIR, that covers a vast extension and constitutes an important source of income to the country, for instance in air traffic control charges. See further on the

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This has overshadowed the very aim of defining geographical regions of primary responsibility among States parties to ensure effective search and rescue services.¹²³

Among these responsibilities, States parties are to establish the basic elements for search and rescue services. These basic elements are for instance: the development of a legal framework, in compliance with the Parties' undertaking to 'adopt all legislative or other measures necessary to give full effect to the SAR Convention and Annex thereto';¹²⁴ the assignment of a responsible authority for search and rescue services; the organisation of all available resources; the establishment of adequate communication facilities; the management of the operational system through staff and other supporting personnel, including their training; as well as the coordination and operational processes to improve search and rescue services.¹²⁵

States parties are to ensure that the main components of a SAR system, whether national or regional, are in place to enable its efficient management and operation.¹²⁶ The basic

particular case of Malta, J Coppens, 'The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin' (n 33) 97 to 99. See also S Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea' (2011) 23 *International Journal of Refugee Law*, 538, 545. See further S Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (n 7).

¹²³ For a detailed look at the search and rescue regions in the Mediterranean, see the charts obtained from the US Coast Guard website, 7 and 8 <<https://www.dco.uscg.mil/Portals/9/CG-5R/nsarc/IMO%20Maritime%20SAR%20Regions.pdf>>. Note the overlap areas between Spain and Morocco, Spain and Algeria and most notably, between Italy and Malta, Greece and Turkey, and Turkey and Cyprus. For an analysis on overlapping functional zones, see S Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (n 7) 524 and 538.

¹²⁴ SAR Convention, Art I.

¹²⁵ Annex to the SAR Convention, para 2.1.2 and IAMSAR Manual, Vol I Organization and Management, 2013 edn, para 1.7.4.

¹²⁶ It is important to note that the composition of the services, facilities, equipment and staffing required by each SRR may vary, depending on its physical characteristics. See IAMSAR Manual, vol I, para 2.1.2.

components of a SAR system include: SAR communications,¹²⁷ SAR facilities,¹²⁸ medical support,¹²⁹ an on-scene coordinator,¹³⁰ support facilities,¹³¹ the rescue coordination centre,¹³² and when appropriate, a rescue sub-centre.¹³³

Ultimately, States parties, having accepted responsibility to provide SAR services within a defined geographic area,¹³⁴ are to ensure that assistance is provided to any person in distress at sea, ‘regardless of the nationality or status of such a person or the circumstances in which that person is found’.¹³⁵ The search and rescue services include the disembarkation of survivors, an aspect that was developed in the 2004 amendments to the SAR Convention.¹³⁶ For the purpose of the present analysis on responsibility-sharing, it suffices to point out here that the primary responsibility to guarantee the coordination and cooperation between the

¹²⁷ These are essential to enable rescue coordination centres (RCCs) to receive alerting information, which would allow the dispatch of specialised rescue units and other resources without delay. They are also crucial to allow exchange of information with the persons in distress, as well as with all the parties actively involved in the operation, such as the SAR on-scene coordinator. See IAMSAR Manual, vol I, paras 2.1.2, 2.2.1 and 2.2.2.

¹²⁸ A search and rescue facility is defined as: ‘Any mobile resource, including designated search and rescue units, used to conduct search and rescue operations’, Annex to the SAR Convention, para 1.3.7. See also IAMSAR Manual, vol I, paras 2.1.2 and 2.5.

¹²⁹ For advice and assistance, as well as evacuation services. See IAMSAR Manual, vol I, Organization and Management, 2013 edn, para 2.5.6.

¹³⁰ An on-scene coordinator is defined as: ‘A person designated to co-ordinate search and rescue operations within a specified area’, Annex to the SAR Convention, para 1.3.14. See also IAMSAR Manual, vol I, para 2.6.1.

¹³¹ By support facilities, IAMSAR Manual refers to the resources needed for operation responses. These would include: training facilities, communication facilities, navigation systems, medical facilities, voluntary services, refueling services and critical incident stress counsellors. IAMSAR Manual, vol I, para 2.7.1.

¹³² IAMSAR Manual, vol I, paras 2.1.2 and 2.3. A Rescue Coordination Centre is defined as a unit ‘responsible for promoting efficient organization of search and rescue services and for co-ordinating the conduct of search and rescue operations within a search and rescue region’, Annex to the SAR Convention, para 1.3.5.

¹³³ IAMSAR Manual, vol I, para 2.4.

¹³⁴ When referring to ‘geographic area’ or ‘area’, the term is used in its generic meaning and it should not be mistaken for the thirteen search and rescue Areas defined by the IMO.

¹³⁵ Annex to the SAR Convention, para 2.1.10 in conjunction with para 2.1.9.

¹³⁶ The 2004 amendments to the SAR Convention were adopted by means of Resolution MSC.155(78), on May 2004, MSC 78/26/Add.1, Annex 5. These amendments entered into force on 1 July 2006. Malta, however, formally objected to these amendments and do not bind it. Regarding Resolution MSC.155(78), see further n 169 below.

States parties falls again on the State responsible for the SRR in which the assistance is rendered, ‘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’.¹³⁷ To this end, a mandatory provision is addressed to the Rescue Coordination Centres (RCCs) or sub-centres concerned, to start the process of identifying ‘the most appropriate place(s) for disembarking persons found in distress at sea’ at the termination of search and rescue operations, and consequently to inform the ship or ships involved.¹³⁸

A SAR plan, where the responsibility-sharing system for coordination over search and rescue operations is based on a geographical delineation and the assignment of SRRs to States parties may be a sound plan when responding to accidents occurring in the context of regular maritime traffic. However, this system becomes inadequate when facing unsafe sea migration flows concentrated in specific geographical routes as it creates a much heavier burden on the States with SRRs adjacent to sea migration routes and conflictive areas and consequent reluctance to respond effectively.¹³⁹ In the present refugee crisis, the sheer magnitude of the number of unsafe sea crossings and arrivals to the shores of ‘front-line’ States creates an enormous strain on these countries, both in terms of capacity at sea to retrieve persons in distress and in terms of reception capacity on land.¹⁴⁰ This, undoubtedly, exacerbates States’ unwillingness to become countries of disembarkation and the effects on the persons in need of assistance and protection are devastating. Survivors’ accounts reveal that sea migrants aboard precarious and even drifting boats are often simply given food and water as well as some indications of how to reach the shores of another country, or they are

¹³⁷ Annex to the SAR Convention, para 3.1.9.

¹³⁸ Annex to the SAR Convention, para 4.8.5.

¹³⁹ This was highlighted by the Parliamentary Assembly of the Council of Europe, ‘Lives Lost in the Mediterranean Sea: Who is responsible?’ (n 115). A recommendation was therein issued ‘to tackle the issue of responsibility-sharing, particularly in the context of rescue services, disembarkation, administration of asylum requests and resettlement with a view to developing a binding European Union protocol for the Mediterranean region. The heavy burden placed on front-line States leads to a problem of saturation and a reluctance to take responsibility’ para 13.6.

¹⁴⁰ Italy, Greece Malta are clear examples. In the case of Malta this is further aggravated by the vast extension of its SRR. See SRR charts (n 123). See also, J Coppens, ‘The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin’ (n 33) 98.

towed outside the SRR they are located in, in order to avoid disembarkation duties.¹⁴¹ These help-on practices usually rely on a narrow interpretation of the concept of distress and too often they have led to the deaths of the persons on board.¹⁴² More alarmingly, States' unwillingness to allow disembarkation on their shores sometimes translates into exerting violence to sea migrants themselves on board their craft, as deterrent practices.¹⁴³

The Parliamentary Assembly of the Council of Europe (PACE) highlighted that '[t]he heavy burden placed on front-line States leads to a problem of saturation and a reluctance to take responsibility' and it issued a recommendation 'to tackle the issue of responsibility-sharing, particularly in the context of rescue services, disembarkation, administration of asylum requests and resettlement with a view to developing a binding European Union Protocol for the Mediterranean region'.¹⁴⁴ This recommendation was issued in the aftermath of the tragedy known as the 'left-to-die boat' in 2011, where sixty-three migrants lost their lives while their boat drifted for fourteen days within Libyan waters, in a NATO maritime surveillance area under the operation called 'Unified Protector'. In that case, despite a

¹⁴¹ See Human Rights Watch Report, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers', 21 September 2009, 41 *et seq.* <www.hrw.org/sites/default/files/reports/italy0909web_0.pdf>. Accounts of violence and push-back practices are also contained in this report. Further accounts of incidents, such as, the left-to-die-boat case, mentioned below, are given in T Basaran 'The Saved and the Drowned: Governing Indifference in the Name of Security' (2015) 46 Security Dialogue 3, as well as in K Gombeer, 'Human Rights Adrift. Enabling the Disembarkation of Migrants to a Place of Safety in the Mediterranean', in F de Londras and S Mullally (eds) (2015) vol 10, The Irish Yearbook of International Law (Bloomsbury Hart Publishing 2017).

¹⁴² See Human Rights Watch Report, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (n 141) where reference is made to a specific case reported in The Independent, 'Doomed to Drown: The desperate last calls of the migrants no one wanted to rescue', 25 May 2007 <<https://www.independent.co.uk/news/world/europe/doomed-to-drown-the-desperate-last-calls-of-the-migrants-no-one-wanted-to-rescue-5333201.html>>. See also S Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea' (n 122) 553 and 554.

¹⁴³ Recent images of Greek coastguards firing warning shots and pushing an overcrowded inflatable boat with sea migrants trying to reach Greek shores are illustrative of these practices. See itv News, 'Greek coast guard fire warning shots towards migrant boat', 2 March 2020 <<https://www.itv.com/news/2020-03-02/greek-coast-guard-fire-warning-shots-towards-migrant-boat/>>.

¹⁴⁴ see the Parliamentary Assembly of the Council of Europe, 'Lives Lost in the Mediterranean Sea: Who is responsible?' Report of the Committee on Migration, Refugees and Displaced Persons, Doc 12895, 5 April 2012 (n 115) para 13.6.

distress call logged by the Italian Maritime RCC, which pinpointed the boat's position, and despite being closely seen by at least one military helicopter from which some food was thrown, and approached by several fishing vessels as well as one military ship, no rescue operation took place and nearly all the persons on board the craft perished at sea.¹⁴⁵

An incident in October 2013 also tragically illustrates the devastating effect on the lives of sea migrants. This particular incident involved a fishing boat with an estimated number of over four hundred passengers, including over a hundred children, mostly Syrian refugees. They departed from the port of Zuwarah (Libya) the night of the 10 October. According to the survivors' accounts, a Libyan vessel flying the Berber flag approached the vessel three hours after their departure asking them to return. They shot rounds of bullets resulting in several persons wounded and damages to the hull of the fishing boat, causing the water to progressively enter. The Libyan boat ultimately returned and the sea migrants on board the fishing boat continued heading to the Italian island of Lampedusa, with only one water pump functioning. The levels of water ingress became dangerous and one of the passengers on board the vessel, Dr M Jamno, contacted the Maritime Rescue Coordination Centre Rome (MRCC Rome) seeking assistance. The first call confirmed by the MRCC Rome was at 12:26 hours. Several distress calls followed to which MRCC Rome replied asking those on board to call the Maltese forces and gave them the contact number. The fishing boat was located closer to Lampedusa, approximately 70 nautical miles (nm) away, than to Malta, 124 nm off the Maltese coast, yet it was within the Maltese SRR. One of the closest facilities to the fishing boat was the Italian navy ship *ITS Libra*, around 27 nm away. From 13:00 hours calls were made to Malta and at 15:00 hours a rescue operation was confirmed to be on its way. The situation at that time was however already critical as the second water pump stopped working. Around 17:00 hours the vessel sank rapidly with passengers trapped in some small cabins on the deck. At 17:14 hours the Italian naval ship *ITS Libra* was directed to the location as well as other facilities. Arrival of the first rescue facility occurred at 17:51

¹⁴⁵ For a detailed account of the 'left-to-die boat' case, see the Parliamentary Assembly of the Council of Europe, 'Lives Lost in the Mediterranean Sea: Who is responsible?' Report of the Committee on Migration, Refugees and Displaced Persons, Doc 12895, 5 April 2012 (n 115), as well as the Report of the Committee on Migration, Refugees and Displaced Persons, Doc 13532 of 9 June 2014 <<http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20940&lang=en>>. See further Forensic Architecture, research agency, based at Goldsmiths, University of London, 'The left-to-die boat, the deadly drift of a migrants' boat in the Central Mediterranean', 11 April 2012 <<https://forensic-architecture.org/investigation/the-left-to-die-boat>>.

hours. It is believed that at least two hundred people perished in this incident where rescue operations were delayed.¹⁴⁶

The unbalanced responsibility-sharing is exacerbated by the existence of vast SRRs and any legal vacuum in terms of responsibility for the coordination and cooperation in cases of undeclared and non-functional SRRs. This was for instance the case of the Libyan SRR until 2018. An illustrative incident for this proposition is the one relating the *M/V Salamis*.¹⁴⁷ This Greek owned ship flying the Liberian flag assisted 102 migrants in distress at sea, located 45 nm off the Libyan coast, the night of 4 August 2013. Despite Italian Authority requests to disembark them in the Libyan port of Al Khums, the captain of the tanker decided to continue to the port of Valletta, Malta, the scheduled port of call. However, the Maltese Authorities refused to allow the disembarkation of the migrants and the tanker was stopped by the Maltese Armed Forces, in spite of the urgent attention needed by some of the migrants on board. Eventually, on 7 August, the Italian authorities allowed the disembarkation of the rescued migrants in the port of Syracuse.

Libya officially designated its SRR to the IMO in 2018, as State party to the 1979 SAR Convention,¹⁴⁸ in accordance with the Annex to the SAR Convention that establishes that

¹⁴⁶ See Watch the Med account of verified facts ‘Over 200 die after shooting by Libyan vessel and delay in rescue’, 11 October 2013, <<https://watchthemed.net/reports/view/32>>. See also L’Espresso, ‘Lampedusa shipwreck: those 268 deads could have been avoided’, by F Gatti, 7 November 2013. English version is available at <<https://espresso.repubblica.it/inchieste/2013/11/07/news/lampedusa-shipwreck-those-268-deads-could-have-been-avoided-1.140418>>. See further Open Migration, ‘The children’s shipwreck: a “disaster of bureaucracy”’, by L Bagnoli, 10 January 2018 <<https://openmigration.org/en/analyses/the-childrens-shipwreck-a-disaster-of-bureaucracy/>>.

¹⁴⁷ See Watch the Med Report, ‘Tanker “Salamis” carrying migrants stopped from entering Malta’, 5 August 2013 <<http://watchthemed.net/reports/view/18>>. See also the IMO Sub-Committee on Flag State Implementation, at its 17th session, Agenda item 15, ‘Measures to protect the safety of persons rescued at sea, Compulsory guidelines for the treatment of persons rescued at sea, submitted by Spain and Italy’, FSI 17/15/1, 13 February 2009, with regards to Spain and Italy undertaking search and rescue operations in SRRs where responsible countries had neglected their duties, such as Libya, 1 and 2. See further P Mallia, ‘The MV Salamis and the State of Disembarkation at the International Law: The Undefinable Goal’ 18 (2014) (N 11) American Society of International Law Insights <<https://www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal>>.

¹⁴⁸ Para 2.1.4 of the Annex to the SAR Convention provides that ‘[e]ach search and rescue region shall be established by agreement among the Parties concerned. The Secretary-General shall be informed of such agreements’. See also para 2.1.11 of the Annex to the SAR Convention in accordance to which parties are to

the geographical area covered by the SRRs ‘shall be established by agreement among Parties concerned’.¹⁴⁹ This official declaration has however spurred grave concerns regarding the treatment of those rescued by Libyan search and rescue facilities and the return and disembarkation of survivors on Libyan shores, as will be examined in chapter 6.

The responsibility-sharing system is reliant on mechanisms of cooperation established in the SAR Convention, as complementary instruments to strengthen the effectiveness of SAR services. These become even more relevant in the context of the search and rescue of sea migrants where capacities are stretched to breaking point and States’ reluctance to allow disembarkation on land determine the responses at sea. However, some functional shortcomings in the context of irregular crossings readily emerge.

2.3 Operational cooperation between States in the SAR Convention

The system of responsibility-sharing designed in the SAR system relies heavily on the mechanisms of cooperation established in the SAR Convention. The need for cooperation between States parties is repeatedly present in the operational provisions for search and

forward to the Secretary-General information on their search and rescue service, including the national authority in charge of the maritime SAR services, the location of the Rescue coordination centres, the geographical area covered in the SRR and the types of available search and rescue units. The Libyan Port and Maritime Transport authority notified the IMO in 2017 of the Libyan SRR, for which see the answer by Mr Avramopoulos on behalf of the European Commission to the Parliamentary Question, with reference P-003665/2018, 4 September 2018 <http://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html?redirect>. Previously, in July 2017, the President of Libyan Ports and Maritime Transport Authority had informed the IMO that the maritime SRR would coincide with the FIR, and hence the boundaries of the maritime SRR would coincide with the maritime borders of its FIR. See IMO, Sub-Committee on Navigation, Communications and Search and Rescue, 5th session Agenda item 16, ‘Further Development of the Provision of Global Maritime SAR Services: Libyan Maritime Rescue Coordination Centre Project’ submitted by Italy, NCSR 5/INF.17, 15 December 2017, para 10 <<https://docs.imo.org/Search.aspx?keywords=NCSR%205%2FINF.17>> available once registered as a public user. See also Bundestag Research Services, ‘Maritime rescue in the Mediterranean: Rights and obligations of vessels under the SAR Convention and manifestations of the principle of non-refoulement on the high seas’, February 2018 <<https://www.statewatch.org/news/2018/feb/bundestag-Research-Services-Maritime-rescue-in-Med.pdf>>.

¹⁴⁹ Para 2.1.4 of the Annex to the SAR Convention. Although these are not systematically reached and overlapping of SRRs occurs. See S Trevisanut, ‘Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?’ (n 7).

rescue services, particularly between neighbouring States.¹⁵⁰ It is considered in the operational organisation and development of search and rescue services, when they cannot be achieved individually, in order ‘to ensure that assistance is rendered to any person in distress at sea’.¹⁵¹ To this end, parties are on the one hand encouraged, by means of soft law provisions, to enter into agreements with other States in order to strengthen search and rescue cooperation and coordination. On the other hand, parties are required, under a mandatory provision, to allow their responsible authorities to make operational plans and arrangements for search and rescue cooperation and coordination with relevant authorities of other States.¹⁵²

Cooperation among States parties to the Convention is provided in the interest of safety of life at sea,¹⁵³ for the purpose of coordinating search and rescue operations among neighbouring States,¹⁵⁴ and providing mutual assistance among rescue coordination centres in their respective SRRs.¹⁵⁵ The difficulty remains, in the context of large flows of irregular crossings, that cooperation between neighbouring States primarily amounts to cooperation between front-line States. Therefore it does not alleviate pressure among the States involved, causing too often more friction than cooperation, with tragic outcomes, as illustrated earlier. Another example is the one involving the *Budafel* in May 2007. In that incident, 27 persons were clinging for three days to a fish pen belonging to a Maltese tuna trawler in the Libyan SRR in harsh water conditions whilst Maltese, Italian and Libyan authorities could not agree who should take responsibility for their recovery and disembarkation on land. Eventually, the Italian navy vessel *Orione* reached the *Budafel* to take all 27 persons on board and disembark them in the port of Lampedusa (Italy).¹⁵⁶

¹⁵⁰ Coordination of search and rescue operations is recommended among States parties, with express reference to coordination among neighbouring States having adjacent SRRs. Annex to the SAR Convention para 3.1.1 and UNCLOS, Art 98.2.

¹⁵¹ Annex to the SAR Convention, para 2.1.1.

¹⁵² Annex to the SAR Convention, para 3.1.8.

¹⁵³ Annex to the SAR Convention, ch 3.

¹⁵⁴ Annex to the SAR Convention, para 3.1.1.

¹⁵⁵ Annex to the SAR Convention, para 3.1.7.

¹⁵⁶ A detailed account of this incident is contained in the Consiglio Italiano per i Rifugiati (CIR) Report Regarding Recent Search and Rescue Operations in the Mediterranean, 1 June 2007, 2 and 3. See further in this report Case (4) involving Italy and Malta, 5.

The next sub-section focuses on the particular mechanism of cooperation for the entry into territorial waters of another State and the cooperation for the disembarkation of survivors from the assisting ship at a place of safety, with special consideration in the context of unsafe irregular crossings.

2.3.1 Entry into territorial waters of another State for search and rescue purposes

Cooperation is contemplated in order to authorise the entry into territorial waters of rescue units of other States parties for rescue operations.¹⁵⁷ Given the fundamental sovereignty implications of this means of cooperation, and the fact that this entry is not covered under the right of innocent passage,¹⁵⁸ the authorisation of entry into the territorial waters of another State of rescue units for search and rescue purposes will not be automatic. A soft law provision recommending States parties to authorise the immediate entry into their territorial waters seeks to strike a balance between sovereignty concerns and saving lives at sea. The entry of the rescue units into the territorial waters of another State is contemplated solely for the purpose of searching for the position of maritime casualties and rescuing survivors of such casualties, and needs to be carried out in accordance with applicable international and national laws or regulations.¹⁵⁹ In such a case the coordination of the search and rescue operation shall be carried out by the RCC of the State party authorising the entry, or any another authority designated by that State party.

This specific mechanism of cooperation is foreseen in the Annex to the Convention only in the event of a maritime casualty and the rescue of survivors of a casualty. The element of distress, although not expressly mentioned, would be implicitly present, as the search and rescue operation has been triggered. The situation of distress would therefore be subsumed in the maritime casualty. It is therefore the term ‘maritime casualty’ that requires closer attention at this point, to better understand the focal interest and concern of the SAR system.

¹⁵⁷ Annex to the SAR Convention, paras 3.1.2 to 3.1.5.

¹⁵⁸ UNCLOS, Arts 17 to 19. Art 18.2 envisages the stopping and anchoring, as an exception to the obligation of continuous and expeditious passage while traversing the territorial sea, ‘for the purpose of rendering assistance to persons, ships or aircraft in danger or distress’.

¹⁵⁹ Annex to the SAR Convention, para 3.1.2 and IAMSAR Manual, vol I, para 3.1.8. Authorisation procedures are contained in paras 3.1.3 to 3.1.6. The SAR Convention does not envisage cases where the territorial sea of a State Party is a non-functional SRR.

A maritime casualty, also referred to as marine casualty, has been defined as an event or sequence of events, directly connected with the operations of a ship, resulting in any of the following: the death of, or serious injury to, a person; the loss of a person from a ship; the loss, presumed loss or abandonment of a ship; material damage to a ship; the stranding or disabling of a ship, or a ship being involved in a collision; material damage to marine infrastructure external to a ship, potentially endangering the safety of the ship, another ship or individual; or severe damage to the environment, or the potential for severe damage to the environment, brought about by the damage of a ship or ships. A maritime casualty excludes any deliberate act or omission, ‘with the intention to cause harm to the safety of a ship, an individual or the environment’.¹⁶⁰

Marine casualties have been classified by the Global Integrated Shipping Information System (GISIS)¹⁶¹ in three degrees of severity: ‘very serious casualties’, involving total loss of the ship, loss of life, or severe pollution; ‘serious casualties’, involving *inter alia* fire, explosion, collision, grounding, contact, heavy weather damage, ice damage, hull cracking and suspected hull defect, and ‘less serious casualties’ which include marine incidents.¹⁶² The latter is defined as ‘an event, or sequence of events, other than a marine casualty, which has occurred directly in connection with the operations of a ship that endangered, or, if not corrected, would endanger the safety of the ship, another ship its occupants or any other person or the environment’.¹⁶³

The term ‘marine casualty’ and its equivalent ‘maritime casualty’ do not envision the inherently unsafe sea crossings on board leaky boats, rubber dinghies, and other ill-fitted and unseaworthy vessels used for such crossings. However, according to the above definition, it remains an open phrase in the sense that it does not specify the events or sets of events causing the casualty. The only restriction to the qualification of an event as a marine casualty

¹⁶⁰ This definition is extracted from the IMO, Maritime Safety Committee, Code of the International Standards and Recommended Practices for a Safety Investigation into a Maritime Casualty or Maritime Incident, Annex to Circular MSC-MEPC.3/Circ.2, 13 June 2008, para 2.9 <http://emsa.europa.eu/retro/Docs/marine_casualties/msc-mepc_3-circ_2.pdf>.

¹⁶¹ Developed by the IMO Secretariat for reporting data purposes.

¹⁶² See IMO, ‘GISIS: Marine Casualties and incidents’ <<https://gisis.imo.org/Public/MCI/Default.aspx>> available once registered as a public user.

¹⁶³ IMO, Maritime Safety Committee, Code of the International Standards and Recommended Practices for a Safety Investigation into a Maritime Casualty or Maritime Incident, Annex to Circular MSC-MEPC.3/Circ.2, 13 June 2008, para 2.10 <http://emsa.europa.eu/retro/Docs/marine_casualties/msc-mepc_3-circ_2.pdf>.

is the existence of a deliberate act or omission with the intention to cause harm to the safety of the ship, the persons on board, or the environment. Questions would therefore arise as to whether smugglers or migrants' acts on board these craft, such as wrecking the boat, in order to provoke situations of imminent danger and distress, or even providing ill-fitted boats, would amount to a deliberate act with the intention to cause harm, and no longer be considered a maritime casualty. A further question stems therefrom, as to whether in these circumstances the mechanism of cooperation based on the entry into territorial waters of another State party for search and rescue purposes would still be available for the search and rescue of these sea migrants, as it would no longer qualify as a maritime casualty. An argument against this hypothetical restriction would be based on the lack of intention to harm the safety of the craft or the people on board, but rather the desperate attempt to trigger a rescue operation, despite the risks involved. Furthermore, the criminal acts or omissions of smugglers should not exclude the events affecting the safety of sea migrants from being treated as a marine casualty.

Accordingly, two distinct aspects can be highlighted, namely the legal effect of a situation of distress at sea and the mechanism of cooperation in place where a maritime casualty occurs in the territorial sea of another State. On the one hand, a situation of distress always triggers a SAR operation, regardless of the circumstances in which the persons are found. On the other hand, however, the entry into the territorial waters of another State may be hindered if it is subjected to the existence of a maritime casualty, as it has been defined in the context of ships used in the maritime traffic. A narrow approach to the concept of maritime casualty would thus hinder this mechanism of cooperation and thus the effectiveness of search and rescue services in the interest of safety of life at sea. It is therefore here argued that the notion of maritime casualty is to be interpreted broadly in order to effectively respond to the needs of sea migrants in distress in the territorial sea of any coastal State. Having said that, this mechanism of cooperation has proved to be controversial in the context of irregular crossings. This can be exemplified with the hostile approach of Libyan officials to non-governmental rescue vessels even outside its territorial waters and the threatening conduct deployed, including firing shots at them. This was for instance the case of the rescue vessel *Bourbon Argos* operated by the international humanitarian medical non-governmental organisation Médecins sans Frontières (MSF). The aid vessel was attacked while conducting SAR operations 24 nm North of the Libyan coast, by a group of armed men on board an unidentified speedboat who fired and boarded the rescue boat in August

2016.¹⁶⁴ Subsequently MSF announced it was suspending rescue operations due to what have been referred to as “credible threats’ by the Libyan coast guard.¹⁶⁵ Another incident involved the aid vessel *Golfo Azurro*, operated by the Spanish NGO Proactiva Open Arms, while on the high seas, in August 2017.¹⁶⁶

2.3.2 Disembarkation of survivors from the assisting ship and delivery at a place of safety

A requirement for cooperation and coordination among the parties was introduced by the 2004 amendments to the SAR Convention, under a mandatory provision, with the purpose of ensuring swift disembarkations from the assisting ships, in order to release the masters ‘from their obligations with minimum further deviation from the ship’s intended voyage’.¹⁶⁷ This is to be coupled with a recommendation addressed to the States parties to further authorise their RCCs to coordinate and cooperate with other RCCs, in order to identify the ‘most appropriate place(s) for disembarking persons rescued at sea’.¹⁶⁸

The disembarkation at a place of safety of persons rescued at sea was the key feature and a main goal of the 2004 amendments to the SAR Convention.¹⁶⁹ These amendments were part of the IMO Secretary-General’s broader initiative to review the legal framework on delivery of persons rescued at sea to a place of safety, expressly including asylum-seekers, refugees

¹⁶⁴ See MSF, ‘MSF condemns attack on rescue vessel’ 25 August 2016 <<https://www.msf.org/central-mediterranean-msf-condemns-attack-rescue-vessel>>.

¹⁶⁵ See D Howden, ‘The Central Mediterranean: European Priorities, Libyan Realities’ Refugees Deeply Quarterly, October 2017 <<http://issues.newsdeeply.com/central-mediterranean-european-priorities-Libyan-realities>>.

¹⁶⁶ Ibid.

¹⁶⁷ Annex to the SAR Convention, para 3.1.9. This provision mirrors the amended SOLAS Convention, Ch V, Reg 33.1.1.

¹⁶⁸ Annex to the SAR Convention, para 3.1.6.4.

¹⁶⁹ Resolution MSC.155(78) identifies the need of clarifying the existing procedures regarding disembarkation of persons rescued at sea, and aims to a) guarantee a place of safety is provided, regardless of the nationality, or any other circumstances of the persons rescued at sea, and b) ensure that the place of safety is provided ‘in every case (...) within a reasonable time’. It further intends to assign the responsibility to provide a place of safety, or to ensure that a place of safety is provided, to the State party responsible for the SRR where the survivors were retrieved. See seventh and eighth preambular paragraphs of this Resolution <[www.imo.org/blast/blastDataHelper.asp?data_id=15528&filename=155\(78\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15528&filename=155(78).pdf)>.

and stowaways,¹⁷⁰ with a coordinated approach among UN specialised agencies by means of an inter-agency group.¹⁷¹ This initiative spurred from the *Tampa* case,¹⁷² which highlighted critical deficiencies in fundamental aspects such as the treatment given to rescued sea migrants and their disembarkation at a place of safety. Consequently, the IMO Assembly requested the Maritime Safety Committee, the Legal Committee and the Facilitation Committee to review the SAR Convention, the Salvage Convention, the FAL Convention, and any other IMO instruments under their scope in order to identify ‘any existing gaps, inconsistencies, ambiguities, vagueness or other inadequacies’, the objectives being: a) that assistance is given to survivors of distress incidents, irrespective of their nationality, status or circumstances in which they are found, b) that assisting ships can deliver the survivors to a place of safety, and c) that survivors are treated, while on board, in accordance with IMO instruments as well as relevant international agreements and

¹⁷⁰ See the opening address of Mr WA O’Neil, Secretary-General of the IMO, to the twenty-second regular session of the IMO Assembly, London, 19 November 2001 <www.imo.org/blast/mainframe.asp?topic_id=82&doc_id=1703>.

¹⁷¹ The inter-agency group included the United Nations High Commission for Refugees (UNHCR), the International Organization for Migration (IOM), the United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS), the United Nations Office on Drugs and Crime (UNODC) and the United Nations Office of the High Commissioner for Human Rights (OHCHR). See the opening address of Mr WA O’Neil (n 170) 2.

¹⁷² *Ruddock v Vadarlis (The Tampa)* (2001) 183 ALR 1, 10, 18 September 2001. The captain of the Norwegian container, the *m/v Tampa*, was requested by the Australian Search and Rescue authorities to attend a distress call from an Indonesian wooden boat sinking in the Indian Ocean, about 75 nm off Christmas Island, within Indonesia’s SRR. As a result, 433 Afghan asylum-seekers were rescued. The captain intended to disembark the rescuees in Indonesia but in view of the pressure received from the asylum-seekers, some of them threatening suicide, he decided to proceed to Christmas Island. Despite his request for permission to enter Australian territorial waters being denied, the captain disobeyed the authorities’ rejection due the increasing concern over the health condition of some of the rescuees. Approximately 4 nm off Christmas Island, Australian troops boarded the *m/v Tampa* taking control of the ship. In the following days separate proceedings were filed against the Commonwealth, three of its Ministers and a departmental Officer. In the meantime the Australian Government had reached an agreement with New Zealand and Nauru to take the asylum-seekers for the initial processing to determine the entitlement to protection as refugees, with the support of the United Nations High Commissioner for Refugees. See FJ Kenney Jr and V Tasikas: ‘The Tampa Incident: IMO perspectives and Responses on the Treatment of Persons Rescued at Sea’ (n 33) 146; R Barnes, ‘Refugee Law at Sea’, (2004) 53 *International and Comparative Law Quarterly*, 47; J Coppens and E Somers, ‘Towards New Rules on Disembarkation of Persons Rescued at Sea?’ (n 6) 382 to 384.

humanitarian traditions.¹⁷³ This resulted in the adoption of the 2004 amendments to the SAR Convention¹⁷⁴ and to the SOLAS Convention,¹⁷⁵ as well as the Guidelines.¹⁷⁶

The wording of the 2004 amendments to the SAR Convention reaffirms the prioritisation of the needs of the shipping community by focusing its wording on the needs of the shipmaster providing assistance,¹⁷⁷ and by extension the shipping industry, seeking by means of cooperation and coordination among States parties the swift release of the master from further obligations, further deviations and costly delays. Health and safety considerations regarding crewmembers and survivors on board the assisting ship need to be added to the commercial ones, at any rate where the assisting ship lacks necessary equipment, enough provisions or adequate facilities to accommodate survivors.¹⁷⁸

Mechanisms of cooperation and coordination for the purpose of disembarkation consistently rely on the geographical responsibility-sharing system whereby the State party responsible for the SRR where assistance takes place ensures there is cooperation and coordination among the States involved so delivery to a place of safety occurs. The initiative lies on that State to proceed with the identification of the most suitable place(s) for disembarking the survivors.¹⁷⁹ Therefore the mechanism of responsibility-sharing for disembarkation

¹⁷³ IMO Assembly resolution A.920(22) of 29 November 2001 on the Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea <[www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20A.920\(22\).pdf#search=A%2E920%2822%29](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20A.920(22).pdf#search=A%2E920%2822%29)>. See in particular the tenth preambular paragraph and operative paragraph 1, where reference is also made to undocumented migrants among survivors in need of assistance.

¹⁷⁴ Maritime Safety Committee Resolution MSC.155(78), of 20 May 2004, adopting the amendments to the SAR Convention <[www.imo.org/blast/blastDataHelper.asp?data_id=15528&filename=155\(78\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15528&filename=155(78).pdf)>. See in particular the sixth preambular paragraph.

¹⁷⁵ Maritime Safety Committee Resolution MSC.153(78), of 20 May 2004, adopting the amendments to the SOLAS Convention <[www.imo.org/blast/blastDataHelper.asp?data_id=15526&filename=153\(78\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15526&filename=153(78).pdf)>. See in particular the sixth preambular paragraph. The amendments entered into force on 1 July, 2006. Malta having objected to these amendments too, it is not bound by them.

¹⁷⁶ See n 49.

¹⁷⁷ Annex to the SAR Convention, para 3.1.9.

¹⁷⁸ This was heavily stressed in the High-Level Meeting to address Unsafe Mixed Migration by Sea (IMO, 4 and 5 March 2015). See the International Chamber of Shipping presentation <www.imo.org/About/Events/Documents/migrantspresentations/e%20ICS%20Presentation%20on%20Migrants%20-%204%20March%202015.pdf>.

¹⁷⁹ Annex to the SAR Convention, paras 3.1.1, 4.8.5 and 3.1.6.4.

introduced with the 2004 amendments consistently adds further emphasis on a system based on the geographical delineation of search and rescue duties among coastal States. The wording is however extremely careful not to introduce an obligation on the State responsible for the SRR where the operation takes place to allow disembarkation on its territory. The limited scope of these duties, consistent with the State's sovereign prerogative to control entry to its territory,¹⁸⁰ leaves the final decision on disembarkation of survivors on land to political discretion. The system consequently relies on ad-hoc cooperation arrangements, based on political will, giving rise to uncertainty and unpredictability. Coastal States' reluctance, if not refusal, to allow disembarkation of rescued sea migrants is however a reality on a global scale.¹⁸¹ This undoubtedly hinders the prospect of developing additional mechanisms of responsibility-sharing among States parties to the SAR Convention, creates difficulties in reaching swift cooperation arrangements and allows the perpetuation of excessive pressure on front-line States, irrespective of their capacities. It also limits the results stemming from the 2004 amendments to the SAR Convention, aimed at alleviating the burden on assisting ships, in particular, merchant ships largely involved in SAR operations of sea migrants, to avoid them incurring further deviations and costly delays due to coastal States not allowing the landing of rescued sea migrants on their shores.¹⁸² It further

¹⁸⁰ On the aspect of sovereignty in the context of disembarkation, see *The Hirsi* case (n 111) para 113. This case concerns fundamentally the principle of non-refoulement, following the interception in May 2009 of three vessels, with about 200 migrants on board, among them, Somali and Eritrean nationals, who had departed from Libya aiming to reach the Italian coast. Three ships from the Italian Revenue Police (*Guarda di Finanza*) and the Coastguard intercepted the three vessels, 35 nautical miles south of Lampedusa, within the Maltese SRR. The occupants were forced to leave the Italian ships and were handed over to the Libyan Authorities.

¹⁸¹ As examples, reference is made to the events in the Bay of Bengal, for which see K Newland, 'Irregular Maritime Migration in the Bay of Bengal: The Challenges of Protection, Management and Cooperation' Issue in Brief, IOM, Migration Policy Institute, July 2015, Issue No 13, p 2. See also UNHCR South-East Asia, Mixed Migration Movements, April-June 2015, Highlights <<https://www.unhcr.org/53f1c5fc9.pdf>> and UNHCR briefing Notes, 'UNHCR urges States to help avert Bay of Bengal boat crisis in coming weeks', 28 August 2015 <www.unhcr.org/55e063359.html>.

¹⁸² Resolution MSC.155(78) and Annex to the SAR Convention, para 3.1.9. See also SOLAS Convention, Ch V, Reg 33.1.1. See, as an example, the *Pinar E* incident in 2009. This case illustrates the tensions regarding disembarkation in the Mediterranean Basin. In that case a dispute arose between Malta and Italy as to where to disembark the persons rescued within the Maltese SRR. Italy's position was that disembarkation should take place in Malta and it refused the assisting ship permission to enter Italian waters. Malta argued that international law required the migrants to be disembarked at the nearest safe port, which, in that case, was Lampedusa, Italy. Four days later, Italy agreed to accept the disembarkation. See Human Rights Watch Report: 'Pushed Back,

hinders humanitarian led SAR operations undertaken by NGO rescue vessels.¹⁸³ This is long known to have a deterrent effect on search and rescue operations at sea involving sea migrants and it represents a threat to the integrity of the SAR system.¹⁸⁴

Conclusion

A universal duty to render assistance at sea and proceed to the rescue of persons in distress, based on principles of humanity, has been translated into a sectoral approach to the search and rescue plan functionally focused on responding to the needs of maritime traffic. No consideration was initially given to unsafe migration flows, at any rate of the present magnitude. Having said that, the SAR Convention applies to matters of concern to the UNHCR and the integration of the principle of non-refoulement in the concept of a place of safety in the Guidelines confirms this. Nonetheless, further considerations relevant to refugee law and international human rights law principles need urgent attention in search and rescue at sea, not only with regards to the notion of a place of safety but also with regards to interpretation of the concept of distress in the context of search and rescue of sea migrants. The interpretation of this concept has a profound significance in the SAR system as it triggers the commencement of a search and rescue operation. This aims at steering away from present

Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (n 141) 43 *et seq.* Malta having objected to the 2004 amendments to the SAR Convention and to the SOLAS Convention as well as the FAL Circular, the mechanisms of cooperation and coordination for the disembarkation of sea migrants in a vast and critical SRR are not applicable to it.

¹⁸³ 2019 for instance was marked with Italy standoffs at sea, denying port access to NGO rescue ships with survivors on board. The ban, initiated with the government formed by the League party and the Five-Star Movements, has persisted despite the change of government, and resettlement requirements have been demanded for the authorisation of disembarkation. See in this respect InfoMigrants, 'The yearlong standoff between Salvini and migrant-rescue NGOs', 9 July 2019 <<https://www.infomigrants.net/en/post/18053/the-yearlong-standoff-between-salvini-and-migrant-rescue-ngos>>. See also Human Rights Watch, 'Italy: End Curbs on Rescue at Sea. Rome Should Not Prosecute NGO Captain', 26 June 2019 <<https://www.hrw.org/news/2019/06/26/italy-end-curbs-rescue-sea>>.

¹⁸⁴ This longstanding concern is reflected in a number of pleads made amid the Vietnamese boat people crisis. See for instance the IMO Council Decision adopted in 1985, calling on 'Governments, Organizations and shipowners concerned to intensify their efforts in ensuring that necessary assistance is provided to any person in distress at sea', cited in Satya N Nandan C.B.E. and Shabtai Rosenne (vol eds) Neal R Grandy (assist ed), the Virginia Commentary, para 98.11(b). See also the Guidelines, para 2.3: 'The purpose of these amendments and the current guidelines is to help ensure that persons in distress are assisted while minimizing the inconvenience to assisting ships and ensuring the integrity of the SAR services'.

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sectoral approaches to the SAR system and setting course towards a more integrating one where the particular needs of sea migrants are furthered. The dynamic aspects of the SAR Convention allow for the discussion proposed here as it relies on a duty of due diligence whose standards are to vary according to the needs and the circumstances in which the States' efforts need to be deployed. This immediately calls for the consideration of the particular needs among sea migrants in the context of irregular crossings in accordance with the vulnerability reasoning. The SAR Convention further articulates the adaptability of UNCLOS, within the realm of this framework convention, to meet the challenges of the search and rescue of migrants at sea.

In the context of irregular crossings, the responsibility-sharing system presents important functional limitations, leaving front-line coastal States to bear an extraordinary share of responsibility for coordination of SAR operations, which undoubtedly undermines the capacity and the efficiency of the search and rescue services. This is furthermore exacerbated by the existence of vast SRRs along migration routes that cannot be effectively covered for search and rescue purposes in the context of unsafe crossings. The mechanisms of cooperation in the SAR Convention do not offer a sound counterbalance to the effect of the responsibility-sharing system among front-line States and they equally present their own functional limitations in the context of search and rescue of sea migrants.

These functional limitations need to be coupled with underlying tensions and conflicting approaches to search and rescue of sea migrants where States' interfering considerations such as migratory restrictive policies and deterrent practices risk perpetuating functional shortcomings and erratic responses at sea. The reluctance to authorise disembarkation on land and differing interpretations of what constitutes a situation of distress risk weakening the SAR system. Amid this political tide, the need to draw on the vulnerability reasoning and the need to advance considerations of humanity become pressing in the reading of the SAR Convention and related instruments. The controversial aspect of disembarkation and delivery of sea migrants to a place of safety is known to have a negative impact on SAR responses at sea with devastating consequences among sea migrants. This inevitably risks perpetuating, if not exacerbating, the situation of vulnerability of sea migrants during sea journeys. This further prompts the question of whether the SAR Convention and hence the SAR system are themselves vulnerable, metaphorically speaking, to tensions between humanitarian search and rescue and migration control and security policies.

Against this background, the following chapter will endeavour to scrutinise the sectoral approach to maritime search and rescue in the light of the fragmentation of international law and underlying tensions in the context of irregular migration.

Chapter 3 A sectoral approach to the search and rescue system: a matter of fragmentation of international law?

Introduction

The previous chapter highlighted the sectoral approach of the SAR Convention to the maritime search and rescue system, framing a maritime instrument designed to be ‘responsible to the needs of maritime traffic’.¹ This chapter presents this sectoral approach to the SAR Convention as an underdevelopment or ‘underlap’ of its operative provisions designed for scenarios of regular navigation, where the field of interest appears narrowed down to the shipping community. It inquires whether this ‘underlap’ can be considered a component in the process of fragmentation of international law where no apparent normative conflict exists. Fragmentation of international law is relevant to underline that the search and rescue of sea migrants is left to a body, the IMO, and an instrument, the SAR Convention, not envisaged nor designed to handle the complexity of the issues relating to unsafe irregular crossings by sea. The purpose is twofold, to highlight how compelling it is to introduce in the reading of the SAR Convention further considerations of humanity and to identify appropriate guiding interpretative mechanisms that allow an integrating interpretation of the SAR Convention and related instruments, in particular of key terms such as persons in distress² and place of safety,³ in order to overcome the effects of this sectoral approach to maritime search and rescue, and set course to a search and rescue system that is consistently responsive to specific protection needs among sea migrants.

To this end, the first section of this chapter introduces the concept of ‘underlap’, a notion not considered in the mainstream study of legal fragmentation, to analyse the underdevelopment of the SAR Convention in its sectoral approach to search and rescue vis-à-vis the broad scope of the obligation in UNCLOS, Article 98. The second section considers this notion of ‘underlap’ as a component in the process of fragmentation of international law.

¹ SAR Convention, third preambular paragraph reads: ‘DESIRING to develop and promote these activities by establishing an international maritime search and rescue plan responsible to the needs of maritime traffic for the rescue of persons in distress at sea’. See ch 2, s 2.1.

² UNCLOS, Art 98.1(b) and Annex to the SAR Convention, paras 1.3.13, 2.1.1 and 4.4.3.

³ Annex to the SAR Convention, para 1.3.2 and Annex to IMO Resolution MSC.167(78) 20 May 2004 adopting Guidelines on the Treatment of Persons Rescued at Sea (the Guidelines) paras 6.12 to 6.18.

In its third section, this chapter scrutinises the sectoral development of the SAR Convention beyond a legal reductionist approach, touching upon political and social theory, specifically to unveil underlying tensions and conflicts in the context of irregular migration, among policy strategies and society-wide rationalities. The Central Mediterranean is used as an illustrative example of a search and rescue operations stage, where policy and social rationalities overlap and at times conflict. It is not however the purpose of this section to engage in political or social theory, but to underscore that these tensions may risk perpetuating the underlap in this sectoral approach to maritime search and rescue and exacerbating the situation of vulnerability among sea migrants. Against this backdrop, section 4 turns to the interpretative guiding legal mechanism that could allow steering the reading of the SAR Convention towards a more integrating construction of this operative tool, mindful of the limitations the underlying tensions may have on a global society consensus for an integrating reading of this maritime legal instrument.

1. An ‘underlap’ in the maritime search and rescue operative provisions

The term ‘underlap’ is used in this thesis to refer to, and highlight, the sectoral approach given to the operational maritime search and rescue plan contained in the SAR Convention, against the backdrop of Article 98 of UNCLOS. The latter is known to be and operate as a ‘framework convention’ with many of its provisions being of general nature and dependent on specific and technical operative regulations, consistent with its principles, for its implementation.⁴ UNCLOS is also conceived as a ‘constitution for the oceans’⁵ and this highlights, in the words of Barnes, its ‘holistic approach to problem-solving, a contribution to a just and ordered society; one which serves the needs of mankind’,⁶ which can be linked

⁴ IMO publication ‘Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization’, Study by the Secretariat of the International Maritime Organization (IMO) IMO Doc LEG/MISC.8, 30 January 2014, 8, <<http://www.imo.org/en/OurWork/Legal/Documents/LEG%20MISC%208.pdf>>. See also R Barnes ‘The Continuing Vitality of UNCLOS’, in J Barrett and R Barnes (eds) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016), 472.

⁵ T Koh’s statement at the final session of the Conference at Montego Bay (6 to 11 December 1982) in M Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Center for Oceans Law and Policy, University of Virginia (the Virginia Commentary) vol I (Martinus Nijhoff Publishers 1985).

⁶ R Barnes ‘The Continuing Vitality of UNCLOS’, in J Barrett and R Barnes (eds) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) 477.

to Koh's reference to a celebration of 'human solidarity' symbolised by UNCLOS.⁷ Its ability to address new challenges and maintain its relevance to realities not envisaged when it was negotiated further characterises UNCLOS as a 'living treaty', as considered in the previous chapter.⁸

Bearing in mind the principles that inform UNCLOS and its ability to address new challenges, the extensive duties contained in Article 98 of UNCLOS contrast sharply with the operational system contained in the SAR Convention, designed to respond to situations of distress following accidents at sea,⁹ and to be 'responsible to the needs of maritime traffic'.¹⁰ Therefore, the term 'underlap' is chosen and is used in this thesis to depict a search and rescue operational system that falls short of matching the magnitude of Article 98 of UNCLOS and the principles therein reflected. The 'underlap' lies, therefore, in the narrow development of the SAR Convention as an operational tool.

The wide duties in Article 98 of UNCLOS respond to a universally conceived moral and customary obligation that bears no distinctions among the persons in need of assistance at sea. This broad duty is reflected, if not reinforced, in paragraph 2.1.10 of the Annex to the SAR Convention.¹¹ However, the specificities of search and rescue operations involving irregular sea migration flows, and the needs of those embarked in irregular crossings at sea were not addressed in the initial SAR plan.¹²

⁷ See T Koh's statement (n 5) *in fine*.

⁸ M Wood, 'Reflections on the United Nations Convention on the Law of the Sea: A Living Instrument' in J Barrett and R Barnes (eds) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016), lxxvii. See R Barnes, 'The Continuing Vitality of UNCLOS' (n 6) 459, 473 and 482. See ch 2, s 1.3.

⁹ IMO publication, 'SAR Convention, International Convention on Maritime Search and Rescue, 1979. As amended by resolutions MSC.70(69) and MSC.155(78)' 2006 edn, Foreword to the Sar Convention: 'As its title implies, this Convention is designed to improve existing arrangements and provide a framework for carrying out search and rescue operations following accidents at sea' iii, first paragraph.

¹⁰ SAR Convention, third preambular paragraph.

¹¹ Annex to the SAR Convention, para 2.1.10 reads: 'Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found'.

¹² See Mr K Sekimizu's address in the IMO press briefing 'IMO Secretary-General welcomes UN Security Council resolution on migrant smuggling' Briefing 45, 14 October 2015, <<http://www.imo.org/en/MediaCentre/PressBriefings/Pages/45-UNSC-resolution-.aspx>>.

The seeming dichotomy between the wide description of the duty and the narrow approach in the design of a universal system to guarantee an effective response to fulfil the duty, can be observed when reading the preamble of the SAR Convention,¹³ and paragraph 2.1.10 of the Annex to the SAR Convention. The latter acts as a reminder of the all-encompassing scope of the duty, benefiting all persons navigating at sea. However, this contrasts with the segmented approach given to the system designed therein. This functionally limited plan is hence what characterises the ‘underlap’.

This ‘underlap’ is revealed in the inconsistent interpretations of the concept of distress in the context of sea migration.¹⁴ Search and rescue operations were not envisaged to assist people attempting to cross the seas on board overcrowded, unseaworthy ships, rickety boats, unstable inflatable boats, or any other ill-fitted craft, with no safety equipment and no crew to steer the boats. In many occasions basic indications would be given to one of the persons on board on how to steer the craft and some orientation as to the course to follow.¹⁵ Usually the persons on board these craft have insufficient water and food. They risk suffering from hypothermia, or from skin burns due to contact with water and fuel.¹⁶ They further risk

¹³ SAR Convention, third preambular paragraph (n 1).

¹⁴ This inconsistent interpretation of the notion of distress, as seen in ch 2, fns 115 and 115 therein, was considered at the inter-agency High-Level Meeting hosted by the IMO in March 2015 to address unsafe mixed migration by sea. See the Maritime Safety Committee 95th session, Agenda item 21, Outcome of the inter-agency High-Level Meeting to address unsafe mixed migration by sea, MSC 95/21/4/Rev.1 of 17 April 2015, p 3, para 9.1. It had also been highlighted by the Parliamentary Assembly of the Council of Europe, ‘Lives Lost in the Mediterranean Sea: Who is responsible?’ report of the Committee on Migration, Refugees and Displaced Persons, Doc 12895 of 5 April 2012 <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf> issued as a result of the ‘left-to-die’ boat case in 2011, which is considered in ch 2 s 2.2. See further J Coppens ‘The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin’ (2013) 44 *Journal of Maritime Law and Commerce*, 89.

¹⁵ Survivors’ testimonies evidence this. See as example Human Rights Watch Report: ‘Pushed Back, Pushed Around: Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers’, 21 September 2009, at p 41 *et seq.* <www.hrw.org/sites/default/files/reports/italy0909web_0.pdf>.

¹⁶ See for instance the account of the international humanitarian medical non-governmental organisation Médecins sans Frontières (MSF), ‘Mediterranean: 11,482 people helped in first 100 days of search and rescue’ 20 August 2015 <<https://www.msf.org.uk/article/mediterranean-11-482-people-helped-in-first-100-days-of-search-and-rescue>>.

suffocation from the engine fumes.¹⁷ They are often given substandard life jackets, if any. When bigger boats are used, a number of persons on board are compelled to make the crossings under deck, crammed in the holds, locked.¹⁸ Crossings on board so-called ‘ghost ships’, i.e., unmanned and unseaworthy ships, where sea migrants are abandoned to their fate, are another example of the life-threatening nature of these journeys during which the number of deaths remains unabated. The common denominator in all these crossings is the lack of safety, the danger, the inhuman and degrading conditions in which the persons are floundering on the seas and their situation of vulnerability. The fear, the anxiety and the human suffering are ever present during these perilous journeys, as will be further considered in chapters 4 and 5. However, the assessment of situations of distress, which would not present a difficulty in regular navigation where safety standards are met and situations of danger occur normally following accidents at sea, remains inconsistent and controversial among different actors involved in search and rescue of sea migrants in the context of irregular crossings.

The ‘underlap’ is further reflected in the controversial aspect of disembarkation of sea migrants at a place of safety. Guidance on the understanding of the notion of safety has seen an important development through the 2004 amendments to the SAR Convention and the Guidelines, with the acknowledgment of due consideration in the SAR system to the fundamental principle of non-refoulement with regards to refugees and asylum-seekers. However this remains insufficient to consider the notion of place of safety outside this particular realm, as will be examined in detail in chapter 6.

Finally, this ‘underlap’ can also be argued to be exposed in the initial design of the response to accidents at sea based on the geographical responsibility-sharing and heavily reliant on mechanisms of cooperation mainly among neighbouring coastal States with search and rescue capacities stretched to a breaking point to respond to unsafe migration flows by sea.

This ‘underlap’, it is argued here, lies in, and uncovers, the prioritisation of an efficient and safe maritime traffic for the shipping community in the design of the system, as seen in

¹⁷ See for instance MSF Dr S Bryant’s blog ‘Yet Again’ 31 August 2015, podcasted by MSF <<https://blogs.msf.org/en/staff/blogs/moving-stories/yet-again>>.

¹⁸ See for instance the footage available at <<http://www.elperiodico.com/es/internacional/20161004/como-los-barcos-negreros-proactiva-muestra-la-bodega-de-una-embarcacion-de-inmigrantes-5453531>>. See also MSF, Dr S Bryant’s blogs, ‘Yet Again’ 31 August 2015 (n 17) and ‘Some medical matters’ 7 August 2015 <<https://blogs.msf.org/bloggers/simon/some-medical-matters>>.

chapter 2.¹⁹ The lack of a comprehensive vision in the SAR system, of incidents and needs encountered at sea outside regular navigation, in particular the needs involved in the context of irregular and unsafe migration by sea, is reflected in the failure of the search and rescue system to adapt and respond effectively to the scale and the nature of these unsafe journeys. This further reveals, as will be argued later on in this chapter, underlying policy tensions between the duty to assist at sea and the pressures from external border surveillance strategies in increasingly coercive migration management policies.

This ‘underlap’, it is suggested here, can be analysed in the light of the fragmentation of international law. This expression of fragmentation is presented as the result of treating the SAR system from its inception, purely as a highly specialised and technical maritime issue, despite its humanitarian purpose,²⁰ where the IMO, a body devoted to shipping, was seen as the ‘only organisation responsible to deal with the problem’.²¹ The consequence of this sectoral approach to maritime search and rescue is that search and rescue of sea migrants is left to a body and a technical instrument, not designed to tackle issues outside the arena of shipping navigation, in particular not designed to respond to needs arising from unsafe migration flows by sea.

2. The suggested underlap: a matter of fragmentation of international law?

Fragmentation of international law has been studied and approached primarily from the observation of overlapping and conflicting norms. This has certainly constituted the core of the debate in the proliferation of international norms and judicial institutions.²² Analysing

¹⁹ Ch 2, s 2.1.

²⁰ A Fischer-Lescano, T Löhr and T Tohipidur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ (2009) 21 (N 2) *International Journal of Refugee Law* 256, 289, where SOLAS Convention and the SAR Convention are referred to as the humanitarian law of the sea. Contrast with R Barnes’ view on maritime conventions and in particular the SAR Convention regarding the disembarkation at a place of safety, R Barnes, ‘Refugee Law at Sea’ (2004) 53 (N 1) *International & Comparative Law Quarterly*, 47, 71 and 72.

²¹ Annex II to the international North Atlantic Air and Surface Search and Rescue Seminar, 1970, IMCO Maritime Safety Committee, 23rd session, Agenda 11, 27 January 1971, MSC XXIII/11, Vol 2, the IMO Archives, Workshop ‘A’, SAR Operations, in ‘Conclusion 0-3’, at p 2. See ch 2, ss 1.1.2 and 3.

²² See the International Law Commission (ILC), ‘Fragmentation of International Law: Difficulties arising from the diversification and Expansion of International Law’, Report of the Study Group of the International Law

the suggested ‘underlap’ as a further consequence of the fragmentation of international law, linked to the process of the specialisation of international law, allows understanding better the segmented approach to the SAR Convention. This approach also paves the way to explore relevant guidance from the International Law Commission (ILC) Report on ‘Fragmentation of international law: difficulties arising from the diversification and expansion of international law’²³ (hereafter referred to as the ILC report), to extract guiding mechanisms and tools that may enable a more integrating reading of the SAR Convention. In particular, this approach invites to assess the viability of the interpretative guiding mechanism contained in Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT),²⁴ formulating the principle of systemic integration in the reading of the SAR Convention and particular terms therein, such as persons in distress and place of safety. This approach in turn enables assessing the viability of a more integrating reading of the SAR system to develop beyond these specific terms, in order to become more responsive to the needs arising in unsafe irregular crossings by sea.

To this end, the meaning of the notion of fragmentation is examined as well as the concerns addressed by the ILC in the light of Hafner’s background study on ‘Risks ensuing from fragmentation of international law’ (Hafner’s study).²⁵ This initial step assists in

Commission finalised by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006 (ILC Report A/CN.4/L.682) <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf>. See further, among others: I Brownlie, ‘Problems concerning the Unity of International Law’ in *Le Droit International à l’heure de sa codification: Etudes en l’Honneur de Roberto Ago* (A Giuffrè, ed, 1987) 153, 160; P M Dupuy, ‘The Danger of Fragmentation or Unification of the International Court of Justice’ (1999) 31 *N. Y. U. Journal of International Law and Politics*, 791; G Hafner, ‘Pros and Cons Ensuuing from Fragmentation of International Law’ (2004) 25 (N 4) *Michigan Journal of International Law*, 849 (Hafner).

²³ ILC Report A/CN.4/L.682. See also the Report of the Study Group on Fragmentation of International Law, ILC fifty-fourth session, UN Doc A/CN.4/L.628, 1 August 2002 (ILC Report A/CN.4/L.628) and the Report of the Study Group of the ILC on Fragmentation of International Law, ILC fifty-eighth session, ‘Fragmentation of International Law: Difficulties arising from the diversification and Expansion of International Law’, UN Doc A/CN.4/L.702, 18 July 2006 (ILC Report A/CN.4/L.702).

²⁴ The Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331. It entered into force 27 January 1980. Art 31(3)(c) provides: ‘[t]here shall be taken into account, together with the context: (...) (c) [a]ny relevant rules of international law applicable in the relations between the parties’.

²⁵ This feasibility study was the initial step for the ILC to consider this topic in its long-term programme of work and it is hence at the origin of the ILC Report A/CN.4/L.682. See also G Hafner, ‘Risks ensuing from fragmentation of international law’, Annex 5 to the Report of the ILC on the work of its fifty-second session, 1 May - 9 June and 10 July - 18 August 2000, Official Records of the General Assembly, fifty-fifth session,

understanding the scope and the purpose of such a study, which shaped its parameters and the treatment sought to overcome the difficulties arising therefrom. Emphasis is given to the difference between the concept of fragmentation and the consequences arising therefrom in order to distinguish between the process itself and the conflict of overlapping norms readily associated with it. This in turn allows to expand the contours of the existing debate and examine the suggested underlap as an effect of fragmentation of international law, different to the conflicting overlapping norms.

2.1 Meaning and scope of the term fragmentation: what defines fragmentation?

Fragmentation of international law can be characterised as a process of sectorisation, or segmentation, of the international legal system, that takes place by way of expansion, diversification and specialisation of international law.²⁶ The notion of fragmentation is linked to the phenomenon of proliferation of rules, special regimes²⁷ and institutions.²⁸ The

Supplement No. 10, Extract from the Yearbook of the ILC, 2000, vol. II(2), UN Doc A/55/10 <http://legal.un.org/ilc/documentation/english/reports/a_55_10.pdf>.

²⁶ A Pagliari, 'Reflexiones sobre la Fragmentación del Derecho Internacional. Aplicación y Efectos' (2009) 5 *Ars Boni et Aequi*, Revista Jurídica de la Universidad Bernardo O'Higgins, 11 (Pagliari). See further Hafner's study (n 25) and the ILC Report A/CN.4/L.682 (n 22).

²⁷ The term 'special regime' has received many definitions in Public International Law. For the purpose of the analysis proposed in this thesis, reference is made to the broad definition given in the ILC Report A/CN.4/L.702 (n 23). See the Conclusions therein, para 3(11): 'A group of rules and principles concerned with a particular subject matter may form a special regime...' and particularly the third type of special regime therein para 3(12): "... sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a "special regime". Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and 'trade law', etc., give expression to some such regimes'. These illustrate legal areas of functional specialisation, developing their own biases, and reflect adequately the processes of specialisation and sectorisation. See moreover M Young 'Regime Interaction in Creating, Implementing and Enforcing International Law', ch 3 in M Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012). The author refers to 'one "hybrid" definition of regime as "sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases', 86. See also M Young, 'Introduction: The Productive Friction between Regimes' 5 to 11. See further and N Matz-Lück, 'Norm Interpretation across International Regimes: Competences and Legitimacy', chapter 7, 204 and 205.

²⁸ ILC Report A/CN.4/L.628 (n 23) para 7. On the proliferation of judicial institutions, see the address to the Plenary session of the General Assembly of the United Nations, on 26 October 1999 by S M Schwebel, President of the International Court of Justice <<https://undocs.org/pdf?symbol=en/A/54/PV.39>>. See also the address by H E Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations

concept of fragmentation was in fact understood, from the initial exploratory work by the Study Group on Fragmentation of International Law, as ‘a consequence of the expansion and diversification of international law’.²⁹ The specialisation of international regulations and regimes appears as a key contributing factor to the diversification and expansion of international law,³⁰ and ultimately to the process of fragmentation.³¹ This specialisation of international regimes into functional systems developing their own interests and priorities is what has been called ‘functional differentiation’,³² with their own principles and biases, and, borrowing Fischer-Lescano and Teubner’s term, their own ‘rationalities’.³³ This specialisation of international law is hence an expression of and reveals the increasing sectionalism of a globalised society. This development of highly specialised substantive law, where each regime guards its own expertise, pursuits and ethos, inevitably unveils a tendency to restrict the interests and concerns of a particular group or a specific area in norms of international law.

This sectoral approach can be readily identified in the IMO instruments analysed in this research. In particular, the SAR Convention exposes a compartmentalised approach to search

General Assembly, 26 October 2000 <<https://www.icj-cij.org/files/press-releases/9/2999.pdf>> as well as his speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000, ‘The proliferation of international judicial bodies: The outlook for the international legal order’ <<https://www.icj-cij.org/files/press-releases/1/3001.pdf>> and his speech of 30 October 2001 <<https://www.icj-cij.org/files/press-releases/3/2993.pdf>>. See further P M Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (n 22).

²⁹ ILC Report A/CN.4/L.628, para 4. Dupuy highlights three features that characterise the phenomenon of ‘expansion’ of international law, namely, the enlargement of the material scope of operation of international law, covering the different fields of human activity; a multiplication of actors, including non-State actors with increasing protagonism of non-governmental organisations (NGOs); and bodies monitoring the fulfilment of these obligations or, as he refers to them, “follow-up machineries”, particularly in the arena of human rights, international trade law or international environmental law. See P M Dupuy, ‘The Danger of Fragmentation or Unification of the International Court of Justice’ (n 22) 795. See further P M Dupuy, ‘A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law’ (2007) 1 (N 1) *European Journal of Legal Studies*, 25, 26.

³⁰ See ILC Report A/CN.4/L.702 (n 23) paras 3 and 4. See also Pagliari (n 26), 13.

³¹ Hafner (n 22) 850, 853, 856, and 859. See also Pagliari.

³² ILC Report A/CN.4/L.682 (n 22) para 7.

³³ A Fischer-Lescano and G Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 (N 4) *Michigan Journal of International Law*, 999 (Fischer-Lescano and Teubner) 1000, 1004, 1007 and 1009. ILC report A/CN.4/L.682 (n 22) paras 8 and 17.

and rescue at sea, based on a search and rescue system designed to respond to the needs of maritime traffic. It favours efficiency in the specialised arena of the shipping industry in detriment of an integrating perspective of other interests at stake, among which stand out the specific needs involved in irregular sea crossings with sea migrants floundering on the sea in unsafe and inhuman conditions. These specific needs require human rights law and refugee law considerations to permeate in the reading of this legal instrument to tailor the response at sea accordingly. These specific needs further require adapting the standards of care and preventative state of readiness differently to the reactive response needed for ships in the course of regular navigation needing assistance as a result of a maritime incident, in order to give an effective response to the different needs arising at sea and maintain an efficient search and rescue system in place.

Consistency of international law and its comprehensive nature constituted key concerns in the background study 'Risks ensuing from fragmentation of international law',³⁴ that led to the ILC study and report on this subject.³⁵ The core risk highlighted by Hafner is the 'risk of generating frictions and contradictions between the various legal regulations' as well as the risk for States to have to comply with mutually exclusive obligations which inevitably leads to the breach of an international obligation when complying with a colliding one, and results in State responsibility.³⁶ Accordingly, this feasibility study focuses on the tensions, contradictions and incompatibilities arising from conflicts of overlapping norms.³⁷ This in

³⁴ G Hafner, 'Risks ensuing from fragmentation of international law' UN Doc A/55/10 (n 25).

³⁵ ILC Report A/CN.4/L.682 (n 22).

³⁶ G Hafner, 'Risks ensuing from fragmentation of international law' UN Doc A/55/10 (n 25), 144. See also Hafner (n 22) 851. Hafner depicts fragmentation of international law as the result of 'separate erratic subsystems' and linked to the nature of international law as a law 'of coordination instead of subordination'. the author rejects the existence of a homogenous system of international law, for it 'consists of erratic blocks and elements: different partial systems; and universal, regional, or even erratic blocks and elements; different partial systems; and universal, regional, or even bilateral subsystems and subsystems of different levels of legal integration', 850. See also ILC Report on the work of its fifty-fourth session (29 April-7 June and 22 July-16 August 2002) Supplement No 10, UN Doc A/57/10, para 489 <https://legal.un.org/ilc/documentation/english/reports/a_57_10.pdf>.

³⁷ Five illustrative cases of the risks of fragmentation are given in this study, namely, The Charter of the United Nations and other obligations under international law, immunity and human rights obligations, international trade regulations and international environmental regulations, international regulations on broadcasting, and the United Nations Convention on the Law of the Sea and international fisheries treaties, UN Doc A/55/10, Annex 5, 144,145 and 147 para 1.

turn shaped the purpose of the work of the ILC, set by means of recommendation, to ‘seek ways and means to overcome the possible detrimental effects of such fragmentation’.³⁸ This was mirrored in the recommendation contained in the report of the Study Group which defined the approach, the scope, and more importantly the aim of the ILC Report to ‘identify certain areas where conflicting rules of international law existed, and, if possible, develop solutions for these conflicts’.³⁹

It becomes readily visible how interlinked the notions of fragmentation and norm conflict are. However, the process of fragmentation, discussed above, needs to be distinguished from the actual effects of fragmentation. This allows differentiating the actual concept from its consequences and hence assess the applicability of the notion of fragmentation to scenarios other than the conflict of overlapping norms, and consider legal mechanisms foreseen to correct the effects of fragmentation, other than conflicts of norms. The debate on fragmentation can be safely said to be chiefly devoted to its effects. Although some effects have been acknowledged as positive,⁴⁰ a much greater emphasis has been given to the risks

³⁸ G Hafner, ‘Risks ensuing from fragmentation of international law’ UN Doc A/55/10 (n 25), 144 to 147.

³⁹ ILC Report A/CN.4/L.628 (n 23) para 11.

⁴⁰ From a substantive legal standpoint, for instance, emphasis has been made on the enrichment of the international law due to its development in a greater variety of legal areas, previously unaddressed, resulting in ‘an increased diversity of voices and a polycentric system of international law’ (ILC Report A/CN.4/L.628, para 7), or a pluralistic international legal system (ILC Report A/CN.4/L.682 para 492: ‘Fragmentation moves international law in the direction of legal pluralism’). From an institutional perspective, the proliferation of judicial bodies has been seen as an opportunity to develop more specialised and thus more precise bodies of interpretation of norms, and a process enabling a more efficient implementation of norms. See P M Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (n 22) 795 and 796. See also Hafner (n 22) 850, 851 and 860 regarding the efficiency aspect of implementation and compliance with norms in the context of regionalisation of international law and also with regards to the specialisation of international regulations. See also the address to the Plenary Session of the General Assembly of the United Nations, on 26 October 1999 by S M Schwebel, President of the International Court of Justice (n 28). However, this needs to be contrasted with the contradictory observation of the negative effect the proliferation of primary norms has on norm implementation. See in this respect G Hafner, ‘Risks ensuing from fragmentation of international law’ UN Doc A/55/10 (n 25), 147 para 7. The proliferation of judicial bodies has further been admitted to allow the development of international law in a greater variety of legal areas, and consequently, its enrichment. In this respect see the Address by H E Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly, 26 October 2000 (n 28) and Speech by H E Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000, ‘The proliferation of international

that fragmentation poses to the unity and coherence of international law as a legal system, primarily on the observation of the conflict of overlapping norms.⁴¹ These are the undesirable consequences or ‘difficulties’, as the title to the report suggests, the ILC aimed to overcome in the study of this topic and a wealth of literature has been concerned with it.

2.2 Effects of fragmentation in a negative light: delimiting the scope of the debate

Concerns ranging from fears of threat to the unity and coherence to mere considerations of possible difficulties arising from an increasing normative diversity constitute the core of the debate in the fragmentation of international law among legal scholars,⁴² international court judges⁴³ and practitioners. These concerns are based on the observation of conflicts arising from overlapping norms.

Fragmentation of international law has been under scrutiny both from an institutional and from a substantive standpoint.⁴⁴ The latter relates to the emergence of specialised

judicial bodies: The outlook for the international legal order’ (n 28), as well as Speech of 30 October 2001, (n 28). See also ILC Report A/CN.4/L.682, para 7. See further B Simma, ‘Fragmentation in a Positive Light’ (2004) 25 (N 4) *Michigan Journal of International Law*, 845, 846 and 847.

⁴¹ ILC Report A/57/10 (n 36) Supplement No. 10, para 498.

⁴² See for instance I Brownlie, ‘Problems concerning the Unity of International Law’ (n 22) 854 and 856, where the author even refers to the ‘threat to reliability, credibility and consequently, the authority of international law’. P M Dupuy refers to a degree of ‘legal insecurity’ with the creation of new jurisdictions, giving rise to potential conflicting jurisdiction and divergent jurisprudence problems, for which see ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (n 22) 796 to 798. However, contrast P M Dupuy’s views on the debate on fragmentation or the unity of the international legal order in ‘A Doctrinal Debate in the Globalisation Era: On the Fragmentation of International Law’ (n 29) 25. See further B Simma, ‘Fragmentation in a Positive Light’ (n 40) 845.

⁴³ See n 28.

⁴⁴ The institutional consideration relates to the proliferation of international courts and the potential for jurisdiction conflicts as well as the potential for divergent judicial decisions over similar matters. This would be the case where different judicial institutions apply differently the same or similar rules of international law, giving rise to conflicting jurisprudence, which could further lead to forum shopping (ILC Report A/CN.4/L.702, para 7 and ILC Report A/CN.4/L.628, para 14). These were the main concerns expressed by two consecutive Presidents of the ICJ in their successive addresses to the Plenary Sessions of the General Assembly of the United Nations, namely, Stephen M Schwebel, on 26 October 1999, and Gilbert Guillaume on 26 October 2000 and his speech of 30 October 2001 to the General Assembly of the United Nations (n 28). Concerns over the lack of hierarchy among judicial institutions, and particularly the International Court of Justice (ICJ) position and its role in the new scenery of the international judicial stage, played an important

regulations, functional clusters of rules and special regimes of international law. Concerns over incongruities and conflicts between overlapping norms of international law are the core subject of the discussion. They constitute the focal attention of the ILC study group, leaving aside institutional considerations of competencies and of hierarchical relations among institutions.⁴⁵

The scope of the ILC study on fragmentation is therefore limited to the substantive question of the diversification of the law ‘into highly specialised “boxes”’.⁴⁶ It focuses on the effects of diversification of the law into these highly specialised regimes. Its concern centres on how the relationship between these ‘boxes’ should be conceived, as well as their relationship with general international law, and how the divergences in the application of similar rules of international law should be addressed. Within this process of specialisation, the study focuses in particular on the conflict of norms,⁴⁷ and on how the incongruities can be solved on the ‘merits’.⁴⁸

The scope of the ILC study fits the purpose ‘to assist international judges and practitioners in coping with the consequences of the diversification of international law’.⁴⁹ The aim is to provide ‘what could be called a “toolbox” designed to assist in solving practical problems arising from incongruities and conflicts between existing legal norms and regimes’ in

part in this debate. In this regard, see M Koskenniemi and P Leino, ‘Fragmentation of International Law? Postmodern anxieties’ (2002) 15 *Leiden Journal of International Law*, 553 (Koskenniemi and Leino).

⁴⁵ See ILC Report A/CN.4/L.628, para 14 and ILC Report A/CN.4/L.682. See also Koskenniemi and Leino, and C Leatley, ‘An Institutional hierarchy to combat the fragmentation of international law: has the ILC missed an opportunity?’ (2007) 40 *NYU International Law and Politics*, 259.

⁴⁶ ILC Report A/CN.4/L.682, para 13. The ILC study follows the approach and the recommendation of the Study Group to identify certain areas where conflicting rules of international law exist, in order to develop solutions for these conflicts. See ILC Report A/CN.4/L.628, para 11. See also ILC Report A/CN.4/L.682 para 489.

⁴⁷ A broad meaning is given to the term conflict of norms in the context of disputes. See ILC Report A/CN.4/L.682, paras 21 to 25. This broad notion of conflict of norms includes situations ‘where two rules or principles suggest different ways of dealing with a problem’ (para 25) or where a treaty may ‘frustrate the goals of another treaty’ (para 24) even if there is no incompatibility in the strictest sense of conflict whereby compliance with one norm can only be achieved by a State by failing to comply with another norm. See further E Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’ (2006) 17 (N 2) *European Journal of International Law*, 395.

⁴⁸ Koskenniemi and Leino (n 44) p 578.

⁴⁹ ILC Report A/CN.4/L.628, para 21 (sub-para a to e). See also ILC report A/CN.4/L.682, para 20.

scenarios of regulatory overlap.⁵⁰ The approach to the topic of fragmentation of international law is thus framed to provide practitioners and judges in litigious situations where norms conflict with guiding tools,⁵¹ extracted from techniques existing in traditional international law, contained in the VCLT.⁵²

The existence of conflicting overlapping norms is not, however, what constitutes and defines fragmentation of international law, but rather a consequence of it. It is one effect of the expansion and the diversification of international law and the proliferation of rules emerging from special regimes,⁵³ which has led to the study of relationships between norms for conflict-resolution purposes.

Out of sight remains another undesired effect of fragmentation, identified here as a normative underlap, that presents its own difficulties but shares the same concern for coherence in international law.

2.3 Fragmentation in a non-overlapping scenario: expanding the contours of the existing debate

Underneath the core aspect of fragmentation, outlined in the previous section, lies a fundamental concern for coherence in the international legal system. This was reflected in the *rationale* for the Commission's study of fragmentation with the purpose of solving conflicts of norms resulting from fragmentation. This *rationale* appears to have a broader vision that reaches beyond the mere consistency aspect deriving from specific conflict scenarios. Hence, reference needs to be made to the 'problems of coherence in international law' arising as a result of the emergence of special types of law, special regimes, and geographically or functionally limited treaty-systems.⁵⁴ The term 'coherence' encompasses not only the notion of consistency, but also the concept of 'integration' of a diversity of

⁵⁰ ILC Report A/CN.4/L.628, para 21 *in fine*.

⁵¹ ILC Report A/CN.4/L.682, paras 20 and 21, and paras 46 to 480. Regarding the scope of the ILC study group's findings, see the remarks by M A Young, 'Introduction: The Productive Friction between Regimes' in *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012) 3.

⁵² VCLT, Arts 30, 31 and 53. See ILC report A/CN.4/L.682, paras 17, 228 to 323, and 410 to 432. See P M Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law' (n 29).

⁵³ See as an example, ILC report A/CN.4/L.682, para 14 where it is stated: 'fragmentation does create the danger of conflicting and incompatible rules, principles, rules-systems and institutional practices'.

⁵⁴ ILC Report A/CN.4/L.682, para 15.

elements, so they form a united whole.⁵⁵ This interpretation allows, it is here argued, considering a broader aspect of fragmentation, a further consequence of the diversification of the law into highly specialised regimes, which may not become visible if no disputes arise, and hence where coherence checks become more difficult to perform. This coherence can be undermined by the sectorisation that accompanies the process of fragmentation of international law. As part of this process, insular approaches to specific problems in a highly specialised treaty, tailored to the needs of a specific regime, tend to focus on the interests of a specific network,⁵⁶ in the present analysis, as pointed out earlier, the shipping community is at the centre of the operative design of maritime search and rescue.⁵⁷ No conflict between norms may arise in such a situation, but this segmented norm may leave other interests and problematics, alien to the regime, unaddressed or unattended.

Fragmentation of international law is therefore relevant to explain the sectoral approach to maritime search and rescue services. The SAR Convention conveys a continuing consistency with UNCLOS through Article II,⁵⁸ during the codification and the development of the law of the sea. More broadly, avoidance of inconsistency between the framework Convention UNCLOS and IMO instruments was ensured ab initio with the participation of the IMO Secretariat at the Third United Nations Conference on the Law of the Sea.⁵⁹ However, an excessively sectoral approach has brought to maritime search and rescue a different risk,

⁵⁵ The term ‘coherence is defined in Oxford dictionary online as: ‘1. The quality of being logical and consistent, and 2. The quality of forming a unified whole’. The Merriam Webster dictionary online defines coherence as: ‘1: the quality or state of cohering as a: systematic or logical connection or consistency; b: integration of diverse elements, relationships, or values’.

⁵⁶ ILC Report A/CN.4/L.682, paras 482 and 483.

⁵⁷ SAR Convention, third preambular paragraph (n 1).

⁵⁸ SAR Convention, Art II: ‘(1) Nothing in the Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to resolution 2750(XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of the coastal and flag State Jurisdiction. (2) No provision of the Convention shall be construed as prejudicing obligations or rights of vessels provided for in other international instruments.’

⁵⁹ See IMO Doc LEG/MISC.8 of 30 January 2014, ‘Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization: Study by the Secretariat of the International Maritime Organization (IMO)’, 11. See further the speech of the Secretary-General of the IMO, Mr K Sekimizu, in his visit to the International Tribunal of the Law of the Sea, on 18 March 2014 <<http://www.imo.org/en/MediaCentre/SecretaryGeneral/SpeechesByTheSecretaryGeneral/Pages/itlos.aspx>>.

already mentioned, that search and rescue of sea migrants is left to a body and technical instruments, primarily the SAR Convention, not designed to tackle issues regarding needs arising from unsafe migration flows by sea, outside the arena of shipping navigation.

An incipient integration of international refugee law considerations has taken place with the incorporation of the principle of non-refoulement, by way of the Guidelines on the Treatment of Persons Rescued at Sea, 2004 (the Guidelines)⁶⁰ for the purpose of the identification process of a place of safety in the last stage of the rescue operation. Despite this integrating effort, it is here argued that the continuing underdevelopment of this highly specialised and technical legal instrument illustrates the view of the ILC study group that ‘international law is a law of a fragmented world’,⁶¹ where normative fragmentation cannot be observed in a vacuum.

Beyond a purely legal technical approach, fragmentation of international law has attracted not only political but also social considerations.⁶² A political approach to fragmentation, and in particular to norm collision, focuses on the institutional activities that reinforce, favour and advance their own special interests and objectives, without considering other interests, or even a common interest. Specialised courts, international organisations and other bodies compete for their primacy in what has been called in political theory language a ‘hegemonic struggle’.⁶³ Also in the arena of regulatory conflicts, at the heart of the debate on fragmentation of international law, a social theory approach explores the origin of normative and political collisions in a sectoral society. In their view, the emergence of specialised spheres of social activities is what characterises the ‘fragmentation of the international social world’.⁶⁴ A social perspective understands the regime-collisions as a mirror of the underlying

⁶⁰ IMO Resolution MSC.167(78) 20 May 2004 on Guidelines on the Treatment of Persons Rescued at Sea, IMO Doc MSC 78/26/Add.2, paras 6.12 to 6.18. This will be further developed in ch 6.

⁶¹ ILC Report A/CN.4/L.628, para 6.

⁶² P M Dupuy, ‘A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law’ (n 29); Koskenniemi and Leino (n 44) 561 and 562; Fischer-Lescano and Teubner (n 33). See also G Hafner, ‘Risks ensuing from fragmentation of international law’ UN Doc A/55/10 (n 25).

⁶³ Koskenniemi and Leino, 562; Fischer-Lescano and Teubner; G Hafner, ‘Risks ensuing from fragmentation of international law’ UN Doc A/55/10 (n 25) 143. See also on political fragmentation, Hafner (n 22) 850 et seq.

⁶⁴ ILC Report A/CN.4/L.682, paras 7 and 8. See also ILC Report A/CN.4/702 paras 5 and 6.

tensions and conflicts between policies and strategies in a fragmented society, and the ‘expression of deep contradictions between colliding sectors of a global society’.⁶⁵

The underlap suggested here undoubtedly reflects the existence of specialised spheres of social activity. Social and political perspectives further underscore specific pursuits where underlying tensions and conflicting priorities exist at the core of search and rescue of sea migrants.

Aspects of political and social fragmentation in the arena of search and rescue of sea migrants are therefore considered next. It is not however the purpose of the following section to engage in political or social theory analysis. This would fall outside the scope of the present research. For the purpose of the present argument, it would suffice to highlight the unquestionable impact social differentiation as well as issue-specific policies have in the specialised legal regime of maritime search and rescue, outside regular maritime traffic. These inevitably reproduce the particular interests, priorities and biases of each functional system within the law, and they reveal existing underlying tensions or conflicts among them.⁶⁶

Accordingly, aspects of political and social fragmentation may reveal the extent to which political and social divergent priorities impact on the normative underlap.

3. Underlying tensions in a fragmented society: border control priorities, security biases, shipping concerns and humanitarian considerations in the search and rescue of sea migrants

3.1 Fragmentation beyond an exclusive normative approach

Legal fragmentation is scrutinised here in a different light, a light that reveals a normative consequence, different from, and overshadowed by, the much discussed overlapping of norms, normative conflicts, proliferation of highly specialised tribunals with differing or even contradictory decisions against the backdrop of lack of jurisdictional hierarchy. The fragmentation studied here does not present conflicting norms across different legal regimes. It is characterised by a sectoral approach to the design of the maritime search and rescue

⁶⁵ Fischer-Lescano and Teubner (n 33) 1003 and 1004.

⁶⁶ Ibid, 1013.

system developed in the hands of a highly specialised institution, the IMO, and tailored to the interests and needs of the shipping community.⁶⁷ Beyond this normative effect of fragmentation, further aspects of underlying fragmentation are here considered with regards to maritime search and rescue in the context of irregular crossings to underscore differing priorities, underlying tensions and contradictions among policy strategies, and ultimately among society-wide rationalities.

Search and rescue of migrants at sea has become the theatre of operations where fundamental considerations and aspects pertaining to different functional systems and operational spheres concur, and at times confront one another. Border control policing for migration restriction policy purposes, national and international security motivations against smuggling and other international crimes resulting in the militarisation of operations at sea, humanitarian considerations in the realm of human rights law as well as international refugee law regimes, and economic and efficiency drivers in the shipping community enter this complex stage of maritime rescue operations with their differing priorities and biases. A diversity of narratives have consequently flooded this theatre of operations, including the antagonistic ‘pull factor’ and ‘deterrent’ discourses discussed below, the former emphasising that humanitarian driven search and rescue operations encourage the irregular and unsafe migration flows, and the latter highlighting the discouraging effect of border surveillance activities. These have undoubtedly had an impact on the SAR operative system. Differing rationalities, shaped by the priorities sought at sea, inevitably result in a variety of constructions of key terms, in particular the meaning of the term persons in distress for the purpose of initiating a rescue operation, and the notion of place of safety for disembarkation purposes. This ultimately results in differing responses to unsafe sea crossings, exposing the shortcomings of the maritime search and rescue system in the context of irregular crossings.

This approach draws on limited aspects of political and social considerations regarding fragmentation developed respectively by Koskenniemi and Leino,⁶⁸ and Fischer-Lescano and Teubner.⁶⁹ They are instrumental to allow a better understanding of, and a more comprehensive approach to, underlying causes of legal fragmentation and the consequences deriving therefrom. The former approach highlights the insular and sectoral strategical approaches or policies pursued by specialised actors in the international arena, representing

⁶⁷ ILC Report A/CN.4/L.682, para 482.

⁶⁸ Koskenniemi and Leino (n 44).

⁶⁹ Fischer-Lescano and Teubner (n 33) 1003.

and advancing their own particular interests and priorities.⁷⁰ The latter acknowledges these political tensions and ‘policy-conflicts’ that in turn reveal ‘deep contradictions between colliding sectors of a global society’ and ‘contradictions between society-wide institutionalised rationalities’.⁷¹ Legal fragmentation is depicted by Fischer-Lescano and Teubner as ‘an ephemeral reflection of a more fundamental, multidimensional fragmentation of global society itself’,⁷² whose origins ‘lie not in law, but within its social context’.⁷³ Their analyses are however centred on the conflict of norms, whereas the present study focuses on the underlap of the maritime search and rescue plan. Having said that, reference to their work remains relevant to the present study to outline policies and rationalities that risk perpetuating the under-representation of the specific needs among sea migrants. Their multidimensional fragmentation approach is therefore material to emphasise the urgency and the importance of advancing human rights law and refugee law considerations in the reading of the SAR Convention to adequately respond to these specific needs, and enhance their protection. It is also pertinent to acknowledge that an interpretative guiding legal tool to enable an integrating reading of the SAR Convention and related instruments will not solve hegemonic struggles among differing policy rationalities and demands, where underlying social tensions exist.

This is relevant as this thesis focuses on the development of a legal interpretative reasoning allowing for such an integrating reading of the SAR Convention and related instruments, based on the VCLT as the legal ‘toolbox’ proposed in the ILC Report to read a treaty in its systemic environment.⁷⁴ The recourse to this legal technique has its own agenda. The purpose is to integrate human rights law and refugee law considerations in the reading of this maritime legal instrument and related ones. This aims at addressing the specific needs

⁷⁰ Koskeniemi and Leino, 578. See also Fischer-Lescano and Teubner, 1003: ‘In this political perspective, collisions between legal norms are merely a mirror of the strategies followed by new collective actors within international relations who pursue power-driven “specialist interests” without reference to a common interest and give rise to drastic “policy-conflicts”’. See also p 1009: ‘Societal fragmentation impacts upon law in a manner such that the political regulation of differentiated societal spheres requires the parcelling out of issue-specific policy-arenas’.

⁷¹ Ibid, 1004 and 1007.

⁷² Ibid, 1004.

⁷³ Ibid, 1045

⁷⁴ ILC Report A/CN.4/L.682. See in particular paras 410 to 493 relevant to Art 31(3)(c) of the VCLT and the principle of systemic integration.

among sea migrants in the realm of maritime search and rescue and tailor the response at sea to these needs, following the vulnerability reasoning considered in chapter 1. It ultimately pursues furthering an inter-regime dialogue to the extent that the SAR Convention allows fostering further considerations of humanity.⁷⁵

The underlying tensions illustrated below are reminders of the constraints any legal interpretative mechanism has to solve underlying tensions among different functional systems. An integrating interpretative reasoning may however entice a profound debate where all differing policy and social rationalities, preferences and demands are considered. Among these, it is here argued, considerations of humanity and specific protection needs among sea migrants urgently need to be advanced.

The following sub-sections strive to underscore underlying tensions between border surveillance and security biases, humanitarian led rescue priorities and commercial considerations by outlining differing priorities among institutional approaches and policy pursuits. To this end, the encounter of these functional systems in the Central Mediterranean will be used as an example. It is not however the purpose to delve in each of these functional systems.

3.2 Border controls, security concerns and search and rescue of migrants at sea

Tensions and resistance among coastal States exist, globally, to allow disembarkation of rescued sea migrants ashore, in their exercise of their sovereign prerogative.⁷⁶ The refusal to allow entry or disembarkation appears as a political expression of State rationalities concerned about, *inter alia*, security issues, the preservation of a national identity, the economic wellbeing and the management of limited resources in a context of social under-provision. This, one may argue, has translated into generalised and increasingly anti-migrant sentiment and stringent migration control efforts.

In the case of search and rescue of sea migrants, the resistance or even refusal of coastal States to allow disembarkation on land has had a clear negative impact on search and rescue

⁷⁵ ILC Report A/CN.4/L.682, paras 487 and 488.

⁷⁶ See on this aspect of sovereign prerogative the case of *Hirsi Jamaa and Others v Italy* App no 27765 (ECtHR, 23 February 2012) (*The Hirsi* case) para 113. See also J Hathaway and T Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (2014) Law & Economics Working Papers. Paper 106, <http://repository.law.umich.edu/law_econ_current/106>.

operations.⁷⁷ Not only does it allow disincentives in the conduct of search and rescue among the shipping community to grow, but it allows tensions to develop between sea border policing linked to interception operations and the ‘deterrent effect’ rhetoric on the one hand, and on the other hand the proactive search and rescue response at the heart of humanitarian operations, accompanied with the critical ‘pull factor’ narrative.⁷⁸

An illustrative example sustaining the above proposition can be found within the EU, among individual member States and reflected at the EU institutional level. At this level, the approach to maritime search and rescue is considered exclusively in the context of sea operations carried out by member States for the surveillance of external sea borders under the coordination of the European Agency for the Management of Operational Cooperation,⁷⁹

⁷⁷ This resistance has been exemplified in chapter 2 with reference to some incidents, including *the Budafel* in 2007 (ch 2 s 2.3), the *Pinar E* in 2009 (ch 2 s 2.3 and fn 182 thereto), the *Salamis* in 2013 (ch 2 s 2.2 and fn 147 thereto). A more recent example is the prolonged standoff of the rescue vessel *Open Arms*, operated by NGO Proactiva Open Arms, in August 2019, after the refusal of Italy and Malta to allow the disembarkation of survivors without EU member States’ agreement on their relocation, for which see Reuters, G Jones, I Melander, ‘Italy says six EU States will take in *Open Arms* migrants’ 15 August 2019 <<https://uk.reuters.com/article/uk-europe-migrants/italy-says-six-eu-states-will-take-in-open-arms-migrants-idUKKCNIV50RT>>.

⁷⁸ See for instance Frontex Report, Operations Division, Joint Operations Unit, ‘Concept of reinforced joint operation tackling the migratory flows towards Italy: JO EPN-Triton to better control irregular migration and contribute to SAR in the Mediterranean’ (2014) Reg. No 2014/JOU, p 4, where Frontex claims that one of the most important factors that have an impact on migration patterns is: ‘The presence of the naval assets of *Mare Nostrum* close to the Libyan coast, which may encourage migrants belonging to those nationals whose countries have no readmission agreements with Italy’ <https://www.proasyl.de/wp-content/uploads/2014/12/JOU_Concept_on_EPN-TRITON_2_.pdf>. See also the view of Frontex’s executive director, Mr G Arias, regarding *Mare Nostrum* operation at the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament, 4 September 2014, quoted by C Heller and L Pezzani in the forensic report ‘Death by Rescue’ produced by Forensic Oceanography, part of the Forensic Architecture Agency at Goldsmiths (University of London), 18 April 2016 <<https://deathbyrescue.org/report/narrative/>> under the Main Narrative and heading ‘The “Increasing Death” criticism’. Counterinterviews to the above are presented under the same heading in the report, turning to the root causes for the increase in the number of unsafe crossings. See further E Cusumano and J Pattison, ‘The non-governmental provision of search and rescue on the Mediterranean and the abdication of state responsibility’ (2018) 31 (N 1) *Cambridge Review of International Affairs*, 53, 64 and 65.

⁷⁹ 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 Agency’, also known as Frontex, later reinforced to become the European Border and Coast Guard Agency.⁸⁰

Within the EU, the duty to render assistance at sea, to proceed to the search and rescue of persons in distress at sea and to promote and maintain effective SAR services, lies with the member States parties to the SAR Convention, the SOLAS Convention or UNCLOS.⁸¹ At present, the EU is not a member of the IMO,⁸² neither is the EU a contracting party to the IMO Conventions, including the SOLAS and the SAR Conventions.⁸³ The EU is a contracting party to UNCLOS,⁸⁴ although only with regards to matters which competence

the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, (2014) OJ L 189/93 (Reg (EU) No 656/2014). See preambular paras (3) and (4).

⁸⁰ The European Border and Coast Guard Agency is legally operational as from 6 October 2016. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, (2004) OJ L 349/1 and Council Decision 2005/267/EC establishing a secure web-based information and coordination Network for Member States’ Migration Management Services (2005) OJ L 83/48, (2016) OJ L 251/1.

⁸¹ Reg (EU) No 656/2014, preambular paragraphs (15) and (16). All EU States, except Austria, Czechia and Slovakia, all landlocked States, are parties to the SAR Convention. All EU States are parties to SOLAS Convention and to UNCLOS. See SAR status of ratifications <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>>.

⁸² For the EU to gain full membership, the IMO Convention would need to be amended accordingly. See IMO Convention, particularly Art 4, according to which membership in the IMO is open to all States. See on this point L Nengye and F Maes, ‘Legal Constraints to the European Union’s Accession to the International Maritime Organization’ (2012) 43 (N 2) *Journal of Maritime Law and Commerce*, 279. Having said that, the European Commission holds observer status in the IMO.

⁸³ Most of the IMO Conventions only contemplate States becoming contracting parties thereto, for example the SAR Convention, Art IV. These Conventions would therefore need to be amended accordingly. This is not however the case for the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, London 1 November 2002 (PAL Protocol 2002) where Art 19 allows Regional Economic Integration Organisations constituted by sovereign States that have transferred the relevant competence to the Organisation to sign, ratify, accept, approve or accede to the protocol. The EU acceded to the PAL Protocol 2002 by means of Council Decision of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as regards Arts 10 and 11 thereof (2012) OJ L 8/13.

⁸⁴ The EU succeeded the EC according to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007, in force 1 December 2009, OJ

has been transferred to it by its member States. These do not include competence on maritime search and rescue matters under UNCLOS, Article 98.⁸⁵

Within the EU legislative framework, maritime search and rescue operations are contemplated under the EU surveillance of the external sea borders Regulation, to apply solely to Frontex operations,⁸⁶ whereby member States are required to comply with their obligation to render assistance at sea in accordance with international law, including the SAR Convention.⁸⁷ Outside Frontex operations, search and rescue obligations remain therefore the member States' exclusive competence, exercised in the framework of international conventions.⁸⁸ Member States are also to ensure that their participating units,⁸⁹ involved in these sea operations, undertaken for the surveillance of the member States' external sea borders under the coordination of Frontex,⁹⁰ comply with this obligation when they encounter any of the emergency phase situations, i.e., uncertainty, alert, or distress phases.⁹¹ Search and rescue operations are not undertaken under Frontex coordination in a proactive

No C 306, 17 December 2007. See S Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 (N 4) *International Journal of Marine and Coastal Law*, 523, 536.

⁸⁵ See Annex IX to UNCLOS, Arts 4 and 5, and the declaration by the European Community on 1 April 1998 <https://www.un.org/depts/los/convention_agreements/convention_declarations.htm#EuropeanCommunity%20Upon%20signature>. Note that among the matters for which the EU shares competence with its member States are: '... the provisions on maritime transport, safety of shipping and the prevention of marine pollution contained inter alia in Parts II, III, V, VII and XII of the Convention...' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en#EndDec>.

⁸⁶ See the intervention and the statement of the observer from the European Commission at the High-Level Meeting hosted by the IMO in March 2015, contained in the Report of the maritime Safety Committee on its ninety-fifth session, 22 June 2015, IMO MSC 95/22/Add.2, Annex 27, 16 and 17, accessible once registered as a public user <<https://docs.imo.org/Search.aspx?keywords=MSC%2095%2F22%2FAdd.2>>.

⁸⁷ Reg (EU) No 656/2014 preambular paras (8), (14) and (15).

⁸⁸ See in this respect the note filed by the Greek, French, Spanish, Italian, Cypriote and Maltese delegations on their position regarding Articles 9 and 10 of Regulation (EU) No 656/2014, relating to search and rescue situations, in Council (2013) Doc 14612/13, Brussels, 10 October, p 1, whereby they oppose the regulation of search and rescue in an EU legislative instrument. See also Reg (EU) No 2016/1624 (n 80) preambular paragraph 45: 'The implementation of this Regulation does not affect the division of competence between the Union and the Member States under the Treaties, or the obligations of Member States under international conventions'.

⁸⁹ Reg (EU) No 656/2014, Art 2(5).

⁹⁰ Reg (EU) No 656/2014, Art 2(2).

⁹¹ Reg (EU) No 656/2014, Art 9.

manner. Nor are they at the core of Frontex's coordination mandate. Having said that, the duty to support search and rescue operations by the participating units deployed under the coordination of Frontex is unquestionable. Reluctance to divert State offshore patrolling vessels deployed under Frontex coordination when requested for a search and rescue operation, on occasions, outside the geographical area of the surveillance operational plan to control irregular migration flows and to tackle cross border crime, reflect tensions among policy-conflicts between institutional rationalities, between search and rescue led operations and border surveillance activities.⁹²

Deployment of assets under Frontex coordination cannot amount to a limitation of coastal member States' rescue facilities, as States parties to UNCLOS and the SAR Convention are to maintain an adequate and effective search and rescue service.⁹³ In the same vein, member States' duties under search and rescue provisions are not discharged with the deployment of assets in operations under the coordination of Frontex, whose remit is the surveillance of external borders, and thus cannot be altered by the sea border surveillance regulations.⁹⁴ This becomes even more fundamental with a reinforced Frontex, as the European Border and Coast Guard Agency, whose executive Director, Mr Fabrice Leggeri depicts the new Agency: 'stronger and better equipped to tackle migration and security challenges at

⁹² This was for instance the case where the Director of Operations Division of Frontex expressed his concerns regarding the 'engagement of Frontex deployed assets in activities outside the operational area', as reported in the forensic report 'Death by Rescue' (n 78). See also the letter from K Rosler, Director of Operations Division of Frontex, to the General Director of Immigration and Border Police, Sr G Pinto, dated 25 November 2014 (hereafter referred to as Frontex letter) <https://deathbyrescue.org/assets/annexes/6.Frontex_Letter%20to%20Giovanni%20Pinto_25.11.2104.pdf>.

⁹³ UNCLOS Art 98.2 and SAR Convention, first preambular paragraph.

⁹⁴ Reg (EU) No 656/2014, preambular paragraph (15) *in fine*: 'This Regulation should not affect the responsibilities of search and rescue authorities, including for ensuring that coordination and cooperation is conducted in such a way that the persons can be delivered to a place of safety'. See also Frontex, Operations Division Joint Operations Unit, 'Concept of reinforced joint operation tackling the migratory flows towards Italy: JO EPN-Triton to better control irregular migration and contribute to SAR in the Mediterranean Sea' (n 78) regarding the launch of the joint operation Triton, p 11: 'Nevertheless, Frontex proposed deployment should not be seen as limitation for Host MS to plan and deploy their means to respond to irregular migratory flows in the Central Mediterranean as well as to ensure efficient SAR capacity under national responsibility (...)'.
(...)'.

Europe's external borders. (...) It also has a key role at Europe's maritime borders through its new coast guards' functions'.⁹⁵

Conflicting positions regarding the allocation, priorities and management of the States' assets to provide search and rescue services and external sea border control can only accentuate long standing concerns regarding the unlikelihood for consistent interpretation of the concept of distress phase and its assessment when encountering sea migrants in irregular crossings.⁹⁶ A situation defined as distress phase entails the suspension of the patrolling activities of the assets deployed in the joint operations implemented by Frontex. Furthermore, the search and rescue operations resulting from the identification of a distress situation involve a different outcome as regards disembarkation, when contrasted with the procedures following detection and interception of migrants at sea. Whereas the former involves inevitably the disembarkation at a place of safety,⁹⁷ the latter contemplates not only the possibility of disembarkation,⁹⁸ but also the entitlement to order the vessel intercepted to alter course outside or away from the territorial sea or the contiguous zone of a member State. This second outcome would amount to a deterrence action, undertaken either by States individually, or in joint operations under the coordination of Frontex, in what Hathaway and Gammeltoft-Hansen have referred to as *non-entrées* practices.⁹⁹

Consequently, it becomes increasingly compelling to develop a robust concept of distress allowing a certain and consistent interpretation of this emergency phase across the different

⁹⁵ See Frontex European Border and Coast Guard Agency news, 'European Border and Coast Guard Agency launches today' 6 October 2016 <<https://frontex.europa.eu/media-centre/news-release/european-border-and-coast-guard-agency-launches-today-CHIYAp>>.

⁹⁶ See Parliamentary Assembly of the Council of Europe, 'Lives Lost in the Mediterranean Sea: Who is responsible?' Report of the Committee on Migration, Refugees and Displaced Persons, Doc 12895 of 5 April 2012, issued as a result of the 'left-to-die' case, considered in more detail in ch 2 s 2.1. See also V Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 (N 2) International Journal of Refugee Law, 174, 195 and 196.

⁹⁷ Reg (EU) No 656/2014, Art 10.1(c).

⁹⁸ Reg (EU) No 656/2014, Arts 10.1(a) and (b) in conjunction with Arts 6.1(c), 7.2(c) and (d), and 8. No reference to place of safety is made in these provisions.

⁹⁹ J Hathaway and T Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (n 76). The term 'non-entrée' was coined by Hathaway to describe legalised policies adopted by States to block refugees from accessing their territories, for which see J Hathaway, 'The Emerging politics of Non-Entrée' (1992) 91 Refugees 40, 41. See also J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 291 and fn 70 thereto.

actors involved in search and rescue operations. In a growing regulatory hegemony of external sea border surveillance, it becomes equally urgent to reinforce and define further the role of the maritime instruments relevant to the search and rescue at sea and their role in the rendering of assistance to sea migrants. Life protection measures at sea afforded by these instruments need to be actively protected from *non-entrées* practices in external sea border control policy pressures.¹⁰⁰

Having said that, interception procedures within EU operational plans for external sea border surveillance and the prevention of unauthorised border crossings, including interceptions, are to be undertaken in compliance with, and in full respect of fundamental rights, as well as refugee and asylum seekers' rights.¹⁰¹ Interception procedures at sea, regardless of whether they take place in territorial waters of member States, or of third countries, contiguous zones and the high seas, should guarantee the observance of these fundamental rights, including the principle of non-refoulement, as well as the access to international protection to those in need of it,¹⁰² and also guarantee safety at sea when orders are given to alter route.¹⁰³ However, constraints regarding transparency in maritime surveillance operations, particularly in interception procedures, mark Frontex operations. Despite being key to guarantee that safety of life at sea is not jeopardised, and that human rights and refugee rights are preserved, this lack of transparency is often justified on grounds of protection of public

¹⁰⁰ See Fischer-Lescano and Teubner (n 33) 1031 in the context of health protection measures needing protection from economic pressures.

¹⁰¹ Reg (EU) No 656/2014, preambular paras 8 to 10, 12 and 17. According to these paragraphs member States are to respect their respective obligations under the United Nations Convention relating to the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Convention on the Rights of the Child and other relevant international instruments. Frontex, in the fulfilment of its mandate, is to comply with the above instruments and the Charter of Fundamental Rights of the European Union. Surveillance operations are to be undertaken in compliance with the principles of proportionality and non-discrimination, and in full respect of human dignity, fundamental rights and the rights of refugees and asylum seekers, including the principle of non-refoulement, and in accordance with the provisions of the asylum *acquis*. See also in this respect Reg (EU) 2016/1624, preambular paras 47 to 49.

¹⁰² Reg (EU) No 656/2014, preambular para 17 and Arts 4.4 and 4.6. See V Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (n 96).

¹⁰³ Reg (EU) No 656/2014, Art 3.

security.¹⁰⁴ Joint operations, such as *Hera* in its different stages,¹⁰⁵ have been marked by a lack of data regarding processes of screening intercepted sea migrants and asylum applications among these persons intercepted at sea, Frontex claiming that it does not collect data in that respect, which has caused much concern and criticism.¹⁰⁶ Among these critical voices, Moreno-Lax highlights that Frontex not registering data concerning international protection in the surveillance operations ‘casts doubt on the robustness of its commitment to fundamental rights’.¹⁰⁷ Hathaway and Gammeltoft question that Frontex is actually bound by international human rights legal instruments and state that its mandate ‘raises the specter of a legally unaccountable entity deterring refugee and other migration in foreign space’.¹⁰⁸

Tensions between deterrent practices and proactive search and rescue operations in the context of humanitarian operations, criticised on grounds of encouraging further unsafe

¹⁰⁴ See Reg (EU) No 2016/1624, Art 74, by virtue of which Frontex is subject to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. See also, as an example, Frontex letter of 22 June 2015 refusing a particular request to access specific information on these grounds, ‘as the disclosure of the requested document would jeopardize the effective control and surveillance of external sea borders of the EU Member States and the fight against cross border crime and ultimately would undermine the protection of the public interest as regards public security’ <<https://www.asktheeu.org/en/request/2076/response/7165/attach/3/2015%2006%2022%20OpPlan%20Triton%202015.pdf>>.

¹⁰⁵ See V Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (n 96) 181 and 182. Frontex and Spain initially deployed naval patrols in the area between the Canary Islands and the Atlantic coast of Africa. Later, upon concluding bilateral agreements, naval assets were deployed to patrol the territorial waters of Mauritania, Senegal and Morocco to stop and deter migration by boat from West Africa.

¹⁰⁶ Ibid, 182 where Moreno-Lax refers to a letter from Frontex to the Immigration Law Practitioners’ Association, Ref 2425/19.12.2008, dated 21 January 2009, for which see fn 49 thereto. See on more general grounds the author’s concern about this practice on 179 to 185. See also Migrants at Sea blog website, edited by N Frenzen, Professor at Gould School of Law, University of Southern California, USA, where concern is expressed regarding the contravention of the principle of non-refoulement in the execution of Hera operations <<https://migrantsatsea.org/tag/joint-operation-hera/>>.

¹⁰⁷ V Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’, 185.

¹⁰⁸ J Hathaway and T Gammeltoft-Hansen, ‘Non-Refoulement in a World of Cooperative Deterrence’ (n 76) 26 and 27.

crossings or the so-called ‘pull factor’ narratives,¹⁰⁹ appeared blatant with the disappearance of the Mare Nostrum operation in the Central Mediterranean route.¹¹⁰ Mare Nostrum operation was launched by the Italian government in October 2013, in the aftermath of the tragic shipwreck one kilometre off the Italian coast of Lampedusa causing the death of at least 366 persons.¹¹¹ It prioritised rescue at sea and security, on an unprecedented scale in terms of capacity and geographical area covered. It expanded beyond the Italian search and rescue region, to the close proximity of the Libyan coast.¹¹² Mare Nostrum came to an end in October 2014 because of lack of financial and policy support. The EU, reflecting member States’ reticence to support a proactive and preventive search and rescue driven operation, did not envisage a substitution for Mare Nostrum search and rescue coordination efforts. Instead, an external border surveillance coordination under Frontex umbrella was put in place, under the name of Triton. Triton sea external border control operation responds to rationalities and priorities that differ from and prevail over humanitarian led operations.¹¹³ The reduction in the number of assets deployed and a more restricted geographical area covered, extending only up to 30 nautical miles off Lampedusa, effectively diminished search and rescue capacity nearer the Libyan shores.¹¹⁴ This in turn lead to an effective

¹⁰⁹ This narrative has been rebutted based on the continuing increase of unsafe crossings that followed the end of the Mare Nostrum operation in October 2014. See Amnesty International (AI) Public Statement 9 July 2015 Index: EUR 03/2059/2015, ‘A safer sea: The impact of increased search and rescue operations in the central Mediterranean’ <<https://www.amnesty.org/en/documents/eur03/2059/2015/en/>> 1: ‘In the first months of 2015, 70,474 refugees and migrants arrived in Italy by sea, the vast majority from Libya; between 1 January and 29 June 2014, the number was 60,431’. See also the forensic report by C Heller and L Pezzani, ‘Death by Rescue’ (n 78), Main narrative, under section ‘The “pull factor” criticism’, where two main factors are identified to explain the increase of unsafe crossings in 2013 and 2014, the first one being the Syrian exodus due to the worsening of the situation both in Syria and the neighbouring countries, and the second one the increasing violence in Libya.

¹¹⁰ This route covers North Africa to Italy, Libya being the main departure point. See Frontex, ‘Central Mediterranean route’ <<http://frontex.europa.eu/search-results/?q=central+mediterranean+route>> and <<http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/>>.

¹¹¹ See the forensic report by C Heller and L Pezzani, ‘Death by rescue’ (n 78), section ‘Main Narrative’.

¹¹² Ibid.

¹¹³ S Carrera and L den Hertog, ‘Whose Mare? Rule of Law challenges in the field of European border surveillance in the Mediterranean’ (2015) CEPS Paper in Liberty and Security in Europe, No 79/January 2015 <https://www.ceps.eu/system/files/LSE_79.pdf>.

¹¹⁴ See map comparing the operational areas of the Mare Nostrum operation and Frontex’s Triton operation in the forensic report by C Heller and L Pezzani, ‘Death by rescue’ (n 78).

increase of risk to the lives of sea migrants, in favour of a policy of deterrence which materialised in an increase of the death toll.¹¹⁵ This ultimately resulted in search and rescue, far from becoming a proactive task, being perpetuated as secondary to border surveillance patrolling. Consequent efforts focused on increasing the budget, the capacity at sea and extending the geographical area for patrolling further South, although not reaching the area covered during the Mare Nostrum operation,¹¹⁶ which contributed to the decrease in the number of deaths at sea since the beginning of the Triton operation.¹¹⁷ The concern remains whether member States have matched or are willing to match search and rescue efforts or whether these are spared to prioritise deterrence and non-entrées practices.

Differing rationalities between security and defence policy and humanitarian led search and rescue also meet at sea and even collide. Ghezelbash, Moreno-Lax, Klein and Opeking have examined the increasing securitisation of search and rescue services as the response to search and rescue of sea migrants as a common trend, both in EU and Australia,¹¹⁸ calling for an integrating search and rescue system to recover the ‘humanitarian dimension of SAR’.¹¹⁹ In the Central Mediterranean security pursuits materialised in the EU military operation in the Southern Central Mediterranean (EUNAVFOR MED),¹²⁰ launched in June 2015, renamed

¹¹⁵ Forensic report by C Heller and L Pezzani, ‘Death by rescue’, in the Main narrative, under sections ‘Disregarding External Voices’ and ‘In the Rescue Gap’. February 2015 saw large numbers of fatalities. However, a peak of mortality was reached in April 2015, when two successive shipwrecks cost the lives of more than 1,200 people. See Forensic Oceanography Statistical Annex to the report Death by Rescue <https://deathbyrescue.org/assets/annexes/DeathbyRescue_Statistical%20annex_17.04.2016.pdf>.

¹¹⁶ Forensic report by C Heller and L Pezzani, ‘Death by Rescue’ (n 78), the Main Narrative, under section ‘After the Shipwrecks’.

¹¹⁷ See Amnesty International Public Statement 9 July 2015 (AI) Index: EUR 03/2059/2015, ‘A safer sea: The impact of increased search and rescue operations in the central Mediterranean’ (n 109) p 2.

¹¹⁸ D Ghezelbash, V Moreno-Lax, N Klein and B Opekin, ‘Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia’ (2018) 67 (N 2) *International and Comparative Law Quarterly*, 315.

¹¹⁹ *Ibid*, 351.

¹²⁰ Council Decision 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) OJ L122, 19 May 2015.

shortly after Operation Sophia.¹²¹ This operation, structured in three sequential phases,¹²² constitutes an institutional effort to identify, intercept and destroy vessels that could be used by smugglers and traffickers, and to disrupt trafficking networks, under a military action whose activities range from surveillance, interception to destruction of vessels and directing military actions against smugglers within Libyan territorial waters.¹²³ Security is therefore at the core of Operation Sophia, and whilst the assets deployed under this operation are to offer support to rescue operations, search and rescue is not an operational priority. Operation Sophia has seen its mandate enhanced with the additional task of training the Libyan coastguard and navy primarily in aspects of security, including border management and the disruption of human smuggling and trafficking networks,¹²⁴ and also with contributing to the implementation of the UN arms embargo on the high seas off the coast of Libya.¹²⁵ The

¹²¹ This was after the name given to a baby who was born on board the ship during the operation which rescued her mother in August 2015. See the Council of the European Union, press release, ‘EUNAVFOR Med: EU agrees to start the active phase of the operation against human smugglers and to rename it “Operation Sophia”’, 28 September 2015 <<http://www.consilium.europa.eu/en/press/press-releases/2015/09/28-eunavfor/>>.

¹²² Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) (2015) OJ L 122/31, Art 1.

¹²³ Forensic report by C Heller and L Pezzani ‘Death by Rescue’ (n 78) Main Narrative, under section ‘After the Shipwrecks’.

¹²⁴ Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (2016) OJ L 162, 21.6.2016, p. 18; Political and Security Committee Decision (CFSP) 2016/1635 of 30 August 2016 on the commencement of the capacity building and training of the Libyan Coast Guard and Navy by the European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (EUNAVFOR MED/2/2016) OJ L 243, 10.9.2016, p 11. See also S Carrera, S Blockmans, J P Cassarino, D Gros and E Guild, Report of a CEPS Task Force ‘The European Border and Coast Guard: Addressing migration and asylum challenges in the Mediterranean?’ The Centre for European Policy Studies (CEPS) 2017, 35 to 37 <https://www.ceps.eu/wp-content/uploads/2017/02/TFR%20EU%20Border%20and%20Coast%20Guard%20with%20cover_0.pdf>.

See further European External Action Service (EEAS) ‘Remarks by High Representative/Vice-President Federica Mogherini at the Press Conference in Libya’ Luxembourg, 18 April 2016 <https://eeas.europa.eu/headquarters/headquarters-homepage/5510/remarks-by-high-representativevice-president-federica-mogherini-at-the-press-conference-on-libya_en>.

¹²⁵ Political and Security Committee Decision (CFSP) 2016/1637 of 6 September 2016 on the commencement of the European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) contributing to the implementation of the UN arms embargo on the high seas off the coast of Libya (EUNAVFOR MED/4/2016) OJ L 243, 10.9.2016, 14. See the Council of the European Union press release, ‘EUNAVFOR MED Operation Sophia: mandate extended by one year, two new tasks added’ 10.11.2016

former task has been a crucial early support to enable Libya to establish its search and rescue region, where a great number of search and rescue operations, within the central Mediterranean route, take place. The support given to Libya to increase its search and rescue capacity, to declare its own search and rescue region in order for this country to have a fully operational search and rescue region, raises serious concerns regarding the purpose given to the mechanism of cooperation under the SAR Convention and the risk of becoming an instrument to advance migration restrictive policies. It enables the return of those retrieved from the sea by Libyan coast guards to Libyan shores without further considerations of their legal status, and their protection needs. The obligation of non-refoulement does no longer apply in these operations. Presented in the guise of search and rescue operations within the SAR Convention framework, they amount to interdiction practices to prevent sea migrants from leaving Libyan shores and forced returns to Libyan territory where sea migrants' human rights, freedoms and lives are at risk.¹²⁶ This will be further discussed in chapter 6, when considering the notion of place of safety for the purpose of disembarkation at the end of a rescue operation.¹²⁷ This continuing cooperation with Libyan authorities, where Operation Sophia had an early role in its consistent effort to perpetuate surveillance, defence and security over assistance at sea, arguably constitute a form of cooperative non-entrée.¹²⁸ The SAR Convention appears in this sense vulnerable to these underlying tensions, and exposed to the risk of being used as an instrument of cooperative non-entrées practice.

3.3 Search and rescue at the core of interventions at sea: humanitarian activism

The appearance on the scene of civil society rescue organisations and volunteer maritime rescuers, for whom search and rescue operations are the very *raison d'être* of their presence

<http://www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-eunavfor-med-sophia/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EUNAVFOR%20MED%20Operation%20Sophia%3A%20mandate%20extended%20by%20one%20year%2C%20two%20new%20tasks%20added>.

¹²⁶ See for instance European Union Agency for Fundamental Rights (FRA) 'Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and Criminal Investigations', 1 October 2018, para 6 <<https://fra.europa.eu/en/publication/2019/fundamental-rights-considerations-ngo-ships-involved-search-and-rescue>>.

¹²⁷ Chapter 6, s 1.3.

¹²⁸ J Hathaway and T Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (2014) Law & Economics Working Papers. Paper 106, University of Michigan Law School (n 76).

along migration routes,¹²⁹ have a crucial role in maritime search and rescue as it fills a void States have not filled and increases capacity of rescue facilities at sea.¹³⁰ They represent a sector of the society that favours the need of a central weight to the humanitarian approach to the service rendered, putting the safety and protection of sea migrants at the very core of their intervention. In this sense, one may argue they are a counterbalance to institutional policies that prioritise surveillance and security rationalities. They are undoubtedly key in search and rescue at sea.¹³¹ These differing approaches epitomise the different prioritisations across sectors of society and the pursuits of different sectoral approaches to search and rescue of sea migrants. The tensions are further reflected in the lack of mutual trust when it comes to search and rescue of sea migrants. The presence of volunteer rescuers at sea also enables monitoring and give visibility to States' inactions and practices that jeopardise the efficiency of search and rescue services. In the words of a representative of Médecins sans Frontières in Rome, 'it is useful to have someone playing the watchdog role in international waters, trying to make sure that state authorities don't do things they shouldn't do'¹³².

¹²⁹ For instance, this activism has proved very important in the central Mediterranean route, between 20 km and 50 km off the coast of Libya. See E Cusumano, 'How NGOs took over migrant rescues in the Mediterranean'(2016) *euobserver*, Leiden, 1 Sept <<https://euobserver.com/opinion/134803>>.

¹³⁰ Records show that from 1 January to end October 2015 'non-governmental vessels had rescued over 18,000 people, accounting for 7.6 percent of all rescued people' according to the forensic report by C Heller and L Pezzani, 'Death by Rescue', p 46. See Annex to the report <https://deathbyrescue.org/assets/annexes/DeathbyRescue_Statistical%20annex_17.04.2016.pdf>. See, as example, the acknowledgment of the contribution of MOAS and MSF to the search and rescue of sea migrants in Amnesty International Public Statement 9 July 2015 (AI) Index: EUR 03/2059/2015, 'A safer sea: The impact of increased search and rescue operations in the central Mediterranean' (n 109) pp 2 and 3. See also for NGOs contribution to search and rescue in 2017 and 2018, FRA 'Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and Criminal Investigations' (n 126). See for a broader view and moral approach to SAR obligations and the impact of non-governmental SAR, E Cusumano and J Pattison, 'The non-governmental provision of search and rescue on the Mediterranean and the abdication of state responsibility' (2018) 31 (N 1) *Cambridge Review of International Affairs*, 53.

¹³¹ Records show that from 1 January to end October 2015 'non-governmental vessels had rescued over 18,000 people, accounting for 7.6 percent of all rescued people' forensic report by C Heller and L Pezzani, 'Death by Rescue', Main Narrative, under section 'After the Shipwrecks'. See also Annex to the report <https://deathbyrescue.org/assets/annexes/DeathbyRescue_Statistical%20annex_17.04.2016.pdf>.

¹³² Interview conducted by Cuttitta in March 2016 and quoted in his article P Cuttitta, 'Repoliticization through Search and Rescue? Humanitarian NGOs and Migration Management in the central Mediterranean' (2018) 23 (N 3) *Geopolitics Journal*, Routledge Taylor & Francis Group, 632, 640 and 641. On land, the online mapping platform called WatchTheMed (WTM), concerned with maritime search and rescue, is a monitoring and a

In their effort to advance the prioritisation of the humanitarian task, their activism is caught in ‘pull factor’ dialectics and the institutional scepticism towards this approach as a manifestation of the social and political tensions involved. The mistrust towards non-governmental activism in the search and rescue of sea migrants has resulted in closing ports to NGO rescue vessels, not allowing their departure,¹³³ confiscation, pressures to de-flagging rescue vessels,¹³⁴ and criminalisation of some interventions, on grounds of facilitating illegal immigration and colluding with smuggler networks.¹³⁵ This was for instance the case of the

pressure instrument that has denounced inactions and maritime abandonment of those in need of assistance in the Mediterranean, as well as the misconduct and even violence of security forces against sea migrants. WatchTheMed has outlined how sea migrants have been put at further risk, exacerbating their vulnerability and resulting, in certain cases, in avoidable losses of lives. See WatchTheMed: a counter-surveillance network to stop deaths and violations of migrants’ rights at sea <http://watchthemed.net/media/uploads/page/3/WTM_launch_05.12.2013_ENG-FR.pdf>. See also on the activist project of the creation of the WatchTheMed Alarm Phone in October 2014, M Stierl, ‘The WatchTheMed Alarm Phone – A Disobedient Border-Intervention’ (2015) 1 (N 2) *Journal für kritische Migrations- und Grenzregimeforschung*. See further See M Stierl ‘A sea of struggle – activist border interventions in the Mediterranean Sea’ (2016) 20 (N 5) *Citizenship Studies* (Routledge Taylor & Francis Group) 561.

¹³³ This was for instance the case of the aid ship *Open Arms*, blocked by the Spanish authorities in the port of Barcelona for about 100 days. See euronews, M Rodríguez Martínez & O Valero, ‘Spain blocks rescue ship from leaving Barcelona port’, 14 January 2019 <<https://www.euronews.com/2019/01/14/spain-blocks-rescue-ship-from-leaving-barcelona-port>>.

¹³⁴ See for instance, with regards the removal of flag of the rescue vessel *Aquarius*, firstly by the Gibraltar Maritime Administration in August 2018 and followed by the Panama Maritime Authority in September 2018, for which see Human Rights at Sea Review, ‘Human Rights and International Rule of Law: Ramifications of the De-Flagging of M/V *Aquarius Dignitus*’, February 2019 <https://www.humanrightsatsea.org/wp-content/uploads/2019/02/HRAS_Aquarius_Review_and_Commentary_2019_SECURED.pdf>.

¹³⁵ See FRA, ‘Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and Criminal Investigations’ (n 126) paras 6 to 10 and tables 1 and 2 thereto. See also Study requested by the European Parliament’s Committee on Petitions, S Carrera, L Vosyliute, S Smialowski, J Allsopp and G Sanchez ‘Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 update’, published by the Policy Department for Citizens’ Rights and Constitutional Affairs, December 2018. In particular, see the Overview and section 3 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU\(2018\)608838_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf)>.

For an overview, see also K Roepstorff, ‘Migration and the Shrinking Humanitarian Space in Europe: From Maritime Search and Rescue Operations to Contested Humanitarian Action in EU countries’, 15 October 2019, Centre for Humanitarian Action <<https://www.chaberlin.org/en/publications/migration-and-the-shrinking-humanitarian-space-in-europe-2/>>.

The Cap Anamur in June 2004, involving this German non-governmental aid ship which had rescued 37 people from West Africa from a sinking inflatable adrift near the Italian island of Lampedusa.¹³⁶ A more recent incident involved the detention of the captain of non-governmental migrant rescue ship *Sea-Watch 3* for entering the port of Licata, in the island of Lampedusa, Italy, in June 2019, defying Italian authorities, to disembark 40 migrants after a two-week stand-off.¹³⁷

Humanitarian missions are heavily reliant on States' willingness to allow disembarkation on land and this proves at times challenging. For instance, the humanitarian mission in the Central Mediterranean is highly dependent on the Italian Government's willingness to authorise disembarkation of sea migrants particularly those rescued outside the Italian search and rescue region. Italy has attempted to regulate NGO rescuers' activism in search and rescue by means of a Code of Conduct for them to adhere to, conditioning the authorisation to disembark survivors to its compliance.¹³⁸ This has spurred a number of concerns among certain NGOs, including the weakening of rescue capacity and the effectiveness of search and rescue operations, as well as concerns to continue adhering to principles of neutrality, impartiality and independence that characterise humanitarian activism in what seems an attempt to introduce migration control priorities to humanitarian search and rescue.¹³⁹

¹³⁶ In this incident, Italian navy frigates, helicopters and Italian Coast Guard forced the *Cap Anamur* back when she tried to dock at Empodocle, in Sicily, Italy. As the situation on board deteriorated dramatically during the 11 days the *Cap Anamur* was sailing in the high seas, the captain issued an emergency call and was authorised to enter port, where the ship's captain, the first officer and the director of the relief organisation owning the vessel were arrested by the Authorities on the alleged grounds of aiding illegal immigrants. The ship was seized and the crew was ordered to leave the vessel. The Italian court finally acquitted the rescue workers. For more information about this incident, see UNHCR news 'Handling of Cap Anamur asylum claims was flawed, says UNHCR' by R Colville, 23 July 2004 <<http://www.unhcr.org/4101252e4.html>> and UNODC Case Law Database Fact Summary <https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/ita/2009/case_n.326704_r.g.n.r.html>.

¹³⁷ In January 2020, the Italian Supreme Court of Cassation confirmed the release of *Sea Watch 3* captain, Carola Rackete. In the Court's reasoning, rescue operations at sea imply the consequent obligation to disembark survivors at a safe place. See INFOMIGRANTS News, 'Rackete upheld rescue duty: Italy's top court' 24 February 2020 <<https://www.infomigrants.net/en/post/22951/rackete-upheld-rescue-duty-italy-s-top-court>>.

¹³⁸ See the content of the Code of Conduct <<https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf>>.

¹³⁹ See for instance Médecins sans Frontières' statement explaining their decision not to sign the Code of Conduct, on 2 August 2017 <<https://www.msf.org/qa-why-msf-didn-t-sign-code-conduct-search-and-rescue>>

Also in the central Mediterranean migratory route, tensions between humanitarian-led operations and States' officials have repeatedly occurred. Libyan coast guards' interventions at sea have repeatedly shown hostile interventions towards NGO SAR operators, including threatening and firing against them. This was for instance the case involving the aid vessel *Golfo Azurro*, operated the Spanish NGO Proactiva Open Arms in August 2017, while on the high seas.¹⁴⁰

and MSF press release 'MSF committed to saving lives on Mediterranean but will not sign the Italian "Code of Conduct"' 31 July 2017 <<https://www.msf.org/msf-committed-saving-lives-mediterranean-will-not-sign-italian-code-conduct>>. Some NGOs have agreed to this Code of Conduct and some have refused to sign it, for which see *euobserver* news, by E Zalan, 'NGOs divided by Italy's New Rescue Code', 1 August 2017 <<https://euobserver.com/migration/138656>>. See also FRA, 'Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and Criminal Investigations', (n 126) para 7. See further E Cusumano, 'The Sea as Humanitarian Space. Non-Governmental Mediterranean Migratory Route' [2017] *Mediterranean Politics* ISSN: 1743-9418, 387 (online) <<https://www.tandfonline.com/doi/full/10.1080/13629395.2017.1302223>>.

¹⁴⁰ D Howden, 'The Central Mediterranean: European Priorities, Libyan Realities' *Refugees Deeply Quarterly*, October 2017 <<http://issues.newsdeeply.com/central-mediterranean-european-priorities-Libyan-realities>>. Also, MSF announced it was suspending rescue operations due to what have been referred to as "credible threats" by the Libyan coast guard. In a previous incident, on 17 August 2016, the rescue boat *Bourbon Argos* operated by MSF was attacked while conducting SAR operations off the Libyan coast, by a group of armed men on board an unidentified speedboat who fired and boarded the rescue boat. See MSF, 'MSF condemns attack on rescue vessel' 25 August 2016 <<https://www.msf.org/central-mediterranean-msf-condemns-attack-rescue-vessel>>. See also Sea-Watch news, 'Libyan Navy is risking lives of Sea-Watch crew and refugees during illegal return operation', 10 May 2017 <<https://sea-watch.org/en/libyan-navy-is-putting-sea-watch-crew-and-refugees-into-danger-during-an-illegal-return-operation/>>. Libyan coast guards have also repeatedly exercised violence against sea migrants as documented in the incident of 6 November 2017 by Sea-Watch account, 'Clarification on the incident of November 6th' 7 November 2017 <<https://sea-watch.org/en/clarification-on-the-incident-of-november-6th/>> and the detailed digital reconstruction of the events that unfolded in that operation: Forensic Architecture, 'Sea Watch vs the Libyan Coastguard', December 2018 <<https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard>>. See for testimonies of sea migrants returned by the Libyan coast guard and the inhuman treatment they were subjected to, Oxfam International, 'Libya migration deal: two years on, thousands drowned in the Mediterranean and sent back to human rights abuses' 1 February 2019 <<https://www.oxfam.org/en/press-releases/libya-migration-deal-two-years-thousands-drowned-mediterranean-and-sent-back-human>>. This starkly contrasts with the terms of cooperation with Libya contained in the Parliamentary Assembly of the Council of Europe Resolution 2215 (2018) adopted 25 April 2018, on The Situation of Libya: Prospects and Role of the Council of Europe <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24738>> in particular para 11 where the Assembly called on European Union Member States to make cooperation with the Libyan coast guards

The gradual decrease of humanitarian-led presence as a result of the above, especially off the coast of Libya, where most of the rescue operations are needed in the Central Mediterranean, have undoubtedly devastating effects on the losses of lives at sea and on the treatment of those retrieved from the sea.

3.4 Shipping community considerations

The shipping community is heavily relied upon in the search and rescue of sea migrants, and although the pressure eased in the second half of 2015, merchant ships are still at the forefront of search and rescue operations.¹⁴¹ The disruption caused to, and the costs incurred by, the shipping industry are directly linked to the limited capacity of States' assets made available for search and rescue operations and to the uncertainty surrounding the disembarkation of survivors ashore due to the States' lack of political will to authorise the said disembarkations.¹⁴² The shipping industry calls for a decrease of the level of involvement in search and rescue of sea migrants. Perceived as an institutionalised source of search and rescue assets, it is deemed unsustainable by the shipping sector as they favour a more proactive role of Governments in terms of capacity building.¹⁴³ The cost and the disruption for the shipping industry should not however be the sole criterion to take into

dependent on the respect of sea migrants' fundamental rights and asks Member States to ensure cooperation with humanitarian NGOs involved in civil rescue operations.

¹⁴¹ See the International Chamber of Shipping (ICS) position 'Mediterranean Migrant Rescue Crisis' 2019 <[http://www.ics-shipping.org/docs/default-source/key-issues-2019/mediterranean-migrant-rescue-crisis-\(june-2019\).pdf](http://www.ics-shipping.org/docs/default-source/key-issues-2019/mediterranean-migrant-rescue-crisis-(june-2019).pdf)>. See Italian Coast Guard data, according to which 'the number of people rescued by commercial ships went down from 11,954 in the first five months of 2015 to only 3,689 from June to September, thus dropping from a contribution of 30 percent of the total of all rescues to 4 percent', contained in the Annex to the report 'Death by Rescue' (n 78). Compare with 2014 FRONTEX figures on 'Relative shares of different vessels performing search and rescue operations in the Central Mediterranean in May – December 2014' where a dramatic increase in the involvement of shipping industry vessels in search and rescue operations can be observed in June 2014, reaching 20%. Italian Navy vessels appear as the most prominent source of search and rescue facilities in the overall period, whereas vessels deployed under FRONTEX border control joint operations, Aeneas, Hermes and Triton, oscillate between approximately between 20% and 45%.

¹⁴² See ICS Communication by D Massey, 'Shipping Industry Very Concerned about Italian Policy on Migrants Rescued at Sea' 12 June 2018 <<http://www.elabor8.co.uk/category/companies/ics/page/2/>>.

¹⁴³ See ICS 'Large Scale Rescue Operations at Sea. Guidance in ensuring the safety and security of seafarers and rescued persons', 2nd edn (Maritime International Secretariat Services Limited, 2015) <<http://www.ics-shipping.org/docs/default-source/resources/safety-security-and-operations/large-scale-rescue-at-sea.pdf?sfvrsn=30>>.

account when considering the decrease of merchant ships' assistance in mass sea rescue operations.¹⁴⁴ Merchant ships are generally considered to be ill-fitted to perform large scale operations. The vessels' structure and manoeuvrability limitations create difficulties in the successful performance of such operations.¹⁴⁵ Seafarers lack proper training to conduct mass sea rescue operations and are on occasion involved in traumatic situations.¹⁴⁶ The limited number of crew and space on board further pose health and also security issues on board.¹⁴⁷ These aspects considered above startlingly expose the limitations of the SAR Convention to achieve its very purpose, that is, to establish 'an international maritime search and rescue plan responsible to the needs of maritime traffic for the rescue of persons in distress at sea'.¹⁴⁸ The very focus of this maritime tool is perversely undermined by States' reluctance or resistance to allow disembarkation and the under-provision of State-owned assets to provide an effective search and rescue system to respond to the large scale of unsafe irregular crossings.

The theatre of operations in the Central Mediterranean is only one illustrative example given here to expose the different approaches and priorities among the social sectors involved in the maritime search and rescue in their particular pursuits. It highlights the tensions among sectoral approaches and the institutional expressions of different policies and operational priorities at sea, when search and rescue operations concern irregular crossings. At the intersection of these sits the SAR Convention as a technical maritime legal instrument, whose normative underlap appears vulnerable to these conflicting priorities and to differing

¹⁴⁴ See K Goddard, 'Rescuing Refugees and Migrants at sea: Some Commercial Shipping Implications' (2015) 21 *Journal of International Maritime Law*, 352, for an analysis on the implications on carriage of goods by sea contracts under English Law.

¹⁴⁵ See the report by C Heller and L Pezzani, 'Death by Rescue' (n 78).

¹⁴⁶ These could involve retrieving bodies from the water.

¹⁴⁷ For instance, in March 2019, the small tanker *El Hibru 1*, had rescued over 100 migrants off the coast of Libya and three of them unlawfully seized control of the vessel after learning they were going to be returned to Libya. The vessel was assisted by Malta Armed Forces and escorted to Malta. See World Maritime News 'Tanker hijacked by Migrants Reaches Malta' 28 March 2019 <<https://www.offshore-energy.biz/tanker-hijacked-by-migrants-reaches-malta/>>; Maltatoday 'Three teenagers charged with hijacking commercial vessel: the tanker was forced to change course and head to Malta by a group of migrants it had rescued' 30 March 2019, <https://www.maltatoday.com.mt/news/court_and_police/93980/three_teenagers_charged_with_hijacking_commercial_vessel_#XpMKyi2ZM-c>.

¹⁴⁸ SAR Convention, third preambular paragraph.

interpretations arising therefrom of key terms that have an impact on its implementation.¹⁴⁹ The need is therefore urgent to explore the possibility of utilising a legal interpretative mechanism to reach an integrating interpretation of the key legal notions of persons in distress and place of safety in the SAR Convention, proved to be controversial in the context of irregular crossings. It is therefore this interpretative legal reasoning to adequately deal with concerns not envisaged in a sectoral approach to maritime search and rescue that the remainder of this thesis is devoted to.

4. A legal mechanism for an integrating reading

The interpretation proposed here seeks to integrate and advance considerations of international human rights law and refugee law in the reading of the SAR Convention and related instruments to respond to the specific needs among sea migrants, in order to attain a more vulnerability-orientated approach and protection tailored to these needs. Consideration is therefore given to the interpretative guidance given in the VCLT and within it, to the principle of systemic integration formulated in Article 31(3)(c), whereby ‘international obligations are interpreted by reference to their normative environment’.¹⁵⁰ This interpretative guiding mechanism will be analysed with the aim of assessing the possibility of integrating human rights law and refugee law considerations and advance the particular needs among sea migrants.

Mindful of Fischer-Lescano and Teubner’s view that a ‘legal instrument cannot overcome contradictions between different social rationalities’,¹⁵¹ this interpretative reasoning seeks to assess whether this legal mechanism allows an integrating interpretative approach to the obligations contained in a sectoral legal instrument. This can set the legal ground for an invitation to further a legal argumentative debate about the role of the SAR system in the context of irregular crossings and to advance the needs of sea migrants.

The vitality of the SAR Convention and hence its ability to adapt to the challenges of unsafe migration by sea, as with UNCLOS, seen in the previous chapter, certainly allows this

¹⁴⁹ This consequently has the same effect on the relevant provisions of the SOLAS Convention and UNCLOS.

¹⁵⁰ ILC Report A/CN.4/L.682, para 413. Systemic integration and Art 31(3)(c) are considered in paras 410 to 480.

¹⁵¹ Fischer-Lescano and Teubner (n 33) 1045.

exploratory integrating reading to articulate the humanitarian priority afforded to search and rescue obligations and the debate that may stem therefrom.¹⁵²

Conclusion

The sectoral approach to the maritime search and rescue has been examined in this chapter in the light of fragmentation of international law, to point towards the relevant interpretative guiding mechanism that would allow a more integrating reading of the SAR Convention.

The concept of underlap highlights the sectoral design of the SAR Convention against the backdrop of a wide and evolving obligation contained in UNCLOS, Article 98. The examination of the fragmentation of international law allows to argue that such legal fragmentation applies to this particular analysis and it is concluded that this underlap is a consequence of legal fragmentation, different to the much studied risk of overlap and the potential for norm conflict. This underlap has been presented as a consequence of the maritime search and rescue system being left to a highly specialised body, the IMO, whose remit is fundamentally concerned with the safety, security and environmental performance of the international shipping industry. Equally, it has been argued that this underlap is a consequence of the maritime search and rescue plan being framed in an instrument aimed at responding to the needs of maritime traffic but not designed to tackle large flows of unsafe migration by sea, where considerations of international human rights law and refugee law arise. Examining this underdevelopment of the SAR Convention in the light of legal fragmentation sets the course in the following chapters to the study of the doctrinal formula of systemic integration contained in the VCLT, Article 31(3)(c) as the legal interpretative mechanism to deal with this normative underlap. The purpose is to assess whether this guiding interpretative mechanism can achieve a more integrating reading of the SAR Convention, particularly with regards to the concept of persons in distress and the notion of a place of safety.

¹⁵² Barnes analyses the involvement of UNCLOS in the search and rescue of sea migrants, citing the example of the Mediterranean maritime migration crisis. Despite not being drafted envisaging similar events, according to Barnes, its relevance is 'influenced by the priority it affords to humanitarian search and rescue obligations'. See R Barnes, 'The Continuing Vitality of UNCLOS' in J Barrett and R Barnes (eds) *The Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) 474.

Chapter 3

By considering fragmentation beyond a purely legal analysis and drawing on political and social fragmentation, policy and social frictions are outlined, using the example of the Mediterranean as a theatre of operations in the context of search and rescue of sea migrants. A normative approach appears essential to understand the potential of the SAR Convention to allow an integrating reading in order to shape the legal duties it contains in the light of the challenges and the needs that arise in the context of irregular crossings. It allows to establish at the interpretative stage legal grounds to advance human rights and refugee law considerations on which to entice furthering the debate on the role of maritime search and rescue in the context of irregular crossings. Expectations regarding its potential to solve tensions and conflicting priorities among different sectors of society however need to be curbed.

The interpretative guiding tool proposed here will be explored in the following chapters within the legal interpretative reasoning of the terms that define the notion of persons in distress and the concept of place of safety. This will aim at furthering an inter-regime dialogue and assessing the extent to which international human rights law and refugee law considerations can be integrated in the reading of the SAR Convention and therefore permeate in the search and rescue system in order to become more responsive to the needs of sea migrants. Substantive international human rights law and refugee law considerations will need to be identified and examined.

Chapter 4 ‘Distress phase’ and ‘persons in distress at sea’: a legal interpretative reasoning for a dynamic, responsive and integrating outcome

Introduction

A consistent reading of what constitutes a distress phase, or a vessel, boat, craft or a person in distress, for the purpose of maritime search and rescue (SAR), is imperative to ensure and maintain effective SAR services and therefore the integrity of the SAR system. Distress phase is defined in the SAR Convention as ‘[a] situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance’.¹ Yet, differing interpretations of this definition, particularly when encountering overloaded and unseaworthy boats in irregular crossings, have led to losses of lives, and to calls and recommendations for consistent approaches. This is for example the case of the report published by the Parliamentary Assembly of the Council of Europe, ‘Lives Lost in the Mediterranean Sea: Who is Responsible?’,² issued after the ‘left-to-die-boat’ tragic incident in 2011. However, that particular incident did not involve an issue of interpretation, as distress calls had actually been logged by the Italian Maritime Rescue Coordination Centre and hence the case was concerned with failings to proceed to the rescue operation rather than the interpretation of a situation of distress.³

The incident in May 2007 of the ‘phantom ship’ (*barca fantasma*), as it was named by the Italian media, in the Maltese SAR region, where at least 53 lives were lost despite being spotted by Maltese Authorities, also underscores the differing interpretations of the concept of distress phase. According to a Maltese commander interviewed by Klepp as part of the author’s anthropological fieldwork carried out in Malta in 2007, that particular boat was not

¹ Annex to the SAR Convention, para 1.3.13.

² Parliamentary Assembly of the Council of Europe, ‘Lives Lost in the Mediterranean Sea: Who is responsible?’ Report of the Committee on Migration, Refugees and Displaced Persons, Doc 12895 of 5 April 2012 <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf> para 13.3: ‘avoid differing interpretations of what constitutes a vessel in distress, in particular as concerns overloaded, unseaworthy boats, even if under propulsion, and render appropriate assistance to such vessels. Whenever safety requires that a vessel be assisted, this should lead to rescue actions’.

³ This incident has been referred to in ch 2, s 2.2 and in ch 3, s 3.1.

in distress. The Armed Force of Malta's interpretation of the definition of distress, in the commander's words is as follows: '[d]istress is the imminent danger of loss of lives, so if they are sinking, it's distress. If the boat is not sinking it's not distress. Even if it's six meters long and has 30 people on board'.⁴

There have been instances where migrants at sea have punctured or destroyed their own craft or jumped overboard when in sight of other vessels, in order to increase their chances of triggering a rescue operation,⁵ and ultimately avoid 'push-back' practices.⁶ The tensions already underlined in the previous chapter between rationalities and priorities pertaining to different policy purposes, such as migration control, security motivations or economic disincentives, and humanitarian considerations risk perpetuating the differing interpretations and approaches to the assessment of a situation of distress at sea.⁷ Increasingly robust migration border control policies can arguably intensify the risk of a narrower interpretation

⁴ S Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea' (2011) (N 3) 23, *International Journal of Refugee Law*, 538, 553 and 554.

⁵ Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge Studies in International and Comparative Law 2016) 19. See also the report published by PRO ASYL, 'Pushed back: systematic human rights violations against refugees in the Aegean Sea and at the Greek-Turkish land-border', 2013, 25 <https://www.ecoi.net/en/file/local/1340728/1226_1383834659_pushed-back-web-01.pdf>. This report is based on PRO ASYL research conducted into the alleged use of 'push-backs' practices from Greece to Turkey, based on ninety interviews. According to this report there have been cases where people have tried to puncture their own inflatable boats in order to be rescued and avoid being pushed back.

⁶ This widely used term refers to practices that include stopping and also turning back or handing back sea migrants to the country where they sailed from without prior screening. This was for example the practice in the case of *Hirsi and Others v Italy*, App no 27765 (ECtHR, 23 February 2012) in the context of an interception at sea, referred to in ch 2 (fn 180 thereto). See the Submission by the Office of the United Nations High Commissioner for Refugees in the case of *Hirsi and Others v Italy* <<http://www.refworld.org/pdfid/4b97778d2.pdf>>. See also the report published by PRO ASYL, 'Pushed back: systematic human rights violations against refugees in the Aegean Sea and at the Greek-Turkish land-border' (n 5). See further B Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception' (2006) 30 (N 1) *Fordham International Law Journal*, Article 3, 75, 84.

⁷ See J Hathaway and T Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (2014) *Law & Economics Working Papers*. Paper 106 <http://repository.law.umich.edu/law_econ_current/106>. See further L Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?' in V Moreno-Lax and E Papastavridis (eds) *Boat Refugees' and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*, *International Refugee Law Series*, volume 7 (Brill Nijhoff 2016) chapter 9, 222.

of the notion of distress at sea, favouring interception practices, including push-backs, or preventing disembarkation in a particular State territory.⁸ This has undeniably a detrimental effect on the role of the maritime SAR system, and its underlying concern for the safety of migrants at sea.

Neither the 2004 amendments to the SAR Convention⁹ nor the Guidelines on the Treatment of Persons Rescued at Sea¹⁰ brought any interpretive guidance as to the defining features of persons in distress at sea. The former, however, introduced an additional circumstance to the definition of persons in distress at sea, in paragraph 2.1.1 of the Annex to the SAR Convention, namely, ‘persons in need of assistance who have found refuge on a coast in a remote location within an ocean area inaccessible to any rescue facility other than as provided for in the annex’. The latter focuses on the treatment of survivors, with particular reference to asylum-seekers and refugees, after they have been retrieved from the situation of distress, making reference to the principle of non-refoulement.¹¹ Proposals to review the definition of distress and its interpretation were made at the inter-agency High-Level Meeting to address unsafe mixed migration by sea (the High-Level Meeting) hosted by the

⁸ See R Barnes, ‘Refugee Law at Sea’ (2004) 53 (N 1) *International & Comparative Law Quarterly*, 47, 61, and B Miltner, ‘Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception’ (2006) 30 (N 1) *Fordham International Law Journal*, 75. B Miltner reflects this tension between ‘the predominantly humanitarian character of rescue, in contrast to the migration control policy objectives that underpin interception practices’, p 82. The author is however concerned with an insufficient distinction between rescue and interception, where a preference to label an operation as a rescue may ‘permit greater interference with a vessel and reduced responsibilities regarding disembarkation and temporary protection of its occupants.’ p 92. On this point, see also pp 111 to 115. This approach contrasts with the concern addressed here of narrowing the interpretation of the notion of distress to avoid triggering rescue operations and incurring disembarkation responsibilities against the background of deterrent migration policies, as discussed in the previous chapter.

⁹ IMO Maritime Safety Committee (MSC) Resolution MSC.155(78) 20 May 2004 (IMO MSC.155(78)) on the adoption of amendments to the International Convention on Maritime Search and Rescue, 1979, as amended <[http://www.imo.org/blast/blastDataHelper.asp?data_id=15528&filename=155\(78\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15528&filename=155(78).pdf)>.

¹⁰ IMO Maritime Safety Committee Resolution MSC.167(78) 20 May 2004 (IMO MSC.167(78)) <[http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf)>.

¹¹ IMO MSC.167(78), para 6.17 and Appendix ‘Some Comments on Relevant International Law’ to IMO MSC.167(78) para 7.

IMO in March 2015.¹² However, these met concerns and reluctance in the same forum.¹³ The differing views were further expressed at the Maritime Safety Committee on its ninety-fifth session.¹⁴ The delegations of Italy and the United States exemplified the differing approaches at that meeting. The former underlined the lack of a ‘harmonized interpretation of the concept of “distress”’ and the need to ‘open a discussion aimed at overcoming the current discretionary powers for intervention, which are today the result of different interpretations of this concept’.¹⁵ The latter expressed concern regarding suggestions to review ‘national legislation for the purpose of revisiting the definition of “distress”’ and urged ‘caution on disrupting the settled law and policy for effective search and rescue to address the current surge in human smuggling activity in the Mediterranean’.¹⁶

The differing interpretations of what constitutes a situation of distress and the coexistence of narrow and wide readings of its definition in terms of assessing the degree of danger and urgency involved, have encouraged calls among legal scholars for a more coherent understanding of the notion of distress.¹⁷ The common aim points towards the need of advancing further a *pro homine* approach despite search and rescue constituting a duty that is already underpinned by considerations of humanity. It is with the firm belief that this

¹² See IMO MSC 95/21/4/Rev.1 of 17 April 2015, para 9.1, available, once registered as a public user for free access to resources made available by the IMO <[https://edocs.imo.org/Final Documents/English/MSC 95-21-4-REV.1 \(E\).docx](https://edocs.imo.org/Final Documents/English/MSC 95-21-4-REV.1 (E).docx)>.

¹³ See IMO Legal Committee Report LEG 102/2 of 20 April 2015, ‘Report of the Legal Committee on the Work of its One Hundred and Second Session’, para 11.35, available, once registered as a public user for free access to resources made available by the IMO <[https://edocs.imo.org/Final Documents/English/LEG 102-12 \(E\).docx](https://edocs.imo.org/Final Documents/English/LEG 102-12 (E).docx)>.

¹⁴ IMO Report of the Maritime Safety Committee on its Ninety-fifth Session, MSC 95/22/Add.2, 22 June 2015, available, once registered as a public user for free access to resources made available by the IMO <<https://docs.imo.org/Search.aspx?keywords=MSC%2095%2F22%2FAdd.2>>.

¹⁵ Annex 27 to IMO Report of the Maritime Safety Committee on its Ninety-Fifth Session, MSC 95/22/Add.2, p 24.

¹⁶ *Ibid*, p 33.

¹⁷ R Barnes, ‘Refugee Law at Sea’ (n 8); L Komp, ‘The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?’ (n 7). Komp proposes ‘[a] [w]ider [u]nderstanding of the [t]erm of “Distress”’, 234 *et seq.* on grounds of the interpretation of treaties in good faith and in accordance with the principle of effectiveness based on a teleological approach to the treaty, and in the light of the right to life as it has been interpreted by the ECtHR. See also V Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23 (No 2) International Journal of Refugee Law, 174, 195 and 196.

narrative needs to be taken further, that this chapter undertakes a process of interpretation of the notions of distress phase and persons in distress, anchored in the 1969 Vienna Convention on the Law of Treaties (VCLT), Articles 31 to 33, which reflect customary international law.¹⁸ These rules of interpretation are addressed to States for implementation purposes, or, as French states: ‘Treaty interpretation is as much a matter for States in the implementation of their obligations, as it is for tribunals seised of a dispute’.¹⁹ It is to the former audience that this legal reasoning is addressed, outside the realm of court disputes, to contribute to the on-going debate on the notion of persons in distress at sea.²⁰

This chapter scrutinises the semantic content and the legal application of the notion of distress, with special emphasis on the notion of persons in distress and the terms defining this concept. The interpretative reasoning proposed draws on legal interpretative mechanisms with the aim of enhancing the protection of migrants at sea. The present chapter strives to answer the question of whether the semantic content and the construction of the terms defining ‘persons in distress’ allow for a more responsive maritime search and rescue system to ensure adequate protection to the integrity and lives of sea migrants.

To this end, the first section is devoted to the initial stage of the interpretative process, i.e., the text itself, in particular, the components that define the notion of distress phase, distinguishing between the concepts of interpretation and construction. With regards to the latter, special consideration is given to the defining term danger and its qualifying words grave and imminent. The construction of a generic term such as danger is analysed in the context of maritime salvage cases with relevant legal effects in search and rescue operations. The construction of ‘grave’ and ‘imminent’ within the context of the SAR Convention draws on the vulnerability reasoning, as a legal argumentative mechanism to address the specific needs of migrants at sea. The second section is concerned with the idea of adaptability of the elements that define the term distress phase to changing circumstances, present-day conditions and concerns regarding unsafe crossings. The third section introduces the principle of systemic integration, formulated in Article 31(3)(c) of the VCLT in that urge of advancing further considerations of humanity in the SAR system. Initial considerations are made regarding the applicability of Article 31(3)(c) of the VCLT and its relevance to the

¹⁸ R Gardiner, *Treaty Interpretation*, 2nd edn (The Oxford International Law Library 2015) (Gardiner) 174.

¹⁹ D French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal rules’ (2006) 55 (N 2) *International Comparative Law Quarterly*, 281 (French) 287.

²⁰ See French, 283, 267 and 287.

construction of the notion of distress. Primary limitations readily highlight its role as an interpretative tool, rather than a mechanism to revise the content of the treaty or to apply extraneous rules. Having said that, this section emphasises the potential of Article 31(3)(c) and its key role in reaching a more integrating reading of the SAR Convention, particularly the notion of persons in distress. The purpose is to advance human rights law considerations in the notion of persons in distress at sea in the SAR Convention, and consequently in UNCLOS, and the SOLAS Convention.

1. The notion of distress in the SAR Convention: interpretation and construction of its defining components under the VCLT

1.1 Initial considerations on the interpretative process

Treaty interpretation, concisely, seeks to reveal the meaning of the text, as ‘the text must be presumed to be an authentic expression of the intention of the parties’.²¹ Articles 31 to 33 of the VCLT provide guiding rules to ascertain the intention of the parties to the treaty within the agreement therein articulated. They do not however provide a complete and exhaustive guidance, nor do they resolve all interpretative issues that may arise in the process of interpretation, many of which would involve matters not contemplated or considered during the negotiations or the drafting of the treaty.²² This allows some margin of appreciation in the approach and the building of an interpretative legal reasoning, which nonetheless needs to follow a logical reasoning where other factors, varying from case to case, need taking into consideration. The process of interpretation has consequently led to long differing views as to whether it is to be regarded as an art or a science.²³ Irrespective of either preference in

²¹ UN Conference on the Law of Treaties, Official Records: Documents of the Conference, A/CONF.39/11/Add2, p 40, para 11 <https://treaties.un.org/doc/source/docs/A_CONF.39_11_Add.2-E.pdf>; (1966) Yearbook of the International Law Commission (ILC) Vol II, p 220, para 11 <http://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf>. Both are referred to in Gardiner (n 18) p 7.

²² Gardiner, ch 1.

²³ Waldock, Third Report on the Law of Treaties, Document A/CN.4/167 Extract from the Yearbook of the ILC, 1964, Vol II p 54, para 6. Contrast with U Linderfalk, ‘Is Treaty Interpretation an Art or a Science?’ International Law and Rational Decision Making (2015) 26 (No 1) European Journal of International Law, 169 (Linderfalk). See R Higgins, *Problems and Process: International Law and How to Use it* (Oxford University Press 1994): ‘nothing is mechanistic and context is important’, 8. See further Gardiner (n 18) 5.

determining the nature of the task, treaty interpretation involves a process of legal reasoning anchored in the guiding rules contained in the VCLT, Articles 31 to 33, which application is not mechanistic.

Treaty interpretation involves considering the components of Article 31 of the VCLT as a whole, as a unity, where no hierarchy among the elements therein is established.²⁴ It further confers the process of interpretation a cumulative nature where all the elements therein add to the construction of the text.²⁵

In Gardiner's words, 'It is the *treaty* which is to be interpreted; it is the *terms* whose ordinary meaning is to be the starting point, their context moderating selection of that meaning, and the process being further illuminated by the treaty's object and purpose'.²⁶

1.2 'Distress phase': an examination of its defining terms

The process of interpretation of the concept of distress phase, and persons in distress at sea, requires analysing the provision itself and the ordinary meaning of terms of the treaty as a starting point.²⁷

The inclusion of a definition for the term distress phase to identify the emergency situation that triggers the commencement of a search and rescue operation, in the Annex to the SAR Convention,²⁸ provides evidence of the intention of the parties to give a particular meaning to this emergency phase.²⁹ This technical use of the term distress phase, stipulated in a definition, could arguably amount to a 'special meaning' in the sense of Article 31.4 of the VCLT,³⁰ whether it falls into one of the two categories that Gardiner distinguishes under the

²⁴ Gardiner (n 18) 162.

²⁵ Ibid, 172. See also C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 (N 2) *International and Comparative Law Quarterly*, 279 (McLachlan) 285.

²⁶ Gardiner (n 18) 164. Regarding the notion of context, see 197 to 210. See further Linderfalk (n 23) particularly his commentary on the arbitration case regarding Guinea-Guinea Bissau Maritime Delimitation, 177. Concerning the notion of the treaty's object and purpose, see Gardiner (n 18) 211 to 222. See further Linderfalk (n 23) 178.

²⁷ Gardiner (n 18) 164.

²⁸ Annex to the SAR Convention, para 1.3.13. The definition is quoted in the Introduction. The Annex to the SAR Convention is considered an integral part of the Convention according to Article I.

²⁹ Gardiner (n 18) 339 and 340.

³⁰ Art 31.4 reads: 'A special meaning shall be given to a term if it is established that the parties so intended'.

notion of a special meaning.³¹ The first category refers to a specific meaning a term has in a particular area of human endeavour, a term of art, whose meaning is known and considered to be ordinary in a particular context. The second category refers to a particular meaning given which differs from the more common one or the expected one.³² However, the notion of a special meaning has limited impact, if any, and scarce practical effect in the present process of interpretation, as it is the actual terms used in the definition ‘distress phase’ itself that are the object of interpretation and construction in this chapter. Consequently, the process of interpretation proposed here concerns the examination of the ordinary meaning of the words used to define ‘distress phase’, particularly, ‘reasonable certainty’, ‘threatened by’, ‘grave and imminent danger’ and ‘requires immediate assistance’. Resort to definitions in various dictionaries will be made as an initial method to ascertain the linguistic meaning of these terms. This is a widespread practice among international courts and tribunals.³³

These terms will be examined in their context,³⁴ and in the light of the object and purpose of the SAR Convention, in accordance with Article 31.1 of the VCLT,³⁵ whereby the interpretation process is informed by the principle of good faith. Although lacking a specific and independent function, the principle of good faith is to buttress the intentions of the parties, when considered together with the object and purpose of the SAR Convention.³⁶ Reliance on Article 31.4 will hence be very limited whilst the interpretative rules in Articles 31.1 to 31.3 remain of most relevance in the process of interpretation of the notion of distress phase. It is therefore to these interpretative rules that this interpretative reasoning draws attention.

Prior to the examination of the relevant terms defining ‘distress phase’, however, a distinction needs to be made between interpretation and construction, i.e., between the

³¹ Gardiner (n 18) 334.

³² Ibid.

³³ Ibid. 186 to 189. P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave* (Brill Nijhoff 2015) (Merkouris) 18 to 22.

³⁴ The context includes the text of the SAR Convention, its Preamble, its Annex, which is considered an integral part of the Convention and its Resolutions, according to Art I of the SAR Convention. Gardiner (n 18) 197 to 210. See also Linderfalk (n 23) 177.

³⁵ Gardiner (n 18) 211 and 222.

³⁶ For a detailed consideration of the principle of good faith in the interpretation process, see Gardiner (n 18) 167 to 181, particularly, 172.

semantic content of the terms used in the definition of distress phase and their legal effect and application to the given facts, respectively.

1.3 Interpretation and construction: their roles in the legal interpretative reasoning

The process of interpretation considered in the present analysis is not limited to the semantic content or the specific use of the language but also to its construction, or in other words, its legal effect, or relevance to a diversity of facts. A fundamental distinction between these two concepts of interpretation and construction has been highlighted in the arena of legal theory,³⁷ although it seems to be diluted at times in legal practice. The differentiation is nonetheless important for conceptual clarity purposes.

Interpretation on the one hand corresponds to the process of ascertaining the linguistic meaning of the words and the text, which can be retrieved from the dictionary. It deals with the semantic content of the provision or provisions analysed and it is the first step in the process of analysis within the legal reasoning.³⁸ Construction on the other hand constitutes a second stage of the process that gives the words or the text a legal effect to their linguistic meaning and determines the legal content.³⁹

The distinction is thus also particularly important in a teleological approach to the SAR Convention, whose purpose is, as mentioned in chapter 2, to rescue persons in distress at sea.⁴⁰ It hence further allows linking the interpretative reasoning to the dynamic or evolutive nature of the relevant instruments, in particular UNCLOS and the SAR Convention, already mentioned in the previous chapters,⁴¹ as well as the SOLAS Convention, and their legal effect and continuous relevance in changing circumstances. As Solum states in the context

³⁷ L Solum, 'The Interpretation-Construction distinction' (2010) 27 *Constitutional Commentary*, 95 (Solum) <<http://scholarship.law.georgetown.edu/facpub/676>>. See also M Milanovic, 'The ICJ and Evolutionary Treaty Interpretation' (2009) Blog of the European Journal of International Law, *EJIL: Talk!* <<https://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/>> (Milanovic).

³⁸ Solum, 96 and 98.

³⁹ *Ibid.*

⁴⁰ SAR Convention, third preambular paragraph. This has been pointed out in ch 2, s 2.1.

⁴¹ The dynamic components to search and rescue service obligations and the characterisation of the particular instruments as living treaties were considered in ch 2, s 1.3, and in ch 3, s 1.

of Constitutional construction, '[a]dvocates of "purposivism" or "dynamic interpretation" are focused on construction (...).' ⁴²

Milanovic highlights the lack of consideration of this dual exercise of interpretation and construction in the International Court of Justice (ICJ) decision in the case *Costa Rica v Nicaragua* regarding navigational and related rights on the River San Juan.⁴³ In accordance with the 1858 Treaty of Limits between Costa Rica and Nicaragua (the 1858 Treaty),⁴⁴ Costa Rica had been granted a 'perpetual right of free navigation for the purpose of commerce'.⁴⁵ The cornerstone of the dispute was the meaning of the term commerce.⁴⁶

The main point of criticism for Milanovic in the ICJ interpretative approach to this term and the use of word 'meaning' throughout the judgment is that the Court 'elides the distinction completely' between the plain meaning of the words and the application given to that meaning. This is particularly relevant in the context of evolutionary interpretation, or even, evolutionary construction of a treaty, whereby the meaning of a specific word does not change over the time, however the application of that meaning, i.e., its construction, does.⁴⁷

⁴² Solum (n 37) 118.

⁴³ *Costa Rica v Nicaragua (Dispute Regarding Navigational and Related Rights)* Judgment, ICJ Reports 2009, 13 July, 213. See Milanovic (n 37).

⁴⁴ 15 April 1858, 118 CTS 439.

⁴⁵ Art VI: '...[L]a República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre navegación, (...) con objetos de comercio (...)',

⁴⁶ Nicaragua argued that the meaning of the term, in its original version 'con objetos de comercio' was the one given at the conclusion of the treaty in 1858 as such was the intent of the parties to the Treaty. Hence, according to Nicaragua, the meaning was limited to articles of commerce or merchandise or trade in goods and consequently free navigation was limited to these activities. Costa Rica argued the term 'objetos de comercio' referred to the purpose of commercial or transactional activity, and hence it included both trade in goods and in services, including transportation of passengers. See ICJ Reports 2009, 13 July (n 43) paras 45 to 64.

⁴⁷ Milanovic (n 37). To illustrate the difference between the semantic content and its legal effect, Milanovic uses as an example the term 'cruel' extracted from Art 7 of the ICCPR and Art 3 of the ECHR. The linguistic meaning is retrieved from the dictionary, looking for the semantic content, i.e., the ordinary meaning of this word, which has undergone no changes over the years. However, its legal treatment, its construction, has changed, based on the example of death penalty of juveniles or execution by public hanging, which would be presently be considered cruel, but not in 1789. In Milanovic's terms: 'its application to given cases has evolved'.

Bearing the above in mind, it is however safe to state that the term interpretation can be used, as it is indeed widely used, as a generic term that encapsulates both the linguistic meaning and the construction of its provisions.⁴⁸

1.4 Semantic meaning of the terms defining ‘distress phase’

The process of interpretation of the terms defining ‘distress phase’ proposed here therefore starts with the semantic content of the key elements of paragraph 1.3.13 of the Annex to the SAR Convention, considered in the context of the SAR Convention.

The key components that define a situation of distress are: the existence of ‘a reasonable certainty’, regarding the existence of a ‘threat by grave and imminent danger’ to a person, vessel or other craft, and ‘requires immediate assistance’.⁴⁹ The semantic meaning of these terms are scrutinised hereunder as an initial step in this interpretative reasoning.

The phrase ‘reasonable certainty’ bears an exercise of evaluation that can only be determined with reference to a particular set of facts or a given scenario. Basic considerations can however be extracted from the linguistic meaning of each concept.

The word ‘reasonable’ finds common descriptors, such as: being in accordance with or agreeable to reason, i.e., rational, just, proper, ordinary or usual in the circumstances.⁵⁰ Its construction depends ultimately upon the context and is determined against the background of a particular set of facts or a given scenario. Although in a different context, the following definition is relevant for the present purpose: ‘[t]hat which is fair, proper, just, moderate,

⁴⁸ VCLT, Art 31. See also the United Nations General Assembly (UNGA), International Law Commission (ILC), ‘Fragmentation of International Law: Difficulties arising from the diversification and Expansion of International Law’, report of the Study Group of the International Law Commission finalised by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006, (ILC Report A/CN.4/L.682) <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> paras 411 to 453.

⁴⁹ Annex to the SAR Convention, para 1.3.13 reads: ‘*Distress phase*. A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance’.

⁵⁰ Definitions extracted from <www.thelawdictionary.org/reasonable/>, the Legal Information Institute, Cornell Law School <www.law.cornell.edu/wex/reasonable> and the Merriam Webster Dictionary online <<https://www.merriam-webster.com/dictionary/reasonable>>.

suitable under the circumstances, fit and appropriate to the end in view, having the faculty of reason, not immoderate or excessive, honest, equitable, tolerable'.⁵¹

The word 'certainty' is defined as a 'firm conviction that something is the case' and also as '[a] fact that is definitely true or an event that is definitely going to take place'.⁵²

Within the context of the SAR Convention, the terms 'reasonable certainty' need to be read in contrast with the concepts of 'uncertainty' in paragraph 1.3.11 and 'apprehension' in paragraph 1.3.12 that characterise the uncertainty phase and the alert phase respectively. A higher degree of conviction is hence required in the assessment of the specific situation to consider it a distress phase. A reasonable degree of certainty allows, however, some room for doubt.

The term 'threatened by' requires ascertaining the linguistic meaning of 'threat', defined as: '[a] statement of an intention to inflict pain, injury, damage or other hostile action on someone in retribution for something done or undone',⁵³ linked to the term menace. The second meaning attributed to 'threat' is: '[a] person or thing likely to cause damage or danger'. This second meaning expresses the notion of likelihood, the possibility or the prospect of danger, which is relevant to and entwined with the words that follow in the definition of distress phase, namely, 'grave and imminent danger'.

In analysing the phrase 'grave and imminent danger', the attention needs first be drawn to the nucleus, which is 'danger', and subsequently to its qualifying terms, namely, 'grave' and 'imminent'.

'Danger' is defined as 'the possibility of suffering harm or injury',⁵⁴ or 'exposure or liability to injury, pain, harm or loss'.⁵⁵ The notion of 'possibility' or 'exposure' and the synonyms thereof, such as 'risk' or 'peril',⁵⁶ carry the notion of likelihood and chance, which is

⁵¹ In the context of US constitutional law, see J Scott Harr and others, *Constitutional Law and Criminal Justice System*, 7th edn (Cengage Reading 2016) 202, quoting an extract from the judgment in the case *B Cass v the State*, 124 Tx Crim, 208, 61 S W (2d) 500 No 14624, 22 March 1933.

⁵² Definition extracted from Oxford Dictionaries online <<https://en.oxforddictionaries.com/definition/certainty>>.

⁵³ Definition extracted from Oxford Dictionaries online <<https://en.oxforddictionaries.com/definition/threat>>.

⁵⁴ Definition extracted from Oxford Dictionaries online <<https://en.oxforddictionaries.com/definition/danger>>.

⁵⁵ Merriam Webster online dictionary <<https://www.merriam-webster.com/dictionary/danger>>.

⁵⁶ Oxford Dictionaries online <<https://en.oxforddictionaries.com/definition/danger>>.

fundamental to distinguish from the actual suffering of harm, pain, injury, or loss. This notion of likelihood or possibility conveyed twice in the definition, both by the terms ‘threatened by’ and ‘danger’, reinforces the preventive approach given to the search and rescue services.

The concept of danger is qualified with the adjectives ‘grave’ and ‘imminent’. The former is defined as ‘giving cause for alarm’, or ‘serious’,⁵⁷ and aims at setting a degree of intensity in the risk. The latter is defined as ‘about to happen’, i.e. ‘impending’, or ‘close’, or ‘approaching’,⁵⁸ and seeks to establish a degree of proximity of the danger involved. Again, in both instances, these terms qualify the risk, i.e., the possibility or the exposure to suffering harm, not the harm itself.

The notion of ‘danger’ is presented as a generic term, an open textured or variable concept,⁵⁹ where the lack of predetermined situations in the definition allows an assessment on a case-by-case basis. It allows adapting to different circumstances and requires in each instance an assessment based on ‘reasonable certainty’ bearing in mind it applies to both persons and vessels or other craft. Regarding the former, the notion of distress also includes, as from the 2004 amendments, ‘persons in need of assistance who have found refuge on a coast in a remote location within an ocean area inaccessible to any rescue facility other than as provided for in the annex’,⁶⁰ i.e. maritime rescue.

Finally, the sentence ‘requires immediate assistance’ needs also analysing its semantic content. The verb ‘requires’ bears here the meaning of ‘need for a particular purpose’,⁶¹ not the meaning of instruction, or demand. This meaning is consistent with, and confirmed in the context of the SAR Convention, Annex thereto, paragraph 4.4.3.1, where the words ‘in need of assistance’ are used.⁶² The present analysis will turn to this paragraph when considering the difficulties the construction of the term ‘distress phase’ raise, in particular

⁵⁷ Oxford Dictionaries online <<https://en.oxforddictionaries.com/definition/grave>>.

⁵⁸ Oxford Dictionaries online <<https://en.oxforddictionaries.com/definition/imminent>>.

⁵⁹ Merkouris (n 33) 148. The author highlights that ‘these terms due to the indeterminacy of their own content have “evolutionary potential”, and thus more amenable to evolutive interpretation’. See also Gardiner (n 18) 192 and 193.

⁶⁰ Annex to the SAR Convention, para 2.1.1 and IMO MSC.155(78) (n 9).

⁶¹ Oxford Dictionaries online <<https://en.oxforddictionaries.com/definition/require>>.

⁶² Annex to the SAR Convention, para 4.4.3.1 reads: ‘*Distress phase*: When positive information is received that a person, a vessel or other craft is in danger and in need of immediate assistance’.

when the definition contained in paragraph 1.3.13 is assessed in the context of paragraph 4.4.3.1.

The definition of distress phase has been interpreted in accordance with the ordinary meaning of its terms, in their immediate context. Their construction also needs to be done in the context of the SAR Convention and in the light of its object and purpose, guided throughout the process by the principle of good faith, in accordance with Article 31.1 of the VCLT. The context relevant to the present construction is for the present purpose the text of the SAR Convention, including its Preamble and the Annex thereto.⁶³ Having said that, reference will be made to the construction given by courts to the notion of ‘danger’ in cases of maritime salvage, therefore outside the context of the SAR Convention, as these are helpful to prove that this generic term allows a broad and a dynamic construction.

1.5 The construction of the term danger and its qualifying words grave and imminent

Despite the lack of difficulty the semantic content of these words entail, their construction or their legal effect has proved to be inconsistent in the context of irregular crossings. This has consequently given way to varying responses when encountering persons on board flimsy overcrowded boats. It has unquestionably created uncertainty as to what circumstances create a situation of distress at sea and trigger a search and rescue operation. It further permits to create situations where unsafe crossings are assessed erratically, allowing underlying tensions and priorities to shape the notion of distress at sea to fit differing pursuits.⁶⁴ This can undoubtedly hinder timely assistance at sea or, indeed, assistance at all. It further affects the effectiveness of search and rescue services, and ultimately weakens the SAR system, taking a toll on the safety of lives at sea, primarily the lives of sea migrants.

1.5.1 ‘Danger’: a broad and dynamic construction in the context of maritime salvage

As mentioned earlier, the notion of danger constitutes a generic term that adapts and remains relevant in a diversity of circumstances. This has been observed in the construction or legal

⁶³ Art 31.2 of the VCLT. See Gardiner (n 18) 197-210. See *Golder v the United Kingdom*, App No 4451/70 (ECtHR, 21 February 1975) para 34: ‘the preamble is generally very useful for the determination of the “object” and “purpose” of the instrument to be construed’.

⁶⁴ This has been addressed in ch 3, s 3.

application of the concept of danger in the context of maritime salvage. The cases chosen to illustrate the judicial approach to the construction of the notion of maritime property in danger, some predating the International Convention on Salvage, 1989,⁶⁵ are cases predominantly decided by English courts, given their traditional relevance in the developing of salvage law worldwide.⁶⁶ It is not the purpose of this sub-section to delve on the law of salvage but to highlight the broad construction given to the generic concept of danger, a normative element shared with the SAR Convention, that does not appear defined in the 1989 Salvage Convention.

Salvage is defined as: ‘any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever’.⁶⁷ Maritime property subject to salvage includes ships, craft and other structures capable of navigation, cargo, freight and apparel.⁶⁸ The existence of a situation of danger lies at the core of a service of salvage and the salvage reward and yet it is not defined in the Salvage Convention.

The notion of danger has been construed broadly by the courts, when establishing for instance whether there has been a situation of danger to the ship, for the purpose of awarding a salvage claim. Such danger ‘need not be from the normal perils of sailing on the sea’.⁶⁹

⁶⁵ London, 28 April 1989, 1953 UNTS 165. This Convention replaces the Convention for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea, Brussels, 23 September 1910, 327 UNTS 3.

⁶⁶ See F Lansakara, ‘Maritime Law of Salvage and Adequacy of Laws Protecting the Salvor’s Interest’ (2012) 6 (N 3) *TransNav International Journal on Marine Navigation and Safety of Sea Transportation*, 431 <www.transnav.eu>. Salvage cases around the world are generally decided under English Law, under the Lloyds’ Open Form (LOF). It is the contract most widely used for the performance of salvage services. It ‘provides a regime for determining the amount of remuneration to be awarded to salvors for their services in saving property at sea and minimising or preventing damage to the environment’ <<https://www.lloyds.com/market-resources/lloyds-agency/salvage-arbitration-branch/lloyds-open-form-lof>>. Clause J of its latest version, LOF 2011, provides English law as the governing law of the agreement. It further provides, in clause J, that the salvage reward is determined by Arbitration in London. The form is available in the same website.

⁶⁷ Art 1(a).

⁶⁸ Art 1(c) in conjunction with Art 1(b) and Art 3. Freight is defined by Wilson as ‘the consideration payable to the carrier for the carriage of goods from the port of shipment to the agreed destination’ in J F Wilson, *Carriage of Goods by Sea*, 7th edn (Pearson 2010) 289.

⁶⁹ F Rose, D Steel and R Shaw, *Kennedy & Rose: The Law of Salvage*, 8th edn (Sweet & Maxwell, 2013) paras 5-008 and 5-016.

Danger can also arise from the condition of the crew. *The Pendragon Castle*⁷⁰ can be used as an illustrative case. Despite no objective danger or dangerous situation for the m/v *Sapinero*, on a voyage with a cargo of grain during which the cargo absorbed water, the apprehension of danger that the vessel would fill and sink, even if unfounded, was sufficient to establish a service of a salvage nature. *Sapinero*'s communications to vessels in the vicinity amounted, according to the Court of Appeal to an urgent demand for assistance. The m/v *Pendragon Castle* offered the assistance by standing by the m/v *Sapinero* along the route to the port of Plymouth and by offering men to jettison part of the cargo. The Court of Appeal held that the unfitness of the Captain of the m/v *Sapinero* constituted *per se* a 'serious danger to any craft' and the assistance was therefore needed and salvage awarded.⁷¹

The danger can be other than physical danger of loss or damage, for example exposure to financial risks because of the immobilisation of a ship and cargo,⁷² third party liability claim as a result of the risk of contacting and damaging navigational beacons,⁷³ or danger to the proprietary rights of a vessel in the hands of pirates or stolen. This is for instance *The Cythera* case,⁷⁴ decided by the Supreme Court of Australia in 1965, regarding the theft of the yacht by two crew members while the owners were on land. The operation of recovery of the *Cythera* while navigating involved the intervention of the cargo vessel *Colorado del Mar* with the eventual successful apprehension of the yacht. The notion of danger was a key contentious point in determining whether this amounted to a salvage operation with the purpose of awarding a reward, as the foundation of a salvage claim. In the dispute, the owners of the *Cythera* rejected there was any physical danger to the yacht, as it was in tight, staunch and strong, and was navigated by two competent sail men.⁷⁵ Owners' argument on the notion of danger was hence firmly anchored on the physical integrity of the yacht.⁷⁶

⁷⁰ *The Pendragon Castle. The Sapinero. Lancashire Shipping Co, Ltd v United States* No 109, Court of Appeal for the Second Circuit 5F (2d) 56 (1924) <<https://law.justia.com/cases/federal/appellate-courts/F2/5/56/1550600/>>.

⁷¹ *Ibid*, para 3.

⁷² *The Glaucus* (1948) 81 Lloyd's Rep 262, p 266; *The Troilus* [1951] A C 820 HL; *The Orelia* [1958] 1 Lloyd's Rep 441. See J Reeder, *Brice on Maritime Law of Salvage*, 5th edn (Sweet & Maxwell 2012) paras 1-162 to 1-170.

⁷³ *Owners of the Hamtun v Owners of the St John (The Hamtun and The St John)* [1999] 1 Lloyd's Rep 883.

⁷⁴ *Société Maritime Calédonienne v The Cythera and her cargo* [1965] 2 Lloyd's Rep 454.

⁷⁵ *Ibid*, p 460 col 2.

⁷⁶ *Ibid*, p 460.

However, the Supreme Court rejected such a narrow interpretation of the concept of danger and included the danger to the proprietary rights of the owner.⁷⁷

The degree of danger, often in dispute in salvage claims for the purpose of assessing the quantum of the salvage reward, can be determined by a variety of circumstances, among which, ‘illness, exhaustion, ignorance and incompetence of the master and crew’.⁷⁸ The circumstances which are seen to increase the degree of danger are not related to the type of damages or consequences that may result from the risks, but to the risks themselves.⁷⁹ This is consistent with the reasoning applied to the construction of the qualifying words ‘grave and imminent’ contained in the definition of distress, discussed below.

1.5.2 Construction difficulties surrounding the qualifying words grave and imminent: the role of vulnerability reasoning

A difficulty in the construction of the definition of ‘distress phase’ revolves around the weight the qualifying words grave and imminent are given when determining the situation of danger that would trigger the initiation of a search and rescue operation. In addition to the difficulty itself in evaluating the standards in each case, the construction of the notion of distress phase, in the context of the SAR Convention brings uncertainty rather than clarity.

The nature and the extent of the operating procedures required are decided under the SAR Convention upon the evaluation of the phase of emergency involved.⁸⁰ The distress phase as defined in paragraph 4.4.3 of the Annex thereto triggers the declaration of the distress phase and the operational plan for conducting a search and rescue in accordance with Chapter 4 of the Annex to the SAR Convention.⁸¹

⁷⁷ Ibid. Justice Macfarlan added: ‘in cases where the ship is in the hands of persons whose declared object is feloniously and permanently to deprive the owner of his proprietary rights, the physical safety of the ship ceases to be the dominant element in assessing the degree of danger and the deprivation of the property and the restoration of that property to the owners are sufficient’, p 461, col 2.

⁷⁸ F Rose, D Steel and R Shaw, *Kennedy & Rose: The Law of Salvage* (n 69) para 5-012. Reference is therein made to the following cases: *The Swan* (1839) 1 W Rob 68; *The Charlotte Wyle* (1846) 2 W Rob 495; *The Aglaia* (1888) 13 P D 160 (in this case, the crew were suffering from frost-bite).

⁷⁹ F Rose, D Steel and R Shaw, *Kennedy & Rose: The Law of Salvage* (n 69) para 5-008.

⁸⁰ Annex to the SAR Convention, para 4.2.4 in conjunction with para 4.4.

⁸¹ Annex to the SAR Convention, para 4.5.3.

Within the emergency phases defined in paragraph 4.4 of the Annex to the SAR Convention for the purpose of determining the appropriate operating procedure, ‘distress phase’ is described as: ‘[w]hen positive information is received that a person, a vessel or other craft is in danger and in need of immediate assistance’. In what amounts to a second definition of the concept of distress phase within the same legal instrument, the requirement of ‘reasonable certainty’ gives way to the receiving of ‘positive information’. Furthermore, the qualifying words grave and imminent no longer accompany the notion of danger, and the notion of threat of such a danger is substituted by the existence of an actual danger, when using the words in danger.

The first difference noted, namely, the requirement of ‘reasonable certainty’ contained in paragraph 1.3.13 of the Annex to the SAR Convention and the requirement of receiving ‘positive information’ in paragraph 4.4.3.1 thereto, does not seem to bring any interpretative difficulty. Both expressions can be read to complement each other in order to ascertain the commencement of a search and rescue operation. However, the second difference, that is, the absence in the second definition of the qualifying words grave and imminent, and the substitution of the term threat by the words in danger, creates from the outset further uncertainty. Notwithstanding the requirement to avoid superfluous or redundant readings of provisions within a treaty, so as to give a meaning to all the terms therein,⁸² the coexistence of these two definitions of ‘distress phase’ create a further difficulty in its construction. The role of the qualifying words grave and imminent in the assessment of a situation of distress and consequently the legal effect of the notion of distress phase itself in the context of unsafe crossings at sea arguably become elusive and volatile. Their construction ultimately becomes more vulnerable to the differing sensibilities and pursuits of the actors involved, as pointed out previously.

Against this background, one interpretative view could regard the first definition in paragraph 1.3.13 of the Annex to the SAR Convention as containing a double component of likelihood, as it were, of suffering harm. The semantic meanings of ‘threatened by’ and ‘danger’ coexisting in the definition of distress, amount to a prospect of a possibility, or the likelihood of an exposure, grave and imminent, to suffering harm. Whereas the second definition in paragraph 4.4.3.1 contains a single layer of likelihood, when using just the

⁸² This requirement is an expression of the principle of effectiveness, for which see Gardiner (n 18) 179 and 180.

words in danger, where the qualifying words regarding the degree of intensity and proximity of such a risk are no longer needed to initiate a search and rescue operation.

Against this backdrop, the IMO Assembly appears to shed a light on the intensity of the dangers recognised in unsafe practices associated with the trafficking, the smuggling or the transport of migrants by sea, when using the qualifying word grave and its equivalent term serious.

The IMO Assembly for instance recognised in 1997 ‘the grave danger to life arising from unsafe practices associated with trafficking or transport of migrants by sea’.⁸³

The term unsafe practices has been defined by the IMO Maritime Safety Committee (MSC) as:

‘any practice which involves operating a ship that is:

.1 obviously in conditions which violate fundamental principles of safety at sea, in particular those of the International Convention for the Safety of Life at Sea, 1974, as amended (hereinafter SOLAS 1974); or

.2 not properly manned, equipped or licensed for carrying passengers on international voyages,

and thereby constitute a serious danger for the lives or the health of the persons on board, including the conditions for embarkation and disembarkation’.⁸⁴

⁸³ IMO Assembly Resolution A.867(20) adopted on 27 November 1997 (Agenda item 9), Combating Unsafe Practices Associated with the Trafficking or transport of Migrants by Sea <[http://www.imo.org/en/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/Resolution%20A.867\(20\).pdf](http://www.imo.org/en/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/Resolution%20A.867(20).pdf)>. The term smuggling was only introduced at a later stage, with the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted 15 November 2000, 2241 UNTS 507.

⁸⁴ IMO MSC/Circ.896/Rev.2 ‘Interim Measures for Combating Unsafe Practices Associated with the Trafficking, Smuggling or Transport of Migrants by Sea’, 26 May 2016, Annex thereto, para 1.1 <<http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.1-Circ.896-REV1.pdf>>. The concept of ship, for the purpose of the circular is defined as ‘every description of water craft (...) used or capable of being used as a means of transportation on water’ in para 2.2.1 of the Annex to the Circular. This circular revokes an earlier version of 12 June 2001, MSC/Circ.896/Rev.1.

The MSC has further acknowledged how '[e]xperience has shown that migrants often are transported on ships that are not properly manned, equipped or licensed for carrying passengers on international voyages'.⁸⁵

The recognition at the IMO Assembly,⁸⁶ of the 'grave danger' involved in unsafe crossings in the context of irregular migration by sea, ineludibly bears a significance in the construction of the first definition of distress in the Annex to the SAR Convention and reinforces its legal effect in the context of unsafe irregular crossings.

Cumulatively in this legal reasoning for a construction that enhances the protection at sea, one further argument needs to be considered when weighing the qualifying words grave and imminent and their legal effect in the context of irregular sea crossings. This argument draws on the vulnerability reasoning explored in chapter 1.

The vulnerability reasoning arguably has implications in the interpretation of these qualifying words grave and imminent. It calls for the special consideration to the lived vulnerability among sea migrants, determined by the exposure to harm or actual harm experienced in the context of irregular crossings, and hence to their specific needs. In this context, it seeks to address and accommodate the differences their crossings conditions present, in the interpretation of the notion of distress and the terms defining distress. It further calls for a corrective mechanism in the assessment of a situation of distress and ultimately in the implementation of the SAR Convention. As mentioned in chapter 1, this reasoning brings an asymmetry that characterises substantive equality, focusing on the result rather than on a sameness of treatment.⁸⁷ Vulnerability reasoning aims at redressing these inequalities by providing a level of protection that is more responsive and tailored to the particular needs of sea migrants.⁸⁸

⁸⁵ Ibid, para 4.

⁸⁶ The Assembly consists of all the IMO Members, according to the Convention on the International Maritime Organization (IMO) Geneva, 6 March 1948, 289 UNTS 3, Art 12.

⁸⁷ See in particular M Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in M Fineman and A Grear, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge, 2013) ch 1, 13 and 14. This was considered in ch 1, s 4.2.

⁸⁸ L Peroni and A Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 (No 4) Oxford University Press and New York University School of Law, 1056, 1076.

The SAR Convention departs from a formal equality approach to the treatment of people in distress at sea, as already discussed in chapter 1.⁸⁹ This approach however renders any equality a mere formality and hence illusory if the specific needs of those travelling in such unsafe and inhumane conditions are not specifically considered in a substantive equality approach to the construction of the qualifying terms grave and imminent. The problem thus resides in how these qualifying terms setting the level of severity and immediacy to define ‘danger’ are construed in order to assess if there is a situation of distress that triggers a rescue operation.

Vulnerability reasoning has an impact for instance in the European Court of Human Rights (ECtHR) decisions⁹⁰ and the UN Human Rights Committee (HRC) considerations⁹¹ regarding the treatment given to members of vulnerable groups, by taking special consideration to, or special protection of, their specificities and their needs. It has further implications when assessing the levels of severity required to reach the threshold of what

⁸⁹ Paragraph 2.1.10 of the Annex to the SAR Convention reads: ‘Parties shall ensure that assistance be provided to *any person in distress at sea*. They shall do so *regardless of the nationality or status of such a person or the circumstances in which that person is found*’ (emphasis added). It was the UNHCR, at the International Conference on Maritime Search and Rescue, that proposed to add in the draft of this provision, the words ‘or status’. With this proposal, the UNHCR sought to establish that the Convention would also be applicable to matters of their concern. See International Conference on Maritime Search and Rescue, 1979, Agenda item 6, SAR/CONF/6/2, the IMO Archives. This was pointed out in ch 2, s 2.1.

⁹⁰ See for instance *MSS v Belgium and Greece* (GC) App No 30696/09 (ECtHR, 21 January 2011) regarding the applicant’s detention in detention centres in Greece. The Court did not regard the two periods of detention imposed on the applicant ‘as being insignificant’ as it considered that ‘the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously’ (para 232). With regards to the conditions of detention, the Court concluded they constituted degrading treatment and the ‘applicant’s distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker’ (para 233). See also *Price v United Kingdom*, App No 33394/96 (ECtHR, 10 July 2001) paras 25 to 30 where the disability of the applicant was crucial in the assessment of the detention conditions, and *Slawomir Musial v Poland*, App No 28300/06 (ECtHR, 20 January 2009) paras 95 and 97 regarding overcrowding and poor prison conditions with the aggravating circumstance of the prisoner’s mental health problems and the need for specialised treatment.

⁹¹ See for instance *W O Jasin et al v Denmark*, Communication No 2360/2014, Communication No 2360/2014, CCPR/C/114/D/2360/2014, views adopted 22 July 2015, concerning a deportation case. The HRC gave due consideration to the great vulnerability of the author as a single mother with three children and suffering asthma and the conditions of living she had previously experienced in Italy, in assessing the risks involved in the deportation to Italy. This case is discussed further in Ch 5 s 4.4.

constitutes torture, inhuman or degrading treatment or punishment in the ‘minimum level of severity test’.⁹² Ill-treatment inflicted on a person in a vulnerable situation will be considered aggravated by the very position or condition of vulnerability.⁹³ Vulnerability reasoning acts as a ‘magnifying glass’ in the words of Peroni and Timmer in the sense that ‘the ill-treatment caused to the applicant looks bigger through the magnifying lens’.⁹⁴

Vulnerability reasoning is relevant to establish the levels and standards marked by the qualifying words imminent and grave when assessing danger. The lived vulnerability of sea migrants intensifies the degrees of severity and proximity of the danger. It further magnifies the effects of the harm they are exposed to. This therefore needs to be weighed accordingly when assessing an emergency phase and the corresponding operating procedure. Attention to vulnerability therefore needs to become part of the process of assessment of a situation of distress.

1.5.3 Further considerations in the construction of ‘distress’ within the context of the SAR Convention: reinforcing the view of a preventive approach to search and rescue

The SAR Convention also identifies a distress phase ‘when information is received which indicates that the operating efficiency of a vessel or other craft has been impaired to the extent that a distress situation is *likely*’.⁹⁵ The likelihood of a situation of distress in this provision presents again that double component of ‘possibility’ or ‘exposure’ referred to above with regards to the definition of distress phase in paragraph 1.3.13. The likelihood of a distress situation appears thus sufficient to trigger a search and rescue operation. This

⁹² A minimum level of severity or a threshold of gravity is needed for a particular treatment to constitute one of the proscribed forms of ill-treatment. This minimum standard of severity is to be assessed on a case-by-case basis and ‘in the light of present-day conditions’ as the European Court of Human Rights regarded in the case of *Selmouni v France* (GC) App No 25803/94 (ECtHR, 28 July 1999) considered further in ch 5, s 4.4. See also *Soering v The United Kingdom*, App No 14038/88 (ECtHR, 7 July 1989) regarding the applicability of Art 3 in a case of extradition, para 100: ‘As is established in the Court’s case-law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within scope of Article 3 (art.3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment (...) the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim’.

⁹³ See for instance *MSS v Belgium and Greece* (n 90) para 232.

⁹⁴ L Peroni and A Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (n 88) 1079 and 1080.

⁹⁵ Annex to the SAR Convention, para 4.4.3.3 (emphasis added).

unequivocally favours the view of a rescue operation being determined with a preventive approach so that the rescue operation takes place before the emergency level reaches a situation of actual distress in cases of operating efficiency impairment of the vessel or other craft. The operative of search and rescue operations is in fact characterised and informed by a preventive approach, regardless of the cause or the circumstances surrounding the emergency situation.

A further consideration stems from the construction of this provision. Impairment of the ‘operating efficiency’ proves not to be necessarily a precondition for a distress phase to take place. Equally, the impairment does not automatically create a situation of distress such as to trigger a search and rescue operation, unless the extent of the operating deficiency of the vessel or other craft is likely to cause a situation of distress.⁹⁶ The circumstances in each case will hence determine the evaluation of the danger involved. For instance, the likelihood of re-establishing the operating efficiency of the vessel or craft, the time involved bearing in mind the sea and weather conditions in the area at the time would be considered. Where unsafe crossings are involved, the likelihood of repairing any operating deficiency is practically nil. In fact the incidents regarding sea migrants reported prove that operating deficiency only worsens rapidly the conditions on board, increasing rapidly the risk to the lives on board.⁹⁷ This effectively amounts to equating operating deficiency of the vessel or craft with a situation of distress phase, at any rate in the context of irregular crossings. This is not, however, the only determinant of a situation of distress.

The SAR Convention considers an additional circumstance that characterises a distress situation, i.e., the lack of information or unsuccessful attempts to establish communication with a person, a vessel or other craft after an alert phase has been identified,⁹⁸ which ‘point[s] to the probability that a distress situation exists’.⁹⁹ Again, in this case the prospect of a situation of distress suffices to trigger a search and rescue operation. This kind of

⁹⁶ Below that threshold, the situation is identified as of ‘alert phase’, as defined in para 4.4.2 of the Annex to the SAR Convention.

⁹⁷ Examples of rapid deterioration of the situation on board, where delayed rescues prove to be fatal, can be found in the report by Amnesty International, ‘Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean’ 30 September 2014 <<https://www.amnesty.org/en/documents/EUR05/006/2014/en/>>.

⁹⁸ Annex to the SAR Convention para 4.4.2. Note that an ‘alert phase’ also follows the ‘uncertainty phase’, defined in para 4.4.1, after ‘attempts to establish contact with a person, a vessel or other craft have failed and enquiries addressed to other appropriate sources have been unsuccessful’.

⁹⁹ Annex to the SAR Convention, para 4.3.3.2.

circumstances seems however less relevant to irregular crossings by sea and more suited to regular traffic, where an alert phase follows in turn an uncertainty phase. This initial emergency phase is established when ‘a person has been reported missing, or a vessel or other craft is overdue’ or ‘when a person, a vessel or other craft has failed to make an expected position’.¹⁰⁰

Outside an actual situation of distress phase, the appearance of a situation of distress phase triggers an obligation on States parties to the SAR Convention to ‘use search and rescue units and other available facilities for providing assistance to a person who is, or appears to be, in distress at sea’.¹⁰¹ This is to be coupled with paragraph 2.1.1 of the Annex to the SAR Convention, which provides: ‘On receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided’. Appearance of distress hence triggers the obligation on States parties to arrange, coordinate and ensure the necessary assistance at sea. A preventive approach therefore determines the intervention of search and rescue units in these situations without waiting for them to become actual situations of distress. The intervention in such circumstances is presented under the term assistance to cover all possible ways of support,¹⁰² where the delivery to a place of safety may not be needed.

The above construction responds to and it is in accordance with the object and purpose of the SAR Convention to establish a search and rescue plan ‘for the rescue of persons in distress at sea’.¹⁰³ The object and purpose consequently revolves around the very notion of persons in distress, according to the third preambular paragraph in conjunction with the first one in the SAR Convention.¹⁰⁴ Whereas the term distress phase considers both persons and vessels or other craft, the purpose is to rescue persons in distress at sea.¹⁰⁵ It is ultimately the

¹⁰⁰ Annex to the SAR Convention, para 4.4.1.

¹⁰¹ Annex to the SAR Convention, para 2.1.9, under the heading ‘Arrangements for provision and co-ordination of search and rescue services’.

¹⁰² Reference is made to the difference between assistance and rescue in ch 2, s 1.2.1. The latter involves the retrieve of those in distress from the sea and their delivery at a place of safety.

¹⁰³ SAR Convention, third preambular paragraph.

¹⁰⁴ ‘Noting the great importance attached in several conventions to the rendering of assistance to persons in distress at sea and to the establishment by every coastal State of adequate and effective arrangements for coast watching and for search and rescue services’.

¹⁰⁵ SAR Convention, third preambular paragraph.

safety of persons at sea that informs the objective of the maritime search and rescue plan.¹⁰⁶ It is therefore in this light that the construction of the term persons in distress needs to be made, in accordance with the principle of good faith.¹⁰⁷

Although the SAR Convention presents a reactive approach to difficulties occurring at sea, the construction of the terms defining the different emergency phases, particularly the distress phase, calls for a preventive approach. This preventive approach to the construction of the notion of distress equally applies in the context of vessels entering places of refuge on grounds of pleading distress.¹⁰⁸

The importance attached in other conventions to the establishment of ‘adequate and effective arrangements (...) for search and rescue services’ is noted in the Preamble of the SAR Convention.¹⁰⁹ The Coastal States’ obligation to promote the establishment, operation and maintenance of effective search and rescue services for the safety on and over the sea, contained in UNCLOS, Article 98.2, reinforces the nature of continuing adaptability and preservation of the search and rescue system. This, it is argued in the following section, allows a dynamic approach to the construction of the definition of distress phase, so as to

¹⁰⁶ SAR Convention, second preambular paragraph, in conjunction with UNCLOS, Art 98.2 and the third preambular paragraph of the SAR Convention.

¹⁰⁷ See Gardiner (n 18) 167 to 181.

¹⁰⁸ See for instance *The Rebecca* (Kate A. Hoff Administratrix of the Estate of Samuel B Allison, deceased (*U.S.A*) v *United Mexico States*) (29 April 1929) Reports of International Arbitral Awards, Volume IV pp 447 and 448 <https://legal.un.org/riaa/cases/vol_IV/444-449.pdf>. When considering the situation of distress and the degree of necessity involved, it was held: ‘Assuredly a ship floundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable. If a captain delayed seeking refuge until his ship was wrecked, obviously he would not be using his best judgment with a view to the preservation of the ship, the cargo and the lives of people on board’ (p 447). See also *The Eleanor* (1809) Edward’s Admiralty Reports, 135. See further IMO Assembly Resolution A.949(23) adopted on 5 December 2003 (Agenda item 17) Guidelines on Places of Refuge for Ships in Need of Assistance <http://www.imo.org/blast/blastDataHelper.asp?data_id=9042&filename=949.pdf>.

¹⁰⁹ SAR Convention, first preambular paragraph: ‘NOTING the great importance attached in several conventions to the rendering of assistance to persons in distress at sea and to the establishment by every coastal State of adequate and effective arrangements for coast watching and for search and rescue services’.

accommodate and apply to the vast diversity of circumstances in which danger is to be assessed.

2. An evolutionary construction of the notions of persons in distress at sea and distress phase in the context of a living treaty

2.1 A dynamic reading in changing circumstances

The semantic content of the term danger defining distress remains unaltered. However, the construction or the legal effect of this notion in the context of maritime search and rescue requires a constant adaptation. This adaptation regards primarily the changing circumstances of each individual case and the challenges unsafe crossings pose in the determination of persons in situations of distress at sea. It further considers the reading of the SAR Convention as a living treaty,¹¹⁰ favouring the continuing relevance of the SAR system to circumstances not initially contemplated, such as irregular crossings, marked by their inherent unsafety and the situation of vulnerability of those enduring these crossings.¹¹¹

‘Danger’ can safely be considered a generic term, even when qualified with the terms grave and imminent, allowing its application to a vast array of possible risks and perils at sea. The use of a generic term in a treaty ‘of continuing duration’ entails the presumption that the parties to the Convention ‘have intended those words to have an evolving meaning’, according to the International Court of Justice (ICJ) judgment in the case *Costa Rica v Nicaragua* referred to earlier.¹¹² The generic term under scrutiny in that dispute was

¹¹⁰ This has been considered in ch 2, s 1.3, and ch 3, s 1. The ECtHR when construing the ECHR in light of the ‘present-day conditions’ has recurrently considered the notion of living treaty and evolving interpretation. See for example the ECtHR decision regarding *Bankovic and Others v Belgium and Others* (GC) App No 52207/99 (ECtHR 12 December 2001) on the admissibility of the application, para 64.

¹¹¹ Mr K Sekimizu, IMO Secretary-General at the time, stated: ‘There is clear recognition among IMO Member States that using the SAR system to respond to mass mixed migration was neither foreseen nor intended, and that although Governments and the merchant shipping industry will continue rescue operations, safe, legal, alternative pathways to migration must be developed, including safe, organized migration by sea, if necessary.’ IMO press briefings ‘IMO Secretary-General welcomes UN Security Council resolution on migrant smuggling’ Briefing 45, 14 October 2015 <<http://www.imo.org/en/MediaCentre/PressBriefings/Pages/45-UNSC-resolution-.aspx>>.

¹¹² See above n 43, para 66 reads: ‘where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been

‘commerce’ in the context of the 1858 Treaty that provided a perpetual legal regime of free navigation in a specific area of the San Juan River.¹¹³ According to the reasoning in this judgment, the intent of the parties upon the conclusion of the 1858 Treaty was or can be presumed to have been to give the term commerce ‘a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law’.¹¹⁴ Hence, its reading, according to the ICJ, ‘is to be updated every time that the treaty is applied’.¹¹⁵

2.2 The notion of distress in the context of a living treaty

The foregoing reasoning applies to the interpretation of the SAR Convention. In particular, it applies when considering the intention of the parties to the SAR Convention in the use of the generic term danger and consequently the notion of distress phase. The use of this generic term is coupled with the crafting of a legal framework that shapes a permanent SAR system, i.e., ‘intended to create a legal regime characterized by its perpetuity’.¹¹⁶ These two elements combined render the presumption that the parties have intended the generic terms distress phase and persons in distress to have an evolving meaning more compelling.¹¹⁷ The legal effect of the term danger and hence of the term distress is undoubtedly capable of adapting and evolving to the different circumstances that contribute to a situation of risk at sea, in light of the present-day conditions, as well as to possible developments of international law. In the present research the construction of the term danger, with or without the qualifying words, and hence the legal effect of ‘distress’, is considered primarily in the context of changing circumstances rather than normative development, as was the case with the term commerce in the case concerning *Nicaragua v Costa Rica*.

This dynamic reading of the SAR Convention, and particularly the concept of danger that shapes the contours of distress phase, reflects changing social contexts and changing values

entered into for a very long period or is “of continuing duration”, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning’.

¹¹³ *Costa Rica v Nicaragua* (n 43) paras 67 to 69.

¹¹⁴ *Ibid*, para 64.

¹¹⁵ *Ibid*, para 70.

¹¹⁶ *Costa Rica v Nicaragua*, para 67.

¹¹⁷ *Ibid*, para 66.

as Boyle points out in the context of UNCLOS.¹¹⁸ This interpretative approach to the notion of distress phase becomes critical to guarantee the continuing relevance of the SAR Convention. It is undoubtedly consistent with the notion of the SAR Convention having the ability to adapt to realities and challenges not envisaged when it was concluded. This is the fundamental characteristic of a ‘living treaty’, as has already been highlighted in chapter 2,¹¹⁹ and consequently, a convention that still remains relevant to the present challenges unsafe crossings present at sea. This concept of ‘living treaty’, explored by Boyle,¹²⁰ Wood,¹²¹ and Barnes,¹²² regarding the capacity of UNCLOS to respond and remain relevant to changes, applies to the SAR Convention as the instrument that articulates a search and rescue system in accordance with the obligation contained in UNCLOS, Article 98.2.¹²³

The changing circumstances in the context of maritime search and rescue are marked with the crossing conditions sea migrants endure. The lack of safety during the entire transit is unquestionable and uncontested, the violence they are exposed to, before and even during transit, mainly in the hands of smugglers, is recurrent.¹²⁴ The conditions of travelling are a threat to their physical and mental integrity.¹²⁵ The dangers involved are obvious, to the point of making these observations a mere platitude, and yet these circumstances do not consistently translate into a recognition of a distress phase. Not even a likelihood or

¹¹⁸ A Boyle, ‘Further Development of the Law of the Sea Convention: Mechanisms for Change’ (2005) 54 (N 3) *International and Comparative Law Quarterly*, 563 (Boyle) 567.

¹¹⁹ Ch 2 s 1.3.

¹²⁰ Boyle (n 118) 584.

¹²¹ M Wood, ‘Reflections on the United Nations Convention on the Law of the Sea: A Living Instrument’ in J Barrett and R Barnes (eds) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, 2016) p lxxvii.

¹²² R Barnes, ‘The Continuing Vitality of UNCLOS’ in J Barrett and R Barnes (eds) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, 2016) ch 16, 459, 482.

¹²³ SAR Convention, Art. II.

¹²⁴ This was considered in ch 1, s 3 and will be scrutinised further in ch 5, s 3 with regards to the crossing conditions. See further the remark in the UN Resolution adopted by the General Assembly on 17 December 2015, A/RES/70/147, ‘Protection of Migrants’, emphasising the importance of protecting persons in vulnerable situations, and expressing concern about the increase in the activities related to traffickers and smugglers, ‘who profit from crimes against migrants, especially migrant women and children, without regard for dangerous and inhumane conditions (...)’, para 5(a). Their vulnerability is further highlighted in para 4(i).

¹²⁵ As an example, see the testimony a twenty-year-old nurse gave to Médecins sans Frontières, and reported on July 2015, ‘Italy: The Journey to Europe was worse than what I left behind in Somalia’ <<https://www.msf.org.uk/article/italy-the-journey-to-europe-was-worse-than-what-i-left-behind-in-somalia>>.

appearance of distress is consistently established that would determine the start of a rescue operation or, at least, the provision of adequate assistance. An illustrative example for the above proposition can be found in the Mediterranean region, which has seen the highest numbers of reported deaths in the last years, and despite a decline in the number of irregular crossings since 2017, the risk of perishing has actually increased.¹²⁶ To these reported deaths, there needs to be added the risks to the integrity of persons undertaking these crossings, which pose a threat to their health and ultimately to their lives. Although little data on the conditions of these journeys is available, survivors report recurrently the loss of fellow migrants dying before they are rescued.¹²⁷ Skin burns, infections due to lack of hygiene, dehydration, hypothermia or suffocation are only some examples of the dangers present in these journeys. As an example, Klepp refers to the rescue of 5 Eritrean nationals by Italian authorities, close to Lampedusa, Italy, in August 2009, whom had been at sea for 3 weeks, during which 75 fellow passengers had died of dehydration and starvation.¹²⁸

Against this background, the construction of distress phase begs for considerations outside the four corners of the SAR Convention to maintain an effective SAR system and remain relevant in the present circumstances, without a need for amendments that would likely fall short of consensus.¹²⁹ The consideration of extraneous rules to the SAR Convention, relevant *ratione materiae*, are an integrated part of the process of construction, a further element in

¹²⁶ See International Organization for Migration (IOM) Missing Migrants Project, a global migration data analysis centre that tracks migrants' deaths and migrants who have gone missing along migratory routes across the world, already referred to in the Introduction <<https://missingmigrants.iom.int>>. In 2017, the mortality rate in the central Mediterranean route was 1.96%, in 2018 it reached 3.11% and as at October 2019, the mortality rate in this route has increased to 3.63%. See IOM press release, 'Mediterranean Migrant Arrivals Reach 76,558 in 2019; Deaths reach 1,071', 11 October 2019 <<https://www.iom.int/news/mediterranean-migrant-arrivals-reach-76558-2019-deaths-reach-1071>>. See further IOM, Fatal Journeys, Vol 3 Part I, 'Improving Data on Missing Migrants', IOM's Global Migration Data Analysis Centre, GMDAC, 2017, p xi and chapters 1 and 2 thereto <https://publications.iom.int/system/files/pdf/fatal_journeys_volume_3_part_1.pdf>.

¹²⁷ IOM, Fatal Journeys, Vol 3 Part I, 'Improving Data on Missing Migrants', IOM's Global Migration Data Analysis Centre, GMDAC, 2017, p 25.

¹²⁸ S Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea' (n 4) 557 (Epilogue). The boat had been spotted by at least ten commercial vessels and the Maltese Navy, who offered them water and food, but did not rescue them. See also T Gammeltoft-Hansen and T Aalberts 'Sovereignty at Sea: The Law and Politics of Saving Lives in the *Mare Liberum*' (2010) Danish Institute for International Studies (DIIS) Working Paper 2010:18. More examples are given in ch 1, s 3 and ch 5, s 3.

¹²⁹ Boyle (n 118) 567.

the process of interpretation of treaties, considered as a unity, according to Article 31 of the VCLT and customary law.¹³⁰ The mechanism of systemic integration formulated in Article 31(3)(c) of the VCLT hence stands on an equal footing with the previous ones,¹³¹ and is not to be considered in exceptional circumstances only.¹³²

This dynamic approach to treaty interpretation aims at applying more expansively the notion of danger and hence the concept of distress. The mechanism of systemic integration formulated in Article 31(3)(c) of the VCLT allows taking into account human rights considerations in the construction of the notion of danger, particularly pressing in irregular crossings, where inevitably the journeys present added layers of risks to the physical and mental integrity of the persons involved.

With this in mind, the following section introduces the guiding mechanism of systemic integration, which will then lead to an exploratory path analysis in chapter 5, to integrate considerations of international human rights law in the construction of the notion of persons in distress for the purpose of maritime search and rescue.

3. Article 31(3)(c) of the VCLT: Initial considerations of the principle of systemic integration within the interpretative reasoning

3.1 A guiding mechanism for an integrating construction of the concept of distress

Article 31(3)(c) of the VCLT provides: ‘[t]here shall be taken into account, together with the context: (...) Any relevant rules of international law applicable in the relations between the parties.’

¹³⁰ *Golder v the United Kingdom* (n 63) para 30. The reference to this judgment is here limited to the methodology followed by the court in the process of interpretation, rather than the substance of the legal reasoning in the construction of Art 6 of the ECHR. With regards to the substance, see the Separate Opinions of Judge G Fitzmaurice and J Zekia, both of whom implicitly follow the interpretation process of Art 31 of the VCLT, and silently apply the systemic integration mechanism. In particular see Judge Fitzmaurice’s Separate Opinion, paras 25 to 31 and para 47. See also paras 41 to 43 where Judge Fitzmaurice invokes Arts 8 and 10 of the Universal Declaration of Human Rights, and Art 14 of the International Covenant on Civil and Political Rights, 1966, for the purpose of interpreting Art 6.1 of the ECHR.

¹³¹ Arts 31.1, 31.2, 31.3 of the VCLT.

¹³² *Golder v the United Kingdom* (n 63) para 35.

This guiding mechanism, as seen earlier, is part of a larger and an integrating interpretation process contained in Article 31, according to which the interpreter must first consider the plain meaning of the words in the specific provision of a treaty. The interpreter is to proceed therefrom to analyse the immediate context within the same treaty. In that zooming out process, as it were, considerations relating to the object and purpose of the legal text containing the international agreement need to be taken into account together with subsequent practice among the states parties thereto. The entire process is governed by the principle of good faith.¹³³ This interpretation procedure has been described, in Huber's words, 'as a progression of legal reasoning through concentric circles, each one constituting a field of reference of potential assistance in treaty interpretation'.¹³⁴

McLachlan points out that 'reference to external sources to inform the meaning of a legal text within a particular subject area' is a 'cumulative process – building upon the meaning of the text'.¹³⁵

As French points out, these guiding interpretative norms holding the status of customary international law, are addressed to States 'as members of the international community',¹³⁶ including the principle of systemic integration, whose importance as a rule of international law has been repeatedly highlighted, among others, by the ILC,¹³⁷ French,¹³⁸ and McLachlan.¹³⁹

The principle of systemic integration contained in Article 31(3)(c) of the VCLT allows a dialogue and a connection between different sources of legal regimes, a communication across different legal arenas. The inter-regime conversation proposed in this legal reasoning

¹³³ VCLT, Arts 26 and 31. See Gardiner (n 18) 170 to 181.

¹³⁴ Huber's words are quoted in the ILC Report A/CN.4/L.682 (n 48) para 463: 'Il faut donc chercher la volonté des parties dans le texte conventionnel, d'abord dans les clauses relatives à la contestation, ensuite dans l'ensemble de la convention, ensuite dans le droit international général, et enfin dans les principes généraux de droit reconnus par les nations civilisées. C'est par cet encerclement concentrique que le juge arrivera dans beaucoup de cas à établir la volonté présomptive des parties "conformément aux exigences fondamentales de la plénitude du droit et de la justice internationale"'.¹³⁵

¹³⁵ McLachlan (n 25) p 285. In the same vein, see Gardiner (n 18) 172: 'the process of interpretation is seen as an accumulation of elements rather than a succession, all items in article 31 constituting the general rule'.

¹³⁶ French (n 19) 267 and 287.

¹³⁷ ILC Report A/CN.4/L.682 (n 48) para 420.

¹³⁸ French (n 19) 283.

¹³⁹ McLachlan (n 25) 280.

aims at advancing the protection of the integrity of the persons at sea, with special consideration to the needs of sea migrants.¹⁴⁰ In articulating the principle of systemic integration, an arguably reductionist regime-objective approach to the maritime SAR system, centred in maritime traffic,¹⁴¹ would give way to a ‘sense of common good of humankind, not reducible to the good of any particular institution or “regime”’.¹⁴²

In what seems at present a stagnated discussion on the construction of the concept of distress phase among States parties to the SAR Convention,¹⁴³ the rules of interpretation in the VCLT, and in particular Article 31(3)(c), conform a guiding mechanism addressed to States parties to the relevant treaty being interpreted, i.e., the SAR Convention and to the wider international community to the extent that the duties to render assistance at sea and proceed to the rescue constitute obligations of customary international law.

The guiding mechanism contained in Art 31(3)(c) is hence pivotal in the building of the legal reasoning for a more integrating reading of the SAR Convention with regards to the concept of persons in distress. This is necessarily linked to and has implications for the coastal States’ response in their obligation to maintain adequate and efficient SAR services.¹⁴⁴ It has also, unquestionably, an impact on the response sought from masters when encountering unsafe irregular crossings at sea.

The acknowledgment of the situation of vulnerability among sea migrants, examined in chapter 1, primarily based on lived vulnerability given the circumstances surrounding irregular crossings, the crossing conditions themselves and the specific dangers involved,¹⁴⁵ brings to the interpretative forefront concerns that are non-existent, or at any rate

¹⁴⁰ French (n 19) 285 to 286. McLachlan (n 25) states: ‘the process of interpretation encapsulates a dialectic between the text itself and the legal system from which it draws breath’, 287. Systemic interpretation hence allows that dialogue between the text itself and the legal system.

¹⁴¹ Ch 2 s 3.1.

¹⁴² ILC Report A/CN.4/L.682 (n 48) para 480.

¹⁴³ See IMO MSC 95/21/4/Rev.1 of 17 April 2015 (n 12) para 9.1, and IMO Legal Committee Report LEG 102/2 of 20 April 2015 (n 13).

¹⁴⁴ SAR Convention, 1st preambular paragraph and UNCLOS, Art 98.2.

¹⁴⁵ In *MSS v Belgium and Greece* (n 90). The court emphasised the particular vulnerability of the applicant, an asylum seeker, ‘because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously’ para 232’. The vulnerability aspect was also raised in the case concerning *Hirsi Jamaa and Others v Italy* (GC) App No 27765/09 (ECtHR, 23 February 2012), paras 36 and 144, as well as the Concurring Opinion of Judge Pinto de Albuquerque, p 78.

exceptional, in regular navigation. In these circumstances, the relevance of human rights considerations in search and rescue operations, particularly involving sea migrants, becomes more apparent.¹⁴⁶

Recourse to human rights law in order to merge considerations and values therein into a maritime normative framework constitutes a reaction and a response to the non-envisaged circumstances of irregular sea crossings in unsafe conditions. It seeks advancing and giving effect to interests and needs underrepresented in the search and rescue system.¹⁴⁷ These considerations are, as will be argued in the following chapter, relevant to the conditions in which these crossings are endured and to the concept of persons in distress at sea.

Article 31(3)(c) is hence instrumental to promote coherence among different legal areas of specialisation within the international legal system, enhancing synergies that might exist among compartmentalised and insular regimes, hence reducing certain effects of fragmentation,¹⁴⁸ among which, one may add, the underlap.

Reliance on Article 31(3)(c) of the VCLT in this legal reasoning has the purpose of influencing the construction of the notion of persons in distress in search and rescue operations in an integrating and consistent manner, particularly in the context of unsafe and irregular sea crossings, where differences of construction and assessment arise. The aim is also to make the response at sea consistently tailored to the specific needs among sea migrants, and thus more robust and effective, within the object and purpose of the SAR Convention, namely, the rescue persons in distress at sea, and ultimately the safety of life at sea.¹⁴⁹ Using the guiding mechanism of Article 31(3)(c), human rights law considerations

¹⁴⁶ See French (n 19) p 297.

¹⁴⁷ See ILC Report A/CN.4/L.682 (n 48) para 473, where reference is made to ‘the need to react to new circumstances and to give effect to interests or needs that for one reason or another have been underrepresented in traditional law’ and it continues: ‘Rather, the significance of the need to “take into account” lies in its performance of a systemic function in the international legal order, linking specialized parts to each other and to universal principles.’

¹⁴⁸ See French (n 19) 282 and 302.

¹⁴⁹ SAR Convention, third preambular paragraph. See also French (n 19) 299, where the author refers to the Award of the Arbitral Tribunal in Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands (*Belgium v The Netherlands*) decision of 24 May 2005 (Volume XXVII). The author highlights the importance that was placed on the object and purpose of the treaty under discussion, and its evolutive interpretation ‘which would ensure an application of the treaty that would be effective in terms of its object and purpose’ (*Belgium v The Netherlands*) p 80 <http://legal.un.org/riaa/cases/vol_XXVII/35-125.pdf>.

are invoked in the interpretation of the notion of persons in distress, despite no references being made in the SAR treaty to human rights law.¹⁵⁰

Such interpretation of the notion of distress at sea stems from the States' commitments under human rights law instruments,¹⁵¹ which will be considered in the following chapter. This interpretative guiding mechanism necessarily leads to a reading of the SAR Convention, as well as the relevant provisions in SOLAS Convention and UNCLOS,¹⁵² coherent with human rights law, within the process of legal interpretation, which, in McLachlan's words, 'itself performs an integrating task within the legal system'.¹⁵³

3.2 Some considerations on the operative formulation of Article 31(3)(c) of the VCLT

Against the background of fragmentation of international law, where the main concern is the overlapping of rules and the potential for conflict, the principle of systemic integration has been presented as an interpretative rule that requires a justification. McLachlan refers to the need of express justification in 'hard cases' or even in 'exceptional circumstances'.¹⁵⁴ The ILC report contemplates the use of Article 31(3)(c) in cases where a 'systemic problem' occurs, conceived as 'an inconsistency, a conflict, an overlap between two or more norms' and in the absence of interpretative tools.¹⁵⁵ Moreover, the use of the principle of systemic integration or the specific reference of Article 31(3)(c) is mainly studied in the cases of

¹⁵⁰ Considerations of relevance apply to this point, as will be discussed in the following chapter, s 5.5. For the present purpose, a parallelism can be drawn with UNCLOS, whose provisions do not make specific considerations to human rights law and yet considerations of humanity are recurrently made by ITLOS in its decisions, for instance, in the case of *M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea)* case No 2, ITLOS Reports 1999, 10, para 155.

¹⁵¹ This is the approach taken by G Marceau, in the context of the interpretation of WTO law. See G Marceau, 'WTO Dispute Settlement and Human Rights' (2002) vol 13 (N 4) EJIL 753, 779 <<http://ejil.org/pdfs/13/4/1561.pdf>>. See further ILC Report A/CN.4/L.682 (n 48) para 444.

¹⁵² SOLAS Convention, Ch V, Regs 7 and 33; UNCLOS, Art 98.

¹⁵³ McLachlan (n 25) 286.

¹⁵⁴ McLachlan (n 25) 281.

¹⁵⁵ ILC Report A/CN.4/L.682 (n 48) para 420.

disputes,¹⁵⁶ involving generic, unclear or open-textured provisions whose meaning had to be determined by reference to extraneous international rules.¹⁵⁷

Looking beyond the four corners of the particular treaty in its interpretation, and referring to external sources to inform the meaning of a particular provision may hence appear as a mechanism used only in particular cases. Yet the normative harmonisation sought in the principle of systemic integration and its formulation in Article 31(3)(c) contain a mandatory provision that do not limit its use to specific instances.¹⁵⁸ Tzevelekos, for example, has acknowledged its use, outside norm conflict scenarios, where a relation of norm complementarity exists, in *Golder v United Kingdom*.¹⁵⁹ In this case, the ECtHR assessed whether the right of access to justice fell ‘within the scope of protection offered by Article 6 of the ECHR’, introducing in its legal reasoning ‘extraneous and relevant norms of international law that are *ratione materiae* complementary to its Convention’.¹⁶⁰

The applicability of Article 31(3)(c) will be thus further explored in the context of the discussed underlap of a specific treaty, in order to interpret the concept of persons in distress at sea in its relationship with its normative environment. In this legal context the inconsistent and even contested interpretation of what constitutes a situation of distress, particularly acute in the context of search and rescue of sea migrants, begs this exploratory legal path.¹⁶¹ This may be itself the justification, if needed, to look beyond the four corners of the SAR Convention, and to build systemic relationships with extraneous rules. A legal reasoning process is therefore proposed in fulfilment of the requirement of integration contained in Article 31(3)(c) of the VCLT, which articulates the principle of systemic integration in order to advance particular needs among sea migrants.

¹⁵⁶ See for example ILC Report A/CN.4/L.682, para 437 referring to state immunity cases. See also McLachlan (n 25).

¹⁵⁷ ILC Report A/CN.4/L.682 (n 48), para 467

¹⁵⁸ French (n 19) p 303.

¹⁵⁹ V Tzevelekos, ‘The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation tool or a Selective Loophole for the Reinforcement of Human Rights teleology?’ (2010) 31 (N 3) Michigan Journal of International Law, 621, (Tzevelekos) 647 and 648. See *Golder v United Kingdom* (n 63).

¹⁶⁰ Tzevelekos, 647 and 648. See also the ILC Report A/CN.4/L.682 (n 48) para 435 where this case was also considered in the study of Art. 31(3)(c), in para 435. See further McLachlan (n 25) 294.

¹⁶¹ See Parliamentary Assembly of the Council of Europe, ‘Lives Lost in the Mediterranean Sea: Who is responsible?’ (n 2) para 13.3. See also French (n 19) 303.

The foregoing reasoning needs nonetheless keeping in mind that the exercise of interpretation seeks to determine the intention of the parties to the treaty, not to undermine the crucial consideration of consent.¹⁶² Boyle considers the limitations to interpretation when he states: ‘interpretation is interpretation, not revision or rewriting of treaties. The result must remain faithful to the ordinary meaning and context of the treaty, “in the light of its object and purpose”’.¹⁶³

Mindful of its limitation as an interpretative tool, this legal reasoning strives to operationalise the use of Article 31(3)(c) in the construction of the notion of persons in distress, outside a situation of overlap and conflict of norms, in an attempt to, in McLachlan’s words: ‘unlock the full potential of Article 31(3)(c)’.¹⁶⁴

3.3 Distinction between interpretation or construction and the actual application of a rule of international law

The mechanism of systemic integration within the process of interpretation and construction needs to be further limited by differentiating the principle of systemic integration of extraneous rules with the actual application of rules to the facts given. Although Article 31(3)(c) of the VCLT only refers to ‘taking into account rules of international law...’ this is a distinction that becomes on occasions blurry, even non-existent, in the reasoning process of construction or interpretation.¹⁶⁵

¹⁶² French (n 19) 300.

¹⁶³ Boyle (n 118) 568.

¹⁶⁴ McLachlan (n 25) 281 and 282: ‘The issue, then, is not whether the rule found in Article 31(3)(c) exists and may be applied in some circumstances. Rather the task is one of “operationalizing” the sub-paragraph so that it may more fully perform its purpose, and, in the process, reduce fragmentation and promote coherence in international law.’ See also the ILC Report A/CN.4/L.682 (n 48) para 423: ‘But if the article is merely the expression of a larger principle – that of “systemic integration” – and if that principle, again, expresses a reasonable or even necessary aspect of the practice of legal reasoning, then, a discussion of its actual and potential uses would constitute a useful contribution to the study of the alleged fragmentation (or diversification) of international law.’

¹⁶⁵ ILC Report A/CN.4/L.682 (n 48) para 467. See T Treves, ‘Human Rights and the Law of the Sea’ (2010) 28 (N 1) Berkeley Journal of International Law, 1, 5 and 6. An example is *Oil Platforms (Islamic Republic of Iran v United States of America)* Judgment ICJ Reports 2003, 6 November, 161 <<http://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf>>. Briefly, this case regards an Iranian claim for the alleged breach of freedom of commerce based on the 1955 Treaty of Amity, Economic and Consular Rights, 284 UNTS 93, between the parties, for the attack on three Iranian oil platforms by the United States. The ICJ

Article 293 of UNCLOS 1982 constitutes an example of a provision expressly enabling the application of extraneous rules of international law: ‘A Court or Tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention’. The wording of the Convention is hence giving express jurisdiction to the Court or Tribunal involved, to apply them, as long as there is no incompatibility with UNCLOS 1982.

In the case concerning *M/V Saiga (No 2)*¹⁶⁶ both aspects of application and interpretation distinctively transpire from paragraph 155 of the decision:

‘In considering the force used by Guinea in the arrest of the *M/V Saiga*, the Tribunal must take into account the circumstances of the arrest *in the context of the applicable rules of international law*. Although the Convention does not contain express provisions on the use of force in the arrest of ships, *international law, which is applicable by virtue of article 293 of the Convention*, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. *Considerations of humanity must apply in the law of the sea*, as they do in other areas of international law’.¹⁶⁷

Although the above paragraph is centred in the ‘applicable rules of international law’ in the use of force in the arrest of ships, the last sentence points at the human rights considerations that must inform the interpretation and implementation of the use of force in UNCLOS 1982.

had limited jurisdiction to interpret and apply this treaty to determine whether there had been a breach, in particular, of Art X (1). Art XX (1)(d) was also at the core of the analysis, in particular the terms ‘measures necessary’, as the United States relied on the exception therein to contend that the use of force amounted to measures necessary to protect their essential security interests. The confusion in the judgment between interpretation of the provision in the normative environment of the use of force and the actual application of the relevant rules of international law becomes apparent in para 41: ‘[t]he application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the court by article XXI, paragraph 2 of the 1955 Treaty’. See also paras 42, 43, 78 and 125. See in the same vein the analysis of this reasoning by the ILC in its Report A/CN.4/L.682, para 460. Contrast with Judge Higgins and Judge Kooijman’s separate opinions, paras 47 to 49 and para 442 respectively, addressing the lack of clear distinction between interpretation and application in the Court’s legal reasoning.

¹⁶⁶ See n 150.

¹⁶⁷ *Ibid*, para 155 (emphasis added).

In *The Juno Trader* case,¹⁶⁸ regarding the detention of a fishing vessel and the obligation of prompt release set out in Article 73(2) of UNCLOS, the International Tribunal of the Law of the Sea construes the provision within a normative environment, with no reference to the applicability of rules of international law:

‘The Tribunal considers that article 73, paragraph 2, must be read in the context of Article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision.’¹⁶⁹

The process of interpretation followed here starts in the immediate context of the provision itself and then places the phrase ‘prompt release’ in the normative environment of human rights with its reference to ‘considerations of humanity’.

In the present construction of the notion of persons in distress, the distinction raises no difficulties. The SAR Convention provision containing the definition of distress is construed taking into account the semantic content and legal effect of its terms, their context and, cumulatively, considering extraneous rules in the normative environment of international human rights law relevant to the integrity of the persons in light of the States’ commitments under this legal regime. No application of such rules is suggested, nor are States’ responsibilities considered. International human rights rules are only invoked to be taken into consideration in the interpretation process.

Conclusion

The interpretative process undertaken in this chapter, in accordance with Article 31 of the VCLT highlights the need to consider cumulatively all the guiding mechanisms contained therein.

The interpretative legal reasoning developed in this chapter concerning the notions of distress phase and particularly persons in distress has highlighted the open texture nature of the notion of distress and its key defining term danger. It has further underscored the

¹⁶⁸ *The Juno Trader (Saint Vincent and the Grenadines v Guinea-Bissau)* case No 13, ITLOS Reports 2004, 17.

¹⁶⁹ *Ibid*, para 77.

preventive approach given to search and rescue services where the notion of distress relies centrally on the concept of danger, defined as the possibility or likelihood of suffering harm or injury. This preventive approach is reinforced by the context of the operating procedures in Chapter 2 of the Annex to the SAR Convention, where an appearance of distress triggers specific actions, and Chapter 4, particularly in situations where the operating efficiency of the vessel, boat or craft is impaired. The degree of intensity and proximity required with the qualifying words grave and imminent in the first definition of distress phase do not alter the generic nature of the term. It raises, however, doubts when read in the context of the operating procedures and the second definition of distress phase therein. The vulnerability reasoning, it has been here argued, brings a legal corrective mechanism to the weighing of these qualifying words and the levels of proximity and intensity of danger when assessing a situation of distress to address the needs of migrants at sea.

The legal reasoning followed in the construction of the term distress links the use of a generic term such as danger to define the open-textured term of distress, with its legal context, namely the SAR Convention. The consideration of continuity of this instrument for the maintenance of the SAR system and the use of a generic term entails the presumption that the parties to the SAR Convention intended to give a dynamic reading to the concept of distress. This interpretative approach places this dynamic reading of a provision in the context of the SAR Convention as a living treaty, which remains relevant to the circumstances and the conditions that mark unsafe irregular crossings.

The interpretative legal reasoning developed in this chapter allows to conclude that the terms defining ‘persons in distress’ admit a broad and dynamic reading of this term that can accommodate the specific needs among sea migrants in order to enhance their protection.

Additionally, the principle of systemic integration formulated in Article 31(3)(c) of the VCLT which is part of the interpretative process, brings to the legal interpretative reasoning a mechanism that enables a dialogue and a connection across different legal arenas. It builds systemic relations between different rules. Its relevance to the present interpretative process is unquestionable as it seeks a more coherent reading of the term distress and a consistently integrating construction of this concept. This ultimately aims to achieve a cohesive response at sea, putting the persons in need of assistance at the centre of this inter-regime conversation. This approach has certainly proved controversial in the context of search and rescue of sea migrants, where, as seen in the previous chapter, underlying tensions exist. This interpretative reasoning seeks to enhance further a *pro homine* approach to the

Chapter 4

construction of 'persons in distress'. It is informed by the principle of good faith and takes into account its context, the object and purpose of the SAR Convention. It further seeks to take into account considerations of human rights law, invoked by means of Article 31(3)(c), in order to respond to the needs of sea migrants and redress their situation of vulnerability at sea.

To this end, the following chapter will examine both the functioning of Article 31(3)(c) VCLT and the substance of the specific rules of international human rights invoked for the construction of the notion of danger defining 'persons in distress'. It will also examine the requirements in the process of systemic integration in terms of their relevance and their applicability in the relations between the parties to the SAR Convention. This will allow exploring whether and to what extent this maritime instrument can integrate considerations of human rights law, in its interpretation, to become more responsive to the needs of sea migrants and to guarantee its relevance and its effectiveness in their search and rescue. In seeking a more integrating reading of the SAR Convention, the following chapter will hence further explore treaty interpretation and the role Article 31(3)(c) of the VCLT can play where no conflict of norms arise, but instead, a situation of underlap exists.

Chapter 5 The concept of persons in distress in maritime search and rescue and international human rights law considerations: building systemic relationships in the interpretative reasoning

Introduction

The initial stages of the interpretative reasoning concerning the terms defining ‘persons in distress’ in the previous chapter confirm the broad meaning and the evolving reading of the concept of distress and its defining generic term danger in the SAR Convention, that allow accommodating specific needs accruing in the context of irregular crossings. These needs are related not only to the unsafe practices endemically present in these crossings, but also to the hardships involved in the treatment and the crossings conditions sea migrants are overwhelmingly subjected to.

The question this chapter strives to answer is whether an integrating construction of the notion of persons in distress and its defining term danger, grounded in international human rights law, is achievable. The aim is to scrutinise whether such an integrating construction, based on Article 31(3)(c) of the VCLT, can foster an interpretative scope of the notion of danger and therefore persons in distress that incorporates the exposure to or actual suffering of what constitutes cruel, inhuman or degrading treatment, for the purpose of search and rescue operations. This question stems from the crossing conditions vastly imposed upon sea migrants, the treatment widely inflicted on them, the suffering resulting therefrom and the protection needs that emerge.

To this end, this chapter scrutinises the functionality of the principle of systemic integration, contained in Article 31(3)(c) of the VCLT, as an interpretative guiding mechanism in the construction of ‘persons in distress’ and its relationship with the normative environment of international human rights law, for a more integrating reading of the SAR Convention. The recourse to international human rights law considerations into the law of the sea and the maritime normative framework is a response to the non-envisaged circumstances prevailing along migratory flows by sea: the crossing conditions sea migrants are overwhelmingly subjected to. These are conditions that in a different context such as detention conditions, have been found to constitute a violation of the prohibition of cruel, inhuman or degrading

treatment, according international and regional legal instruments referred to in this chapter and to the relevant jurisprudence also examined in this chapter.

The role of Article 31(3)(c) becomes one of advancing the specific needs of sea migrants, and thus enhancing their protection within the SAR system. In this sense, the interpretative legal reasoning proposed remains underpinned by the vulnerability reasoning. This vulnerability reasoning calls for mechanisms of redress by accommodating the differences and the specific needs within the process of construction of the notion of persons in distress.

This chapter considers in its first section an existing inter-regime conversation at sea where considerations of humanity inform the international law of the sea and the maritime legal arenas. The second section proposes furthering the inter-regime dialogue by considering international human rights law in the construction of the notion of persons in distress, based on the interpretative guiding mechanism formulated in Article 31(3)(c) of the VCLT. It invokes, for the construction of the notion of danger, central in the term of persons in distress, the prohibition of cruel, inhuman or degrading treatment. The following section draws on reports by fieldwork organisations to outline the exposure to or the actual threat to the integrity sea migrants endure during irregular journeys due to the widespread untenable crossing conditions and the ill-treatment they are subjected to. Against this background, section four argues that the crossing conditions to which sea migrants are repeatedly exposed and the suffering arising therefrom amount to cruel, inhuman or degrading treatment. It develops a legal reasoning for an interpretation of the notion of persons in distress and its central concept of danger that invokes international rules safeguarding against cruel, inhuman and degrading treatment. The scope and the standards applied to the rules invoked are consequently scrutinised. Sections five and six return to the operative of Article 31(3)(c) of the VCLT to assess, respectively, the relevance of the international rules invoked and their applicability in the relations between the parties, as required, in order to establish its legal viability in the present reasoning. This is determinant to establish in turn that the term persons in distress can and is to be construed to include situations where the crossing conditions amount to cruel, inhuman or degrading treatment for the purpose of initiating search and rescue operations.

1. An existing inter-regime dialogue at sea

The significance of human rights law in the law of the sea and the maritime realm poses no controversy. It is recurrently referred to with the term considerations of humanity, a term

that, in Brownlie's words, 'may depend on the subjective appreciation of the judge, but, more objectively, they may be related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite analogy'.¹ Undoubtedly, the term considerations of humanity offers a systemic dialogue between these legal arenas.

Considerations of humanity are present, whether explicit or implicitly in the provisions of UNCLOS. These can be found for instance in Article 73 regarding the prompt release of arrested vessels and crews.² The International Tribunal for the Law of the Sea (ITLOS) has issued a number of decisions concerning the prompt release of the crew. For example, in *The Juno Trader* case,³ regarding the detention of a fishing vessel and the obligation of prompt release set out in Article 73(2) of UNCLOS, the Court construed the obligation of prompt release of vessels and crews as including 'elementary considerations of humanity and due process of law'.⁴ In the earlier case of *M/V Saiga (No 2)*,⁵ regarding the arrest and detention of the oil tanker *Saiga*, master and crew, the Tribunal assessed the use of force in the process of arresting the vessel. In particular, the Tribunal examined the firing of live ammunition by the Guinean officers at the ship, causing severe injuries to two crewmembers. The Tribunal affirmed that: '[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law'.⁶

Considerations of humanity can also be traced in Article 99 of UNCLOS, regarding the prohibition of transport of slaves in connection with Article 110 paragraph 1(b) which allows

¹ I Brownlie, *Principles of Public international Law*, 7th edn (Oxford University Press, 2008) 27. See also the latest edition, J Crawford, *Brownlie's Principles of Public International Law*, 9th edn (Oxford University Press 2019) 43.

² UNCLOS, Art 73, paras 2 to 4. See T Treves, 'Human Rights and the Law of the Sea' (2010) 28 (No 1) Berkeley Journal of International Law, 3, where the author considers the safeguard of freedom of crewmembers.

³ *The Juno Trader (Saint Vincent and the Grenadines v Guinea-Bissau)* case No 13, ITLOS Reports 2004, 17, para 77. Ch 4, s 3.3 has also reflected on the construction of Art 73, para 2 of UNCLOS and human rights law considerations, where the notion of prompt release is placed in the normative environment of human rights law.

⁴ According to T Treves, ITLOS uses the term 'considerations of humanity' as a 'substitute for human rights', T Treves, 'Human Rights and the Law of the Sea' (n 2) 5 and more generally 3 to 6.

⁵ *M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea)* case No 2, ITLOS Reports 1999, 10.

⁶ *Ibid*, para 155. See also paras 157 and 159.

ships to board vessels on the high seas where there are reasonable grounds to suspect that the ship is engaged in the slave trade.⁷

Considerations of humanity can be further located in Article 146, regarding the protection of human life with respect to activities carried out in the Area, defined as the ‘seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction’.⁸ Within national jurisdiction, the International Court of Justice, in the *Corfu Channel* case,⁹ concerning Albania’s failure to inform the United Kingdom about the laying of mines in its territorial waters, and to warn the approaching British warships, considered such obligation was based on ‘elementary considerations of humanity’¹⁰

Considerations of humanity are engrained in Article 98, already discussed, regarding the duty to assist at sea and the obligation to provide search and rescue services in situations of distress, as Treves points out in his exploratory approach both to the relevance of human rights in the law of the sea and the relevance of the law of the sea in human rights law.¹¹ Oxman even considers the role of UNCLOS in advancing human rights and highlights human rights preoccupations therein, such as the duty to rescue.¹² This duty, in Oxman’s words: ‘finds new support in modern international law in the increasing acceptance of humanitarian norms in state practice and conventional law’.¹³

⁷ This can arguably be extendable to victims of trafficking, seen as a contemporary form of slavery, as suggested by Judge Pinto de Albuquerque in his Concurring Opinion in *Hirsi Jamaa and Others v Italy* (GC) App No 27765/09 (ECtHR, 23 February 2012) p 78 and fn 2 thereto. See also D Weissbrodt and Anti-Slavery International, ‘Abolishing Slavery and its Contemporary Forms’ (2002) Office of the United Nations High Commissioner for Human Rights (OHCHR), HR/PUB/02/04, para 62 <<https://www.ohchr.org/Documents/Publications/slaveryen.pdf>>. See Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, New York, 15 November 2000, 2241 UNTS 507, Art 8 paras 2 and 7.

⁸ UNCLOS, Art 1.1(1).

⁹ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* Judgment, ICJ Reports 1949, 9 April, 4.

¹⁰ *Ibid*, p 22.

¹¹ T Treves, ‘Human Rights and the Law of the Sea’ (n 2) 3.

¹² B Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (1998) 36 Colum. J. Transnat’l L 399, 414 and 415.

¹³ *Ibid*, 415.

In the context of maritime search and rescue operations, considerations of humanity among legal scholars are fundamentally scrutinised focusing on the right to life. In this arena, Trevisanut for instance explores the relationship between the safety of life at sea and the right to life, for the recognition of a right to be rescued, with emphasis on the application of human rights law at sea.¹⁴ Komp's exploratory approach to the connection between the duty to render assistance at sea and the right to life presents European Court of Human Rights (ECtHR) decisions concerning the right to life as a 'guidance, by analogy', on the interpretation of the duty aiming at the prevention of harm to individuals for a broad interpretation of the notion of distress.¹⁵

In the context of interventions at sea, whether for search and rescue purposes or interception operations in connection with border surveillance activities, considerations of humanity are linked to the treatment given to rescued or intercepted migrants and include the protection of dignity and the integrity of individuals, and the prohibition of torture, cruel, inhuman or degrading treatment or punishment. Regarding search and rescue operations, the IMO Assembly adopted the Resolution A.920(22) on Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea.¹⁶ This Resolution requested the review of IMO legal instruments focusing on the procedures to provide survivors with a place of safety and to treat them with humanity while on board.¹⁷ This resolution was followed by the adoption

¹⁴ S Trevisanut, 'Is there a right to be rescued at sea? A constructive view' (2014) 4 *Journal of Questions of International Law*, 3, and its updated version 'Recognizing the Right to be Rescued at Sea', (2017) 31 (N 1) *Ocean Yearbook Online*, 137. Contrast with E Papastavridis, 'Is there a right to be rescued at sea? A sceptical view' (2014) 4 *Journal of Questions of International Law*, 17. See also M Pallis, 'Obligations of states towards asylum seekers at sea: interactions and conflicts between legal regimes' (2002) 2 and 3 *International Journal of Refugee Law*, 329, 335.

¹⁵ L Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of protection Against the return of Migrants and Asylum Seekers to the High Seas?' in V Moreno-Lax and E Papastavridis (eds) *Boat Refugees' and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*, International Refugee Law Series, Volume 7 (Brill Nijhoff 2016) chapter 9. The author further emphasises the principles of good faith and effectiveness in the interpretation of the notion of distress to buttress a wider scope of application, 242, 243 and 247.

¹⁶ Adopted 29 November 2001
<http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20A.920%2822%29.pdf>.

¹⁷ Ibid, operative para 1.

of the 2004 amendments to the SAR and the SOLAS Conventions,¹⁸ already discussed in chapter 2, and their contemporary IMO Resolution MSC.167(78) on Guidelines on the Treatment of Persons Rescued at Sea (the Guidelines).¹⁹ This followed *The Tampa* case,²⁰ which, as commented in chapter 2,²¹ highlighted critical deficiencies in such aspects as the treatment given to rescued boat people and their delivery to a place of safety. The delivery of survivors to a place of safety, which marks the end of a rescue operation,²² is underpinned by the obligation of non-refoulement, reflected in the Guidelines, as will be considered in detail in chapter 6 when construing the notion of place of safety.²³

Against this background, the following sections explore furthering the considerations of humanity in the construction of the notion of persons in distress for the triggering of search and rescue operations. The approach proposed for the construction of the notion of distress builds upon specific considerations given among legal scholars to the right to life, referred

¹⁸ IMO Maritime Safety Committee Resolution MSC.155(78) 20 May 2004, adopting the amendments to the SAR Convention <[http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-\(MSC\)/Documents/MSC.155\(78\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-(MSC)/Documents/MSC.155(78).pdf)>. IMO Maritime Safety Committee Resolution MSC.153(78), 20 May 2004 <[http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-\(MSC\)/Documents/MSC.153\(78\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-(MSC)/Documents/MSC.153(78).pdf)>.

¹⁹ Adopted by the IMO Maritime Safety Committee Resolution MSC.167(78) 20 May 2004 <[http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf)>. See in particular paras 5.2, 5.6, and 6.17.

²⁰ *Ruddock v Vadarlis (The Tampa)* (2001) 183 ALR 1. See R Barnes, 'Refugee Law at Sea' (2004) 53 (N 1) *International & Comparative Law Quarterly*, 47; J Coppens, E Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' *The International Journal of Marine and Coastal Law* (2010) 25, 377, 382 to 384.

²¹ Ch 2, section 2.3.2 and fn 172 thereto.

²² Annex to the SAR Convention, para 1.3.2.

²³ Para 6.17 of the Guidelines reads: 'The need to avoid the disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea'. The prohibition of refoulment is further expressly contained in the Appendix to the Resolution MSC 167(78) adopting the Guidelines, 'Some Comments on relevant International Law', para 7. The ECtHR examined the principle of non-refoulement in the *Hirsi Jamaa* case (n 7) regarding the interception of sea migrants on the high seas by Italian authorities and their return to Libyan authorities in May 2009. According to its interpretation of the ECHR, the ECtHR stated that: 'States must refrain from returning a person (directly or indirectly) to a place where he or she could face a real risk of being subjected to torture or to inhuman or degrading treatment' (p 16).

to earlier. However, it focuses on a less visited arena, that is, the prohibition of cruel, inhuman and degrading treatment.

2. Furthering the inter-regime dialogue in the construction of ‘persons in distress’ in the SAR system: building systemic relationships

The semantic content of ‘danger’ was established in the previous chapter, as the possibility of or the exposure to suffering injury, pain or harm, both physical and mental, and even loss of life.

Hence, as seen in the earlier chapter, the notion of persons in distress at sea entails the likelihood of suffering harm or injury, be it physical or mental.

The open-textured nature of the elements defining the term distress phase allows its construction to be determined by reference to a developed body of international law.²⁴ It therefore calls for a reference to other sources of international law by means of the systemic integration reasoning to ‘assist in giving content to the “rule”’.²⁵ The VCLT articulates the principle of systemic integration providing, in Article 31(3)(c): ‘[t]here shall be taken into account, together with the context: (...) (c) Any relevant rules of international law applicable in the relations between the parties.’

This guiding mechanism, as pointed out in the main introduction, has a purpose of clarification of what the treaty provision actually means.²⁶ It allows a more coherent approach to the legal reasoning underpinning the construction of the definition of distress phase, in particular the notion of persons in distress at sea.²⁷ Reference to other international law obligations in the interpretative process further allows a dialogue between specialised

²⁴ United Nations General Assembly, International Law Commission (ILC), ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report of the Study Group on the ILC finalised by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006 (ILC Report A/CN.4/682) para 467.

²⁵ See D French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal rules’ (2006) 55 *International Comparative Law Quarterly*, 281 (French) 304.

²⁶ *Ibid*, 282.

²⁷ *Ibid*, 282 and 285, where references are made to the promotion of coherence within the international legal system.

fields of international law that have evolved in insular compartments,²⁸ which in the present argument aims at enhancing the protection of sea migrants.

In the inter-regime conversation proposed here through the principle of systemic integration, the integrity of the persons at sea remains central. It is unquestionably key for the purpose of the SAR Convention, as well as the SOLAS Convention, Chapter V, Regulations 7 and 33, and UNCLOS, Article 98, in the arena of maritime law and international law of the sea, in the context of safety of life at sea. It is also fundamental for the purpose of international human rights law, particularly concerning the right to life and the safeguard against torture, cruel, inhuman or degrading treatment or punishment.²⁹ The notion of persons in distress at sea is therefore here construed bearing in mind its normative environment where a relation of complementarity can be drawn between the notion of distress phase in the SAR Convention, when applied to persons, and international human rights law, based on the common *telos* of the safeguard of the integrity of individuals.³⁰

The mechanism of systemic integration contained in Article 31(3)(c) of the VCLT is proposed here to incorporate in the construction of the definition of persons in distress and its central element of danger, human rights law considerations. In particular, it is proposed to enable considering the exposure to hardships endured during irregular and unsafe crossings, the standards of which may amount to, as will be reasoned, the subjection to cruel, inhuman or degrading treatment. An integrating reading of the definition of persons in distress hence aims at incorporating in the notion of danger the exposure to or the actual

²⁸ C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 (N 2) *International Comparative Law Quarterly*, 279 (McLachlan) 284 and 318 to 319.

²⁹ See for instance *Tyrer v United Kingdom*, App No 5856/72 (ECtHR, 25 April 1978) regarding corporal punishment on a fifteen-year-old, where it is highlighted that one of the main purposes of Art 3 of the ECHR is 'to protect (...) a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects', as, 'in addition to the physical pain he experienced [although the applicant did not suffer severe or long-lasting physical effects] he was subjected to the mental anguish of anticipating the violence he was to have inflicted on him' para 33.

³⁰ See V Tzevelekos 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?' (2010) 31 (N 3) *Michigan Journal of International Law*, 621 (Tzevelekos) 647 to 650 where the author analyses the use of Art 31(3)(c) by the ECtHR as an anti-fragmentation tool when there is complementarity of norms rather than conflict.

suffering of human rights violations, in particular, cruel, inhuman or degrading treatment, safeguarded against in international human rights law.

Connecting present insular regimes or otherwise ‘melding’³¹ human rights law with maritime law and international law of the sea can play a contributory role in the on-going debate on the construction of the notion of persons in distress at sea. Its purpose in the present interpretative reasoning is the safeguard of the integrity of persons at sea, particularly for those involved in irregular crossings, and ultimately the integrity of the SAR system. It offers an opportunity for the SAR system to address the specific conditions in irregular crossings, raising aspects that are under-represented in the SAR system, as it was not intended, nor foreseen as a response to mixed migration flows.³² It further allows the SAR system to become more responsive to the specific needs among sea migrants, taking into account the exposure to intense levels of physical and psychological hardship in irregular sea crossings.

This approach is relevant to, and consistent with, the vulnerability reasoning developed in chapter 1.³³ This approach seeks to ensure that the formal equality or sameness of treatment guaranteed in the treatment of persons in distress at sea, in paragraph 2.1.10 of the Annex to the SAR Convention, which aims at safeguarding the assistance to *any* person in distress at sea,³⁴ is transformed into substantive equality to focus on the result. This is done by

³¹ This term is used by P Sands quoted by French (n 25) 285 and fn 15 thereto. Sands’ quote is however in the arena of environmental protection with reference to ICJ Advisory Opinion on ‘Legality of the threat or use of Nuclear Weapons’, 8 July 1996, referring to the ICJ’s effort ‘to meld humanitarian law, human rights law, environmental law and law governing the use of force into a systemic structure’.

³² IMO press briefings ‘IMO Secretary-General welcomes UN Security Council resolution on migrant smuggling’ Briefing 45, 14 October 2015 <<http://www.imo.org/en/MediaCentre/PressBriefings/Pages/45-UNSC-resolution-.aspx>>. This has been referred to in ch 1 s 1, ch 2, introduction, and ch 3, s 1.

³³ See M Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in M Fineman and A Gear, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013) ch 1, 13 and 14; L Peroni and A Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11 (N 4) Oxford University Press and New York University School of Law, 1056, 1074 to 1082; R Andorno, ‘Is Vulnerability the Foundation of Human Rights?’ in A Masferrer and E García-Sánchez, eds, *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Springer 2016) ch 11, 258. The aspect of substantive equality within the vulnerability reasoning was discussed in ch 1, s 4.2.

³⁴ Paragraph 2.1.10 of the Annex to the SAR Convention reads: ‘Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found’.

addressing the specific conditions of irregular crossings and the specific needs involved among sea migrants to adapt the levels of protection accordingly and redress the difficulties ever present in these crossings. At the interpretative reasoning stage, this can be achieved by developing an integrating reading of the definition of distress and the element of danger therein. The principle of systemic integration could thus be presented as a legal mechanism of interpretation and also of redress by accommodating in the interpretative process specific needs underrepresented in the SAR Convention and furthering a SAR system more responsive to the needs among sea migrants.

Most of the crossings involve the intervention of smuggling facilitation services.³⁵ The unsafe practices define the smuggling networks' *modus operandi*, just as their ruthless and abusive treatment characterises their inhuman practices towards migrants, as seen in chapter 1, leaving them exposed to violence and harm, as will be further highlighted later on. Both aspects inevitably have a bearing on the conditions of the crossings on board the boats or craft provided, to which sea migrants are generally subjected, as will also be illustrated in this chapter.

This interpretative argument therefore requires the observation and outline of practices and patterns in the conditions in which sea migrants undergo irregular crossings, to underscore not only the widespread unsafe practices along these journeys, widely acknowledged by the international community, but also to reveal the levels of physical and mental suffering resulting therefrom.

The following section thus considers the exposure to grave levels of physical and psychological hardship endured by sea migrants upon embarkation.

³⁵ See for instance EUROPOL-INTERPOL joint report 'Migrant Smuggling Networks', executive summary, May 2016 <<https://www.europol.europa.eu/publications-documents/europol-interpol-report-migrant-smuggling-networks>>. According to this report '90% of all migrants reaching Europe use facilitation services of a migrants smuggling network at some point throughout their journeys', p 2. See also European Migrant Smuggling Centre, 3rd Annual Activity Report, 25 March 2019 <<https://www.europol.europa.eu/publications-documents/emsc-3rd-annual-activity-report---2018>>.

3. Journeys of dangers to the integrity of sea migrants: illustrative examples of the treatment inflicted on them and the suffering resulting therefrom

Beyond the recognised unsafe practices that mark irregular crossings, this section draws on reported conditions of crossings recurrently endured by sea migrants and the effects these crossing conditions have on them. This allows establishing, with a reasonable certainty,³⁶ the risks, aside purely navigational ones, arising in these journeys. It further allows to outline the exposure of sea migrants to levels of hardship that readily allow to identify relevant provisions that may be invoked under the principle of systemic integration. The prohibition of cruel, inhuman or degrading treatment, contained in international and regional human rights legal instruments, conveys a universal consensus for the protection against these forms of ill-treatment and will thus be examined in the following section as the next stage in this interpretative legal reasoning where the functionality of Article 31(3)(c) is explored.

3.1 Violence and other forms of ill-treatment related to irregular sea crossings

The coercion and the violence overwhelmingly present in the context of irregular sea crossings have already been highlighted in chapter 1 when addressing the situation of vulnerability of sea migrants. These inhuman practices form the background of what are known to be unsafe crossings on board overcrowded and substandard boats or craft. The utter disregard for the safety and the well-being of sea migrants coupled with the ill-treatment during the crossings, inevitably increase the degree of proximity and intensity of the dangers to the physical and mental integrity of sea migrants during these journeys. These conditions hence also need to be taken into account when examining the legal application of the qualifying terms immediate and grave in the definition of distress, as seen in chapter 4.

³⁶ The definition of distress phase requires a degree of ‘reasonable certainty’, Annex to the SAR Convention, para 1.3.13: ‘*Distress Phase*. A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance’. This term has been considered in ch 4, s 1.4, within the interpretation of the definition of distress phase.

The physical and psychological symptoms associated with the hardships of the crossing conditions imposed on sea migrants, including traumatic lesions often resulting from abuse by smugglers are devastating.³⁷

The following sub-sections draw upon reports by fieldwork organisations, as it has been done in chapter 1, and the findings therein, to illustrate these crossing conditions, where recurrent practices and patterns in the ill-treatment inflicted on migrants along sea crossings can be outlined. They further underscore the physical and psychological suffering these crossing conditions cause on sea migrants. This allows in turn to raise, with a reasonable certainty, in accordance with the definition of distress phase in the SAR Convention,³⁸ the dangers they very often face at sea, and the risks specific to these irregular crossings, overwhelmingly reliant on smugglers' networks. Ultimately, it permits addressing specific needs in these journeys within the SAR system and their incorporation to the notion of distress for a search and rescue situation.

3.2 Physical suffering during sea crossings

Most of the examples given here are extracted from Médecins sans Frontières (MSF) reports. As a humanitarian medical organisation, MSF has provided since 2000 'emergency medical aid, medical screenings and mental health care to migrants who reach European shores by

³⁷ See for instance MSF report, 'The Illness of migration: Ten years of medical humanitarian assistance to migrants in Europe and in transit countries. A report by Médecins sans Frontières' (a publication by the German Section of Médecins sans Frontières, 2013) (MSF 'The Illness of Migration') 8 and 9 <https://www.msf.org.uk/sites/uk/files/migration_english_july_2013_0.pdf>. See also IOM press release 'UN Migration Agency Issues Report on arrivals of Sexually Exploited Migrants, chiefly from Nigeria', 21 July 2017 <<https://www.iom.int/news/un-migration-agency-issues-report-arrivals-sexually-exploited-migrants-chiefly-nigeria>>. See also IOM report, 'Human Trafficking through the Central Mediterranean Route: Data, Stories and Information Collected by the International Organization for Migration', 2017, 29 and 30 <http://www.italy.iom.int/sites/default/files/news-documents/IOMReport_Trafficking.pdf> where IOM has also reported psychological disorders, high trauma and pathologies observed. See further MSF Dr Simon Bryant's blog, Moving Stories, 'Some Medical Matters', 7 August 2015 <<https://blogs.msf.org/bloggers/simon/some-medical-matters>>. See further Refugees International Field report, "'Hell on Earth": Abuses Against Refugees and Migrants Trying to Reach Europe from Libya' by Izza Leghtas, June 2017, pp 11 and 12 <<https://www.refugeesinternational.org/reports/2017/libya>>.

³⁸ See above n 36.

boat'.³⁹ MSF medical teams have observed in the past years an increasing need for medical assistance among sea migrants. According to MSF, '[m]any arrive in a desperate state, suffering from shock, hypothermia, and skin burns as a result of the harsh conditions endured during long journeys at sea. Others might not even survive the journey'.⁴⁰ Trauma related injuries are recurrently reported by medical teams on land, on disembarkation of survivors.⁴¹

In April 2016, MSF launched search and rescue operations at sea under the coordination and direction of the Maritime Rescue Coordination Centre in Rome, Italy.⁴² Their reports hence provide an instrumental insight on the harsh conditions endured during transit and the physical and psychological effects these have on the migrants. Some of these reports, as well as MSF podcasts, based on stories already written by MSF staff, are here referred to for this purpose. On board the three search and rescue vessels, the *Dignity I*, *Bourbon Argos* and *Aquarius*, MSF medical teams have treated violence-related injuries 'linked to detention, torture and other ill-treatment, including sexual violence, in Libya'.⁴³ Medical treatments on board these search and rescue vessels also directly relate to the conditions of irregular crossings on board unseaworthy craft. They include: 'skin diseases, dehydration, hypothermia, scabies, and serious injuries like chemical burns caused by fuel mixing with sea water in the boat'.⁴⁴

The most notorious circumstance in irregular crossings is the cramming conditions sea migrants have to endure for days. The overcrowding is a constant feature of irregular crossings and it is well known to be a widespread practice among smuggler networks to

³⁹ See MSF report, 'Migrants, Refugees and Asylum Seekers: Vulnerable People at our Doorstep', 6 July 2009, Introduction <<https://www.doctorswithoutborders.org/what-we-do/news-stories/research/migrants-refugees-and-asylum-seekers-vulnerable-people-europes>>.

⁴⁰ Ibid.

⁴¹ MSF, 'Mediterranean Search and Rescue' <<https://www.msf.org.uk/country/mediterranean-search-and-rescue>>.

⁴² Ibid. In MSF words, MSF and their partner SOS Méditerranée 'were forced to terminate the lifesaving operations of the search and rescue vessel, Aquarius, due to a sustained campaign by European governments to obstruct search and rescue operations'.

⁴³ Ibid.

⁴⁴ Ibid. See also MSF news, 'MSF in the Mediterranean: Two Days, Three Ships, 1,300 Rescued', 10 June 2016 <<https://www.doctorswithoutborders.org/what-we-do/news-stories/news/msf-mediterranean-two-days-three-ships-1300-rescued>>.

maximise profits in each crossing.⁴⁵ This uncontestedly increases dramatically the risks for the persons on board. It constitutes *per se* an imminent danger to the passengers as they are likely to be overturned by swells or passenger movements due to the high instability of the craft. Adverse weather conditions have fatal consequences, as the International Organization for Migration (IOM) reported regarding the capsizing of a twenty-metre-long fishing boat with sixty Rohingya refugees on board, while attempting to cross from Myanmar to Bangladesh, due to a monsoon storm.⁴⁶

The cramming conditions further create untenable human conditions that last for days at a stretch, if not weeks. Sea migrants hence remain restrained in a very limited space, with no possibility to move for long periods of time. This causes health issues among survivors, as MSF doctors have pointed out.⁴⁷ The Migrant Offshore Aid Station (MOAS), a search and rescue NGO that started operating in the Mediterranean in August 2014 and since September 2017 is present in South East Asia,⁴⁸ has also highlighted the treacherous crossing conditions. In words of its co-founder, C Catrambone, after one rescue operation: ‘the people we rescued yesterday afternoon were packed in so tightly that their legs had cramped and they struggled to move as we rescued them’.⁴⁹ IOM reported two instances off the coast of Yemen in August 2017 where Somali and Ethiopian migrants were forced into the sea. The survivors’ accounts depicted the cramming conditions on board the boats. They had to squat

⁴⁵ See for instance the survivors’ account to IOM regarding the 160 Ethiopian migrants forced into the seas off Yemen and the description of the crossing conditions, in IOM press release ‘160 Ethiopians Migrants Forced into the Seas off Yemen by Smugglers Today, Following Death of up to 50 Yesterday’ posted 11 August 2017 <<https://www.iom.int/news/160-ethiopian-migrants-forced-seas-yemen-smugglers-today-following-death-50-yesterday>>. This was quoted in ch 1 s 3 and referenced in fn 152 thereto.

⁴⁶ See IOM press release ‘Rohingya Children Drown Fleeing Myanmar Violence: IOM’ 10 September 2017 <<https://www.iom.int/news/rohingya-children-drown-fleeing-myanmar-violence-iom>>.

⁴⁷ See MSF special report, ‘Migrants, Refugees and Asylum Seekers: Vulnerable People at our Doorstep’ (n 39) Introduction.

⁴⁸ MOAS website <<https://www.moas.eu/about/>>.

⁴⁹ These words are quoted in MOAS report, ‘MOAS and MSF rescue 369 people during first rescue’, 4 May 2015 <<https://www.moas.eu/moas-msf-rescue-369-people-first-rescue/>>. For a recent example, see MSF, ‘Rohingya refugees left to starve at sea’ 22 April 2020 <<https://www.msf.org/rohingya-refugees-left-starve-sea>>. This report contains the testimony of a 14-year old Rohingya girl who explains the cramped and treacherous conditions on board the fishing trawler where ‘people’s legs swelled and got paralysed. Some died and were thrown into the sea. We were adrift at sea with people dying every day’.

down for the entire crossing, they were not allowed to move and if they did, they would be beaten or killed. They had to urinate on themselves.⁵⁰

The wooden panels smugglers sometimes place on the bottom of these highly unstable craft cause other dangers due to the cramming conditions aboard. When these panels start to break due to the weight on the boat, they take a ‘v’ shape causing the people in the middle to get crushed and stomped on.⁵¹

The persons sitting on the floor of these rubber craft very often suffer chemical burns in their skin. These skin burns are caused by direct contact with the mixture of fuel leaks and sea water. Women are reported to suffer more this type of injury, according to MSF, as they normally ‘sit on the floor of the rubber boats, rather than on the sides, making them more likely to come into contact with leaking fuel mixed with salt water, which can cause serious skin injuries’.⁵² The cramming conditions on board make any movement impossible and hence the contact with the mixture of fuel and sea water, unavoidable.⁵³

The cramming conditions on board can further cause skin infections due to the lack of hygiene during the crossings. Any skin infections present before the boarding,⁵⁴ can only worsen during the sea crossings, where washing or toilet facilities are inexistent.⁵⁵

⁵⁰ IOM press release, ‘160 Ethiopian Migrants Forced into the Seas off Yemen by Smugglers Today, Following Death of up to 50 Yesterday’, 11 August 2017 <<https://www.iom.int/news/160-ethiopian-migrants-forced-seas-yemen-smugglers-today-following-death-50-yesterday>>. These incidents were referred to in ch 1, s 3.

⁵¹ See the account of the MSF nurse, Courtney Bercan’s blogpost, ‘Good Luck my sister’ 21 December 2016, <<https://www.msf.org.uk/article/search-and-rescue-good-luck-my-sister>>.

⁵² See MSF news ‘MSF in the Mediterranean: Two Days, Three Ships, 1,300 Rescued’ (n 44). In particular see the case of one woman suffering second-degree burns on twenty per cent of her body, from contact with salt water. See also the reported death of a woman days after being rescued from a sinking dinghy in the Western Mediterranean on 29 October 2017, due to severe fuel burns suffered during the sea transit, as reported by the IOM <<https://www.iom.int/news/corpses-26-trafficked-women-arrive-italy-mediterranean-migrant-arrivals-reach-154609-2017>>.

⁵³ MSF podcast, Episode Six: ‘How we rescued 560 people on the Mediterranean’ 1 June 2017 <<https://www.msf.org.uk/article/podcast-how-we-rescued-560-people-mediterranean>>.

⁵⁴ These are very common due to the unsanitary conditions in detention centres, warehouses, or connection houses, where undocumented migrants wait until they are embarked, as washing facilities are scarce or non-existent, and clothes remain unwashed and unchanged for weeks. See MSF doctor Simon Bryant’s blog, Moving Stories, ‘Some Medical Matters’, 7 August 2015 (n 37).

⁵⁵ See MSF special report, ‘Migrants, Refugees and Asylum Seekers: Vulnerable People at our Doorstep’ (n 39) Introduction.

Those travelling on rubber dinghies or on deck on board wooden boats further endure long hours of exposure to the sun, sea water, rain, as well as high and low temperatures, without shelter. MSF has pointed out that survivors arrive on land suffering from respiratory infections, skin infections caused by overexposure to salt and water, hypothermia, and dehydration.⁵⁶

The crossing conditions below deck on board wooden boats do not guarantee reliable shelters or safer prospects. On the contrary, spaces below deck offer less chances of survival in situations where the boats take in water or capsize. In fact, the persons travelling below deck are the ones who cannot afford a passage on deck.⁵⁷ According to Dr Simon Bryant of MSF, ‘[p]eople die in these wooden migrant boats due to the toxic fuel fumes of leaked fuel, oil, and engine exhaust, perhaps in combination with heatstroke, dehydration, and physical crushing as people and the boat move in a swell’.⁵⁸ Drowning below deck occurs when there are leaks or when the boat capsizes as the persons inside are trapped, with, often, no exit available to them, becoming, in Dr Simon Bryant’s words, ‘death trap boats’.⁵⁹ Asphyxia has also been reported, as a further cause of death below deck due to the cramming conditions and lack of aeration. During a rescue operation of sea migrants on board a wooden boat by Swedish Coast Guards, off the coast of Libya, on 25 August 2015, with the assistance of MSF, Dr Simon Bryant accessed the space below deck to discover only dead bodies, even those still above the level of the incoming water, as he later reported.⁶⁰ The Spanish NGO Proactiva Open Arms filmed the space below deck of a fishing boat after the people travelling on board had been disembarked onto their rescue boat. This short footage illustrates the unhealthy conditions of confinement for those travelling in cramming

⁵⁶ Ibid.

⁵⁷ Amnesty International, ‘Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean’ (Amnesty International 2014) p 18 <<https://www.amnesty.org/download/Documents/8000/eur050062014en.pdf>>.

⁵⁸ MSF Dr Simon Bryant’s blog ‘Yet Again’ podcasted by MSF, 31 August 2015, <<http://blogs.msf.org/en/staff/blogs/moving-stories/yet-again>>.

⁵⁹ Ibid.

⁶⁰ Ibid. See also as illustrative examples of people being trapped below deck, C Peregrin news report ‘Tragedy in The Mediterranean: 33 Dead, Including Seven Children, as Boat Capsizes’ Lovin Malta, August 2017 <<https://lovinmalta.com/news/tragedy-in-the-mediterranean-33-dead-including-seven-children-as-boat-capsizes>>, and News report by E Graham-Harrison, ‘Crewmembers arrested after at least 50 migrants die when boat capsizes’, The Guardian, 22 September 2016 <<https://www.theguardian.com/world/2016/sep/22/egypt-arrests-crew-members-50-migrants-killed-boat-capsizes>>.

conditions below deck, with no aeration, high temperatures inside and the engine fumes with people having to endure days in these conditions, on urine, defecation and vomit.⁶¹

Another aspect directly affecting the physical integrity of sea migrants during their sea journeys is the scarcity of food and fresh water supplies. It is a well-known fact that among the irregular crossings, food and water are in very short supply in order to maximise the space on board to fit more migrants and maximise the profit. This, linked to the over exposure to the heat, cause dehydration, resulting in extreme cases in deaths during the crossings. The shortage of food provisions aboard, especially among persons who embark already in a state of malnourishment due to the harsh conditions they are subjected to throughout the migration route, also causes starvation, with potential fatal consequences.⁶²

3.3 Psychological suffering during the sea crossings

The psychological suffering is directly linked to the levels of fear and anguish due to the unseaworthy conditions of the boats or craft, or the lack of minimum safety conditions on board since the very start of the journey. It is associated to the utter uncertainty as to their fate at sea and as to the prospects of reaching safe shores or being found and rescued. The mental torment of seeing relatives or friends or fellow passengers suffering or being lost to the sea during the crossings, becomes traumatic. Such is IOM's account of the twenty-metre fishing boat, with sixty people on board, that capsized in adverse weather conditions while attempting to cross from Myanmar to Bangladesh. Survivors, as young as seven and eight-year olds, were reported to show signs of being traumatised after losing their entire families

⁶¹ This footage is available at El Periódico, J Triana, 'Como los barcos de esclavos: Proactiva muestra la bodega de una embarcación de inmigrantes. El equipo de Proactiva Open Arms muestra la bodega de una embarcación de donde rescató a decenas de personas' 4 October 2016, updated 28 February 2018 <<http://www.elperiodico.com/es/internacional/20161004/como-los-barcos-negreros-proactiva-muestra-la-bodega-de-una-embarcacion-de-inmigrantes-5453531>>. See also MSF, Simon Bryant's post 'Some Medical Matters', 7 August 2015 (n 37).

⁶² Although not among the top causes of death recorded, death by starvation along the sea journey has also been acknowledged by IOM in its Missing Migrant Project. See <<https://missingmigrants.iom.int>>.

to the sea.⁶³ IOM particularly acknowledges the magnitude of the psychological effects these experiences can have on children.⁶⁴

The psychological integrity is furthermore deeply affected by and also linked to the deep-rooted violence and abuse exerted on migrants along the migration journeys, including the sea crossings, as illustrated above. IOM refers to psychological distress, disorders or high trauma and pathologies observed as a result.⁶⁵ According to MSF, regarding the Central Mediterranean migration route, '[m]any are traumatized during the time spent in Libya and the precarious conditions aggravated by the journey in the sea before being rescued'.⁶⁶ MSF has further recorded psychological symptoms associated with sexual violence, including 'insomnia, anorexia, depression and suicidal thoughts'.⁶⁷ MSF teams have repeatedly identified psychological manifestations of traumatic travelling experiences, reporting common symptoms ranging from headaches and general body pains to post-traumatic reactions and depressive symptoms, in their words, 'associated with harsh travelling conditions'.⁶⁸ General anxiety is also commonly described and cases of psychosis due to their traumatic experiences have also been identified in rescue operations.⁶⁹ Another example of psychological suffering can be found in the identification of survivors being terrified to the point of being unable to talk.⁷⁰

Consequently, the adverse effects on both the physical and mental integrity observed through a number of reported incidents and medical examinations allow an understanding about the

⁶³ IOM press release, 'Rohingya Children Drown Fleeing Myanmar Violence' 10 September 2017 <<https://www.iom.int/news/rohingya-children-drown-fleeing-myanmar-violence-iom>>.

⁶⁴ IOM press release, '160 Ethiopian Migrants Forced into the Seas off Yemen by Smugglers Today, Following Death of up to 50 Yesterday', 11 August 2017 <<https://www.iom.int/news/160-ethiopian-migrants-forced-seas-yemen-smugglers-today-following-death-50-yesterday>>.

⁶⁵ IOM, 'Human Trafficking through the Central Mediterranean Route: Data, Stories and Information collected by the International Organization for Migration' IOM, 2017 <http://www.italy.iom.int/sites/default/files/news-documents/IOMReport_Trafficking.pdf>. See further IOM press release, '160 Ethiopian Migrants Forced into the Seas off Yemen by Smugglers Today, Following Death of up to 50 Yesterday', 11 August 2017 (n 64).

⁶⁶ MSF, 'MSF in the Mediterranean: Two Days, Three Ships, 1,300 Rescued' (n 44).

⁶⁷ MSF 'The Illness of Migration' (n 37) 9. This refers to a survey undertaken in Morocco over 63 women migrants in 2010, although it can be safely stated that these effects can be transposed to other regions and are relevant to all stages of the migration journeys.

⁶⁸ MSF 'The Illness of Migration' (n 37) 8.

⁶⁹ MSF Dr Simon Bryant's post, Moving Stories, 'Medical Matters' (n 37).

⁷⁰ MSF Nurse, Courtney Berkan's podcast 'Good luck, my sister', 6 April 2017 (n 51).

suffering involved in these sea journeys. The hardship is not only linked to the navigational hazards due to the unseaworthy conditions of the overcrowded and unstable boats or craft used. It is also related to the cramming, unsanitary and inhumane conditions on board these boats, as well as the coercion, violence and abuse involved resulting in physical and mental suffering endured during these sea crossings, as illustrated above and in chapter 1. The dangers involving irregular sea crossings hence present additional features specific to the clandestine nature of the journeys, which would not apply to regular navigation. The specific dangers and the risks involved in irregular crossings hence call for further considerations outside the realm of maritime navigational concerns. It prompts the need to advance the debate on human rights law considerations when assessing situations of distress at sea and construing the notion of persons in distress.

This interpretative process hence takes the reasoning to the following stage, that is, the scrutiny of the provisions in international and regional legal instruments for the prohibition of cruel, inhuman and degrading treatment, focusing particularly on their application in situations of detention or confinement where it has been held to infringe the international human rights law prohibition. The purpose is ultimately to assess the role of the principle of systemic integration contained in Article 31(3)(c) of the VCLT and whether it enables an integrating construction of the notion of persons in distress where danger also envisages the exposure to what constitutes cruel, inhuman or degrading treatment along these journeys.

4. ‘Persons in distress’: a term scrutinised invoking the prohibition of cruel, inhuman and degrading treatment

4.1 Setting the grounds for this inter-regime dialogue

As analysed in the construction of the concept of distress phase in the previous chapter, the notion of danger is central in the definition of distress.⁷¹ Its semantic content, i.e., the exposure to suffering injury, pain or harm, either physical or mental, and even the risk of loss of life, appears with a reasonable certainty in irregular crossings by sea.⁷² The levels of severity of the suffering among sea migrants observed by fieldwork organisations, call

⁷¹ Ch 4, s 1.4.

⁷² The definition of distress phase in the Annex to the SAR Convention, para 1.3.13, requires ‘a *reasonable certainty* that a person, a vessel or other craft is threatened by grave and imminent danger’ (emphasis added).

additionally for the consideration of danger in the light of the exposure to cruel, inhuman or degrading treatment inflicted upon embarkation on board cramped, unseaworthy boats, craft or other vessels unfit for the crossings in a context of generalised violence.

The notion of danger and hence persons in distress is therefore scrutinised in the remainder of this chapter invoking international human rights law by virtue of the principle of systemic integration formulated in Article 31(3)(c) of the VCLT.⁷³ The ill-treatment, the crossing conditions to which sea migrants are repeatedly exposed, or subjected, and the suffering arising therefrom, it will be argued in this section, reach the levels of severity, or the threshold, recognised and safeguarded against in the relevant international legal instruments. This threshold responds to a universal consensus for human rights protection, in particular for the protection of the dignity, as well as the physical and mental integrity of individuals.⁷⁴

The interpretative argument proposed here, calling for a construction of the notion of persons in distress based on the principle of systemic integration, requires at this stage looking into the provisions invoked, namely the freedom from cruel, inhuman and degrading treatment. It further requires ascertaining the minimum levels of severity safeguarded against in these provisions. To this end, the crossing conditions will be scrutinised primarily in the light of cases where conditions of detention or confinement have been held to be in breach of the prohibition of cruel, inhuman or degrading treatment given the strong similarities between irregular crossing conditions and detention conditions. Finally, this interpretative reasoning will scrutinise the relevance of the international rules invoked and their applicability in the relations between the parties, in accordance with Article 31(3)(c) of the VCLT.

The present reasoning does not purport to apply the provisions invoked below, nor does it attempt to engage responsibilities among States under the said provisions. It invokes them to assess the notion of persons in distress at sea taking into account the exposure to suffering or the actual suffering among sea migrants, as a result of the ill-treatment inflicted upon them, which prohibition is contained in a number of international rules. These will be referred to in the following sub-section in an attempt to highlight their universality. The

⁷³ For the purpose of the interpretation of a treaty, Article 31(3)(c) provides that '[t]here shall be taken into account, together with the context: (...) (c) Any relevant rules of international law applicable in the relations between the parties.'

⁷⁴ See UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (HRC, CCPR General Comment No 20) 10 March 1992 para 2 <<http://ccprcentre.org/ccpr-general-comments>>.

succeeding sub-sections strive to present how the concepts of cruel, inhuman and degrading treatment have been construed and the standards they encapsulate.

4.2 The provisions safeguarding against cruel, inhuman or degrading treatment: a cohesive universal consensus

The existence of a global and cohesive consensus on the prohibition of cruel, inhuman or degrading treatment can be extracted from the following universal and regional human rights legal instruments safeguarding against these forms of ill-treatment:

The International Covenant on Civil and Political Rights (ICCPR),⁷⁵ adopted by the United Nations in 1966, has a universal reach.⁷⁶ Article 7 of the ICCPR reads: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’ The above article transposed into treaty obligations Article 5 of The Universal Declaration of Human Rights,⁷⁷ which states: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. ICCPR, Article 10.1 complements Article 7. It specifically focuses on individuals deprived of their liberty and provides that they ‘shall be treated with humanity and with respect for the inherent dignity of the human person’.

At a regional level, the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR),⁷⁸ provides in its Article 3, that ‘[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

⁷⁵ UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171. It entered into force 23 March 1976.

⁷⁶ As at 21 July 2020, the number of States parties to the ICCPR is 173. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

⁷⁷ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

⁷⁸ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5. It entered into force on 3 September 1953. The ECHR is enforced by the European Court of Human Rights (ECtHR) in accordance with Art 19 of the ECHR.

The African (Banjul) Charter on Human and People's Rights⁷⁹ stipulates in Article 4 as follows: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of this person. No one may be arbitrarily deprived of this right'. Article 5 further reads: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of this legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.

The American Convention on Human Rights Pact of San José, Costa Rica,⁸⁰ in its Article 5 under heading 'Right to Humane Treatment' provides, in its first two paragraphs: '1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person'.

Torture, characterised as an aggravated and deliberate form of cruel, inhuman or degrading treatment that attaches a higher intensity of the pain or suffering inflicted,⁸¹ is not considered when assessing the crossing conditions and the forms of ill-treatment generally involved therein. The ill-treatment inflicted with the crossing conditions observed, one may argue, do

⁷⁹ Organization of African Unity (OAU), African Charter on Human and People's Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982). It entered into force 21 October 1986. The Charter is enforced by the African Commission on Human and People's Rights and the African Court on Human and People's Rights according to Art 30 of the Banjul Charter and the Protocol to the African Charter on Human and People's rights on the Establishment of an African Court on Human and People's Rights, 9 June 1998.

⁸⁰ Organization of American States (OAS) American Convention on Human Rights, "Pact of San José", Costa Rica, 22 November 1969. It entered into force 18 July 1978. The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights are the bodies in charge of the application and the interpretation of the Convention. See <<http://www.cidh.oas.org/what.htm>>.

⁸¹ J Waldron, 'Inhuman and Degrading Treatment: The Words themselves' (2010) 23 (N 2) Can J L & Jurisprudence 269 (Waldron), 271 and 272. See also M Nowak and E McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008) (Nowak and McArthur) para 43. See the case of *Ireland v United Kingdom*, App No 5310/71 (ECtHR, 13 December 1977) paras 145-167. This is a clear example of the quantitative approach used by the ECtHR, as Waldron highlights. See also *Ilasçu and others v Moldova and Russia*, App No 48787/99 (ECtHR, 8 July 2004) para 426. Contrast with N Rodley, 'Integrity of the Person' in D Moeckli, S Shah & S Sivakumaran (eds) *International Human Rights Law*, 3rd edn (Oxford University Press 2018) chapter 9, 170. Torture becomes relevant for the purpose of construing the notion of place of safety, in chapter 6, where basic considerations are given in s 3.3.

not constitute torture, and it is hence not studied for the purpose of the present interpretative reasoning with regards the notion of persons in distress. Nor is the notion of cruel, inhuman or degrading punishment considered relevant to the crossing conditions.⁸² Instead, cruel, inhuman and degrading treatment are scrutinised with the aim of invoking them in the construction of the notion of danger in the definition of distress phase with particular focus on the notion of persons in distress.

The terms cruel, inhuman or degrading treatment are not defined in the provisions cited earlier. These terms form an open-textured phrase, the legal meaning of which and the standards thereto require their own interpretative exercise.⁸³ Invoking these norms when construing the terms grave and imminent danger in the definition of distress phase thus requires some consideration regarding the scope and the legal application of these terms.

4.3 Initial considerations to assess the scope of these forms of ill-treatment

The forms of ill-treatment safeguarded against in Article 3 of the ECHR, Article 7 of the ICCPR and equivalent provisions in other international instruments are understood as the infliction of severe pain or suffering, whether physical or mental, where the conduct can be both intentional or negligent, and the presence of a purpose is not required.⁸⁴ Determining further the scope of these forms of ill-treatment, mainly cruel, inhuman or degrading treatment, is necessary for the purpose of understanding the legal content of the provisions invoked for the construction of the notion of danger within the concept of persons in distress. Some initial considerations to these forms of ill-treatment are given in this sub-section to understand their legal content and the significance that may be attached to the notion of

⁸² According to the HRC, this term under Art 7 of the ICCPR is construed to include ‘excessive chastisement ordered as a punishment for a crime or as an educative or disciplinary measure’. See HRC, CCPR General Comment No 20 (n 74) para 5. This prohibited act becomes relevant to the construction of the term place of safety, particularly in confinement situations.

⁸³ Waldron (n 81). See ILC Report A/CN.4/682 (n 24), paras 467 and 473. With regards to Art 3 of the ECHR, see D Harris, M O’Boyle, E Bates and M Buckley, *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights*, 4th edn (Oxford University Press 2018) (hereafter, Harris, O’Boyle, Bates & Buckley) 279. See Nowak and McArthur (81) para 43. See further the case *Ireland v United Kingdom* (n 81). In particular see J Fitzmaurice’s Separate Opinion, para 12. J Fitzmaurice concludes that: ‘[i]t is thus left to be determined in the light of the circumstances of each particular case whether what occurred amounted to, or constituted the specified treatment’ (para 12).

⁸⁴ HRC, CCPR General Comment No 20 (n 74).

persons in distress in the context of search and rescue of sea migrants during irregular crossings. As mentioned earlier, it is not the purpose of the present examination to look into States' responsibilities under the provisions invoked.

The prohibition of cruel, inhuman or degrading treatment applies irrespective of the nature of the conduct,⁸⁵ and regardless of whether the perpetrators inflicting these forms of ill-treatment act in their official capacity, outside their official capacity or in a private capacity.⁸⁶ Private individual acts, such as smugglers' practices, that result in the victim's suffering, whose levels of severity reach the threshold required, would therefore amount to cruel, inhuman or degrading treatment.

The distinction between cruel and inhuman treatment does not seem to rely on any specific legal criterion. Nowak and McArthur conclude, using the semantic meaning of these terms, that no essential difference actually exists.⁸⁷ The term cruel is not contemplated as a differentiated form of ill-treatment in Article 3 of the ECHR, but it is generally referred to in the remainder of this chapter, for the purpose of the legal reasoning, as subsumed in Article 3 of the ECHR. The United Nations Human Rights Committee (HRC) i.e., the body of independent experts that monitors the implementation of the ICCPR by its States parties,⁸⁸

⁸⁵ Harris, O'Boyle, Bates & Buckley, 243 to 272. See also B Rainey, E Wicks and C Ovey, *Jacobs, White and Ovey: The European Convention of Human Rights*, 7th edn (Oxford University Press 2017) (Rainey, Wicks and Ovey) 185 to 216.

⁸⁶ HC, CCPR General Comment No 20 (n 74) para 2. In the realm of the ECHR, see for instance *Pretty v UK*, App No 2346/02 (ECtHR, 29 April 2002) para 51, and cases therein cited; *A v United Kingdom*, App No 25599/94 (ECtHR, 23 September 1998) a case where a young boy aged 9 was beaten by his step-father with a garden stick causing bodily harm. The ECtHR held that the treatment had been sufficiently severe to reach the level prohibited by Art 3 of the European Convention of Human Rights, para 21; *Z and Others v The United Kingdom* (GC) App No 29392/95 (ECtHR, 10 May 2001) where the treatment suffered by four children, abused and neglected by their parents, uncontestedly reached the threshold of inhuman and degrading treatment prohibited in Art. 3 of the ECHR. See in particular paras 73 and 74 therein: 'There is no dispute in the present case that the neglect and abuse suffered by the four applicant children reached the threshold of inhuman and degrading treatment' (para 74). See further *Opuz v Turkey*, App No 33401/02 (ECtHR, 9 June 2009) para 161; *Valiulienė v Lithuania*, App No 33234/07 (ECtHR, 26 March 2013). These cases regard acts of physical violence inflicted by the partners to their victims causing suffering including psychological suffering, at the level required by Art 3 of the ECHR.

⁸⁷ Nowak and McArthur (n 81) para 43, and fn 74 therein.

⁸⁸ The HRC issues reports and publishes its interpretation of the content of human rights provisions by means of General Comments. See <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>>. The HRC

publishes its interpretation of the provisions of the ICCPR by means of General Comments. In its interpretation of Article 7 of the ICCPR,⁸⁹ the HRC does not consider it necessary to elaborate a list of what acts or conducts would amount to any of these treatments.⁹⁰ Nor does the HRC consider it required to establish clear distinctions between the different types of ill-treatment contained in Article 7.⁹¹ According to the HRC, nonetheless, ‘the distinctions depend on the nature, the purpose and the severity of the treatment applied’.⁹² Hence, although the quantitative element of intensity is crucial in the distinction between forms of ill-treatment,⁹³ qualitative aspects are also taken into account in the assessment of the kind of ill-treatment inflicted.⁹⁴

Bearing the above in mind, it seems however necessary, to ascertain the meaning given to inhuman and degrading treatment. More detail is provided to the latter for a better understanding of the element of humiliation therein.

is the successor of the United Nations Commission on Human Rights. For more detailed information see also <<https://ijrcenter.org/un-treaty-bodies/human-rights-committee/>>.

⁸⁹ HRC, CCPR General Comment No 20 (n 74).

⁹⁰ Ibid, para 4.

⁹¹ Ibid. See D Weissbrodt and C Heilman, ‘Defining Torture and Cruel, Inhuman and Degrading Treatment’ (2011) 29 Law & Ineq, 343 (Weissbrodt and Heilman) 352 and fns 47 and 48 therein citing examples where the HRC refers to violations of Art 7 of the ICCPR without identifying the type of ill-treatment, and even finding violations of both Art 7 and Art 10 of the ICCPR. In particular, see HRC views on *Torres Ramirez v Uruguay*, HRC Communication No 4/1977, UN Doc CCPR/C/10/D/4/1977, 23 July 1980 <http://www.worldcourts.com/hrc/eng/decisions/1980.07.23_Torres_Ramirez_v_Uruguay.htm>. The claimant alleged being inflicted harm while in detention, with techniques such as suffocation in water, standing for four days, hanging by the arms, tied together, for about thirty-six hours and blows, which brutality resulted in having to transfer him to the military hospital (para 2). The HRC concluded that this treatment constituted a violation of Arts 7 and 10 of the ICCPR, without considering the different forms of ill-treatment therein contained.

⁹² HRC, CCPR General Comment No 20 (n 74) para 4. Contrast with Fitzmaurice Separate Opinion in *Ireland v United Kingdom* (n 81) paras 17, 22, 25, 26, 27, 28, and 35, where the distinction is presented, based on the nature of the conduct and the intensity of the ill-treatment.

⁹³ See Y Arai-Yokoi, ‘Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR’, (2003) 21 (N 3) Netherlands Quarterly of Human Rights, 385. See *Ireland v United Kingdom* (n 81) paras 167 and 168, regarding the reasoning for the qualification of the treatment deployed in the five techniques as inhuman treatment rather than torture.

⁹⁴ Judge Fitzmaurice’s Separate Opinion in *Ireland v United Kingdom* (n 81). Contrast with Waldron (n 81) 272.

Treatment has been deemed inhuman when causing ‘if not actual bodily injury, at least intense physical and mental suffering’.⁹⁵ It does not necessarily require being deliberate.⁹⁶

Degrading treatment has been defined as ‘the infliction of pain and suffering, whether physical or mental, which aims at humiliating the victim’ so that the ‘the infliction of pain or suffering which does not reach the threshold of ‘severe’ or ‘intense’ must be considered as degrading treatment if it contains a particularly humiliating element’.⁹⁷ Judge Fitzmaurice emphasises on the qualitative distinction that identifies a degrading treatment in the case of *Ireland v United Kingdom*⁹⁸. Judge Fitzmaurice draws on the semantic content of the term degrading which differs from inhuman treatment, and the notions of ‘humiliation, bringing into contempt, loss of esteem, and debasement, presumably from status as a human being’.⁹⁹ Judge Fitzmaurice further underscores the objective character of the treatment rather than the subjective feelings arising therefrom.¹⁰⁰

The ECtHR has however deemed treatment to be degrading, based on the victim’s subjective evaluation, namely, since it was ‘such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance’.¹⁰¹ Additional elements both in the act and in the feelings arising therefrom are also considered in the assessment of degrading treatment, such as a treatment that shows a lack of respect or diminishes the dignity of a person, and feelings capable of breaking an individual’s moral or physical resistance.¹⁰²

⁹⁵ *Soering v The United Kingdom*, App No 14038/88 (ECtHR, 7 July 1989) regarding the applicability of Art 3 in a case of extradition, para 100.

⁹⁶ *Labita v Italy* (GC) App No 26772/95 (ECtHR, 6 April 2000) para 120.

⁹⁷ *Nowak and McArthur* (n 81) para 44.

⁹⁸ *Ireland v United Kingdom* (n 81).

⁹⁹ Judge Fitzmaurice’s Separate Opinion in *Ireland v United Kingdom* (n 81) paras 27 and 29 and fn 18 thereto.

¹⁰⁰ In Judge Fitzmaurice’s words: ‘[t]hat various kinds of treatment – and they cover a wide range – are capable of diminishing or breaking down physical or moral resistance is obvious, but degradation, if any, consists not in that but in the particular methods employed’ (Ibid, para 28).

¹⁰¹ *Ireland v United Kingdom* (n 81) para 167. See also *Kalashnikov v Russia*, App No 47095/99 (ECtHR, 15 July 2002) where the Court found that the detention conditions amounted to degrading treatment ‘because it was such to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them’, para 95.

¹⁰² *Pretty v United Kingdom*, App No 2346/02 (ECtHR, 29 April 2002) para 52 in similar terms, where treatment is considered degrading if it ‘humiliates or debases an individual, showing a lack of respect for, or

The Court regards whether the purpose of a particular treatment is to humiliate or debase, and whether the adverse effects on the person suffering such treatment is such as to fall within the scope of Article 3 of the ECHR. In any event, the Court considers whether the suffering exceeds the level of hardship or humiliation inevitably connected to legitimated forms of treatment or punishment, where the measures undertaken preserve human dignity, in order to determine whether a conduct is degrading. However, it has been established that the absence of such a specific purpose does not automatically or conclusively exclude the existence of degrading treatment and a finding of a violation of Article 3 of the ECHR.¹⁰³

As with Article 3 of the ECHR, the forms of ill-treatment forbidden in Article 7 of ICCPR and equivalents in other international rules refer not only to ‘acts that cause physical pain but also to acts that cause mental suffering to the victim’.¹⁰⁴ The aim of the ICCPR, Article 7, appears clearly established by the HRC ‘to protect both the dignity and the physical and mental integrity of the individual’.¹⁰⁵

Whereas the emphasis in the notion of inhuman treatment is upon physical or mental suffering, the emphasis in the notion of degrading treatment is upon humiliation or debasement. However, both forms of ill-treatment may overlap.¹⁰⁶

The standards applied by international bodies such as the HRC and the ECtHR, inform the thresholds, i.e., the minimum severity required, to determine whether a conduct falls within the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. The test in all cases of ill-treatment becomes a relative one, and it depends on the circumstances

diminishing, his or her dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral or physical resistance’. See also *Soering v United Kingdom* (n 95) para 100.

¹⁰³ *Kalashnikov v Russia* (n 101) paras 95 and 100. See also regarding the absence of the purpose to debase, *Peers v Greece*, App No 28524/95 (ECtHR, 19 April 2001) para 74. See further *Labita v Italy* (n 96) para 120. See Harris, O’Boyle, Bates & Buckley (n 83) 260. See Rainey, Wicks and Ovey (n 85) 190.

¹⁰⁴ HRC, CCPR General Comment No 20 (n 74) para 5. See also Weissbrodt and Heilman, (n 91) 376.

¹⁰⁵ HRC, CCPR General Comment No 20 (n 74) para 2.

¹⁰⁶ See, in respect of Art 3 of the ECHR, Harris, O’Boyle, Bates & Buckley (n 83).

of the case.¹⁰⁷ These are considered in their totality and as having a cumulative effect. This applies to all instruments referred to above.¹⁰⁸

The circumstances surrounding irregular crossings, scrutinised in the previous section, underscore endemic unsafe practices and the risks sea migrants are consequently exposed to, including an ever-pending threat to their lives at sea. The coercion, violence and ill-treatment inflicted upon sea migrants are also widespread practices associated to irregular crossings. Their levels of severity and resulting suffering need to be assessed in these surrounding circumstances of unsafe practices, together with the duration of time enduring these conditions aboard, the physical and mental effects, and the gender, age and state of health of the sea migrants.¹⁰⁹

Attention is therefore drawn in the following sub-section to the construction, given by the international courts and the international human rights bodies to the terms cruel, inhuman and degrading treatment. This will assist in understanding the levels of hardship safeguarded against under the prohibition of these forms of ill-treatment. It will in turn assist in assessing the scope of the rules invoked for the proposed interpretation of the notion of danger and the term persons in distress in the SAR Convention, under Article 31(3)(c) of the VCLT. It will

¹⁰⁷ See for instance *Soering v The United Kingdom* (n 95) para 100: ‘As is established in the Court’s case-law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within scope of Article 3 (art.3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment (...) the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim’. See also *Ilasçu and others v Moldova and Russia* (n 81) para 427. See further the case of *Mader v Croatia*, App No 56185/07 (ECtHR, 21 June 2011) para 106: ‘The assessment of this minimum is relative: it depends on all circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects, and in some instances, the sex, age and state of health of the victim’. See *Kalashnikov v Russia* (n 101) para 95; See *Kafkaris v Cyprus* (GC) App No 21906/04 (ECtHR, 12 February 2008) para 95. See Harris, O’Boyle, Bates & Buckley (n 83) 238. See further W Kälin and J Künzli, *The Law of International Human Rights Protection*, 2nd edn (Oxford University Press 2019) (hereafter Kälin and Künzli) 319 and 320, with regards Art 7 of the ICCPR.

¹⁰⁸ Weissbrodt and Heilman (n 91) 382. For instance, the African Commission on Human and People’s Rights and the Inter American Commission have adopted the ECtHR’s conclusions that the minimum level of severity ‘depends on all the circumstances of the case, such as the duration of the treatment, the physical or the mental effects and in some cases, the victims’ age, gender, and state of health.’

¹⁰⁹ *Soering v The United Kingdom* (n 95) para 100 and *Mader v Croatia* (n 107) para 106. Both are quoted in n 107.

contribute to address the exposure to, or the actual, cruel, inhuman or degrading treatment sea migrants are subjected to during sea crossings. It ultimately aims at redressing these widespread dangers of, or actual, forms of physical or psychological harm by tailoring the maritime search and rescue response to this integrating reading of the notion of persons in distress.

4.4 Interpretation of cruel, inhuman and degrading treatment: considering the minimum levels of severity that amount to these forms of ill-treatment

The cases commented here assist in understanding how the standards of ill-treatment are construed and applied, and hence in identifying what constitutes cruel, inhuman or degrading treatment in specific scenarios. The decisions therefore provide determinacy and tangibility to notions that encapsulate values and moral arguments. These conform the base of any decision on the evaluation of these conducts and the suffering arising therefrom. In assessing both the conduct and the suffering, the legal reasoning is not limited to an automatic assignment of the notions of inhuman and degrading treatment to particular situations or practices.¹¹⁰ In this sense, the circumstances surrounding each case and each victim play a key part in the reasoning.¹¹¹

In the judicial realm, this section predominantly refers to cases decided by the ECtHR enforcing the ECHR, given its prolific and, in Weissbrodt and Heilman's words, influential work among international and regional bodies.¹¹² The Court's interpretative approach to

¹¹⁰ Contrast with Waldron (n 81) 276. The author raises a concern about the risk of the standards, calling for reflection and reasoning and an evaluative approach, giving way to a list of rules and principles as to what constitutes inhuman or degrading treatment, deprived of the original argument sought.

¹¹¹ Harris, O'Boyle, Bates & Buckley (n 83) 238 and 260: 'As with other kinds of ill-treatment proscribed by Article 3, the test as to what is "degrading" is a relative one, depending upon all the circumstances of the case'.

¹¹² See Weissbrodt and Heilman (n 91) 358 and 382. As the authors point out, the distinction of forms of ill-treatment based on the degree of severity of the harm resulting therefrom originated with the European Commission and the ECtHR and was subsequently applied by international and regional bodies. Also, the test in assessing the minimum level of severity, which according to the ECtHR is a relative one, i.e., it depends on the circumstances of the case, has also influenced both the African Commission on Human and People's Rights and the Inter-American Commission on Human Rights. As an illustrative example of the influential work of the ECtHR and the European Commission, see the Inter-American Commission on Human Rights (Organization of American States) Report 63/99, 13 April 1999, *Rosario Congo v Ecuador*, Case 11.427, Inter-Am Comm'n HR Report No 63/99, of 13 April 1999 <<http://cidh.org/annualrep/98eng/Merits/Ecuador%2011427.htm>> paras 41, 53 and 58 regarding the

Article 3 of the ECHR is consistent with its view that it is a ‘living instrument which must be interpreted in the light of present-day conditions’.¹¹³ Reference is also made to cases brought before the HRC for consideration, where a dynamic approach to Article 7 of the ICCPR can also be observed.

The crossing conditions sea migrants endure, the violence they are exposed to and their situation of vulnerability in these journeys do not constitute isolated cases but a generalised pattern with devastating effects among them. These factors are therefore central in the present legal argument for an integrating construction of the notion of persons in distress at sea. The cramped and unsanitary conditions in which they travel, the scarcity of the most basic provisions on board, such as fresh water and food, the violence surrounding these clandestine journeys and the physical and mental suffering resulting therefrom, outlined earlier, add to the anguish, fear and feeling of utter helplessness and debasement due to unsafety and the high risks of drifting, capsizing, or sinking. All these factors are to be considered cumulatively.

The observation of these crossing conditions unveil parallelisms and similarities with cases where conditions of detention have been assessed and held to be in breach of the prohibition of inhuman and degrading treatment. Elements and factors considered in these decisions are recognisable in the crossing conditions.

This sub-section therefore considers cases where conditions of detention have been held to amount to inhuman or degrading treatment in order to understand the legal standards applied

application of special standards in cases involving persons with mental illnesses, the Inter-American Commission refers to the practice of the ECtHR. See further *Prosecutor v Krnojelac*, case No. IT-97-25-T, Trial Chamber Judgment, 181, Int’l Crim Trib for the Former Yugoslavia, 15 March 2002: ‘the Trial Chamber regards the general reasoning and criteria used by the European Court of Human Rights in order to assess the gravity of the act of torture, as well as its relationship with other less serious offences, as sufficiently compelling as to warrant adopting it in the present case’ (fn 190 in *Weissbrodt and Heilman*, n 91).

¹¹³ *Tyler v United Kingdom* (n 29) para 3; *Soering v The United Kingdom* (n 95) para 102; See also *Selmouni v France* (GC) App No 25803/94 (ECtHR, 28 July 1999). In this case the Court considered that ‘certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies’ (para 101). See also *Saadi v UK*, App No 13229/03 (ECtHR, 29 January 2008) para 55. See *Rainey, Wicks and Ovey* (n 85) 185. See also *Harris, O’Boyle, Bates & Buckley* (n 83) 242 and 243.

when determining the nature of the ill-treatment inflicted. They will contribute to understand the minimum levels of severity that amount to forms of ill-treatment and they will assist in shaping the contours of what constitutes cruel, inhuman and degrading treatment. This will in turn allow to comprehend how the categorisation of ill-treatment applies to the crossing conditions and the treatment sea migrants are subjected to.

An integrating reading of the notion of danger and the term persons in distress at sea begs consideration to the exposure to these forms of ill-treatment while at sea and the harm resulting therefrom. Factors such as overcrowded and unsanitary conditions in detention situations, lack of food or water, inexistent or scarce ventilation or shelter, have been held to amount to inhuman or degrading treatment when considering the cumulative effects of the prevailing conditions, as well the specific allegations of the applicants. This was for instance the case of *Dougoz v Greece* regarding the applicant's detention conditions in police headquarters whilst awaiting expulsion from Greek Authorities.¹¹⁴ When assessing the confinement conditions, the ECtHR took into account the overcrowded cells, the insufficient sanitary and sleeping facilities, scarce hot water, the lack of fresh air or natural daylight, as well as the time of the detention and the applicant's allegations. In this case the Court considered that the conditions amounted to degrading treatment.

Crammed and unsanitary conditions while in detention were also key factors in *Kadikis* case.¹¹⁵ This case concerned a fifteen-day detention in a six-square metre cell, of which only 2.5 square metres allowed free space to move and the rest was platform for sleeping purposes, for four or five people. They had to sleep in their clothes. The cell offered poor ventilation and poor lighting. No walks outdoors were allowed during the detention period. They were given only one meal per day and they had restricted access to toilets. Urgent needs required the use of a bottle or a plastic bowl.¹¹⁶ There was no access to drinking water, or any water, in the cell. The Court found that, despite the lack of intention by the authorities to cause debasement or humiliation on the applicant, the detention conditions during fifteen days could not but affect his dignity and arouse feelings of humiliation and debasement. The

¹¹⁴ Case of *Dougoz v Greece*, App No 40907/98 (ECtHR, 6 March 2001) para 46; See also *Ilasçu and others v Moldova and Russia* (n 81) para 433. See further *Kalashnikov v Russia* (n 101) para 95.

¹¹⁵ *Kadikis v Latvia (No 2)* App No 62393/00 (ECtHR, 4 May 2006).

¹¹⁶ *Ibid*, paras 20 and 21.

ECtHR thus concluded that the treatment inflicted on the applicant amounted to degrading treatment contrary to Article 3 of the ECHR.¹¹⁷

In the case *Kalashnikov v Russia*,¹¹⁸ the ECtHR, took the view that the cell, continuously and severely overcrowded, itself raised ‘an issue under Article 3 of the Convention’.¹¹⁹ The Court considered additional factors, such as: the absence of ventilation in the cell where the applicant was confined all day except for one or two hours of outdoor activity,¹²⁰ the infestation of pests in the cell,¹²¹ the exposure to contagious diseases suffered by other inmates with whom the applicant shared the cell despite the lack of actual contagion.¹²² Another factor that weighed in the assessment of the inhuman or degrading conditions of confinement was the dilapidated and filthy conditions of the toilet with no screen to separate it from the living area in the cell or to allow some privacy.¹²³ The Court assessed the applicant’s suffering and his health’s deterioration, including skin diseases, in these conditions of detention during four years and ten months.¹²⁴ The Court considered the detrimental effects on the applicant’s health and wellbeing, emphasising ‘the considerable mental suffering’ the applicant must have suffered,¹²⁵ ‘diminishing his human dignity and arousing in him such feelings as to cause humiliation and debasement’.¹²⁶ In this case the Court held that the treatment the applicant suffered amounted to degrading treatment, and hence a violation of Article 3 of the ECHR.¹²⁷

Mental suffering, unquestionably present among sea migrants enduring irregular crossings, is at the heart of the case of *Fedotov v Russia*,¹²⁸ where the treatment inflicted on the

¹¹⁷ Ibid, para 56.

¹¹⁸ *Kalashnikov v Russia* (n 101).

¹¹⁹ Ibid, para 97. This, the Court acknowledged, had a negative effect on the sleeping conditions as the inmates had to take turns on the basis of eight-hour sleep shifts and the space per inmate was between 0.9 and 1.9 square metres. The constant lighting in the cell, as well as the ever-present noise and tumult further aggravated sleeping conditions.

¹²⁰ Ibid.

¹²¹ Ibid, para 98.

¹²² Ibid.

¹²³ Ibid, para 99.

¹²⁴ Ibid, paras 98 to 100.

¹²⁵ Ibid, para 102

¹²⁶ Ibid, paras 101 and 102.

¹²⁷ Ibid, para 102.

¹²⁸ Case of *Fedotov v Russia*, App No 5140/02 (ECtHR, 25 January 2006).

applicant was assessed bearing in mind the circumstances of an unlawful detention and the mental anguish arising therefrom. The applicant's second detention on 6 and 7 July 2000, involved a 22-hour detention during which he received no food or drink and could not use the toilet.¹²⁹ The Court noted that 'the applicant was kept overnight in a cell unfit for an overnight stay, without food or drink or unrestricted access to a toilet'.¹³⁰ According to the Court, 'the unsatisfactory conditions of detention exacerbated the mental anguish caused by the unlawful nature of his detention',¹³¹ to conclude that 'the applicant was subjected to inhuman treatment, incompatible with Article 3 of the Convention'.¹³²

Undoubtedly, the use of force and physical violence is a cumulative factor for consideration when assessing the category of ill-treatment inflicted and the suffering resulting from it. This is a predominant factor in the context of irregular crossings. In the case of *Jalloh v Germany*,¹³³ for instance, the conduct impugned was the use of force for the administration of emetics on the applicant, in order to retrieve specific evidence of a drugs offence by forcing the applicant to regurgitate a tiny plastic bag of cocaine. The Court considered primarily the mental suffering, the anxiety and the physical pain the measure would have caused to the applicant. It found that the authorities had 'subjected the applicant to a grave interference with his physical and mental integrity against his will'.¹³⁴ It further found that the procedure carried out 'was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him'.¹³⁵ The ECtHR consequently held that the procedure used 'caused the applicant both physical pain and mental suffering',¹³⁶ concluding the applicant had been subjected to inhuman and degrading treatment contrary to Article 3.¹³⁷

However, physical violence is not a requirement for ill-treatment to cause physical and mental suffering that amounts to inhuman treatment. This can be extracted, for instance,

¹²⁹ Ibid, para 66.

¹³⁰ Ibid, para 68.

¹³¹ Ibid.

¹³² Ibid.

¹³³ *Jalloh v Germany* (GC) App No 54810/00 (ECtHR, 11 July 2006).

¹³⁴ Ibid, para 82.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid, para 83.

from the case of *Mader v Croatia*.¹³⁸ In this case, there was insufficient evidence to establish the veracity of the applicant's allegations that he had been subject of beatings while in police custody during his questioning in Zagreb Police Department, leading to his criminal prosecution for murder.¹³⁹ However, the deprivation of sleep and being forced to sit on a chair continuously for 2 days and 19 hours were held to constitute inhuman treatment. Among the circumstances of the case, the ECtHR highlighted the lack of procedural guarantees during the questioning as his lawyer was not present. The Court was persuaded that such treatment caused the applicant 'physical and mental suffering to a degree incompatible with the prohibition of ill-treatment under Article 3 of the Convention'.¹⁴⁰ The Court considered that 'the treatment described by the applicant constituted inhuman treatment and that there has therefore been a violation of the substantive aspect of Article 3 of the Convention'.¹⁴¹

In cases regarding detention conditions, Article 3 of the ECHR, equates to the combination of both Article 7 and Art 10 paragraph 1 of the ICCPR. Article 10 paragraph 1 of the ICCPR, which complements Article 7,¹⁴² and has no correlative in the ECHR, guarantees to '[a]ll persons deprived of their liberty [to] be treated with humanity and with respect for the inherent dignity of the human person'. The HRC resorts to Article 7 in cases where specific violent treatment has been inflicted in custodial circumstances. An illustrative example can be drawn from the HRC views on *Clement Boodoo v Trinidad and Tobago*, Communication No 721/1996.¹⁴³ The conditions of detention described by the author of the communication, while placed in cellular confinement included being locked in his cell for twenty-three hours a day, sleeping on a one-inch-thick carpet, being allowed airing once a day in an area 'where

¹³⁸ Case of *Mader v Croatia* (n 107).

¹³⁹ *Ibid* para 101 and para 109.

¹⁴⁰ *Ibid*, para 108.

¹⁴¹ *Ibid*, para 110.

¹⁴² HRC, CCPR General Comment No 20 (n 74) para 2. See also HRC, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency* (HRC, CCPR General Comment No 29) adopted on 24 July 2001, CCPR/C/21/Rev.1/Add.11, para 13(a) <<http://ccprcentre.org/ccpr-general-comments>>. The HRC highlights the close connection between Articles 7 and 10 of the ICCPR and in its opinion, the latter cannot be subject to lawful derogation under Article 4, paragraph 2 of the ICCPR, even though it is not included in its wording. See further Kälin and Künzli (n 107) 322 and 323.

¹⁴³ HRC views, UN Doc CCPR/C/74/D/721/1996, 15 April 2002, para 2.2 <<https://juris.ohchr.org/Search/Details/967>>.

inmate urinal and faecal wastes are disposed of'.¹⁴⁴ C Boodoo further depicted the airing facility 'damp, slippery, infested with worms and flies and faecal waste (...) scattered on the ground'.¹⁴⁵ As a result of these detention conditions, he was losing his eyesight.¹⁴⁶ In addition, C Boodoo claimed he had been assaulted by the prison wards and subjected to humiliating treatment.¹⁴⁷ The HRC treated both aspects of the detention separately and found, on the one hand, that the appalling and insalubrious detention conditions resulting in the applicant's deterioration of his eyesight were contrary to Article 10, paragraph 1, of the ICCPR.¹⁴⁸ On the other hand, the HRC assessed the physical assaults, the threats of violence, and the humiliating treatment suffered, to find that such treatments amounted to a violation of Article 7, without specifying whether such treatment qualified as inhuman or degrading treatment.¹⁴⁹ The HRC has however found that deplorable conditions of detention amount to a violation of Article 7 of the ICCPR when sustained for a lengthy period of time. In *H Edwards v Jamaica*, Communication No 529/1993, the HRC found that the conditions of detention described by H Edwards, i.e., being alone in a cell measuring six feet by fourteen feet, being let out only for three and a half hours a day, with no recreational facilities and no books, not only constituted a violation of Article 10 of ICCPR but also a violation of Article 7 given he was held in these conditions for ten years.¹⁵⁰

Ill-treatment, regardless of the category of the conduct, must attain a minimum level of severity, causing sufficiently serious suffering or humiliation.¹⁵¹ The assessment of this minimum is relative in the sense that all the circumstances of the case need to be considered,

¹⁴⁴ Ibid, para 2.2.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid, paras 2.3. and 3.1.

¹⁴⁷ Ibid, paras 2.6 to 2.8.

¹⁴⁸ Ibid, para 6.4: 'In the Committee's opinion, the conditions described therein are such as to violate his right to be treated with humanity and with respect for the inherent dignity of the human person and are therefore contrary to article 10, paragraph 1, of the Covenant'.

¹⁴⁹ Ibid, para 6.5. Another illustrative example of segregating both insalubrious detention conditions and intimidating, threatening or violent treatment can be extracted from the views of the HRC regarding *Womah Mukong v Cameroon*, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991, 10 August 1994, paras 9.3. and 9.4 <<https://juris.ohchr.org/Search/Details/321>>.

¹⁵⁰ HRC views, UN Doc CCPR/C/60/D/529/1993, 19 August 1997, para 8.3 <<https://juris.ohchr.org/Search/Details/879>>.

¹⁵¹ See for instance *Mader v Croatia* (n 107) para 106. See further para 107 on the distinction between inhuman and degrading treatment. See also *Rainey, Wicks and Ovey* (n 85) 185 and 186.

including the vulnerability of the person suffering the ill-treatment. This was for instance the case in *Price v United Kingdom*,¹⁵² where the applicant's disability and health problems were determinant for the ECtHR to establish that the inadequate detention conditions, including the sleeping and sanitary facilities and the treatment provided to cater for the applicant's special needs, amounted to degrading treatment.¹⁵³ Also, in the case of *MSS v Belgium and Greece*,¹⁵⁴ the ECtHR, in reaching the conclusion that the detention conditions amounted to degrading treatment, took into account that the applicant, being an asylum-seeker, was particularly vulnerable.¹⁵⁵ Both quantitative and qualitative considerations play a role in the assessment, and both the treatment and the effects on the victim need scrutinising. Hence, at one end the nature and the circumstances of the conduct or treatment, as well as the manner and the method in which they are carried out become relevant.

At the other end, the physical and or mental effects of the treatment inflicted need consideration. The levels of the suffering are clearly intensified in situations of vulnerability, where aspects such as age, gender and state of health, physical or mental, or the circumstances surrounding the facts need to be taken into account. In the case of *Slawomir Musial v Poland*,¹⁵⁶ the ECtHR acknowledged that overcrowding and poor detention conditions 'may have exacerbated to a certain extent [the applicant's] feelings of distress, anguish and fear' given his vulnerability.¹⁵⁷ As mentioned in chapter 4, vulnerability reasoning is applied and it acts as a 'magnifying glass' in the words of Peroni and Timmer.¹⁵⁸

Vulnerability reasoning in the assessment of the minimum level of severity can also be recognised outside detention situations, for instance in cases of forcible removals, including deportation, expulsion and extradition. These have to abide by the principle of non-

¹⁵² *Price v United Kingdom*, App No 33394/96 (ECtHR, 10 July 2001).

¹⁵³ *Ibid*, paras 25 to 30.

¹⁵⁴ *MSS v Belgium and Greece* (GC) App No 30696/09 (ECtHR, 21 January 2011).

¹⁵⁵ *Ibid*, para 232. The vulnerability in this case was considered in chapter 1, ss 2.1 and 2.2, and chapter 4 s 1.5.2. In the context of ICCPR, see HRC, CCPR General Comment No 20 (n 74) para 11.

¹⁵⁶ *Slawomir Musial v Poland*, App 28300/06 (ECtHR, 20 January 2009). See Rainey, Wicks and Ovey (n 85) 206. See also *Soering v The United Kingdom* (n 95) paras 100 and 111.

¹⁵⁷ *Slawomir Musial v Poland*, para 96.

¹⁵⁸ L Peroni and A Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 (N 4) Oxford University Press and New York University School of Law, 1056, 1079 and 1080. This was discussed in ch 4 s 1.5.2.

refoulement, as will be seen in chapter 6 when considering the notion of place of safety.¹⁵⁹ In the context of the ICCPR this obligation is inferred in Article 7. According to the HRC's views: '[s]tates parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.¹⁶⁰ The HRC has considered forcible removal communications on the grounds of Article 7 of the ICCPR, applying a relative test, i.e., based on the individualised circumstances of each case, and particularly, the vulnerability of the persons involved.

The two cases considered below are illustrative of the levels of hardship that the HRC has considered reach the threshold of what constitutes cruel, inhuman and degrading treatment when assessing the living conditions of refugees or asylum seekers. In both instances, the HRC's reasoning for supporting the view of an infringement of Article 7 of the ICCPR is firmly grounded in the precarious and unsafe living conditions combined with the vulnerability of the applicants. The formulation of the HRC views in both cases has raised concerns of stretching the scope of applicability of Article 7 on socioeconomic grounds.¹⁶¹ Arguably, a more elaborated view on the intense physical and mental suffering, or the intense feelings of fear, anguish and inferiority capable of humiliating and debasing the applicants, aggravated by their situation of vulnerability, had they been deported, would have enhanced the focus on the protection sought in Article 7.

¹⁵⁹ Ch 6 s 1.

¹⁶⁰ HRC, CCPR General Comment No 20 (n 74) para 9. The HRC has further considered this obligation in its *CCPR General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted 29 March 2004, CCPR/C/21/Rev.1/Add.1326, May 2004 (HRC, CCPR General Comment No 31) <<http://ccprcentre.org/ccpr-general-comments>>. According to para 12, States parties are under the obligation 'not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'.

¹⁶¹ See the dissenting opinions in these two cases, referred to below in n 167 and n 172.

In the case of *H Said Hashi v Denmark*,¹⁶² a single mother from Somalia with a five-year-old child faced deportation from Denmark to Italy, the first country of asylum,¹⁶³ whilst her residency permit, in the form of subsidiary protection in Italy was valid.¹⁶⁴ Said Hashi had experienced poor living conditions in the reception facility in Italy, especially during her pregnancy.¹⁶⁵ During her pregnancy, despite feeling unwell, suffering bleeding and feeling sick, she did not have access to hospital. She was attended by a nurse but received no further care. H Said Hashi had to skip meals as she was too weak to stand in line.¹⁶⁶ The HRC took into consideration the foreseeable risks H Said Hashi and her five-year-old child would be exposed to if they were removed to Italy, where they would not be entitled to accommodation in reception centres as she had obtained the residence permit. The exposure to the risk of ending up living in the streets, or at any rate living in precarious and unsafe conditions given the lack of entitlement to accommodation in a reception centre, was key in the HRC reasoning. The HRC gave due consideration to the special vulnerability of the applicant and her five-year-old child, as well as the lived experience in Italy. Consequently, the HRC formed the view that the forcible return would expose mother and child to a risk of irreparable harm, in violation of Article 7 of ICCPR, as they would likely be exposed to living conditions constituting cruel, inhuman or degrading treatment.¹⁶⁷

¹⁶² Communication No 2470/2014. See views adopted by the HRC, CCPR/C/120/D/2470/2014, 9 October 2017 <<https://juris.ohchr.org/Search/Details/2320>>.

¹⁶³ The concept of first country of asylum refers to the State that allows refugees coming directly from a territory where their life or freedom was threatened, according to the Convention and Protocol relating to the Status of Refugees, Art 31 in conjunction with Art 1. See G Goodwin-Gillard and J McAdam, *The Refugee in International Law*, 3rd edn (Oxford United Express 2007). The authors identify the problem at present as ‘that of identifying which State is “responsible” for determining a claim to asylum and ensuring protection for those found eligible’, 151. See in this respect Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L180/60, Art 26.

¹⁶⁴ HRC views, CCPR/C/120/D/2470/2014, para 2.6.

¹⁶⁵ *Ibid*, paras 2.2, 2.5 and 9.10. The author of this Communication slept under a shed roof, on a mattress without sheets. She had only one meal a day and difficulties accessing to basic sanitary facilities and access to water.

¹⁶⁶ *Ibid*, paras 2.2., 2.5, 2.8.

¹⁶⁷ *Ibid*, paras 9.7, 9.9, 9.10, 9.11 and 10. The joint opinion (dissenting) of three of the Committee members offers a different evaluation of the levels of hardship to which the author and her child would be exposed to if returned to Italy. According to them, exposing individuals by forcible returns to poor living conditions and difficulties accessing social services, if considered to amount to a violation of Art. 7 of ICCPR, would ‘extend

An earlier case, involving *W O Jasin et al v Denmark*,¹⁶⁸ illustrates a similar set of facts with an enhanced element of vulnerability of the applicant as a single mother of three young children and suffering asthma. Having received the residence permit in Italy, she was left with no shelter nor means of subsistence. W O Jasin was sleeping in the streets with her one-year-old daughter.¹⁶⁹ She left to The Netherlands but the authorities returned her in September 2009. She suffered again indigence and lack of social or humanitarian assistance with her then two-year-old daughter and she received no medical care during her second pregnancy.¹⁷⁰ In these circumstances she failed to renew her residence permit and she left to Sweden and subsequently entered Denmark where she faced deportation after submitting her application for refugee status in that country. The HRC gave due consideration to the personal experience and the personal circumstances, describing her situation as of ‘great vulnerability’,¹⁷¹ to give an individualised assessment of the risks involved in the deportation of the mother and her then three young children. The HRC viewed that deportation under these circumstances would amount to a contravention of Article 7.¹⁷²

The standards of ill-treatment as applied in the cases assessed in this sub-section allow to argue that the sea crossing conditions predominantly forced upon sea migrants, as scrutinised earlier through a number of examples and reports, amount to cruel, inhuman or degrading treatment. The treatment inflicted upon sea migrants even before embarking on these perilous journeys and the conditions they are left to endure during the crossings, reach the minimum levels of severity safeguarded against in the international rules prohibiting cruel, inhuman or degrading treatment, as they have been consistently construed and applied. In reaching this conclusion, consideration is given to situations of lived vulnerability among sea migrants, the treatment inflicted upon them and the suffering resulting therefrom, as

the protection of article 7 and the non-refoulement principle (which are absolute in nature) to breaking point’, Annex to CCPR/C/120/D/2470/2014.

¹⁶⁸ Communication No 2360/2014. See views adopted by the HRC, CCPR/C/114/D/2360/2014, 25 September 2015 <<https://juris.ohchr.org/Search/Details/2022>>.

¹⁶⁹ Ibid, paras 2.6, 2.7 and 8.8.

¹⁷⁰ Ibid, paras 2.8 to 2.12 and 8.4.

¹⁷¹ Ibid, para 8.4.

¹⁷² Ibid, paras 8.10 and 8.11. One dissenting opinion in this case presents the risks of extending the scope of Article 7 to economic hardships and disregards the situation of vulnerability of the author by offering a sort of ‘self-inflicted vulnerability’ narrative regarding the three pregnancies (Appendix II to CCPR/C/114/D/2360/2014).

highlighted earlier. These undoubtedly add to the anguish and fear among sea migrants of the uncertain fate due to the unsafe practices that mark these journeys, where layers of vulnerability compound.¹⁷³

The integrating interpretative reasoning proposed, i.e., that the construction of the term persons in distress, with its defining notion of danger,¹⁷⁴ includes exposure to, risk of, or actual subjection to cruel, inhuman or degrading treatment given the crossing conditions vastly imposed on sea migrants, requires two elements for the viability of the interpretative mechanism formulated in Article 31(3)(c) of the VCLT. These are the relevance of the international rules invoked and their applicability in the relations between the parties. These are considered in the following sections.

5. Relevance of the rules invoked for the construction of ‘persons in distress’

This section examines the requirement in Article 31(3)(c) of the VCLT that establishes that the rules invoked, i.e., the prohibition of cruel, inhuman or degrading treatment as seen in the provisions examined earlier, are relevant for the purpose of construing the definition of ‘persons in distress’ in the SAR Convention.

The relevance of international human rights law in the law of the sea and in maritime law has long been acknowledged by international bodies and legal scholars, as outlined earlier in this chapter.¹⁷⁵

The physical and mental integrity is central in the construction of ‘danger’, defined as ‘the possibility of suffering harm or injury’,¹⁷⁶ or ‘exposure or liability to injury, pain, harm or loss’,¹⁷⁷ when construing the notion of persons in distress, as seen in chapter 4.¹⁷⁸ The

¹⁷³ The approach taken on vulnerability is focused on situations of vulnerability, and irregular crossings present particular, extreme or compounded vulnerability, as seen in ch 1, s 2.3 and s 3.

¹⁷⁴ Annex to the SAR Convention, para 1.3.13 (n 36).

¹⁷⁵ See for instance T Treves, ‘Human Rights and the Law of the Sea’ (n 2), 1 and B Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (n 12) and s 1 above.

¹⁷⁶ Definition extracted from Oxford Dictionaries online <<https://en.oxforddictionaries.com/definition/danger>>.

¹⁷⁷ Merriam Webster online dictionary <<https://www.merriam-webster.com/dictionary/danger>>.

¹⁷⁸ Ch 4, s 1.4 and s 2.

physical and mental integrity is also central in the protection of human rights, in particular the provisions invoked here embodying the prohibition of cruel, inhuman and degrading treatment. The HRC's interpretation of Article 7 of the ICCPR in its General Comment No 20 illustrates this proposition when it establishes that 'the aim of the provision of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual'.¹⁷⁹ The notion of human dignity, briefly touched upon in chapter 1,¹⁸⁰ is presented in the Preamble of the ICCPR as an overarching principle in human rights law.

The physical and mental integrity of the persons is therefore at the intersection of these legal regimes, i.e., international human rights law and the law of the sea and maritime law. This common interest in these legal arenas underscores the relevance of international human rights law at sea, notably the safeguard against cruel, inhuman and degrading treatment.

The untenable conditions prevailing in irregular sea crossings, the coercion endemically involved in these clandestine journeys and the suffering involved, undeniably deteriorate the physical and mental integrity of the persons. They intensify the severity and the imminence of danger at sea and the risks to the physical and mental integrity of the persons enduring these unsafe crossings where layers of vulnerability compound.

The relevance of the provisions invoked here on the prohibition of cruel, inhuman and degrading treatment lays in that connection which stems from the heart of the problem, i.e., the integrity of the persons on board unseaworthy boats in irregular crossings, rather than the identity or the proximity between the treaties themselves.¹⁸¹ Despite being treaties regulating rather different topics in different legal arenas, the extraneous rules invoked become relevant in the context of the irregular crossing practices for the purpose of construing the SAR Convention, in particular the term persons in distress.¹⁸²

¹⁷⁹ HRC, CCPR General Comment No 20 (n 74) para 2.

¹⁸⁰ Ch 1 s 2.1.

¹⁸¹ This criterion of proximity between the treaties themselves is examined by P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill Nijhoff 2015). The four manifestations of the proximity criterion, are, according to Merkouris' study: '(i) [t]erminological identity or similitude (ii) [i]dentity or relevance of the subject-matter of regulation (iii) [c]omplete or partial overlap of the parties to the treaty with the parties to the dispute [and] (iv) [t]emporal [p]roximity', 84 to 95.

¹⁸² See A Boyle, 'Further Development of the Law of the Sea Convention: Mechanisms for Change' (2005) 54 (N 3) *International and Comparative Law Quarterly*, 563, 578 and 579. The author considers for instance the

The relevance suggested here when considering extraneous rules for the construction of the term persons in distress and its open-textured concept of danger is a linkage *ratione materiae*, namely, relevant to the subject matter at stake, which is the protection of the integrity of persons at sea, in particular, sea migrants embarked in irregular sea crossings.¹⁸³

The substantial scope of the definition of persons in distress at sea is hence construed taking into account, or by reference to, the extraneous rules which are relevant to the subject-matter under scrutiny, namely, the integrity, whether physical or mental or both, of the persons involved in irregular crossings, for the purpose of initiation of a rescue operation.¹⁸⁴

relationship between UNCLOS and the 1992 Convention on Biological Diversity (CBD) stating ‘successive treaties in rather different topics can contribute to the development of an integrated legal regime’ (p 578) and adds: ‘Clearly, each agreement is relevant for the purpose of interpreting the other’ (p 579). Boyle makes these observations in the context of his analysis of an evolutionary interpretation of UNCLOS, and the interpretative technique of Art 31(3)(c) of the VCLT. Further comments on this article relevant to the dynamic interpretation have been made in ch 4, s 2.2.

¹⁸³ See WTO United States - Import Prohibition of Certain Shrimp and Shrimp Products - Report of the Appellate Body (12 Oct 1998) WTO Doc WT/DS58/AB/R, regarding the construction of the terms ‘exhaustible natural resources’ under WTO Covered Agreements by taking into consideration international environmental law texts. In particular see para 158. On this understanding of relevance *ratione materiae*, see also *Al-Adsani v United Kingdom*, App No 35763/97 (ECtHR, 21 November 2001) regarding the right of access to court in civil claims, protected under Art 6(1) of the ECHR. This case did not involve a matter of construction of a term in the Convention, but it sought to harmonise two conflicting norms. It involved the subjection of the right of access to court to the restriction of State immunity, in accordance with Art 31(3)(c) of the VCLT, according to which, Art 6 could not be interpreted in a vacuum and the ECHR ‘should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity’ (paras 55 and 56). See further *Golder v United Kingdom*, App No 4451/70 (ECtHR, 21 February 1975). See Tzevelekos’ analysis of the use of Art 31(3)(c) by the ECtHR as an anti-fragmentation tool when there is complementarity of norms rather than conflict (n 30) 647 to 650.

¹⁸⁴ See also as an example where the relevance in the court’s reasoning resides in the subject matter at stake to invoke extraneous rules in the systemic interpretation, *Loizidou v Turkey*, App No 15318/89 (ECtHR, 18 December 1996) paras 42 to 44. In this case the court resorts to extraneous rules unrelated to the object and purpose of the ECHR being interpreted, in particular, the right to enjoy peacefully the private property in Northern Cyprus, when deciding on the validity of the acts of the Turkish Republic of Northern Cyprus (TRNC). The ECtHR expressly applied Art 31(3)(c) and referred to UN Security Council Resolutions 541 (1983) and 550 (1984) declaring the proclamation of the TRNC as legally invalid. See also *Jersild v Denmark* (GC) App No 15890/89 (ECtHR, 23 September 1994). In this case the court analysed the 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination in the light of the freedom of expression, articulated in Art 10 of the ECHR. The Court established that the State’s obligations under the Convention ‘must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN

6. Applicability of the rules invoked in the relations between the parties

The determination whether the relevant rule of international law invoked is applicable in the relations between the parties, appears particularly acute in multilateral treaties.¹⁸⁵ The Report of the Study Group of the International Law Commission (ILC), finalised by Koskenniemi, raises the question whether it is ‘necessary that *all* parties to the treaty being interpreted are also parties to the treaty relied upon as the other source of international law for interpretation purposes’.¹⁸⁶ The identity of parties, as observed by the ILC, becomes highly implausible in cases of multilateral treaties with a significant participation of States, with the perverse effect for these multilateral treaties to become more isolated from the broader context of international law. The ILC proposes as a partial solution or mitigation to such a restrictive approach to the systemic integration: the possibility of invoking a norm, where not in force between all parties to the treaty under interpretation, that it is ‘treated as customary international law’.¹⁸⁷

The prohibition of torture, or cruel, inhuman or degrading treatment holds the normative status of customary international law, that is, a norm that arises from States’ general and consistent practice based on a sense of legal obligation, known as *opinio juris*, and is binding upon the international community.¹⁸⁸

Convention’ para 30. In this case no real normative conflict existed and yet the guiding mechanism of systemic integration was applied.

¹⁸⁵ See ILC Report A/CN.4/L.682 (n 24) paras 470 and 471. See also McLachlan (n 28) 313 to 315. A Boyle, ‘Further Development of the Law of the Sea Convention: Mechanisms for Change’ (n 182) 571.

¹⁸⁶ ILC Report A/CN.4/L.682 (n 24) para 470.

¹⁸⁷ *Ibid*, para 471. See further McLachlan (n 28) 314.

¹⁸⁸ See Weissbrodt and Heilman (n 91) 347, 348 and 361; N Rodley, ‘Integrity of the Person’ in D Moeckli, S Shah & S Sivakumaran, eds, *International Human Rights Law*, 3rd edn (Oxford University Press 2018) chapter 9, 167 and 168; C Chinkin, ‘Sources’ in D Moeckli, S Shah and S Sivakumaran, eds, *International Human Rights Law*, 2nd edn (Oxford University Press 2014) chapter 4, 70 to 72. Customary international law is recognised as a source of ordinary international law according to Art 38(1) of the Statute of the International Court of Justice. A norm of customary international law would however not bind States that have persistently objected to the formation of a particular rule as customary. See A Kaczorowska, *Public International Law*, 4th edn (Routledge, 2010) 35 to 42. See United Nations General Assembly (UNGA) International Law Commission (ILC) Third Report on Identification of Customary International Law, by Michael Wood, Special Rapporteur, Geneva 4 May to 5 June and 6 July to 7 August 2015, UN Doc A/CN.4/682, in particular paras 13 to 17. See also the ILC ‘Draft Conclusions on Identification of Customary International Law’ adopted by the

Therefore, in the present interpretative reasoning of the notion of persons in distress and its defining term danger, the applicability of the international human rights rules regarding the prohibition of cruel, inhuman or degrading treatment in the relations between the parties to the SAR Convention relies on their status of customary international law. This leaves no doubt as to the compliance with the requirement of Article 31(3)(c) of the VCLT and its functionality as a guide for the interpretation of the notion of persons in distress.

Both requirements of relevance and applicability are therefore met for the operability of the mechanism of systemic integration as per Article 31(3)(c) of the VCLT. Accordingly, an integrating interpretative reasoning of the notion of persons on distress and its defining term danger, based on Article 31(3)(c) of the VCLT, allows to consider sea crossings in conditions that amount to cruel, inhuman or degrading treatment to constitute situations of distress and for those enduring them to be considered persons in distress for the purpose of maritime search and rescue.

Conclusion

This chapter has continued with the interpretative legal reasoning focusing on the term persons in distress, and its central notion of danger, commenced in the previous chapter. It has scrutinised the functioning of the principle of systemic integration embodied in Article 31(3)(c) of the VCLT in the construction of the concept of persons in distress when invoking international human rights law considerations. In particular, the interpretative reasoning proposed has invoked the safeguard against cruel, inhuman and degrading treatment in the reading of the key notion of danger in the definition of the term persons in distress.

Irregular crossing conditions have been scrutinised to underscore widespread patterns of unsafe practices and ill-treatment inflicted upon migrants which effects are prolonged, if not worsened, during irregular sea crossings. This allows to establish with a reasonable certainty that the dangers involved are not uniquely linked to the endemic unsafe practices but also concern the widely exposure to coercion or violence. The risks involved therefore include the threat of, or the actual, physical and psychological harm associated with the hardship of these crossings, the levels of which fall within the scope of the provisions safeguarding against cruel, inhuman or degrading treatment.

ILC at its seventieth session, in 2018, and submitted to the GA as a part of the Commission's report covering the work of that session, UN Doc A/73/10.

This therefore underscores the need to further considerations of humanity outside the right to life. It highlights the significance of construing the terms persons in distress and danger taking into consideration the exposure to cruel, inhuman and degrading treatment, in accordance with the standards applied, as examined through a number of decisions of the ECtHR and HRC Communications, particularly in cases regarding detention or confinement conditions.

The international rules on the prohibition of cruel, inhuman and degrading treatment and the standards applied thereto are here proposed to inform the construction of the term persons in distress in the SAR Convention and consequently in related provisions in the SOLAS Convention and UNCLOS, in accordance with the principle of systemic integration. This interpretative reasoning meets the requirements of relevance of the rules invoked and their applicability in the relations between the parties, contained in Article 31(3)(c) of the VCLT, as discussed in the last sections of this chapter. Accordingly, it is concluded that the functionality of the principle of systemic integration is manifest. Consequently, an integrating construction of the notion of persons in distress is viable, at any rate to the extent of the specific safeguards against cruel, inhuman and degrading treatment considered here, primarily linked to the integrity both physical and mental of sea migrants.

The principle of systemic integration, brought in a context where no normative conflict exists, enables furthering, at any rate consolidating, an already existing dialogue at sea between the different legal regimes considered, namely, international human rights law and the law of the sea and maritime law realms, particularly in the context of search and rescue operations. In this sense, it offers further ‘lines of communication between differing legal arenas’.¹⁸⁹ In particular, it brings to the centre of the interpretative reasoning specific dangers sea migrants are endemically exposed to during irregular crossings, namely ill-treatment in the forms of cruel, inhuman or degrading treatment. In introducing an interpretation more responsive to the needs of migrants involved in irregular sea crossings, this interpretative

¹⁸⁹ K Ladeur, quoted by A Fischer-Lescano and G Teubner (Translated by M Everson) ‘Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 (N 4) Michigan Journal of International Law, 999, 1045 and fn 185 therein. See, however, Tzevelekos (n 30), in particular the author’s assessment of Art 31(3)(c) as a ‘pseudo-systemic integration effect’ (p 650) where there is complementarity of norms, instead of conflict of norms, consistent with a general understanding of fragmentation that equates to the notion of conflict of norms, as discussed in ch 3, s 2.

Chapter 5

reasoning based on Article 31(3)(c) of the VCLT becomes a mechanism of redress when considering the vulnerability reasoning.

This interpretative reasoning undoubtedly enhances the humanitarian *telos* in the SAR Convention and contributes to the present debate about the meaning of what constitutes a person in distress at sea, which, as it has been here argued, is to include situations where the crossing conditions amount to cruel, inhuman or degrading treatment. This in turn allows furthering the discussion on the role of the SAR Convention and its continuing relevance in the present search and rescue context of irregular migration by sea to achieve a more responsive and efficient SAR system.

This interpretative legal tool cannot however resolve underlying conflicting priorities and biases. These underlying tensions that form political and social fragmentation, already commented in chapter 3, remain out of reach for this legal interpretative mechanism. The integrity of the SAR system appears thus vulnerable to these underlying tensions where migration restrictive policies and border control priorities bear at present a significant weight.

These underlying tensions become even more blatant in the disembarkation of rescued sea migrants and their delivery to a place of safety. The last phase of the rescue operation meets with the absence of States obligations to accept disembarkation on grounds of their sovereignty to regulate the admission of non-citizens in their own territories. The disembarkation is therefore dependent on the reception and processing efforts a particular State is willing to make and based on its border control and migration policies.

The following chapter considers this integrating interpretative reasoning in the construction of the notion of ‘place of safety’ where the needs of sea migrants and their protection remain central.

Chapter 6 The notion of place of safety for the purpose of disembarkation in maritime search and rescue: furthering considerations of humanity in the interpretative reasoning proposed

Introduction

Delivery of survivors to a place of safety marks the end of a search and rescue operation.¹ As pointed out in chapter 2,² tensions recurrently arise in disembarkations of sea migrants on land. In the context of irregular crossings, this last stretch of the rescue operation epitomises the confronting pursuits and interests of an underlying social fragmentation.³ Indeed, disembarkation on land of sea migrants equates access to territory and a direct interference in migration policies, a prerogative of the State of disembarkation, grounded on the principle of sovereignty.⁴ Coastal States are under no international obligation to allow disembarkation in their territories of undocumented sea migrants, including refugees and asylum-seekers, stateless persons and economic migrants. Political appetite to do so runs thin, as it usually involves long-term reception capacity concerns and refugee status determination processing efforts. Reluctance and refusal to disembark on land are hence common responses that hinder a global SAR system heavily reliant on the cooperation between States parties to the SAR Convention.⁵

¹ Para 1.3.2 of the Annex to the SAR Convention defines rescue as: ‘[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to place of safety’.

² Initial considerations on disembarkation and delivery at a place of safety are contained in ch 2, s 2.3.2.

³ See ch 3, s 3.

⁴ See G Goodwin-Gill and J McAdam, *The Refugee in International Law*, 3rd edn (Oxford University Press 2007) (Goodwin-Gill and McAdam) 270 and 271, regarding United States of America, Indonesia and Australia. See also the case of *Hirsi Jamaa and Others v Italy* (GC) App No 27765/09 (ECtHR, 23 February 2012) para 113.

⁵ Annex to the SAR Convention, para 3.1.9. See J Coppens and E Somers, ‘Towards New Rules on Disembarkation of Persons Rescued at Sea?’ (2010) 25 *International Journal of Marine and Coastal Law*, 379. See also P Mallia, ‘The MV Salamis and the State of Disembarkation at the International Law: The Undefinable Goal’ (2014) 18 (N 11) *American Society of International Law Insights*, 11, <<https://www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal>>; J Hathaway and T Gammeltoft-Hansen, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2014) *Law & Economics Working Papers*, Paper 106, University of Michigan Law School

Discrepancies exist among States parties' interpretation of the term place of safety and as to the scope of protection a place of safety should provide.⁶ Yet a consistent understanding of the notion of place of safety is essential to promote and maintain an efficient SAR system.

Against this background, this chapter draws on the interpretative reasoning developed in the previous chapters to apply to the notion of place of safety. The question this chapter strives to answer is whether an integrating construction of the notion of place of safety, grounded in international human rights law and international refugee law considerations, is achievable. The aim is to scrutinise whether such an integrating construction can foster an interpretative scope of the notion of safety that allows the delivery of sea migrants to address specific protection needs. If the prompt disembarkation from the assisting ship aims at minimising any disruption to commercial vessels,⁷ the purpose of the interpretative reasoning proposed here is again to enhance considerations of humanity and reinforce protection of sea migrants at the last stretch of the rescue operation. Vulnerability reasoning consistently underpins this interpretative reasoning.

This chapter tackles the question above, by discussing first the principle of non-refoulement, considered in the Guidelines on the Treatment of Persons rescued at Sea (the Guidelines),⁸ and its application in this context of delivery of sea migrants to a place of safety.

<http://repository.law.umich.edu/law_econ_current/106>. Recent examples of States' refusals of the disembarkation of sea migrants are Malaysia and Bangladesh rejecting the landing of Rohingya refugees in April 2020 and consequently leaving them stranded at sea in life-threatening conditions. See UNHCR, I Ratwate, 'News comment on maritime movements of refugees and asylum-seekers, from the UNHCR Regional Bureau for Asia and the Pacific', 23 April 2020 <<https://www.unhcr.org/news/press/2020/4/5ea13da74/news-comment-maritime-movements-refugees-asylum-seekers-unhcr-regional.html>>; Human Rights Watch, 'Bangladesh: Rohingya Refugees Stranded at Sea Allow Ashore Hundreds at Risk of Starvation. Provide Health Care', 25 April 2020 <<https://www.hrw.org/news/2020/04/25/bangladesh-rohingya-refugees-stranded-sea>>.

⁶ See for instance Parliamentary Assembly of the Council of Europe Resolution 1821 (2011) on The Interception and rescue at sea of asylum seekers, refugees and irregular migrants, adopted 21 June 2011, para 5.2 <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18006&lang=en>>. See also the case of *Hirsi Jamaa and Others v Italy* (n 4), para 27.

⁷ This is the purpose sought in the third preambular paragraph of the SAR Convention and also in para 3.1.9 of the Annex to the SAR Convention.

⁸ Guidelines on the Treatment of Persons Rescued at Sea, adopted by International Maritime Organization (IMO) Maritime Safety Committee Resolution MSC.167(78) 20 May 2004 <[http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf)>.

The second section turns onto the initial stages of the interpretative process of the concept of place of safety, anchored in the 1969 Vienna Convention on the Law of Treaties (VCLT). It scrutinises the semantic meaning and the construction of the notion of place of safety within the context of the SAR Convention and the Guidelines. Special consideration is given to its nucleus, the generic term safety, and the protection implications it fosters. This section suggests a dynamic approach to the construction of the notion of place of safety in the context of the SAR Convention, characterised as a living treaty capable of adapting to the changing circumstances and the specific needs among sea migrants at disembarkation. In this sense, vulnerability reasoning remains a focus of attention in the interpretative reasoning and it is drawn to the construction of this term.

The third section brings the principle of systemic integration to the interpretative reasoning in order to advance international human rights law and international refugee law considerations. At the stage of disembarkation and delivery to a place of safety, the legal status of sea migrants therefore matters in order to identify the protection needs involved. This chapter does not aim at scrutinising States' asylum determination procedures in the implementation of international refugee law. It invokes considerations of access to fair and efficient procedures, and safeguards against penalization on irregular entry grounds and arbitrary detention. It also draws upon basic conditions of reception, detention or processing centres and treatment therein when assessing the notion of 'place of safety'. International human rights law considerations, whether or not in confinement situations, focus on the prohibition of torture, cruel, inhuman or degrading treatment or punishment.

The last section raises some specific concerns beyond the interpretative reasoning proposed and makes some suggestions for the identification of places that do not offer safety. This interpretative reasoning ultimately invites to continue the discussion to advance even further an integrating construction of the obligations for a more responsive and humanitarian SAR system that would in turn shape the cooperation and coordination among States parties to the SAR Convention.

1. Considerations of humanity and the principle of non-refoulement in search and rescue of sea migrants

Considerations of humanity are unquestionably rooted in the law of the sea and the legal maritime realm.⁹ The delivery of survivors to a place of safety constitutes no exception.

In determining a place of safety for the delivery of survivors, paragraph 3.1.9 of the Annex to the SAR Convention provides that account needs to be taken of ‘the particular circumstances of the case and guidelines developed by the [International Maritime] Organization’.¹⁰ The Guidelines,¹¹ already referred to in chapter 2, will be examined in the interpretative reasoning developed in this chapter. In particular, attention will be given to the obligation of non-refoulement underpinning the disembarkation and delivery of survivors to a place of safety in the context of maritime search and rescue.¹² The same obligation applies to interception of migrants at sea during border surveillance operations.¹³

It is therefore the aim of this first section to scrutinise the obligation of non-refoulement in the context of disembarkation of people retrieved from situations of distress at sea. It is not however the purpose of this section to give a comprehensive account of this obligation as

⁹ According to Brownlie, the term considerations of humanity ‘may be related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite analogy’ See J Crawford, *Brownlie’s Principles of Public International Law*, 9th edn (Oxford University Press, 2019) 43. This was examined in ch 5, s 1.

¹⁰ This paragraph was amended with the adoption of the IMO Resolution MSC.155(78) on 20 May 2004 <[http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-\(MSC\)/Documents/MSC.155\(78\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-(MSC)/Documents/MSC.155(78).pdf)>. Malta formally objected to these amendments and they do not bind it.

¹¹ See n 8.

¹² The Guidelines, para 6.17. The principle of non-refoulement has already been commented in ch 2, ss 2.1 and 2.3 regarding the existence of considerations outside the maritime realm when dealing with disembarkation. Also in ch 3, s 3.2 this obligation is taken into account when examining the underlying tensions between border control and security concerns on the one hand, and disembarkation in search and rescue operations of sea migrants on the other hand. Finally, ch 5, s 1 also draws attention to this obligation when examining an existing inter-regime dialogue.

¹³ See the case of *Hirsi Jamaa and Others v Italy* (n 4). A definition of the notion of interception and a description of States’ practices in this regard is given by the Executive Committee of the High Commissioner’s Programme, at its 18th meeting, 9 June 2000 on ‘Interception of Asylum Seekers and Refugees. The International Framework and Recommendations for a Comprehensive Approach’, UN Doc No EC/50/SC/CRP.17 <<https://www.unhcr.org/4aa660c69.pdf>>. See in particular paras 10 to 12. See also Goodwin-Gill and McAdam (n 4) 371 and 372.

this would fall outside the scope of the present research and the interpretative reasoning proposed.¹⁴ Nor does this section delve into State responsibility deriving from the international wrongful act concerning the violation of the principle of non-refoulement, as the main focus remains on the interpretation of the notion of place of safety for the delivery of survivors in a rescue operation.

1.1 The scope of the principle of non-refoulement considered in the Guidelines: a restrictive approach?

The principle of non-refoulement essentially provides that States are prohibited from returning, expelling or extraditing in any manner whatsoever refugees to territories where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.¹⁵ This prohibition extends to the return, expulsion or extradition of a person, directly or indirectly, to a territory where he or she could face a real risk of being subjected to torture, or to inhuman or degrading treatment or punishment.¹⁶ In words of Goodwin-Gill and McAdam, non-refoulement ‘is the foundation stone of international protection’.¹⁷

¹⁴ For an in-depth study on the principle of non-refoulement see J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 279 to 370; Goodwin-Gill and McAdam (n 4) ch 5 therein; J Hathaway and M Foster, *The Law of Refugee Status*, 2nd edn (Cambridge University Press 2014) 36 to 38. See also E Lauterpacht and D Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in E Feller, V Turk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) Part 2, 2.1, 89 (Lauterpacht and Bethlehem) <<https://www.unhcr.org/419c75ce4.html>> presented at the Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/C9F5DA8B89CF920AF70B140ECF88602/9780511493973c8_p253-258_CBO.pdf/summary_conclusions_article_31_of_the_1951_convention_expert_roundtable_geneva_november_2001.pdf>.

¹⁵ Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (Refugee Convention) and the Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (1967 Protocol).

¹⁶ See for instance the International Covenant on Civil and Political Rights, 1966, 999 UNTS 171 (ICCPR) Art 7, or the Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR) 1950, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5, Art 3.

¹⁷ Goodwin-Gill and McAdam (n 4) p 421. See also J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 8.

The principle of non-refoulement is acknowledged here as a matter of actual application of, and compliance with, the obligation of this international norm, which is central in the delivery of survivors to a place of safety. This does not however prevent invoking the principle of non-refoulement also as a norm that informs the process of interpretation of the notion of place of safety, as part of the interpretation reasoning based on the principle of systemic integration contained in Article 31(3)(c) of the VCLT.¹⁸

In the existing inter-regime dialogue, considerations of humanity resonate in the obligations relating to the disembarkation, and the principle of non-refoulement proves to be a key consideration in determining a place of safety. In particular, the Guidelines, a soft legal instrument that seeks to provide guidance to States parties to the SAR and the SOLAS Conventions as well as shipmasters with regards to humanitarian obligations concerning the treatment of persons rescued at sea,¹⁹ take into consideration, implicitly, the obligation of non-refoulement in the realm of international refugee law.²⁰ The Appendix to the Guidelines further make express reference to the 1951 International Convention relating to the Status of Refugees (Refugee Convention)²¹ and the prohibition of expulsion or “refoulement”

¹⁸ Art 31(3)(c) provides that ‘there shall be taken into account, together with the context (...) (c) Any relevant rules of international law applicable in the relations between the parties.’ The distinction between interpretation, construction and the actual application of a rule of international law has been examined earlier in ch 4, ss 1.3 and 3.3.

¹⁹ The Guidelines (n 8) para 1.1 and paras 6.12 to 6.18. They were adopted at the same time as the amendments to the SAR Convention, adopted by the Maritime Safety Committee Resolution MSC.155(78) on 20 May 2004, MSC 78/26/Add.1, Annex 5 <[http://www.imo.org/blast/blastDataHelper.asp?data_id=15528&filename=155\(78\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15528&filename=155(78).pdf)> and the amendments to the SOLAS Convention, adopted by the Maritime Safety Committee Resolution MSC.153(78) on 20 May 2004 <[http://www.imo.org/blast/blastDataHelper.asp?data_id=15526&filename=153\(78\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15526&filename=153(78).pdf)>. The Guidelines further aim at assisting States parties and masters to understand better their obligations under international law, para 1.2. Malta, party to the SAR Convention has however objected to these Guidelines as well as to the 2004 amendments to the SAR Convention and to the SOLAS Convention, as previously stated. Consequently, this agreement may not be part of the interpretation process of Art 31(3)(a) VCLT with respect to Malta. Having said that, the systemic interpretative reasoning proposed still applies to this country.

²⁰ The Guidelines (n 8) para 6.17 provides: ‘[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea’.

²¹ See the Appendix to the Resolution MSC 167(78), adopting the Guidelines, ‘Some Comments on Relevant International Law’ MSC 78/26/Add.2, Annex 34, 11 para 7. See also the 1967 Protocol (n 15).

contained therein.²² This, one may argue, gives continuity to and is consistent with the position adopted at the International Conference on Maritime Search and Rescue, convened by the International Maritime Organization (IMO) Assembly to consider the final stage of the drafting of the SAR Convention and its adoption.²³ As pointed out in chapter 2,²⁴ the UNHCR intervened in the final drafting of what is now paragraph 2.1.10 of the Annex to the SAR Convention,²⁵ seeking to establish that ‘the Convention would also be applicable to matters of concern to this Office (...)’.²⁶

States parties to the Refugee Convention and / or to the 1967 Protocol relating to the Status of Refugees (1967 Protocol)²⁷ are proscribed from expelling or returning a refugee or an asylum-seeker ‘in any manner whatsoever’ to territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.²⁸ The Refugee Convention, however, provides for an

²² Art 33 para 1 provides: ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.

²³ Resolution A.406(X) of 17 November 1977 of the Assembly, SAR/CONF/9, the IMO Archives. The International Conference was held in Hamburg in April 1979.

²⁴ Ch 2, s 2.1.

²⁵ Paragraph 2.1.10 of the Annex to the SAR Convention reads: ‘Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found’.

²⁶ The UNHCR proposed to re-word what was originally paragraph 2.1.7 of the Annex to the SAR Convention, which read: ‘In providing assistance to persons in distress at sea, Contracting States shall do so regardless of the nationality of such persons’. UNHCR wording proposal provided as follows: ‘In providing assistance to persons in distress at sea, Contracting States shall do so regardless of the nationality *or status* of such persons or the nationality of the ship on which such persons find themselves’ (emphasis added). International Conference on Maritime Search and Rescue, 1979, Agenda Item 6, SAR/CONF/6/2, the IMO Archives.

²⁷ Art 1 of the 1967 Protocol (n 15).

²⁸ The nature of the threat at the origin of flight is what characterises a person as a refugee, irrespective of a formal determination of status, in accordance with the definition contained in Art 1 of the Refugee Convention as amended by its 1967 Protocol. See Lauterpacht and Bethlehem (n 14) para 121 on their construction of refoulement and para 244 on the nature of the risk. Also for their position with regards a wide construction of the qualifying terms regarding the nature of the threat, see paras 136 to 143. See further Goodwin-Gill and McAdam (n 4) 205.

exception to the obligation of non-refoulement informed by the overriding interest of national security and public safety.²⁹

The Guidelines further refer to ‘[o]ther relevant international law [that] also contains prohibition on return to a place where there are substantial grounds for believing that the person would be in danger of being subjected to torture’.³⁰ Although not expressly mentioned, such reference undoubtedly includes the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).³¹ Article 3 proscribes States parties to ‘expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’.³² A prohibition of refoulement also exists, albeit implicitly, in case of exposure to torture in other international legal instruments, for instance, the 1966 International Covenant on Civil and Political Rights (ICCPR), Article 7.³³

²⁹ Art 33 para 2 reads: ‘[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community of that country’. See Lauterpacht and Bethlehem (n 14) for their interpretation of the terms shaping this exception, paras 145 to 192.

³⁰ Appendix ‘Some Comments on Relevant International Law’ MSC 78/26/Add.2, Annex 34, p 11, para 7.

³¹ Adopted in New York, 10 December 1984, 1465 UNTS 85. Art 1 defines torture, for the purpose of UNCAT as: ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or accidental to lawful sanctions’.

³² Art 3, para 1. The prohibition of torture within this Convention refers to this aggravated and deliberate form of ill-treatment with the purpose of obtaining information or extracting a confession, or punishment, intimidation or coercion perpetrated or instigated by a public official or with consent or acquiescence of a public official or other person in an official capacity. See Art 1.

³³ UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171. It entered into force on 23 March 1976. Art 7 provides: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Torture in this instrument does not require the involvement in any way whatsoever of public officials or individuals acting in an official capacity. See UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (HRC, CCPR General Comment No 20) 10 March

The Guidelines do not refer to the principle of non-refoulement more broadly in the realm of international human rights law, outside cases of exposure to torture. However, as pointed earlier, the principle of non-refoulement has human rights law ramifications not limited to cases of exposure to torture. In the words of Lauterpacht and Bethlehem, the concept of non-refoulement ‘is relevant, notably in the more general law relating to human rights concerning the prohibition of torture or cruel, inhuman or degrading treatment or punishment’.³⁴ It focuses on the individual’s protection of dignity, and his or her physical and mental integrity, irrespective of the individual’s status or conduct.³⁵ It affords what has been referred to as complementary protection, as it extends its relevance and applicability to protection needs outside the Refugee Convention and it allows no limitation or derogation.³⁶

According to the European Court of Human Rights (ECtHR) interpretation of Article 3 in conjunction with Article 1 of the European Convention on Human Rights (ECHR)³⁷ ‘States must refrain from returning a person (directly or indirectly) to a place where he or she could face a real risk of being subjected to torture or to inhuman or degrading treatment’.³⁸

1992, para 2 <<http://ccprcentre.org/ccpr-general-comments>>. See also for instance at regional level, the European Convention on Human Rights 1950 (ECHR), Article 3.

³⁴ See Lauterpacht and Bethlehem (n 14).

³⁵ See for example HRC, CCPR General Comment No 20 (n 33) para 2.

³⁶ In McAdam’s words, ‘[i]n legal terms, “complementary protection” describes protection granted by States on the basis of an international protection need outside the 1951 Convention framework. It may be based on a human rights treaty or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence’, J McAdam, *Complementary Protection in International Refugee Law* (n 17) 21. See also Goodwin-Gill and McAdam reference to the term ‘complementary protection’ as describing ‘States’ protection obligations arising from international legal instruments and custom that complement – or supplement – the Refugee Convention. It is in effect, a shorthand term for the widened scope of non-refoulement under international law’, Goodwin-Gill and McAdam (n 4) 285, and see further 285 to 324. See further Lauterpacht and Bethlehem (n 14) para 154. See also HRC, CCPR General Comment No 20 (n 33).

³⁷ ECHR, Art 1, reads: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention’. Art 3 provides: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

³⁸ *Hirsi Jamaa and Others v Italy* (n 4) p 16. This case involves the interception of sea migrants on the high seas by Italian authorities and their return to Libyan authorities in 2009. This follows the reasoning in the case of *Soering v United Kingdom* App No 14038/88 (ECtHR, 7 July 1989) regarding the extradition procedure against a German national in the United Kingdom to the United States of America to face charges of murder. In this case, the applicant was exposed to the risk of a death sentence under the State of Virginia law. The ECtHR took into account the personal circumstances of the applicant and held that the extradition to US and

Equally, the interpretation of Article 7 of the ICCPR by the UN Human Rights Committee (HRC) in its General Comment No. 20 leaves no doubt about the relevance and applicability of the principle of non-refoulement to cases of exposure to cruel, inhuman or degrading treatment or punishment.³⁹

The principle of non-refoulement hence needs to be scrutinised, for the purpose of delivery of survivors to a place of safety, invoking both international refugee law and international human rights law.⁴⁰

Outside situations of actual disembarkations that result in the return of sea migrants to territories where they would be exposed to the risks referred to above, the prohibition of refoulement may appear more elusive. This would be for instance the case where a ship on scene does not engage in the rescue of sea migrants, and receives instructions to stand-by until authorities in charge of the coordination of the relevant Search and Rescue Region

experiencing the “death row phenomenon” would expose him to a real risk of treatment contrary to Article 3 (paras 100 to 111). The Charter of Fundamental Rights of the European Union, Official Journal of the European Communities C 364/01, 18 December 2000, safeguards against the removal, expulsion or extradition to a State where there is a serious risk of being subjected to the death penalty. Art 19.2 provides: ‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’. See also the case of *Chahal v The United Kingdom*, App No 70/1995/576/662 (ECtHR, 11 November 1996). This case concerns the intended deportation of Mr Chahal, an Indian national from the UK on grounds of national security. The ECtHR found it substantiated that there was a real risk for Mr Chahal to be subjected to treatment contrary to Art 3 of the ECHR if he was deported to India. The Court considered the absolute terms of Article 3, where no exception and no derogations are permissible in accordance with Art 15 of the ECHR. See in particular paras 95 to 107 of the judgment.

³⁹ HRC, CCPR General Comment No 20 (n 33) paragraph 9 reads: ‘In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end’.

⁴⁰ See Goodwin-Gill and McAdam (n 4) 277 and 278. See also R Barnes, ‘Refugee Law at Sea’ (2004) 53 *International and Comparative Law Quarterly*, 64. See also V Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23 (N 2) *International Journal of Refugee Law*, 174, 200 *et seq.* See also *Hirsi Jamaa and Others v Italy* (n 4) p 16. The principle of non-refoulement includes the prohibition of indirect refoulement, in other words, the return or expulsion to a country where there is a risk of chain refoulement to the country of repatriation, where they would be exposed to the risks referred to above. See also in this respect, Lauterpacht and Bethlehem (n 14) para 115.

(SRR) arrive to retrieve the sea migrants and pull them back to the territory of their departure. The following section draws upon recent incidents in the Mediterranean that highlight, at best a contentious understanding and approach to the principle of non-refoulement outside the territory of a State. At worst, they underscore a complete disregard for this principle and a strategy to elude this obligation, turning a SAR operation into an exercise of extraterritorial border control.

1.2 The principle of non-refoulement: application difficulties in search and rescue of sea migrants

The prevailing opinion supports the view that the obligation of non-refoulement is not circumscribed to territorial jurisdiction of a State but it also applies extraterritorially, that is, where a State exercises extraterritorial jurisdiction, including on the high seas.⁴¹

Although crucial in determining a place of safety for the disembarkation and delivery of survivors in a rescue operation at sea, some States' practices may however make the extraterritorial application of this principle more elusive.

Increasing 'hands-off' practices in search and rescue scenarios seem to be a clear attempt to bypass the responsibilities derived from the *Hirsi Jamaa* case. In such practices, for instance, close-by rescue facilities avoid engaging in a rescue operation, typically under the instructions of the relevant Maritime Rescue Coordination Centre (MRCC) first contacted or informed about the situation of distress, and instructions are given to engage the intervention of other appointed facilities.

In the central Mediterranean route, where the Rome MRCC has been effectively in charge of the search and rescue area off the Libyan coast since Italy undertook the *Mare Nostrum* Operation in October 2013,⁴² there have been recently recurrent instances where Libyan

⁴¹ See for instance, Lauterpacht and Bethlehem (n 14) paras 62 to 67. See also the case of *Hirsi Jamaa and Others v Italy* (n 4) paras 70 to 82, and the Concurring Opinion of Judge Pinto de Albuquerque, 65 to 71. See further UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol', 26 January 2007, paras 24 *et seq.* <<https://www.unhcr.org/4d9486929.pdf>>. See also HRC *CCPR General Comment No 31: The Nature of the General Legal Obligation Imposed on States parties to the Covenant*, adopted 29 March 2004, UN Doc CCPR/C/21/Rev.1/Add.13, (HRC, CCPR General Comment No 31) para 12 <<http://ccprcentre.org/ccpr-general-comments>>. See further Goodwin-Gill and McAdam (n 4) 244 to 250.

⁴² See Ch 3, s 3.2.

coast guard patrols have taken over rescue operations under the instructions of the Rome MRCC.

For instance, according to the NGO Human Rights Watch report on the events of 10 May 2017,⁴³ Rome MRCC having received a distress call from a boat, initially contacted the NGO Sea-Watch vessel instructing those on board to proceed to the rescue. Notwithstanding the m/v *Sea-Watch 2* had initiated the rescue operation, the MRCC Rome contacted them again to inform that Libya was taking over the coordination of the rescue operation and a Libyan patrol vessel was instructed to operate as ‘on-scene command’.⁴⁴ According to the said report, Sea-Watch witnessed some dangerous manoeuvres and unsafe practices by the Libyan patrol vessel that took over the operation, such as not providing life jackets to the sea migrants. The Libyan coast guard eventually returned and disembarked the sea migrants in Tripoli, Libya. This incident reportedly occurred 20 nautical miles (nm) off the coast of Libya, that is, outside its territorial sea.⁴⁵

⁴³ Human Rights Watch, ‘EU: Shifting Rescue to Libya Risks Lives. Italy Should Direct Safe Rescues’, 19 June 2017, based on the NGO Sea-Watch ship’s log, a sea-watch crew’s oral testimony, e-mail communications between the Rome Maritime Rescue Coordination Centre (MRCC) and the *Sea-Watch*, and statements by the MRCC and the Libyan Navy coast guard <<https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives>>.

⁴⁴ The wording of the SAR Convention refers to on-scene coordinator, rather than ‘on-scene commander’ and it is defined in para 1.3.14 as the ‘person designated to co-ordinate search and rescue operations within a specified area’. In accordance with the SAR Convention, para 4.7.1 of the Annex thereto, on-scene coordination seeks to ensure the most effective results. It is the MRCC that designates, where there are multiple rescue facilities about to engage in a SAR operation and it considers it necessary, the ‘most capable person (...) as early as practicable and preferably before the facilities arrive within the specified area of operation’ (para 4.7.2 of the Annex to the SAR Convention). According to the same paragraph, the MRCC in charge needs to take into account the ‘apparent capabilities of the on-scene coordinator and the operational requirements’ in order to assign specific duties to the on-scene coordinator.

⁴⁵ UNCLOS, Art 3. Libya has not claimed a zone contiguous to the territorial sea, known as the contiguous zone over which it may exercise the control necessary to prevent infringement of its custom, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, and punish infringements of such laws and regulations committed within its territory or territorial sea, according to Art 33 of UNCLOS. See Central Intelligence Agency (CIA) ‘The World Fact Book’, listing Maritime Claims by countries <<https://www.cia.gov/library/publications/the-world-factbook/fields/283.html>>. On the particular incident, see Human Rights Watch, ‘EU: Shifting Rescue to Libya Risks Lives. Italy Should Direct Safe Rescues’ (n 43). See also Sea-Watch press release, ‘Sea-Watch demands independent investigation of the illegal return of an overcrowded wooden boat’, 11 May 2017 <<https://sea-watch.org/en/pm-sea-watch-demands-independent-investigation-of-the-illegal-return-of-an-overcrowded-wooden-boat/>>. Similar incidents have been reported,

Human Rights Watch reported a further incident involving various sea migrant boats on 23 May 2017, 15 nm off the coast of Libya,⁴⁶ based on the accounts from the crew on board the NGO rescue vessels *Aquarius*⁴⁷ and *Iuventa*.⁴⁸ The MRCC in Rome had initially appointed the m/v *Vos Hestia*, a rescue vessel operated by the NGO Save the Children, as on-scene commander for this operation. The *Aquarius* and the *Iuventa* had started the rescue operation when a Libyan coast guard patrol entered the rescue area with a dangerous approach to several of the sea migrant boats and then retreated to a distance. The Libyan patrol boat subsequently steered back to the sea migrant boats and two officers, one of them armed, boarded one of the craft, pointing the firearm at the people on board and firing shots into the air. The boat was then steered towards the Libyan coast. As a result, a number of people jumped into the water.⁴⁹ The rescue operation continued with the crews from NGO vessels retrieving people from the water and the unsafe boats. In the meantime, the Libyan coast guard officers that had formerly left the scene, steered the boat back towards the *Aquarius* and transferred the people on board the said ship. Survivors alleged that Libyan officers had taken their phones and money from them. In the same operation, Libyan coast guard officers steered back to Libya a crowded wooden boat. Additionally, other sea migrants were transferred from another wooden boat to the Libyan patrol boat and were also pulled back to Libya.

Another incident involved later that year the Italian warship *Andrea Doria* and the Libyan coast guard, in a coordinated operation also on the high seas.⁵⁰ According to P Biondi's

for which see as example 'Libyan Coastguard stops NGO boat from rescuing migrants after alert from Italy: witness', 7 May 2018 <<https://www.thelocal.it/20180507/libyan-coastguard-prevents-ngo-boat-from-rescuing-migrants-italy>>.

⁴⁶ Sea-Watch press release, 'Sea-Watch demands independent investigation of the illegal return of an overcrowded wooden boat', 11 May 2017 (n 45).

⁴⁷ Jointly operated by Médecins sans Frontières and SOS Méditerranée.

⁴⁸ A vessel operated by the NGO Jugend Rettet.

⁴⁹ Sea-Watch press release, 'Sea-Watch demands independent investigation of the illegal return of an overcrowded wooden boat' (n 46).

⁵⁰ There is contradictory information regarding the exact date of this particular incident. Some sources refer to 27 September whereas others to 31 October. See P Biondi's post 'Italy Strikes Back Again: A Push-Back's Firsthand Account', in University of Oxford, Faculty of Law, Border Criminologies Blog, 15 December 2017 <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/12/italy-strikes>> and P Biondi, 'The Case for Italy's Complicity in Libya Push-Backs', in *Refugees Deeply* publication, 24 November 2017

report,⁵¹ nearly 300 people were returned to Libya as a result of that operation, where the Italian warship, despite being closer to the migrants' boat, provided the Libyan coast guard with the boat's position and avoided any contact with the people on board. They did not initiate a rescue operation. Instead, they approached them on speedboats to throw life jackets at them and they prevented them from continuing their journey. A banner was displayed on the side of the vessel that read: 'Keep Away'.⁵² When the Libyan coast guard vessel reached the location, the Italian warship had already been there for some hours on stand-by. Once all sea migrants had been taken on board the Libyan coast guard vessel, they were returned to Libya.

This intervention of the Italian State-owned vessel *Andrea Doria*, engaging only in the throwing of lifejackets, coordinating the rescue to be performed by Libyan coast guards and opting for stand-by role amounted *de facto* to a handing of sea migrants to Libyan authorities. It resulted in exposing sea migrants to a threat of persecution and / or ill-treatment amounting to torture, or to cruel, inhuman, degrading treatment or punishment in Libya. This intervention, however limited, arguably constituted a violation of the obligation of non-refoulement.⁵³

Refoulement is not defined by the specific conduct itself and the manner in which it is carried out, but by the effect of that conduct, namely, the exposure of the individuals to the risks above. These practices clearly aim at returning sea migrants to the country of departure, circumventing State responsibilities deriving from such international wrongdoing, by eluding a scenario of full and exclusive control that would amount to the exercise of

<<https://www.newsdeeply.com/refugees/community/2017/11/24/the-case-for-italys-complicity-in-libya-push-backs>>.

⁵¹ P Biondi, 'The Case for Italy's Complicity in Libya Push-Backs', in Refugees Deeply publication, 24 November 2017.

⁵² P Biondi specifically refers to this incident in his post 'Italy Strikes Back Again: A Push-Back's Firsthand Account', 15 December 2017 (n 50). This post refers to a video taken by journalist Isobel Young who recorded from the Libyan coast guard vessel, the *Kifa*.

⁵³ See for instance UNHCR views on the prohibition of refoulement under the 1951 Refugee Convention, Art 33(1) 'intended to prohibit any acts or omissions by a Contracting State which have the effect of returning a refugee to territories where he or she is likely to face persecution or danger to life or freedom', in UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol', 26 January 2007, para 30 <<https://www.unhcr.org/4d9486929.pdf>>.

jurisdiction.⁵⁴ These practices doubtless cause alarm both from a SAR operative standpoint⁵⁵ and from international human rights law and international refugee perspectives.

The scope of the obligation of non-refoulement may be put to the test pursuant to an application submitted before the ECtHR against Italy as a result of the incident concerning a rescue operation off the coast of Libya, on the high seas, approximately 30 nm North of Tripoli according to NGO Sea-Watch, on 6 November 2017.⁵⁶ This particular incident cost the lives of at least 20 people before and during the rescue operation. Following the instruction of the MRCC in Rome, involved in the coordinating of the operation to rescue

⁵⁴ *Hirsi Jamaa and Others v Italy* (n 4) paras 81 and 82.

⁵⁵ The operating procedures established in the Annex to the SAR Convention provide that the on-scene coordination of search and rescue units and other facilities engaged in SAR operations are to ensure the most effective results (para 4.7.1). When multiple facilities are about to engage in a rescue operation or already engaged, the rescue coordination centre is to designate ‘the most capable person (...) as on-scene co-ordinator as early as practicable and preferably before the facilities arrive within the specified area of operation. Specific responsibilities shall be assigned to the on-scene co-ordinator, taking into account the apparent capabilities of the on-scene co-ordinator and operational requirements’ (para 4.7.2).

⁵⁶ This application was submitted by 17 survivors, including the surviving parents of 2 children who perished in this incident. It was filed by the Global Legal Action Network (GLAN) and the Association for Juridical Studies on Immigration (ASGI) with support from the Italian non-profit ARCI and Yale School’s Lowenstein International Human Rights Clinic. This application was filed against Italy given its involvement in the coordination of the rescue operation through MRCC Rome. Also, it takes into account that Italy had donated the Libyan coast guard vessels for search and rescue services and the fact that an Italian navy ship was nearby before the Libyan coast guard unit had reached the location where the rescue operation was taking place. See GLAN, Migration and Border Violence ‘Legal action against Italy over its coordination of Libyan Coast Guard pull-backs resulting in migrant deaths and abuse’, 8 May 2018 <<https://www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse>>. See further on this application and more particularly on how the ECtHR may address the responsibility of Italy in respect of this incident, A Pijnenburg, ‘From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?’ (2018) 20 (N 4) European Journal of Migration and Law, 396 <https://brill.com/view/journals/emil/20/4/article-p396_3.xml?rskey=qJzEbO&result=50>. See Sea-Watch account of this incident, ‘Clarification on the incident of November 6th / 7 November 2017’ <<https://sea-watch.org/en/clarification-on-the-incident-of-november-6th/>>. See further the incident involving the m/v *Nivin*, a Panamanian merchant vessel engaged in the rescue of sea migrants on the high seas in November 2018 and instructed by MRCC Rome to return them to Libya in the so-called practice of ‘privatized push-backs’ whereby EU coastal States engage commercial ships to return sea migrants back to unsafe locations. GLAN filed a complaint against Italy with the HRC on behalf of one individual, for which see GLAN, ‘Privatised Migrant Abuse by Italy and Libya’ <<https://www.glanlaw.org/nivincase>>.

approximately 130 people from a sinking dinghy, the Libyan coast guard interfered with the rescue operation already initiated by a number of rescue ships, including the vessel *Sea-Watch 3*. Other rescue units in the vicinity were an Italian navy helicopter and a French warship, both of which, being best equipped, took over the on-scene coordination to carry out the rescue operation jointly.⁵⁷ The Libyan coast guard, alerted by the MRCC in Rome, never attended the marine radio calls but a patrol vessel approached the rescue location at high speed according to *Sea-Watch*, while the latter were heading towards the sea migrants' boat. Libyan coast guards announced taking over the on-scene coordination of the operation.⁵⁸ *Sea-Watch* depicted Libyan coast guards' intervention as 'aggressive and uncoordinated behaviour' that 'caused more stress than relief'.⁵⁹ Libyan coast guards did retrieve a number of people from the water, others climbed without assistance onto the patrol vessel, on board which Libyan officials started beating and threatening them. As a result, some tried to jump into the water. The Libyan coast guard patrol never deployed the rescue boat the patrol vessel had on the aftdeck.⁶⁰ In this operation, *Sea-Watch* rescued 59 people who were disembarked in a port in Italy. At least 20 people were reported dead.⁶¹ The Libyan patrol vessel departed at high speed with total disregard to the safety of a man hanging on to the ladder of the starboard side of the vessel, as he was trying to jump in the sea to reach the *Sea-Watch* dinghy. It was only after *Sea-Watch* had reported this and the Italian helicopter had repeatedly warned the coast guards to slow down the engine that they did so and they pulled the man on board the patrol vessel. 47 sea migrants were returned or in other words

⁵⁷ *Sea-Watch* account of this incident, 'Clarification on the incident of November 6th', 7 November 2017 (n 56).

⁵⁸ *Ibid.* See also, for a detailed digital reconstruction of the events that unfolded in that operation, Forensic Architecture, 'Sea Watch vs the Libyan Coastguard', update December 2018 <<https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard>>. See also New York times, Opinion, Forensic Architecture and Forensic Oceanography, C Heller, L Pezzani, I Mann, V Moreno-Lax and E Weizman, "'It's an Act of Murder": How Europe Outsources Suffering as Migrants Drown', 26 December 2018, and the short film produced by the New York Times Opinion and the research groups Forensic Architecture and Forensic Oceanography <<https://www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html>>.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* This can be readily seen in the short footage therein.

⁶¹ European Council on Refugees and Exiles news, 'Case against Italy before the European Court of Human Rights will raise issue of cooperation with Libyan Coast Guard', 10 May 2018 <<https://www.ecre.org/case-against-italy-before-the-european-court-of-human-rights-will-raise-issue-of-cooperation-with-libyan-coast-guard/>>.

‘pulled-back’ to Libya, where they endured detention in conditions that arguably amounted to torture, inhuman or degrading treatment, including the subjection to beatings and rape. Two of the survivors were reportedly sold and tortured with electrocution.⁶²

Incidents like the ones referred to above, it is here argued, shed a light on how the maritime SAR system and its legal framework are turned into an instrument of extraterritorial border control, at the service of restrictive migration policies. Alarming, these practices have a devastating impact on the safety of sea migrants’ lives at sea and upon their disembarkation on land. This is the case where they are returned to a place where there are substantial grounds for believing that there is a real risk that their lives and freedoms would be threatened or they would be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. In the particular case of Libya, as will be further discussed in the following section, these substantial grounds are based on a vast and varied array of reports that unveil systemic violations of human rights.⁶³ Libya, presently an unstable country torn between militias, with no unified government, but instead a weak central government recognised by

⁶² See also GLAN, ‘Legal Action against Italy over its coordination of Libyan Coast Guard pull backs resulting in Migrants’ deaths and Abuse’, 8 May 2018 (n 56) See further Forensic-Architecture, ‘Sea Watch vs the Libyan Coast Guard’ (n 58). Recent investigations regarding the use of private ships and fishing trawlers by Malta for SAR operations in the Mediterranean during which, allegedly, sea migrants have been returned to Libya, cause particular concern. This form of deterrence practice constitutes a further attempt to circumvent the obligation of non-refoulement. See in this respect Euro-Mediterranean Human Rights Monitor press release, ‘Malta should End Illegal Use of Private Vessels to Push Asylum Seekers to Libya’ 20 May 2020 <<https://euromedmonitor.org/en/article/3563/Malta-Should-End-Illegal-Use-of-Private-Vessels-to-Push-Asylum-Seekers-to-Libya>>. See also UN news ‘UN rights office concerned over migrant boat pushbacks in the Mediterranean’ 8 May 2020 <<https://news.un.org/en/story/2020/05/1063592>>; The Guardian, ‘Exclusive: 12 die as Malta uses private ships to push migrants back to Libya. Survivor reveals further evidence to Guardian and la Repubblica of Malta’s deadly strategy to intercept migrants crossing’ 19 May 2020 <<https://www.theguardian.com/global-development/2020/may/19/exclusive-12-die-as-malta-uses-private-ships-to-push-migrants-back-to-libya>>.

⁶³ For instance, the Parliamentary Assembly of the Council of Europe acknowledges that there is a real risk in Libya of torture and inhuman or degrading treatment or punishment, for which see Parliamentary Assembly of the Council of Europe Resolution 2215 (2018) paras 7 and 8, based on reports from the UN Secretary-General to the Security Council, the reports and studies of the UN High Commissioner for Human Rights, the reports of the UN Support Mission in Libya (UNSMIL), the reports from NGOs and various recent reports providing evidence of slavery. See also para 11.5 of the same Resolution regarding detention centres officially managed by the Ministry of Interior where migrants are ‘cooped up in conditions which UNSMIL describes as inhuman and which are reported by the High Commissioner for Human Rights to be broken beyond repair’.

the international community, is not a place of safety. Hence, one may further argue that the prohibition of refoulement is being repeatedly transgressed in practices like the ones described above, within the *modus operandi* of maritime search and rescue and the inter-State cooperation framework therein.

Setting aside potential infringements of the obligation of non-refoulement at sea, this principle also presents limitations in the role of assessing or discarding places for disembarkation, where efforts deployed seek to circumvent the obligation itself and the responsibilities deriving therefrom.⁶⁴ Libya remains a relevant example to highlight this functional limitation, particularly so given that Libya is the main port of departure in the central Mediterranean and most search and rescue operations take place off its coast.⁶⁵

The relevance of the principle of non-refoulement when it comes to rescue operations off the Libyan coast risks fading, particularly since the recent official declaration of a Libyan SRR which until recently was not operative, despite Libya being a State party to the SAR Convention. The next section therefore scrutinises the context in which Libya has officially declared its SRR and the implications this declaration has in the relevance of the principle of non-refoulement when determining a place of safety for disembarkation of survivors.

1.3 Does the obligation of non-refoulement prove to be sufficient to determine a place of safety? A look at search and rescue off the coast of Libya

In 2018, Libya designated its SRR to the IMO as State party to the SAR Convention.⁶⁶ This was done in accordance with the Annex to the SAR Convention, which establishes that the

⁶⁴ *Hirsi Jamaa and Others v Italy* (n 4). See also A Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' (n 56) 407. See further Bundestag Research Services publication 'Maritime rescue in the Mediterranean: Rights and obligations of vessels under the SAR Convention and manifestations of the principle of non-refoulement on the high seas', February 2018, <<https://www.statewatch.org/news/2018/feb/bundestag-Research-Services-Maritime-rescue-in-Med.pdf>>.

⁶⁵ According to Italy, most SAR operations in the Central Mediterranean route occur 'close to, or sometimes within, Libyan territorial seas' IMO Sub-Committee on Navigation, Communications and Search and Rescue, 5th Session agenda item 16, 'Further Development on the Provision of Global Maritime Services: Libyan Maritime Rescue Coordination Centre Project', submitted by Italy, IMO Doc NCSR 5/INF.17, 15 December 2017, available once registered as public user at <<https://docs.imo.org/Search.aspx?keywords=NCSR%205%2FINF.17>>.

⁶⁶ Para 2.1.4 of the Annex to the SAR Convention provides that '[e]ach search and rescue region shall be established by agreement among the Parties concerned. The Secretary-General shall be informed of such

geographical area covered by the SRRs ‘shall be established by agreement among Parties concerned’,⁶⁷ and the IMO Secretary-General is to be notified accordingly.⁶⁸

This official designation is the result of the support given by Italy, and backed financially by the EU, in order to establish a Libyan MRCC in an identified and declared SRR, within the central Mediterranean route, where most Mediterranean SAR operations take place.⁶⁹ This

agreements’. See also para 2.1.11 of the Annex to the SAR Convention in accordance to which parties are to forward to the Secretary-General information on their search and rescue service, including the national authority in charge of the maritime SAR services, the location of the Rescue co-ordination centres, the geographical area covered in the search and rescue region and the types of available search and rescue units. The Libyan Port and Maritime Transport authority notified the IMO in 2017 of the Libyan Search and Rescue Region (SRR), for which see the answer by Mr Avramopoulos on behalf of the European Commission to the Parliamentary Question, with reference P-003665/2018, 4 September 2018 <http://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html?redirect>. Previously, in July 2017, the President of Libyan Ports and Maritime Transport Authority had informed the IMO that the maritime search and rescue region (SRR) would coincide with the Flight Information Region, and hence the boundaries of the maritime SRR would coincide with the maritime borders of its Flight Information Region. See IMO, Sub-Committee on Navigation, Communications and Search and Rescue, 5th session Agenda item 16, ‘Further Development of the Provision of Global Maritime SAR Services: Libyan Maritime Rescue Coordination Centre Project’ submitted by Italy, NCSR 5/INF.17, 15 December 2017 (n 65) para 10. See also Bundestag Research Services, ‘Maritime rescue in the Mediterranean: Rights and obligations of vessels under the SAR Convention and manifestations of the principle of non-refoulement on the High Seas’ (n 64).

⁶⁷ Para 2.1.4 of the Annex to the SAR Convention. Although these are not systematically reached and overlapping of SRRs occurs. See S Trevisanut, ‘Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?’ (2010) 25 (N 4) *The International Journal of Marine and Coastal Law*, 523 to 542.

⁶⁸ Para 2.1.4 of the Annex to the SAR Convention. This notification is done via the IMO Global Integrated Shipping Information System (GISIS) and the information disseminated under the IMO Global SAR Plan, to make the information on search and rescue services, based on the information provided by IMO member States, available to all States. The information of the Libyan SRR, including coordinates of the SRR and the availability of SAR services can be accessed by registering as a public user at <https://gisis.imo.org/Public>, under Global SAR Plan and the relevant National Responsible Authority, in this case Libya, at <https://gisis.imo.org/Public/COMSAR/NationalAuthority.aspx?CID=LBY>, and its Rescue Coordination Centre details at <https://gisis.imo.org/Public/COMSAR/RCC.aspx?CID=LBY&Action=View&ID=2032>.

⁶⁹ See IMO Sub-Committee on Navigation, Communications and Search and Rescue, 5th Session, Agenda item 16 on Further Development of the Provision of Global Maritime SAR Services: Libyan Maritime Rescue Coordination Centre Project, submitted by Italy, IMO Doc NCSR 5/INF.17, 15 December 2017 (n 65). See also European Commission, EU Emergency Trust Fund for Africa, ‘Support to Integrated border and migration management in Libya – First phase’, 27 July 2017 <https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-first-phase_en>. See further the

support has shown different facets. It can be contextualised at an earlier stage in the training of Libyan coast guards within the EU Naval Force (EURONAVFOR) MED operation, also known as Operation Sophia,⁷⁰ whose original task was centred in security. Operation Sophia extended its mandate a year after its launching in 2015, to, *inter alia*, train Libyan coast guards primarily in aspects of security, including border management and the disruption of human smuggling and trafficking networks.⁷¹

Action Fiche thereto, ‘Annex IV to the Agreement establishing the European Union Emergency Trust Fund for Stability and addressing root causes of irregular migration and displaced persons in Africa and its internal rules’ <https://ec.europa.eu/trustfundforafrica/sites/eutf/files/t05-eutf-noa-ly-04_fin.pdf>. Additionally, see Parliamentary Assembly of the Council of Europe Resolution 2174 (2017) on ‘Human rights implications of the European response to transit migration across the Mediterranean’. In particular see paras 12.3 and 12.4, calling on the EU to step up its cooperation with the Libyan coast guard ensuring funding for training programs, assisting in the establishment of a MRCC and providing patrolling vessels. The Resolution makes this support dependent on Libya’s compliance with human rights. The Parliamentary Assembly acknowledges however the existence of ‘extremely serious and widespread violations of the rights of refugees and migrants’ in Libya (para 12.1.4) <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23964&lang=en>>. A further Resolution by the Parliamentary Assembly of the Council of Europe, 2215 (2018) on ‘The situation in Libya: Prospects and role of the Council of Europe’, calls on EU member States to ‘make any cooperation with Libyan coast guard dependent on its respect of refugees’ and migrants’ fundamental rights, particularly by refraining from exposing them to situations in which they risk being subjected to severe ill-treatment (...)’ and ‘ensure that all co-operation with the Libyan coast guard is contingent on a system of monitoring and sanctions which will ensure compliance with international law in Libyan waters’ <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24738&lang=en>>. With this Resolution, the Parliamentary Assembly calls on European Union States to suspend this co-operation in case of Libya’s repeated human rights violations (see paras 11.1 and 11.2). This has not however materialised despite repeated documented incidents of such violations, as outlined above. See additionally, M Monroy, ‘EU funds the sacking of rescue ships in the Mediterranean’ Security Architecture and Police Collaboration in the EU, 3 July 2017 <<https://digit.site36.net/2018/07/03/eu-funds-the-sacking-of-rescue-ships-in-the-mediterranean/>>.

⁷⁰ See ch 3, s 3.2.

⁷¹ See S Carrera, S Blockmans, J P Cassarino, D Gros and E Guild, Report of a CEPS Task Force ‘The European Border and Coast Guard: Addressing migration and asylum challenges in the Mediterranean?’ The Centre for European Policy Studies (CEPS) 2017, 35 <https://www.ceps.eu/wp-content/uploads/2017/02/TFR%20EU%20Border%20and%20Coast%20Guard%20with%20cover_0.pdf>.

See also EEAS, ‘Remarks by High Representative/Vice-President Federica Mogherini at the Press Conference in Libya’ Luxembourg, 18 April 2016 <https://eeas.europa.eu/headquarters/headquarters-homepage/5510/remarks-by-high-representativevice-president-federica-mogherini-at-the-press-conference-on-libya_en>.

In a more immediate and recent context, this support also transpires from the Malta Declaration in February 2017, by the members of the European Council, ‘on the External Aspects of Migration: Addressing the Central Mediterranean Route’.⁷² It aims, inter alia, at ensuring effective control of EU external borders and stemming the flow of illegal entries into Europe, reducing migratory flows along the central Mediterranean route.⁷³ Libya being the main port of departure in the central Mediterranean route, priority is given to strengthening capacity building, providing training equipment and support to the Libyan national coast guard and other agencies to control sea borders. The support also aims at ensuring adequate reception facilities and the capacity of local communities as host communities,⁷⁴ and cooperation on migration. The latter includes preventing departures and managing returns, as matters of priority.⁷⁵ This Declaration further backs the Italian and Libyan Memorandum of Understanding of 2 February 2017 on Cooperation in the Development Sector to Combat Illegal immigration, Human Trafficking and Smuggling and on Strengthening Border Security,⁷⁶ between Libya and Italy, by virtue of which parties determine to cooperate to identify urgent solutions to reduce irregular migratory flows and fight against human trafficking and irregular migration. This aims at implementing cooperation initiatives and it reignites the Treaty of Friendship, Partnership and Cooperation.⁷⁷

⁷² This is available at <<https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>>.

⁷³ See para 2.

⁷⁴ See para 6 d).

⁷⁵ See para 6 j).

⁷⁶ An unofficial translation of this Memorandum is available at <<https://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf>>. See A Pijnenburg, ‘From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?’ (n 56) 403.

⁷⁷ Signed between Italy and Libya in Benghazi, Libya, 30 August 2008. The text of the Treaty in Italian only is annexed to the Law authorising its ratification, Law No 7 of 6 February 2009 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stat%20o:legge:2009:7>>. See also the case of *Hirsi Jamaa and Others v Italy* (n 4) para 20. See further A Pijnenburg, ‘From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?’ (n 56) 403. See also Mussi and N Tan ‘Comparing Cooperation on Migration Control: Italy-Libya and Australia’ in F de Londras and S Mullally, eds, (2015) vol 10 *The Irish Yearbook of International Law* (Bloomsbury, Hart Publishing 2017) and C Heller and L Pezzani, ‘*Mare Clausum*: Italy and the EU’s undeclared Operation to Stem Migration across the Mediterranean, *Forensic Oceanography*’ (2018) *Forensic Oceanography*. See also M Giuffrè, ‘State Responsibility Beyond Borders: What Legal Basis for Italy’s Pushbacks to Libya?’ (2013) 24 (N 4) *International Journal of Refugee Law*, 692.

The international cooperation displayed to enable Libya to designate, coordinate and operate a SRR complies with the SAR Convention.⁷⁸ Cooperation in accordance with this legal instrument aims at preserving a robust and efficient SAR system to ensure that ‘assistance is rendered to any person in distress at sea’.⁷⁹ Nevertheless, the support given to Libya in its endeavour to designate its SRR and promote the functioning of a MRCC undoubtedly reveals a migration control policy to reduce the number of arrivals to Europe by sea.⁸⁰ It inevitably raises alarms from international human rights and refugee law perspectives. As pointed out by UNHCR, SAR arrangements between States parties could lead to the disembarkation of rescued persons in the territory of the State responsible for that SRR ‘where their lives or freedoms would be at risk, or in serious violations of human rights’.⁸¹

The maritime industry has also expressed concern if faced with instructions from the Libyan MRCC to transfer survivors over to Libyan authorities or disembark them in Libyan territory, fearing the unrest that this could cause on board among sea migrants and the safety

⁷⁸ In particular, paras 2.1.1 to 2.1.3. repeatedly refer to the cooperation between States to participate in the development of search and rescue services, or to establish the basic elements of a search and rescue service as detailed in para 2.1.2, to ensure that assistance is rendered to any person in distress at sea.

⁷⁹ Annex to the SAR Convention, para 2.1.1.

⁸⁰ See for instance, Amnesty International, ‘Between the Devil and the Deep Blue Sea: Europe Fails Refugees and Migrants in the Central Mediterranean’ 8 August 2018, 18, <<https://www.amnesty.org/en/documents/eur30/8906/2018/en/>>. As a result, the number of people held in detention centres run by the General Directorate for Combating Illegal Migration within the Ministry of Interior (DCMI) has significantly increased as rescue and/or interception operations by Libyan coast guards have also increased. Overcrowded and inhumane conditions prevail in these detention centres according to Amnesty International and other agencies such as the UNHCR. See for instance the information given by the UNHCR, Flash Update ‘Libya, 27 July – 3’, August 2018 <<http://reporting.unhcr.org/sites/default/files/UNHCR%20Libya%20Flash%20Update%20-%203AUG18.pdf>>.

⁸¹ UNHCR, ‘General Legal Considerations: search-and-rescue operations involving refugees and migrants at sea’, November 2017 <<https://www.refworld.org/pdfid/5a2e9efd4.pdf>> para 23. The UNHCR does not refer to a specific State. See further the Record of views of the inter-agency meeting with the maritime industry on mixed migration, organised by the IMO on 30 October 2017 <http://www.imo.org/en/MediaCentre/HotTopics/seamigration/Documents/Record%20of%20views%20Inter-agency%20meeting%20with%20the%20maritime%20industry%20on%20mixed%20migration%2030%20October%202017_Final.pdf>. See in particular the main views expressed by the UNHCR, particularly para 11: ‘Capacity- building efforts, including efforts to establish new SRRs, need to be mindful of the likely consequences for refugees and migrants requiring assistance – including the likelihood that rescued people will be disembarked in a place they would be at risk of serious human rights violations such as arbitrary detention, torture, or inhuman and degrading treatment’.

of the vessel and crew.⁸² A further concern expressed by the maritime industry is the contravention by the master of the ship, not flying the Libyan flag, of the principle of non-refoulement.⁸³

Further concerns stem from Libya's interventions at sea, where coast guard patrols have repeatedly shown hostility against NGO SAR operators, including threatening and firing against them. This was for instance the case involving the aid vessel *Golfo Azurro*, operated by the Spanish NGO Proactiva Open Arms, while on the high seas, in August 2017.⁸⁴ Libyan

⁸² Record of views of the inter-agency meeting with the maritime industry on mixed migration, organised by the IMO (n 81) paras 4 and 11. The incident involving the m/v *Vos Thalassa* is illustrative of this concern, whereby sea migrants retrieved from distress at sea on 8 July 2018 allegedly forced the ship to turn away from the inbound Libyan coast guard. See BBC News, 'Italy accuses migrants of hijacking rescue ship off Libya' 12 July 2018 <<https://www.bbc.co.uk/news/world-europe-44806079>>.

⁸³ Record of views of the inter-agency meeting with the maritime industry on mixed migration, organised by the IMO (n 81) para 11. The incident involving the rescue operation undertaken by the offshore supply tug vessel *Asso Ventotto*, an oil rig support vessel flying Italian flag is an example. On 30 July 2018, the *Asso Ventotto* rescued over a hundred people under the instructions of the Libyan coast guards. The location of the boat in distress is however disputed. Whilst it was reported to be 57 nm off Tripoli, within the Libyan SRR, on the high seas, the Italian coast guard suggests the operation took place in Libyan waters. The captain followed the instructions of Libyan coast guards who escorted the tug to Tripoli, Libya, where survivors were disembarked. See information available at Vessel Tracker, 'UNHCR Investigation: Did Return of Migrants to Libya Breach International Law?' 2 August 2018 <<https://vesseltracker.com/en/Ships/Asso-Ventotto-9379416.html>>. See Amnesty International, 'Between the Devil and the Deep Blue Sea: Europe Fails Refugees and Migrants in the Central Mediterranean' (n 80) p 20.

⁸⁴ See D Howden, 'The Central Mediterranean: European Priorities, Libyan Realities' Refugees Deeply Quarterly, October 2017 <<http://issues.newsdeeply.com/central-mediterranean-european-priorities-Libyan-realities>>. the international humanitarian medical non-governmental organisation MSF announced it was suspending rescue operations due to what have been referred to as "credible threats" by the Libyan coast guard. In a previous incident, on 17 August 2016, the rescue boat *Bourbon Argos*, operated by MSF, was attacked while conducting SAR operations off the Libyan coast, by a group of armed men on board an unidentified speedboat who fired and boarded the rescue boat. See MSF, 'MSF condemns attack on rescue vessel' 25 August 2016 <<https://www.msf.org/central-mediterranean-msf-condemns-attack-rescue-vessel>>. In another incident in October 2016, Libyan coast guards interfered to prevent Sea-Watch from conducting a rescue mission. Reference to this incident can be seen in Sea-Watch news, 'Libyan Navy is risking lives of Sea-Watch crew and refugees during illegal return operation', 10 May 2017 <<https://sea-watch.org/en/libyan-navy-is-putting-sea-watch-crew-and-refugees-into-danger-during-an-illegal-return-operation/>>.

coast guards have also repeatedly exercised violence against sea migrants as graphically documented in the incident of 6 November 2017 referred to above.⁸⁵

Whilst the MRCC in Tripoli prepares to become fully operational,⁸⁶ Italy and other European States acting in the realm of maritime border surveillance and maritime SAR operations have enabled, supported and encouraged Libyan coast guard patrols' interventions at sea, presented as SAR operations, resulting in numerous returns of sea migrants to Libya.⁸⁷ Eventually, however, an official Libyan SRR will allow Libya to fully coordinate and deploy search and rescue services within its geographical area, beyond its territorial sea, and this will justify the retreat of the Rome MRCC from the Libyan SRR. The principle of non-refoulement with regards to rescue operations undertaken by Libyan coast guards in the Libyan SRR will consequently not apply when determining a place of delivery on its coast, and yet most basic considerations of humanity will be completely disregarded. Given that refoulement refers to the return to a territory of another State, it becomes urgent to construe the concept of place of safety as integrating considerations of humanity without the need to involve the principle of non-refoulement. The Guidelines, in fact, do not limit protection considerations in the realm of refugee law to instances of refoulement.⁸⁸ The example of

⁸⁵ See for testimonies of sea migrants returned by the Libyan coast guard and the inhuman treatment they were subjected to, Oxfam International, 'Libya migration deal: two years on, thousands drowned in the Mediterranean and sent back to human rights abuses' 1 February 2019 <<https://www.oxfam.org/en/press-releases/libya-migration-deal-two-years-thousands-drowned-mediterranean-and-sent-back-human>>. This starkly contrasts with the terms of cooperation with Libya contained in the Parliamentary Assembly of the Council of Europe Resolution 2215 (2018) adopted 25 April 2018, on 'The Situation of Libya: Prospects and Role of the Council of Europe' (n 69) in particular para 11 where the Assembly called on European Union member States to make cooperation with the Libyan coast guards dependent on the respect of sea migrants' fundamental rights and asks member States to ensure cooperation with humanitarian NGOs involved in civil rescue operations.

⁸⁶ States parties are to meet the requirements for the establishment of rescue coordination centres for their search and rescue services either individually or in cooperation with other States. See Para 2.3 'Establishment of rescue co-ordination centres and rescue sub-centres' of the Annex to the SAR Convention. See also C Heller and L Pezzani, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration across the Mediterranean', Forensic Oceanography, affiliated to Forensic Architecture agency, Goldsmiths, University of London, May 2018 <<https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-Ex-EN.pdf>>.

⁸⁷ Ibid.

⁸⁸ Paragraph 6.17 of the Guidelines presents as a SAR consideration the 'need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be

Libya is undoubtedly transferable to other coastal States in the global SAR system and the need to advance a more integrating reading of the notion of place of safety remains relevant at a global scale.

The remainder of this chapter hence strives to assess whether and to what extent the notion of place of safety can be construed to integrate specific considerations of humanity anchored in international human rights and international refugee law. The next sections draw on the interpretative process followed in chapters 4 and 5, grounded in the VCLT.

2. The notion of place of safety in the SAR Convention: interpretation and construction

2.1 Ordinary meaning of ‘place of safety’: semantic content and construction of this term

Following the interpretative process developed in chapter 4, grounded in the VCLT, this section delves into the semantic content and the legal effect or construction of the notion of place of safety, with special emphasis on its nucleus ‘safety’.⁸⁹ The construction of the term place of safety needs to be done in the context of the SAR Convention and in the light of its object and purpose.⁹⁰ The interpretative reasoning of the provisions, including both the semantic meaning and the legal effect of the terms therein, is underpinned by the principle of good faith, in accordance with Article 31.1 of the VCLT.⁹¹

threatened (...) in the case of asylum-seekers and refugees recovered at sea’. It therefore includes the territory of the flag state of the vessel undertaking the disembarkation and the territory of another State.

⁸⁹ The difference between interpretation and construction has been explained in ch 4, s 1.3.

⁹⁰ In interpreting the SAR Convention, as Gardiner points out, ‘it is the terms whose ordinary meaning is to be the starting point, their context moderating selection of that meaning, and the process being further illuminated by the treaty’s object and purpose’. R Gardiner, *Treaty Interpretation*, 2nd edn (The Oxford International Law Library 2015) (Gardiner) 164 and 197 to 222. See further U Linderfalk, ‘Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making’ (2015) 26 (N 1) *European Journal of International Law*, 169, 178.

⁹¹ Art 31.1 reads: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. See Gardiner, 167 to 181, particularly 172.

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The term place of safety is not defined in the text of the Convention. The starting point in this interpretative task is hence analysing the ordinary meaning of the terms place and safety.⁹² Following a common practice among international courts and tribunals, and as previously done in chapter 4, the semantic meaning is extracted from definitions in various dictionaries.⁹³

The word place is defined as a ‘particular position, point, or area in space; a location’.⁹⁴ It is also defined as a ‘physical environment’, or a ‘physical surrounding’.⁹⁵ Its meanings range from a specific location, for instance ‘a building or locality used for a special purpose’ to ‘an indefinite region or expanse’.⁹⁶

The term safety is defined as ‘[t]he condition of being protected from or unlikely to cause danger, risk, or injury’.⁹⁷ It is also defined as ‘the condition of being safe from undergoing or causing hurt, injury or loss’,⁹⁸ and the notion safe is defined as ‘secure from threat of danger, harm, or loss’.⁹⁹

The notion of safety constitutes a generic term, also referred to as an open textured or variable concept, that is, a term whose construction can be determined by reference to a developed body of international law.¹⁰⁰ Additionally, the assessment and identification of a place of safety is to be made on a case-by-case basis according to the SAR Convention.¹⁰¹ Both aspects undoubtedly allow a broad and dynamic reading in the context of a living treaty,

⁹² Gardiner, 164.

⁹³ See Gardiner, 186 to 189, and P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave* (Brill Nijhoff, 2015) (Merkouris) 18 to 22. This has been done in ch 4, s 1.4.

⁹⁴ Definition extracted from Oxford Dictionaries online <<https://www.lexico.com/en/definition/place>>.

⁹⁵ Definition extracted from Merriam Webster online dictionary <<https://www.merriam-webster.com/dictionary/place>>.

⁹⁶ Ibid.

⁹⁷ Definition extracted from Oxford Dictionaries online <<https://www.lexico.com/en/definition/safety>>.

⁹⁸ Definition extracted from Merriam Webster dictionary online <<https://www.merriam-webster.com/dictionary/safety>>.

⁹⁹ Merriam Webster dictionary online <<https://www.merriam-webster.com/dictionary/safe>>.

¹⁰⁰ Merkouris (n 93) 148, where the author highlights that: ‘these terms due to the indeterminacy of their own content have “evolutionary potential”, and thus more amenable to evolutive interpretation’. See also Gardiner (n 90) 192 and 193.

¹⁰¹ Annex to the SAR Convention, para 3.1.9.

as seen in chapter 4,¹⁰² that is capable of accommodating to different circumstances, including the specific needs of sea migrants, in order to enhance their protection.

Two aspects can be highlighted from these definitions for the construction of the notion of safety. On the one hand, the aspect of protection, which will be considered in more detail when utilising the principle of systemic integration in the interpretative reasoning. On the other hand, the meaning of safety as a condition that is the opposite of a situation of danger. This danger, in the context of the SAR Convention, is not to be construed as the qualified danger presented in the definition of ‘person in distress’ or ‘distress phase’ where the requirements of ‘grave’ and ‘immediate’ determine a degree of severity and immediacy to the notion of danger, as examined in chapter 4.¹⁰³ The notion of safety for the purpose of delivery of survivors at the end of a rescue operation hence repels a generic and unqualified danger or risk.¹⁰⁴

The concepts of location and safety are further considered for the purpose of construction in the Guidelines. These are examined in the following subsection.

2.2 The Guidelines: considerations of humanity in the reading of the notion of place of safety

In this interpretative reasoning, the Guidelines are scrutinised in the light of Article 31(3)(a) of the VCLT, which provides that ‘[t]here shall be taken into account, together with the context (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’.¹⁰⁵

¹⁰² Ch 4 s 1.5.1.

¹⁰³ The definition of distress in the SAR Convention refers to a danger that is qualified by the adjectives ‘grave and imminent’. See Annex to the SAR Convention, para 1.3.13. This was considered in ch 4 s 1.5.2.

¹⁰⁴ The semantic meaning of danger and its construction are considered in ch 4 ss 1.4 and 1.5.1. See also Annex to the SAR Convention, para 1.3.2.

¹⁰⁵ See Annex to the SAR Convention, para 3.1.9, introduced by the 2004 amendments, which provides that disembarkation from the assisting ship and delivery to a place of safety will take place taking into account the Guidelines developed by the IMO on 20 May 2004. See also Gardiner (n 90) 223 to 231 regarding the consideration of subsequent agreements in the treaty interpretation. Contrast with M Ratcovich, ‘The Concept of “Place of Safety”: Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants rescued at Sea?’ (2016) vol 33, *Australian Yearbook of International Law*, 81. Ratcovich considers the Guidelines as part of the context for interpretative purposes,

Although necessarily interlinked, both terms place and safety will be dealt with separately, as far as possible, to scrutinise what each term contributes to the notion of place of safety to determine the completion of a rescue operation. The scrutiny of these terms focuses on the characteristics or the factors taken into account in the identification of a place of safety. This subsection does not consider the procedures for their identification.¹⁰⁶

In terms of location, the Guidelines present alternatives and a broad meaning by which a place of safety can either be ‘on land or aboard a rescue unit¹⁰⁷ or other suitable vessel or facility at sea¹⁰⁸ that can serve as a place of safety *until* the survivors are disembarked to their next destination’.¹⁰⁹ The Guidelines hence consider the transfer to the rescue units and other suitable facilities at sea only as provisional places of safety until disembarkation to their next destination. In addition, a place of safety is a location ‘from which transportation arrangements can be made for the survivors’ next or final destination’.¹¹⁰ The Guidelines set a clear limitation when establishing that an assisting ship ‘should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship’.¹¹¹ Although it may ‘serve as a temporary place of safety’ where considerations of safety and capacity aboard allow so, the ship should be relieved as soon as practicable of further obligations and alternative arrangements made.¹¹²

101 to 104. There is however little effective difference in the interpretative outcome between these two approaches, as Gardiner (n 90) points out, 228 and 229.

¹⁰⁶ For a broader consideration to the factors and the processes in determining a place of safety, see A Campàs Velasco, ‘The International Convention on Maritime Search and Rescue: Legal Mechanisms of Responsibility Sharing and Cooperation in the Context of Sea Migration?’ in F de Londras and S Mullally, eds, (2015) vol 10 *The Irish Yearbook of International Law* (Bloomsbury, Hart Publishing 2017) 57, 77 to 82.

¹⁰⁷ The term ‘rescue unit’ can safely be assumed to refer to the ‘search and rescue unit’, defined in para 1.3.8 of the Annex to the SAR Convention, as a ‘unit composed of trained personnel and provided with equipment suitable for the expeditious conduct of search and rescue operations’.

¹⁰⁸ The term ‘facility at sea’ could equally refer to the ‘search and rescue facility’ defined in para 1.3.7 of the Annex to the SAR Convention as a ‘mobile resource, including designated search and rescue unit, used to conduct search and rescue operations’.

¹⁰⁹ The Guidelines (n 8) para 6.14 (emphasis added).

¹¹⁰ *Ibid*, para 6.12.

¹¹¹ *Ibid*, para 6.13.

¹¹² *Ibid*, paras 6.13 and 6.18. A requirement of timely disembarkation of survivors from the assisting ship is contained in the Annex to the SAR Convention, para 3.1.9. See also A Campàs Velasco, ‘The International Convention on Maritime Search and Rescue: Legal Mechanisms of Responsibility Sharing and Cooperation in the Context of Sea Migration?’ (n 106) 57, 76.

The above physical considerations for the notion of location are governed by a guarantee of safety, understood in its broadest sense, with no qualifying terms such as grave or immediate, as mentioned earlier. Safety is considered in the Guidelines in a number of ways. The Guidelines refer to a place ‘where the survivors’ safety of life is no longer threatened and where basic human needs (such as food, shelter and medical needs) can be met’.¹¹³ As stated earlier, the disappearance of immediate danger does not suffice for an assisting ship to be qualified as a place of safety.¹¹⁴ It could only be considered, if the conditions aboard allow so, as a temporary place of safety.¹¹⁵ Furthermore, as considered in the first section, the principle of non-refoulement is a key determinant for the notion of safety conceived in the Guidelines in the realm of international refugee law. However, this principle is here invoked, drawing on the principle of systemic integration, both with regards the protection of asylum-seekers and refugees, and in the realm of international human rights law for the protection against torture, cruel, inhuman or degrading treatment or punishment.¹¹⁶ The principle of non-refoulement should not only be seen as an end in itself, but as a prohibition that ultimately seeks a result of protection on the grounds mentioned above.

In broader terms, the Guidelines refer to place of safety as a location where the survivors’ safety ‘would not be further jeopardized’.¹¹⁷ The content of the term safety remains indeterminate and it allows a dynamic interpretation.

2.3 A dynamic approach to the construction of the notion of place of safety

A generic term such as safety bears a degree of indeterminacy and open textured content that, according to Merkouris, makes it ‘more amenable to evolutive interpretation’.¹¹⁸ This is more so where the use of such a generic term is contained in a treaty of ‘continuing duration’, as the SAR Convention is, namely, a legal instrument that seeks to promote and

¹¹³ The Guidelines (n 8) para 6.12.

¹¹⁴ Ibid, para 6.13.

¹¹⁵ Ibid.

¹¹⁶ Ibid, para 6.17.

¹¹⁷ The Guidelines (n 8) para 5.1.6. Although this is in the context of guidance given to shipmasters undertaking search and rescue services, it is relevant to the construction of a place of safety regardless of the actors involved in a rescue operation.

¹¹⁸ Merkouris (n 93) p 148. See also Gardiner (n 90) 192 and 193.

develop a permanent search and rescue system, in accordance with UNCLOS, Article 98.2.¹¹⁹

The establishment, operation and maintenance of adequate and effective search and rescue services¹²⁰ entails a continuing adaptability to the changing circumstances. This characterises the SAR Convention as a living treaty, in the sense that, as Barnes points out when referring to UNCLOS, it addresses new challenges and maintains its relevance to realities and circumstances not envisaged when it was negotiated.¹²¹

Consequently, the dynamic reading suggested in the construction of the notion of place of safety sits comfortably in the SAR legal framework. This interpretative approach is consistent with the evolutionary construction of the notion of persons in distress at sea, discussed in chapter 4 in the context of a living treaty.¹²²

The Guidelines equally offer a dynamic approach to the understanding of the notion of place of safety to adapt to the changing circumstances and the needs involved among survivors. They highlight the flexibility States parties to the SAR Convention have to ‘address each situation on a case-by-case basis’.¹²³ Both the Annex to the SAR Convention and the Guidelines further point out the need to take into consideration the particular circumstances of the case.¹²⁴ The Guidelines refer to factors ‘such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue

¹¹⁹ See ICJ judgment in the *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* Judgment, ICJ Reports 2009, 13 July, 213. According to the ICJ, a treaty of continuing duration entails the presumption that the parties to the Convention ‘have intended these words to have an evolving meaning’ (p 213).

¹²⁰ SAR, first preambular paragraph and UNCLOS, Art 98.2.

¹²¹ For the notion of a living treaty with regards to UNCLOS, see R Barnes ‘The Continuing Vitality of UNCLOS’, chapter 16 in J Barrett and R Barnes (eds) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, 2016), 473 and 482. Barnes also refers to its capacity to ‘become relevant to a wider range of issues that simply were not conceived at the time of its adoption, and it continues to develop in ways capable of meeting new challenges’ (482). One of these challenges is irregular maritime migration (473). See also M Wood, ‘Reflections on the United Nations Convention on the Law of the Sea: A Living Instrument’ in J Barrett and R Barnes (eds) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, 2016) p lxxvii.

¹²² Ch 4, s 2.

¹²³ The Guidelines (n 8) para 2.6.

¹²⁴ Annex to the SAR Convention, para 3.1.9 and the Guidelines, para 6.15.

units'.¹²⁵ These represent an open-ended list where aspects of vulnerability, it is here further argued, are indeed of relevance and a valid factor to consider in the selection, or the discarding, of a place of safety.

This adaptability of the notion of place of safety to the survivors' needs resonates with the vulnerability reasoning introduced in chapter 1, and conspicuous in the interpretative reasoning proposed in the previous chapters. Vulnerability reasoning remains crucial in the conceptualisation of the process of disembarkation of survivors and their delivery to a place of safety, where the identification of particular needs, such as the legal status of survivors will determine specific measures and procedures for adequate protection.¹²⁶ Vulnerability reasoning, although not expressly referred to in the Guidelines, is interwoven in the essence of its interpretative guidance and remains central in the interpretative reasoning proposed. It is therefore the object of examination in the next subsection.

2.4 Vulnerability reasoning in this interpretative process

A place of safety should be determined, according to the Guidelines, 'by reference to its characteristics and by what it can provide for the survivors'.¹²⁷ Survivors' needs will unquestionably vary depending on whether they are for example passengers rescued from a cruise or a ferry or crewmembers of a merchant ship or a recreational boat, or sea migrants, including economic migrants, asylum-seekers, refugees or stateless persons. The very situation of distress at sea presents in itself a situation of vulnerability, to which added vulnerabilities need to be identified and addressed in terms of health or physical or mental conditions among survivors. Further particular situations of vulnerability will also need to be identified and addressed in the case of sea migrants and their crossing conditions and exposure to dangers related to the clandestine nature of these journeys, as seen in chapter 1.¹²⁸ Among them further grounds of vulnerability may exist, for instance in case of asylum-seekers, refugees, stateless persons in need of international protection, unaccompanied

¹²⁵ Ibid, para 6.15.

¹²⁶ See as an example of the application of vulnerability reasoning upon disembarkation, Frontex 'Annual report on the implementation of 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 Frontex', 2017, paras 2.1.4 and 2.4.4 regarding identifying and addressing particular vulnerabilities <<http://data.consilium.europa.eu/doc/document/ST-11129-2018-INIT/en/pdf>>.

¹²⁷ Appendix to the Guidelines 'Some Comments on Relevant International Law', para 3.

¹²⁸ Ch 1, s 3.

children or children separated from their families, victims of human trafficking, victims of torture, rape or other forms of physical or psychological or sexual violence. The Guidelines implicitly draw on the vulnerability reasoning when they refer to asylum-seekers and refugees recovered at sea. They address specific protection needs when referring to the need of avoiding ‘disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened’.¹²⁹ This is further acknowledged where reference is made to the need to determine the legal status of survivors, in which case relevant processes are followed once they have been delivered to a place of safety.¹³⁰ The non-exhaustive list of circumstances that need to be taken into account when identifying a place of safety in paragraph 6.15 of the Guidelines includes medical needs among survivors. This open-ended list, undoubtedly, allows to consider other factors determined by specific needs and risks, in accordance with the vulnerability reasoning.

Vulnerability reasoning hence plays an important role in the construction of the notion of a place of safety where the selection of a location for disembarkation and further reception arrangements ought to depend on the protection needs involved among the survivors.¹³¹ The same consideration of vulnerability reasoning would hence need to apply to the actual processes followed to determine a place of safety, where the coordination and cooperation among States and actors involved is crucial.

¹²⁹ The Guidelines (n 8) para 6.17.

¹³⁰ Ibid, para 6.19. This is to be linked to the actual access to fair and efficient procedures for determining refugee status and determine the protection needs involved, as well as appropriate reception arrangements compliant with international human rights law. See UNHCR ‘General legal considerations: search-and-rescue operations involving refugees and migrants at sea’, November 2017 (n 81).

¹³¹ This vulnerability approach is consistent with the Resolution adopted by the General Assembly on 19 September 2016, adopting ‘The New York Declaration for Refugees and Migrants’, Un Doc A/RES/71/1, 3 October 2016, a political declaration containing a series of commitments with regards to large movements of refugees and migrants https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf. See in particular paras 6 and 9 for the very aspect of vulnerability and the notion of ‘large movements’. See also paras 22, 23, 26, 28, 29, 30, 31 and 32, with regards to addressing the particular as well as immediate needs of those in vulnerable situations, in transit and upon arrival and reception, ensuring protection for their human rights and fundamental freedoms. See further the commitments with regards to the protection of migrant children, women and girls, in paras 59 and 60, as well as reception and admission of refugees in Annex I thereto.

The specific needs, repeatedly referred to and addressed in the vulnerability reasoning within the interpretation of the notion of a place of safety, revolve around the protection of international human rights and where applicable, international refugee law. Therefore, in seeking mechanisms of redress in the development of the vulnerability reasoning in the construction of place of safety, the principle of systemic integration could offer, as with the construction of the notion of persons in distress, a guiding mechanism in the interpretative process that allows for the integration of international human rights considerations and international refugee law where applicable. This would permit a more responsive SAR system tailored to the risks and the needs of sea migrants when determining a place of safety for their disembarkation.

The following section scrutinises the functionality of the principle of systemic integration in the construction of the notion of a place of safety, where international human rights law and international refugee law considerations appear key in advancing the protection of sea migrants retrieved from situations of distress at sea.

3. Systemic integration: towards an integrating construction of the concept of place of safety

3.1 Initial considerations in this inter-regime dialogue

The open-textured nature of the notion of place of safety calls for a reference to other sources of international law by means of the principle of systemic integration to ‘assist giving content to the rule’.¹³² It allows exploring further considerations of humanity in the interpretation of the notion place of safety and specific protection needs that fall outside the realm of maritime concerns. This responds to the need to advance the debate on international refugee law and human rights law considerations when construing the notion of place of safety and when assessing prospective places of safety for survivors, or contrarily, when discarding certain locations for disembarkation purposes.

¹³² International Law Commission (ILC), ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006 (ILC Report A/CN.4/L.682), para 467. See also D French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’ (2006) 55 *International and Comparative Law Quarterly*, 304. This was discussed in ch 5, s 2.

As discussed in chapter 5 with regards to the notion of persons in distress, the existing inter-regime dialogue between international law of the sea and maritime law on the one hand and international human rights law on the other rests on considerations of humanity, and the common ground is the integrity of the persons rescued at sea. The notion of safety is here construed bearing in mind this normative environment where a relation of complementarity can be drawn between the notion of place of safety in the SAR Convention and international refugee law and international human rights law, based on the common *telos* of the safeguard of the integrity of individuals.¹³³ The recourse to these legal realms is a response to the specific needs among sea migrants and their exposure to specific risks at their disembarkation and delivery to a place of safety. The notion of safety is therefore here construed taking into account the protection needs among sea migrants, in accordance with the vulnerability reasoning.

This section delves into the role of systemic integration in the construction of the notion of place of safety. It scrutinises the functionality of the principle of systemic integration as an interpretative guiding mechanism in the relationship with the normative environment of international refugee law and international human rights law. It does not consider aspects of application of the norms invoked here. Nor does this reasoning attempt to scrutinise potential responsibilities among States under the provisions invoked.

This section strives to assess whether the principle of systemic integration enables an integrating construction of the notion of place of safety where safety also envisages protection considerations both under international human rights law and international refugee law. The reasoning proposed will also assist determining the potential of the principle of systemic integration, presented as a legal mechanism of interpretation, to become a mechanism of redress, advancing the specific needs of sea migrants in accordance with the vulnerability reasoning, that furthers a SAR system more responsive to the needs of sea migrants.

Ratcovich has also explored the principle of systemic integration in the interpretation of the notion of place of safety, although without examining vulnerability reasoning

¹³³ V Tzevelekos 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?' (2010) 31 (N 3) Michigan Journal of International Law, 621. This was commented in ch 5, s 1.

considerations.¹³⁴ The author's principal argument is the need to interpret the notion of place of safety in the wider context of international law not to expose refugees and asylum-seekers rescued at sea to 'less favourable treatment that they are entitled to under existing international law'. His approach presents a more restrictive view than the one proposed here regarding the requirement of applicability of the norm in the relations between the parties to the treaty being interpreted. According to the author, the rules invoked are to be applicable to 'all the parties to the treaty', and hence, where no identity of parties to the treaties exists, he relies solely on rules of international law that hold the status of customary international law.¹³⁵ Further differences transpire in Ratcovich's emphases on the rules invoked. Whereas the author invokes the protection against torture, inhuman or degrading treatment or punishment, persecution or threats to life or freedom on the Refugee Convention grounds, no further reasoning accompanies the consideration of these rules under Article 31(3)(c). However, the author considers more closely the integration in the notion of place of safety, of the right to life, the right to family unit and the prohibition of discrimination. He also considers in more detail the obligation of non-refoulement, and its status of customary law. In contrast with the present reasoning, Ratcovich does not give specific consideration to the protection from arbitrary detention, although he does leave the discussion open to other fundamental rights to be considered in the interpretation of the term place of safety.

3.2 International refugee law considerations in the construction of the term place of safety

As commented earlier, the Guidelines bring interpretative guidance to the notion of place of safety. In doing so, they include a consideration of protection against threats to the lives and freedoms of those alleging a well-founded fear of persecution in the case of refugees and

¹³⁴ M Ratcovich, 'The Concept of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants rescued at Sea?' (n 105). Ratcovich's illustrative reference for his reasoning focuses on Australian legal framework and practices regarding push-backs and disembarkation in the context of search and rescue and interceptions at sea.

¹³⁵ *Ibid.*, 16 and 33. Contrast with subsection 3.4 below where the interpretation on the applicability requirement in Article 31(3)(c) favours a broader approach. See in this respect ILC Report A/CN.4/L.682 (n 132) paras 470 to 472. See also C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly*, 279 (McLachlan) paras 13 to 17. See also A Boyle, 'Further Development of the Law of the Sea Convention: Mechanisms for Change' (2005) 54 (N 3) *International and Comparative Law Quarterly*, 563 (Boyle) 571.

asylum-seekers retrieved from a situation of distress at sea, grounded in the Refugee Convention and its 1967 Protocol.¹³⁶ This interpretative guidance hence implicitly relies on the principle of systemic integration and it is here furthered, bearing in mind the particular needs acknowledged and the pressing aspects of protection available to refugees, prominently linked to the initial stages upon disembarkation and delivery to a place of safety. It is therefore not the purpose of this subsection to delve into the overall content of protection under the Refugee Convention. Instead, consideration will be given to basic standards for an integrating reading of the concept of place of safety.

The very protection sought in the Refugee Convention and its 1967 Protocol relies on the access of all asylum-seekers to fair and efficient procedures for determining refugee status and establishing their protection needs, with procedural guarantees.¹³⁷ Consequently, this basic standard of protection needs early consideration when assessing a place of safety for the purpose of disembarkation. This consideration, although not contained expressly in a provision of the Refugee Convention, is seen as a principle consistent with, and essential for the application of, the Refugee Convention and the 1967 Protocol.¹³⁸ It is undoubtedly key to avail refugees the protection rights under the Refugee Convention and the 1967 Protocol, even pending formal determination of the refugee status.¹³⁹ The UNHCR's mandate for refugee status determination processes contains some core standards to ensure their fairness

¹³⁶ The grounds of persecution safeguarded against are race, religion, nationality, membership of a particular social group, or political opinion, according to Art 1(2) of the Refugee Convention.

¹³⁷ See UNHCR, 'General legal considerations: search-and-rescue operations involving refugees and migrants at sea', November 2017 (n 81) paras 4 and 6.

¹³⁸ See for instance UN General Assembly Resolution 49/169, UN Doc A/RES/49/169, 24 February 1995, para 5, <<https://www.refworld.org/docid/3b00f30bc.html>>. See also UNHCR, 'A Guide to International Refugee Protection and Building State Asylum Systems' Handbook for Parliamentarians, 2017, 154 to 158 <<https://www.unhcr.org/3d4aba564.pdf>>; UNHCR, Executive Committee 'General Conclusion on International Protection. No. 65 (XLII) - 1991', preambular para (o), UN Doc No A/46/12/Add.1 <<https://www.unhcr.org/uk/excom/exconc/3ae68c404/general-conclusion-international-protection.html>>. See further Goodwin-Gill and McAdam (n 4) 391.

¹³⁹ See UNHCR, Executive Committee 'General Conclusion on International Protection 81 (XLVIII) - 1997, Executive Committee 48th session'. UN Doc No A/52/12/Add.1, para (h), <<https://www.unhcr.org/uk/excom/exconc/3ae68c690/general-conclusion-international-protection.html>>.

These Conclusions are not formally binding but they are reached by consensus and are relevant to the interpretation of the international protection regime. They are considered expressions of opinion that broadly represent the views of the international community. See UNHCR, 'General legal considerations: search-and-rescue operations involving refugees and migrants at sea', November 2017 (n 81) para 6.

and efficiency. These include: access and support to present refugee claims, identification of and assistance to vulnerable asylum-seekers, transparent, fair and non-discriminatory procedures, adequate training and supervision of staff responsible for the refugee status determination process, access to procedures to review decisions by officers not involved in the decision in the first instance, and consistency across procedures and with UNHCR standards of treatment.¹⁴⁰

This core consideration of protection in the reading of the notion of place of safety hence appears incompatible with the notion of a place of safety at sea on board a rescue unit or a vessel or facility at sea, even if treated as provisional safety, when it comes to sea migrants. This is because the assessment of their protection needs vastly rely on fair and efficient determination of refugee status processes.¹⁴¹ Vulnerability reasoning underpins this interpretative reasoning and calls for the accommodation of the specific needs in the construction and the selection process of a place of safety to guarantee that this is actually offered to persons rescued at sea, ‘regardless of their nationality, status or the circumstances in which they are found’.¹⁴² Vulnerability reasoning calls for substantive equality in the result achieved rather than formal equality and sameness of treatment, as already discussed in chapter 1.¹⁴³ Consequently, what may amount to a place of safety for survivors not involved in irregular crossings, may not constitute a place of safety for sea migrants, not even on a provisional basis.

An additional consideration in the international refugee protection system that ought to be taken into account when construing the notion of a place of safety is the protection from penalisation imposed by a State purely on account of an irregular entry, in accordance with

¹⁴⁰ See UNHCR, ‘Procedural Standards for Refugee Status Determination under UNHCR’s Mandate’ 20 November 2003 <<https://www.unhcr.org/4317223c9.pdf>>. See also UNHCR, ‘Refugee Status Determination’ <<https://www.unhcr.org/uk/refugee-status-determination.html>>.

¹⁴¹ See the Guidelines (n 8) para 6.14 clarifies that ‘[a] place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination’. Contrast with UNHCR, ‘General legal considerations: search-and-rescue operations involving Refugees and Migrants at Sea’, November 2017 (n 81) para 7, where it is stated that international protection claims should ordinarily be processed on land where the State of disembarkation meets international standards.

¹⁴² The Guidelines (n 8) preambular para 7 and para 6.19, in conjunction with Annex to the SAR Convention, para 2.1.10.

¹⁴³ Ch 1, s 4.2.

Article 31.1 of the Refugee Convention.¹⁴⁴ This protection can have an impact in the assurance of access to fair and efficient refugee status determination procedures referred to above, as Hathaway points out, where the penalty consists of the denial of these procedural rights.¹⁴⁵

A further consideration of protection relevant to the construction of the notion of place of safety draws on the exercise of States' prerogative to restrict freedom of movement, its maximum expression being detention of refugees, on grounds of irregular entry in search of international protection.¹⁴⁶ The notion of safety is to consider, following the principle of systemic integration, safeguards in accordance with international refugee law, regarding the exercise and the duration of such restrictions of movement, including detention, in

¹⁴⁴ Refugee Convention, Art 31.1 provides: 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'. Regarding the scope and construction of this provision, and in particular of the term 'penalties', a broader interpretation is preferred, for which see Goodwin-Gill and McAdam (n 4) 264 to 267; 384 and 385; 520 to 522. Also see J Hathaway, *The Rights of Refugees under International Law* (n 14) 405 to 412. See further G Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection' in in E Feller, V Turk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) Part 3 'Illegal Entry', 3.1, 185-252 <<https://www.unhcr.org/419c778d4.html>> presented at the Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/C9F5DA8B89CFF920AF70B140ECF88602/9780511493973c8_p253-258_CBO.pdf/summary_conclusions_article_31_of_the_1951_convention_expert_roundtable_geneva_november_2001.pdf>.

¹⁴⁵ J Hathaway, *The Rights of Refugees under International Law* (n 14) 408 and 409.

¹⁴⁶ Detention is defined by the UNHCR, for the purpose of the UNHCR Detention Guidelines, 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention', 2012 (UNHCR Detention Guidelines), as: 'Deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities', para 5 <<https://www.unhcr.org/uk/publications/legal/505b10ee9/unhcr-detention-guidelines.html>>.

accordance with Articles 26¹⁴⁷ and 31.2¹⁴⁸ of the Refugee Convention and the construction given to these provisions. This subsection relies chiefly on the interpretative guidance provided by the UNHCR, particularly the UNHCR Guidelines on Detention, 2012,¹⁴⁹ and the Summary Conclusions on Article 31 of the Refugee Convention, 2001.¹⁵⁰ On these grounds, this subsection offers elementary considerations in the international realm of the UNHCR mandate for a basic overview and understanding of international protection standards when considering detention and places of safety for disembarkation.¹⁵¹ It is not however the purpose to scrutinise national courts' interpretation of these provisions and States' practices regarding detention.¹⁵² Specific references will nevertheless be made later on in this chapter to illustrate failures or disregard for international protection standards primarily with regards to detention and conditions of detention.

Detention based on immigration related grounds is foreseen in international law. Therefore, the right to liberty is not absolute, as pointed out by the UNHCR, regarding refugees, asylum-seekers and other persons seeking international protection and/or found in need of international protection, including stateless persons.¹⁵³ Nonetheless, it is still a limitation to the fundamental rights to liberty and freedom of movement in international and regional human rights legal instruments.¹⁵⁴ Detention therefore is understood as a measure of last

¹⁴⁷ Art 26 reads as follows: 'Freedom of Movement. Each contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances'.

¹⁴⁸ Art 31.2 provides: 'The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country'.

¹⁴⁹ UNHCR Detention Guidelines (n 146).

¹⁵⁰ 'Summary Conclusions: Article 31 of the 1951 Convention' Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001 <<https://www.unhcr.org/419c783f4.pdf>>.

¹⁵¹ For a detailed study on detention and other restriction on freedom of movement, see J Hathaway, *The Rights of Refugees under International Law* (n 14) 413 to 439. See also Goodwin-Gill and McAdam (n 4) 462 to 466.

¹⁵² See J Hathaway, *The Rights of Refugees under International Law* (n 14) for some examples of States' practices, 431 and 435.

¹⁵³ UNHCR Detention Guidelines (n 146) para 18, Guideline 4.

¹⁵⁴ See for example, ICCPR, Art 12, the African (Banjul) Charter on Human and People's Rights (ACHR), 27 June 1981, Art 12, the OAS American Convention on Human Rights, "Pact of San José" (ACHP), 22

resort and strictly in conformity with national and international law, bearing in mind the ‘underlying purpose of preventing persons being deprived of their liberty arbitrarily’.¹⁵⁵ The term arbitrarily is given a broad interpretation and includes insufficient guarantees such as the lack of limits on the maximum period of detention or no access to an effective remedy to challenge it. Considerations of unlawfulness, as well as inappropriateness, injustice and lack of predictability constitute aspects of arbitrary detention, according to the UNHCR.¹⁵⁶ In contrast, detention is to be assessed in each individual case, and meet criteria of necessity, reasonability and proportionality,¹⁵⁷ in line with a legitimate purpose, typically related to public order, including the purpose of identification while establishing the grounds for asylum claims and the assessment of circumstances of arrivals,¹⁵⁸ public health or national security.¹⁵⁹ The UNHCR Guidelines on Detention expressly exclude as a legitimate purpose for detention, any detention sought as ‘a penalty for illegal entry and/or as a deterrent to seeking asylum’.¹⁶⁰ Reasonability regarding detention or alternatives to detention is underpinned by the vulnerability reasoning, whereby special circumstances and needs among asylum-seekers and refugees are to be taken into account.¹⁶¹

International human rights law underpins detention regimes, furthering the scope of protection. In particular human rights law seeks to guarantee the lawfulness of detentions¹⁶² and minimum standards of detention conditions.¹⁶³ The latter is particularly acute in

November 1969, Art 22, the ECHR, 4 November 1950, Art 2 and Protocol No 4 to the ECHR, Art 2. See also the Refugee Convention, Art 26, in conjunction with Art 31.2.

¹⁵⁵ UNHCR Detention Guidelines (n 146) paras 2, 14 and 15.

¹⁵⁶ Ibid, Guideline 4, para 18.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid, Guideline 4.1, paras 22 to 27. See also J Hathaway, *The Rights of Refugees under International Law*, (n 14) 419, 421 and 427.

¹⁵⁹ UNHCR Detention Guidelines (n 146) Guidelines 4.1.1 to 4.1.3, paras 21 to 30. See also Guideline 4.2, para 34.

¹⁶⁰ UNHCR Detention Guidelines, para 31. See also para 32. See a further example of detention for illegitimate purposes, i.e., on preparation for expulsion, in para 33. See also J Hathaway, *The Rights of Refugees under International Law* (n 14) 414 and 422, citing examples of prohibitions of detention for deterrence purposes.

¹⁶¹ UNHCR Detention Guidelines, Guideline 4.2, para 34, para 39 in Guideline 4.3, and Guideline 9.

¹⁶² For instance, ICCPR, Art 9, ECHR, Art 5 and Art 2 of Protocol 4 to ECHR. Also, ACHR, Art 7 and ACHPR, Art 6.

¹⁶³ For instance, ICCPR, Arts 7 and 10.

recurrent scenarios of mass influx where States' practice chiefly resorts to detention centres, facilities or camps closed or of restricted movement.¹⁶⁴

Protection considerations are given in the following subsection in the realm of international human rights law, as done in chapter 5 with regards the notion of persons in distress,¹⁶⁵ for the purpose of construing the notion of place of safety.

3.3 International human rights law considerations in the construction of the term place of safety

Human rights law considerations proposed in this section for the interpretation of a place of safety do not constitute a closed list, but rather a start point that could lead to further exploration of other protection considerations under the principle of systemic integration.

A first consideration that necessarily follows from the issue of detention examined in the realm of refugee law is the protection against arbitrary detention in the construction of the notion of place of safety. The protection against arbitrary detention is encapsulated in the broader protection of liberty and security of person in Article 9.1 of the ICCPR.¹⁶⁶ It strengthens the protection offered in Article 31(2) of the Refugee Convention in the context of migration control and offers a wider scope of application to include as beneficiaries individuals who are not refugees.¹⁶⁷ The term arbitrary is construed in a wide manner, to include not only unlawful deprivation of liberty, but also unjust arrest, or otherwise, 'under

¹⁶⁴ Goodwin-Gill and McAdam (n 4) 465.

¹⁶⁵ Ch 5, ss 4.3 and 4.4.

¹⁶⁶ Art 9.1 provides: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. See reference to equivalent provisions in other international and regional legal instruments (n 154).

¹⁶⁷ See for the interpretation of Art 9, HRC, *CCPR General Comment No 35: Article 9 (Liberty and Security of person)* adopted 16 December 2014, UN Doc CCPR/C/GC/35 (HRC, CCPR General Comment No 35). See further, Commission on Human Rights, 'Specific Groups and Individuals. Migrant Workers: Report of Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights Resolution 2002/62' UN Doc E/CN.4/2003/85, 30 December 2002, addressing arbitrary patterns of detention in migration management situations, based on communications with a number of Governments <<https://www.globaldetentionproject.org/wp-content/uploads/2016/06/Special-Rapporteur-on-the-Human-Rights-of-Migrants-2002.pdf>>. See J Hathaway, *The Rights of Refugees under International Law* (n 14) 424 and 425.

the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person'.¹⁶⁸

The detention itself raises concerns and considerations of human rights law. Migrants deprived of their liberty are to be treated with humanity and dignity. Their fundamental rights are to be protected. Generalised practices of deprivation of liberty among States receiving large numbers of undocumented migrants urge the need to consider the protection of fundamental rights in detention conditions where situations of vulnerability arise or compound. These very considerations are also to apply to States' practices involving disembarkations or transfers of undocumented migrants and refugees and asylum-seekers to offshore processing centres, effectively open-ended or indefinite detention centres, where no prospects exist of being released. Australia, for instance, repeatedly resorts to this practice and it is further coupled with deplorable detention conditions and widespread infliction of ill-treatment therein, resulting in severe physical and mental suffering.¹⁶⁹ Two issues arise

¹⁶⁸ UN Department of Economic and Social Affairs, 'Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile', New York 1964, UN Doc E/CN.4/826/Rev.1, para 23(b), and see paras 23 to 30, <<https://undocs.org/pdf?symbol=en/E/CN.4/826/Rev.1>>. See the case of *Amuur v France*, App No 19776/92 (ECtHR, 25 June 1996) regarding the holding of applicants in the transit zone of the airport Paris-Orly, which, given the restrictions imposed, was held to amount to deprivation of liberty, and its duration excessive. See in particular regarding the arbitrariness of the detention, paras 43 to 54. See also regarding the consideration of detention arbitrary on account of its duration, HRC views on *A Bakhtiyari and R Bakhtiyari v Australia*, Communication No 1069/2002, UN Doc CCPR/C/790/D/1069/2002, 6 November 2003 <<https://juris.ohchr.org/Search/Details/1092>>. See also the Universal Declaration of Human Rights, UN General Assembly, 10 December 1948 Resolution 217 A (III), Art 9.

¹⁶⁹ See Human Rights Watch World report 2019 'Australia: events of 2018' <<https://www.hrw.org/world-report/2019/country-chapters/australia>>. See also UN News 'Australia-bound asylum-seekers left mentally scarred by years of detention on Pacific Islands, warns UN refugee official', 4 April 2018 <<https://news.un.org/en/story/2018/04/1006501>>. See further the Opening statement by UN High Commissioner for Human Rights, M Bachelet, at the 39th Session of the Human Rights Council, 10 September 2018. In Bachelet's words: '[t]he current offshore processing centres are an affront to the protection of human rights' <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23518&LangID=E>>. This in turn raises concerns as to disembarkations contrary to the obligation of non-refoulement. For a detailed examination of Australia's practices in search and rescue and interception at sea, see D Ghezelbash, V Moreno-Lax, N Klein and B Opeskin, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) vol 67, *International and Comparative Law Quarterly*, 315. See also M Ratcovich, 'The Concept of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants rescued at Sea?' (n 105).

from this type of practices with alarming consequences for disembarkation purposes. On the one hand, the disembarkation to the shores where these open-ended detention centres are the common reception practice cannot constitute delivery to a place of safety. On the other hand, where these disembarkations are carried out by a third State, in the present example Australia effects these disembarkations outside its territory, this practice, it is here argued, amounts to an infringement of the obligation of non-refoulement. The reason is that there are substantial grounds for believing that it exposes sea migrants delivered at these offshore processing centres to a real risk of being subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

A fundamental aspect of the safeguard of human rights law in detention circumstances is the actual conditions of detention. The notion of place of safety hence necessarily draws on this consideration.

The UNHCR considers minimum conditions of detention in the Detention Guidelines, grounded in humanity and dignity, with reference to the international standards set in international human rights law.¹⁷⁰ They are also underpinned by the vulnerability reasoning whereby specific needs are acknowledged and mechanisms of redress are sought. Among the international standards of protection and care, Article 10 of ICCPR provides a standard of care in confinement circumstances whereby ‘any person deprived of liberty under the laws and authority of the State’¹⁷¹ is to ‘be treated with humanity and with respect for the inherent dignity of the human person’.¹⁷² As Hathaway points out, the standards of care in this provision are higher than ‘simply the avoidance of the “cruel and inhuman” treatment prohibited by Article 7 of the Civil and Political Covenant’.¹⁷³

¹⁷⁰ UNHCR Detention Guidelines (n 146) Guideline 8, para 48. See in particular para 48(ii) and fn 88 therein.

¹⁷¹ HRC, *CCPR General Comment No 21: Article 10 (Humane treatment of Persons deprived of their liberty)* 10 April 1992, UN Doc HRI/GEN/1/Rev.9 (HRC, CCPR General Comment No 21) para 2 <<http://ccprcentre.org/ccpr-general-comments>>.

¹⁷² ICCPR, Art 10. See J Hathaway, *The Rights of Refugees under International Law* (n 14) pp 435 and 436. See further HRC, CCPR General Comment No 21, paras 2, 3 and 4. See also Commission on Human Rights, Specific Groups and Individuals. Migrant Workers: Report of Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, 30 December 2002 (n 167) para 54, and HRC, *CCPR General Comment No 15: The Position of Aliens under the Covenant*, adopted 11 April 1986, UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 7 <<http://ccprcentre.org/ccpr-general-comments>>.

¹⁷³ J Hathaway, *The Rights of Refugees under International Law* (n 14) p 435. See also for the interpretation of Art 10 of the ICCPR, HRC, CCPR General Comment No 21 (n 171). See also HRC views on *Chedulal Tharu*

The protection against torture, cruel, inhuman or degrading treatment or punishment is unquestionably crucial to invoke in the consideration of human rights law. These are relevant not only in detention circumstances but also need to be considered outside situations of deprivation of liberty. Having said that, the cases studied for the interpretation of these forms of ill-treatment and the vast majority of cases reported raising concerns of ill-treatment are in the context of detentions.

As previously argued in chapter 5, an integrating construction of the notion of danger in the definition of the term persons in distress, grounded in Article 31(3)(c) of the VCLT, allows invoking the protection against cruel, inhuman or degrading treatment or punishment proscribed in Article 7 of ICCPR, Article 3 of ECHR, and their equivalents in relevant legal instruments.¹⁷⁴ This legal interpretative reasoning equally applies to the construction of the concept of place of safety for the disembarkation of survivors and its considerations of protection. In both instances, the protection of the integrity of the survivors remains central. Therefore, the interpretation, the scope of applicability and the standards applied by international bodies to determine the minimum levels of severity required to assess whether the treatment inflicted falls within the said proscribed forms of ill-treatment, examined in chapter 5,¹⁷⁵ are valid for the construction of the notion of place of safety.

Additionally, this section invokes the prohibition of torture and cruel, inhuman or degrading punishment, contained in the same provisions in international and regional human rights legal instruments, when assessing the treatment inflicted on sea migrants, primarily in situations of detention. It is in these situations of confinement where these forms of ill-treatment are chiefly reported and seem more relevant than in the context of living conditions outside detention situations.

and Others v Nepal, Communication No 2038/2011, UN Doc CCPR/C/114/D/2038/2011, 21 October 2015, regarding the enforced disappearance of Nepalese nationals. A separate examination of Art 10 was not deemed necessary after finding a violation of Art 7 of the ICCPR in a case of enforced disappearance while in detention, according to para 10.11 <<https://juris.ohchr.org/Search/Details/2027>>.

¹⁷⁴ Art 5 of the African (Banjul) Charter on Human and People's Rights, 27 June 1981; Art 5 of the American Convention on Human Rights Pact of San José, Costa Rica, 22 November 1969; Arts 1 and 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, and Article 5 of the Universal Declaration of Human Rights, UN General Assembly, 10 December 1948 Resolution 217 A (III).

¹⁷⁵ Ch 5, ss 4.2. to 4.4.

A brief view of the scope of the prohibition of torture and its differentiation from other forms of ill-treatment allows a basic understanding in order to consider the protection against this form of ill-treatment when construing the notion of a place of safety. It is not however the purpose of this subsection to give a detailed account of precedents and standards applied by the relevant treaty bodies to determine what conduct falls within the prohibition of torture.¹⁷⁶

The prohibition of torture is at the core of the protection of the physical and mental integrity of the individual. Undisputedly, it holds the legal status of norm of customary international law¹⁷⁷ and of *jus cogens*.¹⁷⁸ It embodies a fundamental value in international law and it is of universal application, binding on all States.¹⁷⁹

Torture has been characterised by the ECtHR as an aggravated and deliberate form of ill-treatment that results in a higher intensity of pain or suffering.¹⁸⁰ The quantitative element

¹⁷⁶ For a comprehensive examination on the subject of torture, see for example M Nowak and E McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008) (Nowak and McArthur) and see D Weissbrodt and C Heilman, 'Defining Torture and Cruel, Inhuman and Degrading Treatment' (2011) 29 Law & Inequality, 343 (Weissbrodt and Heilman) <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1370&context=faculty_articles>.

¹⁷⁷ See Weissbrodt and Heilman, 347, 348 and 361. As stated in this article a norm of customary international law 'arises from the general and consistent practice of States, when the practice is followed from a sense of legal obligation' (p 361). See further C Chinkin, 'Sources' in D Moeckli, S Shah and S Sivakumaran, eds, *International Human Rights Law*, 3rd edn (Oxford University Press 2018) (Chinkin) ch 4, 70 to 72.

¹⁷⁸ A peremptory norm that allows no derogation and no limitations in accordance with the VCLT, Arts 53 and 64. See further Chinkin, 73 and 74. See also N Rodley, 'Integrity of the Person' in D Moeckli, S Shah & S Sivakumaran, eds, *International Human Rights Law*, 3rd edn (Oxford University Press 2018) chapter 9, 166 to 169.

¹⁷⁹ Chinkin, 73 and 74.

¹⁸⁰ In the case of *Ireland v United Kingdom* App No 5310/71 (ECtHR, 13 December 1977) the ECtHR highlights the distinction between inhuman treatment and torture, when examining five interrogation techniques in detention circumstances. The five interrogation techniques consisted on wall standing for hours, hooding, subjection to continuous loud noise, deprivation of sleep and deprivation of food and drink. The distinction is based on grounds of the degree of severity, or the threshold at which the 'cruel and inhuman treatment' becomes torture in breach of Art 3 of ECHR, despite the purpose sought with these interrogatory techniques being, as signalled by the Court, the extraction of confessions, of specific information in the context of the interrogatory techniques used. Notwithstanding these techniques were used systematically, according to the Court 'they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood'. The Court concludes that the treatment inflicted could not be considered 'serious enough to amount to "torture", which was reserved for the most serious of breaches of Article 3' (paras 145-167). This is

of severity and level of cruelty of the suffering inflicted proves to be key in the ECtHR reasoning.¹⁸¹ Having said that, the levels of severity have seen evolving standards based on a dynamic interpretation of the ECHR that reflects the increasingly higher standards of human rights protection. This is consistent with the consideration that the ECHR is a living instrument which must be interpreted in the light of the present-day conditions.¹⁸² Qualitative elements also converge in the characterisation of ill-treatment as torture, such as the intentionality and the purpose sought in the conduct.¹⁸³ In the interpretation of Article 7 of ICCPR, the HRC does not consider necessary to establish clear distinctions between the different forms of ill-treatment, although it establishes that ‘the distinctions depend on the nature, purpose and severity of the treatment’.¹⁸⁴

UNCAT incorporates a number of distinctive elements in its definition of torture.¹⁸⁵ The quantitative element refers to the act causing ‘severe pain or suffering, whether physical or

a clear example of the quantitative approach used by the ECtHR, See paras 145 to 167. See J Waldron, ‘Inhuman and Degrading Treatment: The words themselves’ (2010) 23 (N 2) *Can J L & Jurisprudence* 269, 271 and 272. Cf D Moeckli, S Shah and S Sivakumaran, eds, *International Human Rights Law* (n 177) 179. See also *Ilasçu and others v Moldova and Russia* App No 48787/99 (ECtHR, 8 July 2004) para 426. See further the Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly of the United Nations Resolution 3452(XXX), UN Doc A/RES/30/4352 of 9 December 1975, Art 1 <<http://www.un-documents.net/dppticdt.htm>>.

¹⁸¹ J Waldron, ‘Inhuman and Degrading Treatment: The Words themselves’, 271 and 272. Waldron observes, in the early stages of interpretation of Art 3 of the ECHR by the ECtHR, an approach that infers a quantitative distinction between ill-treatment forms, varying in different degrees of intensity and different levels of suffering. See *Ireland v United Kingdom*, paras 145 to 167, and *Selmouni v France* (GC) App No 25803/94 (ECtHR, 28 July 1999). See also Nowak and McArthur (176) para 43.

¹⁸² *Selmouni v France*, para 101 and paras 103 to 105 regarding the severity of the ill-treatment inflicted. See also *Dikme v Turkey*, App No 20869/92 (ECtHR, 11 July 2000) paras 73 to 97. This case concerns the physical and psychological ill-treatment inflicted on the applicant while in police custody. The ECtHR held that the severity and the length of the violence inflicted on the applicant for the purpose of extracting a confession or information amounted to torture, for which see paras 95 and 96. This contrasts with the decision in the case of *Ireland v United Kingdom*, and the basis for such a difference in the outcome is arguably the increasingly high standards required in the protection of human rights, in accordance with the characterisation of the ECHR as a living instrument (para 92). See also Weissbrodt and Heilman (n 176) 357, 358, and 376.

¹⁸³ *Ireland v United Kingdom*, and *Selmouni v France*, para 92. See also J Waldron, ‘Inhuman and Degrading Treatment: The words themselves’ (n 180).

¹⁸⁴ HRC, CCPR General Comment No 20 (n 33) para 4.

¹⁸⁵ UNCAT, Art 1 (n 31).

mental'.¹⁸⁶ Qualitative elements include the intentionality of the perpetrator, and the purposes sought with this conduct, namely, obtaining information or a confession, inflicting a punishment, coercion or intimidation, or any reason based on discrimination.¹⁸⁷ The definition of torture for the purpose of UNCAT, further requires that the pain or suffering caused is 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.¹⁸⁸

All forms of ill-treatment are hence invoked in the construction of the notion of place of safety, as a key consideration of protection. The principle of systemic integration proposed in this legal interpretative reasoning of the notion of place of safety purports to take into consideration the exposure to ill-treatment upon disembarkation, primarily while in reception or detention facilities. It further aims at taking into consideration the prospects of protection afforded under international refugee law. It readily calls for a close examination of States of disembarkation where violations of international human rights systematically occur. Such is the case of Libya, now undertaking its search and rescue operations in its SRR and returning sea migrants to their territory where, according to numerous reports, they are endemically subjected to violations of human rights, including torture, inhuman, degrading treatment and punishment.¹⁸⁹

This guiding mechanism of interpretation formulated in Article 31(3)(c) of the VCLT requires, as already examined in chapter 5, that the international rules invoked are relevant and applicable in the relations between the parties.

¹⁸⁶ Ibid

¹⁸⁷ Ibid. See Weissbrodt and Heilman (n 176) 373.

¹⁸⁸ UNCAT, Art 1. This contrasts with the formulation of the prohibition of torture under the ICCPR, which according to the HRC does not differentiate whether the perpetrator acts in a private or in an official capacity, for which see HRC, CCPR General Comment No 20 (n 33) para 2. Equivalent formulations are contained in Art 3 ECHR and related provisions referred to in n 174. Having said that, the definition of torture in Art 1 of UNCAT, although formally applicable only to States parties to it, and to its treaty body, the Committee against Torture, constitutes a reference for international bodies to identify practices as torture. See in this respect Weissbrodt and Heilman (n 176) 388 to 390. See also D Moeckli, S Shah and S Sivakumaran, *International Human Rights Law* (n 177) 179.

¹⁸⁹ See below, s 4.3.

3.4 Relevance of the international rules invoked and their applicability in the relations between the parties

Article 31(3)(c) of the VCLT requires that the rules of international law taken into account are relevant for the purpose of construing the treaty, and more particularly in the present legal reasoning, the notion of place of safety for the purpose of disembarkation in a rescue operation.

The relevance of international human rights law has been examined in chapter 5, in particular the prohibition of cruel, inhuman or degrading treatment for the purpose of construing the notion of persons in distress in the SAR Convention.¹⁹⁰ The same reasoning is valid for the construction of the notion of place of safety where the safeguard of physical and mental integrity remains central. The relevance suggested here is *ratione materiae*, that is, relevance to the subject matter at stake. In the present case, this is the protection of the integrity of sea migrants disembarked from an assisting ship and delivered to a place where safety takes into account safeguards against any form of ill-treatment, including torture, or cruel, inhuman or degrading treatment or punishment. This relevance applies also to the safeguard of humane treatment and respect to the individual's dignity while deprived of their liberty, as provided in the ICCPR, Article 10, invoked in the construction of the notion of place of safety.¹⁹¹

The safeguard against arbitrary detention or arrest within international human rights law is based on the protection of liberty and security of persons.¹⁹² Its relevance to the construction of the notion of a place of safety in the disembarkation of sea migrants lies in the very protection these rights encapsulate. Liberty of individuals relates to, according to the HRC, the 'freedom from confinement of the body',¹⁹³ and security of persons concerns 'freedom from injury to the body and the mind, or bodily and mental integrity'.¹⁹⁴ The HRC outlines the scope of protection expected from States parties to the ICCPR and highlights its

¹⁹⁰ Ch 5, s 5.

¹⁹¹ This safeguard is subsumed in Art 3 of the ECHR within the prohibition of torture, inhuman and degrading treatment.

¹⁹² Art 9 of the ICCPR, Art 5 of the ECHR, Art 6 of the African Charter of Human and People's Rights, Art 7 of the American Convention on Human Rights ("Pact of San José, Costa Rica), and although not legally binding, see also Art 3 of the UDHR.

¹⁹³ HRC, CCPR General Comment No 35 (n 167) para 3.

¹⁹⁴ Ibid.

relevance in the detention in the course of proceedings for the control of immigration.¹⁹⁵ The relevance of this rule remains grounded in the subject matter at stake, that is, the protection of the physical and mental integrity of sea migrants retrieved from situations of distress at sea, upon disembarkation.

The principle of non-refoulement in international human rights law, when invoked as part of the interpretative process, also constitutes a safeguard of the physical and mental integrity of the individuals and its relevance to the subject matter at stake, i.e., the protection of the integrity of sea migrants upon disembarkation, is undisputable.

The notion of safety is inevitably linked to the concept of protection, at the core of international human rights law and international refugee law. Terminology such as ‘safe third country’, ‘safe country of origin’ or ‘safe country of asylum’, primarily used as procedural mechanism in asylum procedures,¹⁹⁶ share a fundamental concern, namely, whether effective protection is available to individuals. This very concept of effective protection and the specific risks sought to be safeguarded against further underscore the relevance of the norms invoked here for the construction of the notion of place of safety. The term effective protection encompasses the respect for fundamental human rights. Among these, the UNHCR refers, *inter alia*, to the absence of a real risk of subjection to torture, or to cruel, inhuman or degrading treatment or punishment. It also refers to the absence of a real risk to life, the absence of a real risk of deprivation of liberty without due process, State compliance with international refugee law instruments, and the absence of a real risk of return to another State where effective protection would not be available, among others.¹⁹⁷

The relevance of the considerations invoked under the Refugee Convention for the purpose of construing the notion of place of safety follows the same reasoning. These are access to

¹⁹⁵ Ibid, para 18.

¹⁹⁶ See UNHCR, ‘Global Consultations on International Protection/ThirdTrack: Asylum Processes (Fair and Efficient Asylum Procedures)’ 31 May 2001, UN Doc EC/GC/01/12, paras 12 to 18 <<https://refworld.org/docid/3b36f2fca.html>>. See also Goodwin-Gill and McAdam (n 4) 390 to 412.

¹⁹⁷ UNHCR, ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers’ Agenda for Protection, Lisbon Expert Roundtable, 9 and 10 December 2002, para 15 <<https://www.refworld.org/pdfid/3fe9981e4.pdf>>. The notion of ‘effective protection’ is considered in these conclusions in the context of return of refugees and asylum-seekers to third States. See also Goodwin-Gill and McAdam (n 4) 393 to 396 and 462 to 466. See further J Hathaway and M Foster, *The Law of Refugee Status*, 2nd edn (Cambridge University Press 2014) 39, fn 122 thereto.

fair and efficient procedures to determine the legal status of those seeking asylum, protection against penalisation that would trump such access, and protection considerations within States' detention practices on immigration grounds. The relevance of international refugee law in the construction of the notion of place of safety is further highlighted in the Guidelines when invoking protection considerations for asylum-seekers and refugees recovered at sea.¹⁹⁸ Safety in terms of protection necessarily includes these specific protection needs among refugees and those seeking asylum upon disembarkation, ultimately relevant to the protection of their physical and mental integrity.

The relevance of the provisions invoked is furthermore underscored and reinforced by the concept of effective protection as pointed out above. This notion also encompasses elements of protection within the realm of international refugee law. The UNHCR refers to a number of factors in a non-exhaustive list. For example, it refers to the absence for the relevant individual of a well-founded fear of persecution on any of the Refugee Convention grounds or the absence of a real risk for the person to be sent to another country where effective protection would not be available. The UNHCR also refers to State compliance with international refugee law instruments, access to fair and efficient procedures for the determination of refugee status, and if a person is so recognised, effective protection to remain available until a durable solution is found.¹⁹⁹

The content of the notion place of safety is hence construed by reference to extraneous rules, i.e., international refugee law considerations with safeguards available to refugees and asylum-seekers, which are relevant to the subject matter under scrutiny, namely the protection of the integrity, both physical and mental, of sea migrants upon their disembarkation.

¹⁹⁸ The Guidelines (n 8) para 6.17.

¹⁹⁹ UNHCR, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' Agenda for Protection, Lisbon Expert Roundtable, 9 and 10 December 2002 <<https://www.unhcr.org/uk/protection/globalconsult/3e5f323d7/lisbon-expert-roundtable-summary-conclusions-concept-effective-protection.html>> para 15. See also the concept of safe third country as defined by the EU Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) OJ L 326/13 (13 Dec 2005). Art 27(1). See further Goodwin-Gill and McAdam (n 4) 393 to 407, and 412 to 414. See further UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)' UN Doc EC/GC/01/12 (31 May 2001) paras 12 to 18. See Lauterpacht and Bethlehem (n 14) paras 119 and 121.

The physical and mental integrity is at the intersection of the legal regimes involved, namely international law of the sea and maritime law relating to safety of life at sea and the notion of place of safety for disembarkation purposes, and international human rights law and international refugee law, where considerations of humanity converge.

The requirement of applicability of the norms invoked in the relations between the parties to the SAR Convention has already been considered in chapter 5, regarding the prohibition of cruel, inhuman or degrading treatment for the purpose of construing the notion of persons in distress in the SAR Convention.²⁰⁰ The status of customary international law of these norms binding upon the international community, leaves no doubt as to the compliance with the requirement of Article 31(3)(c) of the VCLT. The same reasoning is valid with regards to the interpretation of the notion of place of safety, and it also applies when invoking the prohibition of cruel, inhuman or degrading punishment and the prohibition of torture, uncontestably a norm of customary international law.²⁰¹

Equally, the prohibition of arbitrary detention has been identified as a norm of customary international law within the definition and scope determined by the Working Group on Arbitrary Detention, established by the former Commission on Human Rights and the Human Rights Council.²⁰² Arbitrary detentions under customary international law include all deprivations of liberty, including administrative custody of asylum-seekers and migrants for immigration control purposes. The argument for the applicability of this norm in the

²⁰⁰ See ch 5, s 6.

²⁰¹ Weissbrodt and Heilman (n 176) 347, 348 and 363. See further Chinkin (n 177) 70 to 72.

²⁰² UN Commission on Human Rights, 48th session, 'Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment' 21 January 1992, UN Doc E/CN.4/1992/20. The mandate of the Working Group on Arbitrary Detention was extended by the Commission on Human Rights Resolution 1997/50, 15 April 1997, to include observations on reports concerning administrative custody of asylum-seekers and migrants (para 4). See UN Human Rights Council, 'Report of the Working Group on Arbitrary Detention', Chair-Rapporteur El Hadji Malick Sow, UN Doc A/HRC/22/44, 24 December 2012, examining the definition and scope of arbitrary deprivation of liberty under customary international law. In its conclusion, the Working Group finds that 'the prohibition of all forms of arbitrary deprivation of liberty constitutes part of customary international law and constitutes a peremptory norm of *jus cogens*'. See paras 43, 51, 75 and 79 therein <<https://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>>. See also Deliberation No 9 adopted by the Working Group concerning the definition and scope of arbitrary deprivation of liberty under customary international law, within the same report.

relation between the parties hence relies on its status of customary international law as determined by the Working Group in its Deliberation No 9.²⁰³

Determining the status of a particular norm as customary international law is however a complex process, and as the International Law Commission (ILC) points out, it is not 'always susceptible to exact formulations'.²⁰⁴ Regarding the constituent element of general practice for instance, according to the ILC, this means that 'it must be sufficiently widespread and representative, as well as consistent'.²⁰⁵ It further clarifies that universal participation is not required. In other words, 'it is not necessary to show that all States have participated in the practice in question'.²⁰⁶

A parallelism could arguably be drawn with the formulation of Article 31(3)(c). Outside the realm of norms universally applicable, determining whether the rule invoked is applicable in the relations between the parties, especially with regards to multilateral treaties where a complete identity of the parties is unlikely, presents difficulties not resolved.

In this sense, it seems justified to argue in favour of a broader approach to the principle of systemic integration whereby not only recognised customary international rules would be invoked as applicable in the relations between the parties, but also provisions in international treaties that have a very wide acceptance in the international community. McLachlan, proposes 'an intermediate test which does not require complete identity of treaty parties, but does require that the other rule relied upon can be said to be implicitly accepted or tolerated by all parties to the treaty under interpretation'.²⁰⁷ Although not the strict formulation of Article 31(3)(c), as McLachlan and Boyle point out, reference can be made to norms as interpretative guiding mechanisms where they evidence a common understanding among the parties to the treaty under interpretation of the meaning of the term concerned.²⁰⁸ The ILC supports this view when referring to multilateral treaty notions or concepts not found in treaties with identical membership and not reflecting formal customary law, but adopted

²⁰³ See in particular the methodology followed to determine the status of customary international law of the prohibition of arbitrary detention.

²⁰⁴ ILC, 'Draft conclusions on identification on customary international law, with commentaries' (2018) <http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf>.

²⁰⁵ Ibid, Conclusion 8, para 1.

²⁰⁶ Ibid, commentary to Conclusion 8, para 3.

²⁰⁷ McLachlan (n 135) 314 and 315.

²⁰⁸ See Boyle (n 135) 571.

widely enough ‘so as to give a good sense of “common understanding”’.²⁰⁹ With this reasoning in mind, attention is next drawn to the applicability of the norms invoked under international refugee law.

The Refugee Convention and the 1967 Protocol constitute the core of the international framework for the international refugee protection system. The former has been ratified by 146 States²¹⁰ and the latter by 147.²¹¹ The protection system therein however holds a wider consensus reflected in the wording of regional instruments, such as the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention),²¹² or the 1984 Cartagena Declaration on Refugees,²¹³ for instance. At present, among the 113 States parties to the SAR Convention,²¹⁴ 23 are not parties to the Refugee Convention or its 1967 Protocol,²¹⁵ although two of them, Libya and Mauritius, are parties to the OAU Convention.²¹⁶

²⁰⁹ ILC Report A/CN.4/L.682 (n 132) para 472.

²¹⁰ Ratification status as at 27 July 2020
<https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en>.

²¹¹ Ratification status as at 27 July 2020
<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=en>.

²¹² Concluded at Addis Ababa on 10 September 1969, 1001 UNTS 45. It entered into force on 20 June 1974
<<https://treaties.un.org/doc/Publication/UNTS/Volume%201001/volume-1001-I-14691-English.pdf>>. This treaty recognises that the Refugee Convention, as modified by the 1967 Protocol constitutes ‘the basic universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment’ (preambular para 9).

²¹³ This is a non-binding agreement adopted in Cartagena, Colombia, 19 to 22 November 1984
<<https://www.unhcr.org/uk/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>>.

²¹⁴ This information is available at
<<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf>>.

²¹⁵ These are Bahrain, Bangladesh, Barbados, Cuba, India, Indonesia, Jordan, Lebanon, Libya, Mauritius, Niue, Oman, Pakistan, Palau, Qatar, St Lucia, Saudi Arabia, Singapore, Syrian Arab Republic, Tonga, United Arab Emirates, Vanuatu and Vietnam. See Status of ratifications for both the 1951 Refugee Convention and the 1967 Protocol at
<https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en> and
<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5> respectively.

²¹⁶ This information is available at
<<https://treaties.un.org/pages/showDetails.aspx?objid=080000028010432f>>.

In contrast, a universal consensus on the prohibition of refoulement both in the legal spheres of international human rights law and international refugee law exists and the applicability of this customary international rule in the relation between the parties is indisputable for the purpose of the functionality of Article 31(3)(c) and the construction of the notion of place of safety.

In the light of the above, it is here argued that the rules invoked for the interpretation of the notion of place of safety meet the requirement of relevance to the subject matter at stake, that is, the concept of safety and the consideration of the protection needs of sea migrants upon disembarkation.

With regards to the applicability of the rules invoked, those which constitute customary international rules present no difficulties according to the approach given to the requirement of applicability under Article 31(3)(c).²¹⁷ However, where no such legal status applies, the rules invoked arguably need to convey a common understanding among States parties to the SAR Convention in order to determine the content of the protection sought and integrate it in the construction of the notion of place of safety. Therefore, the extent to which the integrating interpretation proposed here is viable, is, outside customary international rules, determined by the degree of consensus on the norms invoked among the States parties to the SAR Convention.

In this respect, it is here argued that the rules invoked under the international refugee law sphere can be considered to have sufficiently wide acceptance to evidence a common understanding among States parties to the SAR Convention of the protection considerations invoked to guide the construction of the term place of safety and the protection it should afford.²¹⁸

Article 31(3)(c) is therefore operative in the present interpretative reasoning and allows an integrating construction of the notion of place of safety, where the considerations of humanity here invoked, both in the realms of human rights and refugee law, inform the scope

²¹⁷ ILC Report A/CN.4/L.682 (n 132) para 471. See also McLachlan (n 135) para 15(c).

²¹⁸ See Boyle (n 135) 571. Boyle suggests that their persuasive force as a guiding mechanism 'will necessarily be weaker the fewer parties there are'. See also McLachlan (n 135) 313 to 315.

of protection the term place of safety can foster taking into account the circumstances of sea migrants and the protection needs at stake.²¹⁹

In practical terms for the assessment of a place of safety, however, a further question readily arises from this interpretative reasoning: What should be the test and threshold applied to establish that a particular State cannot be considered a place of safety for the purpose of disembarkation in the final stage of a rescue operation in the SAR system?

4. Towards a place of safety for sea migrants: effective protection test in the context of SAR operations

4.1 Key elements to identify locations that do not constitute a place of safety for disembarkation purposes

Consistency throughout the integrating interpretative reasoning proposed in this research suggests that the test to apply when determining the delivery at a place of safety needs to be formulated along the lines of the one used in cases considering the application of the principle of non-refoulement in the transfer or return of migrants to countries of origin or third countries.

The ECtHR and the HRC apply equivalent tests in determining whether a particular country does not offer the protection from ill-treatment proscribed in the respective human rights legal instruments they monitor.

In the realm of the ECHR, the ECtHR draws on the following key elements to determine the infringement of the principle of non-refoulement. It requires that ‘substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country’.²²⁰ In ascertaining the risk, ‘the Court must examine the foreseeable consequences of the removal of an applicant to the receiving country in the light of the general situation there as well as the personal circumstances of the person involved’.²²¹ Equally, the HRC considers whether

²¹⁹ See Guidelines (n 8) para 6.15 reads: ‘The Convention, as amended, indicate that delivery to a place of safety should take into account the particular circumstances of the case. (...) Each case is unique, and selection of a place of safety may need to account for a variety of important factors’.

²²⁰ *Hirsi Jamaa and Others v Italy* (n 4) para 114.

²²¹ *Ibid*, para 117.

‘there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed’.²²²

This test can be transposed and be of application, it is here proposed, to ascertain the safety of the place of delivery. Accordingly, delivery at a place of safety at the last stage of a search and rescue operation would necessarily exclude disembarkation in a location where there are substantial grounds for believing that there is a real risk for the survivors of being subjected to ill-treatment, contrary to Article 3 of the ECHR, Article 7 of the ICCPR or their equivalents in other human rights legal instruments. The exclusion would also be on the grounds of other risks, including exposure to persecution or threats to lives and freedoms protected against in the Refugee Convention and the 1967 Protocol, or no access to fair and effective refugee status determination procedures. The risks would further include penalisation on account of irregular entry and arbitrary detention.

The term ‘real risk’ entails, in HRC’s words, that it must be ‘the necessary and foreseeable consequence of the forced return’.²²³ In the same vein, the ECtHR requires systemic flaws or deficiencies in the asylum procedure and the reception conditions resulting in inhuman or degrading treatment, to prevent the return or transfer of the person involved.²²⁴ The threshold for providing substantial grounds to establish that a real risk of irreparable harm exists is

²²² HRC, CCPR General Comment No 31 (n 41) para 12. See also the HRC views on the case of *H Said Hashi v Denmark*, Communication No 2470/2014, CCPR/C/120/D/2470/2014, 9 October 2017, where the HRC refers to the test for the foreseeable risks the applicant and her five children may be exposed to if they were removed to Italy. See para 9.3 <<https://juris.ohchr.org/Search/Details/2320>>.

²²³ HRC views on the case of *X v Sweden*, Communication No 1833/2008, CCPR/C/103/D/1833/2008, 17 January 2012, para 5.18 <<https://juris.ohchr.org/Search/Details/1390>>.

²²⁴ *MSS v Belgium and Greece* (GC) App No 30696/09 (ECtHR, 21 January 2011) paras 342 and 365. See also Court of Justice of the European Union (CJEU) (Grand Chamber) joined cases *NS v Secretary of State for the Home Department* (C-411/10) (2010) OJ C 274/21, and *ME et al v Refugee Applications Commissioner et al* (C-493/10) (2011) OJ C 13/18, of 21 December 2011 for a preliminary ruling in proceedings relating to asylum-seekers who were to be returned to Greece pursuant to EU Reg No 343/2003 (Dublin II) <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5602854>>.

high,²²⁵ and these substantial grounds include recent reports from international organisations.²²⁶

Against the test proposed here for the assessment, or the discarding, of a location as a place of delivery, two examples are brought to this last stage of this interpretative reasoning to underscore practical concerns in the SAR system of cooperation and coordination for the disembarkation of survivors. These do not purport however to examine issues of responsibility among States.

4.2 Rebuttable presumption as to the safety of a country for the purpose of disembarkation: a brief look at Greece

A presumption exists that all EU member States have similar standards of protection of fundamental human rights and refugee rights, with regards to treatment, conditions in reception facilities and asylum procedure systems. However, this presumption is not conclusive and it can in fact be rebutted.²²⁷ For instance, in the case of *MSS v Belgium and Greece* regarding the transfer of an asylum-seeker from Belgium to Greece under the European asylum system based on the Dublin Regulation,²²⁸ the ECtHR relied on numerous reports on the asylum procedure system in Greece published within the period of time between 2006 and 2010, before the judgment in January 2011. These reports, published by

²²⁵ *H Said Hashi v Denmark*, Communication No 2470/2014 (n 222) where the HRC referred to the test for the foreseeable risks the persons involved may be exposed to, in para 9.3.

²²⁶ In the case of *MSS v Belgium and Greece* (n 224) for instance, the ECtHR heavily relies on reports of a number of international and non-governmental organisations to assess the foreseeable risks the applicant was exposed to with his forced return to Greece. See paras 158 to 203 and paras 347 to 349.

²²⁷ *MSS v Belgium and Greece*, paras 342 to 350; See also in that same year the Court of Justice of the European Union (CJEU) (GC) judgment on the joined cases *NS v Secretary of State for Home Department* (C-411/10) (2010) OJ C 274/21, and *ME v Refugee Applications as Commissioner* (C-493/10) (2011) OJ C 13/18, 21 December 2011 (n 224). Both cases are concerned with the concept of safe country in the context of the Dublin System and the respect for fundamental rights of asylum-seekers when considering the transfer of asylum-seekers to the member State responsible for examining the asylum applications under Regulation 343/2003 (Dublin II Regulation). See paras 80, 86, 88 to 89, 94 and 104.

²²⁸ Regulation EU No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31, 29 June 2013 (Dublin III Regulation). The default position is that the country within which the application for asylum was first lodged will be responsible for examining it (Arts 3 and 17).

national and international bodies and non-governmental organisations concluded that there had been systemic placement of asylum-seekers in detention without informing them of the reasons for their detention,²²⁹ widespread deplorable detention conditions amounting to degrading treatment,²³⁰ and recurrent cases of ill-treatment in the hands of police officers.²³¹ These reports further noted systemic failures in the asylum procedure system,²³² and the risk of refoulement.²³³ They offered the Court substantial grounds for believing that the applicant, an asylum-seeker, by being transferred to Greece for the examination of his asylum application, faced ‘a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country’.²³⁴

Consequently, it is here argued that an integrating construction of the notion of place of safety for the purpose of disembarkation would determine that Greek shores were not a place of safety for the disembarkation, at any rate the disembarkation of asylum-seekers during that period. A continuing examination is however necessary to determine whether the situation of systemic deficiencies both in terms of human rights law and refugee law remains necessary, in order to ascertain whether delivery at Greek ports at the end of a rescue operation can be considered delivery to a place of safety. More recently, the Parliamentary Assembly of the Council of Europe has reflected on the improvements in Greece regarding both the reception facilities conditions and the asylum procedure systems.²³⁵

This active awareness can be extrapolated with regards to all States parties to the SAR Convention. The reliance on reports by national and international bodies and non-governmental organisations are a crucial aid to enable determining the standards of protection afforded in coastal States parties to the SAR Convention and whether they can be considered places of safety for the purpose of disembarkation.

Addressing these considerations in the light of the specific needs among sea migrants does not make the task of disembarkation any easier, if anything, it may add more elements of

²²⁹ *MSS v Belgium and Greece* (n 224) paras 161 and 226.

²³⁰ *Ibid*, paras 162, 163, 230 and 231.

²³¹ *Ibid* paras 163 and 227.

²³² *Ibid*, paras 173 to 191.

²³³ *Ibid*, paras 192 and 193.

²³⁴ *Ibid* para 365.

²³⁵ Parliamentary Assembly of the Council of Europe Resolution 2174 (2017) on ‘Human rights implications of the European response to transit migration across the Mediterranean’ (n 69).

discrepancy to the already controversial decisions regarding disembarkation of sea migrants. However, it allows identifying the most appropriate places for disembarkation,²³⁶ taking into account the particular circumstances of the case and the needs among the persons retrieved from situations of distress at sea.²³⁷

To this end, the SAR system relies on the cooperation and coordination between States parties thereto, and their respective MRCCs, to make the ‘necessary arrangements (...) to identify the most appropriate place(s) for disembarking persons found in distress at sea’.²³⁸ It is however the primary duty of the State responsible for the SRR where assistance is rendered to ensure that survivors are delivered to a place of safety.²³⁹ The operative procedures involved in each search and rescue operation allow for the consideration of factors that include specific protection needs, as argued earlier. Consequently, up-to-date information on countries that cannot be considered safe in terms of human rights and refugee law protection should be part of the information continuously available among States parties to the SAR Convention and rescue facilities at sea. This would enable discarding, at least temporarily, territories where there are substantial grounds for believing that sea migrants would be exposed to a real risk of being subjected to torture, or to cruel, inhuman or degrading treatment or punishment, or to threats to their lives and freedom on the grounds of the Refugee Convention, or to their liberty and security. This would in turn allow a continuity in the inter-regime dialogue proposed, that seeks interlocking maritime considerations and considerations of humanity in search and rescue services with a view to strengthening the protection of sea migrants.

Further difficulties and concerns however arise where inter-State cooperation for search and rescue at sea puts in jeopardy the very notion of safety, both at sea and upon disembarkation.

²³⁶ Annex to the SAR Convention, paras 3.1.6.4 and 4.8.5.

²³⁷ The Guidelines (n 8) paras 6.15 and 6.19.

²³⁸ Annex to the SAR Convention, para 3.1.6.4.

²³⁹ Annex to the SAR Convention, para 3.1.9.

4.3 Libya: disembarkation to dehumanisation rather than delivery to a place of safety

Search and rescue operations of sea migrants, carried out by Libyan coast guards within their SRR systematically result in the disembarkation on Libyan shores. This inevitably raises concerns as to the delivery of survivors to a place of safety, as pointed out earlier.

Libya, despite being a State party to a number of international human rights instruments,²⁴⁰ has been consistently reported by many institutions and organisations to systematically fail to protect fundamental human rights. In particular, undocumented migrants, including refugees and asylum-seekers, are in an extremely vulnerable position in the hands of Libyan officials, security forces, armed groups or criminal gangs.²⁴¹ Undocumented migrants are widely exposed to suffering, *inter alia*, arbitrary detention, torture, including sexual violence, and inhuman or degrading treatment or punishment. Labour exploitation, slavery or unlawful killing are also repeatedly highlighted as common practices among other forms of ill treatment to which they are endemically exposed.²⁴²

²⁴⁰ It is party to the ICCPR and its first optional Protocol, the International Covenant on Economic, Social and Cultural Rights; the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women and its Optional Protocol; the Convention on the Rights of the Child and its Optional Protocols on the Involvement of Children in Armed Conflict, and on the Sale of Children, Child Prostitution and Child Pornography. It is also a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Although it has not ratified the Refugee Convention or its 1967 Protocol, it has ratified the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) which contains the same definition of refugee as the one contained in the Refugee Convention as modified by its 1967 Protocol. See <https://www.hrw.org/reports/2006/libya0106/13.htm> and <https://treaties.un.org/pages/showDetails.aspx?objid=080000028010432f>.

²⁴¹ See for instance, Office of the United Nations High Commissioner for Human Rights (OHCHR) UN Support Mission in Libya (UNSMIL), “‘Detained and Dehumanised’ Report on Human Rights Abuses against Migrants in Libya”, 13 December 2016, 12 to 21 https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf. See also Amnesty International, ‘Libya’s Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants’, 2017 <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>. In particular, 6.

²⁴² See Parliamentary Assembly of the Council of Europe, Resolution 2215 (2018) ‘The Situation in Libya: Prospects and Role of the Council of Europe’, paras 7, 8 and 11.5 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24738>. Reference is therein made to other reports and studies by the UNHCR, the UN Support Mission in Libya, reports of non-governmental organisations and various new reports

It is therefore blatant that Libya cannot offer in its territory a place of safety.

The support provided to Libya offers an illustrative example of how cooperation within the SAR Convention becomes an instrument used to advance migration restrictive policies that results in extraterritorial border control, and allows to become a settled form of deterrence.²⁴³ Consequently, a change of course in the inter-state cooperation or coordination in search and rescue operations within the Libyan SRR becomes urgent to identify the most appropriate place(s) for the purpose of disembarking sea migrants to a place of safety.²⁴⁴

Against this backdrop, the integrating interpretative legal reasoning proposed propels the discussion towards a coherent global search and rescue system that advances human rights law and refugee law considerations in the reading and the development of the SAR system

providing evidence on slavery. Among these see UNSMIL, “‘Detained and Dehumanised’ Report on Human Rights Abuses against Migrants in Libya’ (n 244). See also the Report of the Secretary-General, United Nations Support Mission in Libya (UNSMIL), 26 August 2019, UN Doc S/2019/682, paras 50 to 54 <https://unsmil.unmissions.org/sites/default/files/sg_report_on_unsmil_s_2019_628e.pdf>. For a more recent overview of the situation on Libya, see the Report of the Secretary-General, UNSMIL, 5 May 2020, UN Doc S/2020/360 <https://unsmil.unmissions.org/sites/default/files/s_2020_360_e.pdf>. See further on this matter, the Statement by the President of the Security Council, 7 December 2017, UN Doc S/PRST/2017/24 <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_prst_2017_24.pdf>. See also UNHCR, ‘UNHCR Position on returns to Libya’ (Update II) September 2018 <<https://www.refworld.org/docid/5b8d02314.html>>. UNHCR, ‘Joint Statement: Government of Rwanda, UNHCR and African Union agree to evacuate refugees out of Libya’ 10 September 2019 <<https://www.unhcr.org/news/press/2019/9/5d5d1c9a4/joint-statement-government-rwanda-unhcr-african-union-agree-evacuate-refugees.html>>. See further Oxfam International press release, ‘One year on from Libya migration deal, people still in captivity and suffering abuses’, 1 February 2018 <<https://www.oxfam.org/en/press-releases/one-year-libya-migration-deal-people-still-captivity-and-suffering-abuses>> and ‘Libya migration deal: Two years on, thousands drowned in the Mediterranean and sent back to human rights abuses’, 1 February 2019 <<https://www.oxfam.org/en/press-releases/libya-migration-deal-two-years-thousands-drowned-mediterranean-and-sent-back-human>>.

²⁴³ An ‘increasing securitization of SAR’ in detriment to the humanitarian purpose of SAR has been scrutinised by D Ghezelbash, V Moreno-Lax, N Klein and B Opeskin, ‘Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia’ (2018) *International & Comparative Law Quarterly*, Vol 67, 315. The authors highlight the need to recover the humanitarian essence of the SAR Convention, 350 and 351.

²⁴⁴ Annex to the SAR Convention paras 3.1.6.4 and 3.1.9. The SAR Convention also envisages cooperation for rescue purposes within the territorial sea of rescue units of other States parties, in accordance with paras 3.1.2 to 3.1.5.

at each stage of the search and rescue operations. This integrating reading of the SAR Convention is only a first step towards implementation considerations. However, it lays the groundwork for furthering the debate on the role and the relevance of the SAR Convention and the SAR system in the context of unsafe irregular crossings. In this debate, mechanisms of coordination and cooperation within the SAR Convention need to take into account considerations of humanity in the broader legal context of human rights and refugee law considerations.

Conclusion

This last chapter has considered the final stage of search and rescue operations, namely, the delivery of sea migrants at a place of safety. This chapter has drawn on the interpretative legal reasoning developed in the previous chapters and has applied it to the construction of the notion of place of safety in the SAR Convention, particularly controversial in the disembarkation of sea migrants. Where restrictive migratory policies and deterrence practices are prioritised in the functioning of search and rescue services at sea, considerations of humanity need rescuing and bringing to the forefront of the interpretative reasoning of the notion of safety for the purpose of disembarkation.

With this in mind, this chapter has scrutinised the actual application of the principle of non-refoulement and its relevance in the interpretative reasoning. It has examined the refugee law and the human rights law dimensions of this principle and its significance in the process of assessing the disembarkation to a place of safety. It has also underscored some functional limitations for the purpose of guiding the construction of 'place of safety', illustrated with the example of the officially declared Libyan SRR and the increasing capacity of Libyan coast guards to undertake search and rescue operations.

Against this backdrop, the initial stages in the interpretative reasoning, based on Article 31 of the VCLT, confirm that a dynamic reading of the notion of the generic term safety is not only possible but inevitable, based on the very nature of the concept and the context of the SAR Convention characterised as a living instrument. Furthermore, the determination of a place of safety on a case-by-case basis is to take into account the circumstances and relevant factors at stake.

Therefore, the vulnerability reasoning remains a key factor in the construction of the notion of place of safety, whereby the specific needs among sea migrants at disembarkation are addressed. The potential for redress starts at the very stage of interpretation of this concept

when invoking international human rights law and, where applicable, international refugee law protection considerations based on Article 31(3)(c) of the VCLT.

The scope of protection invoked here in the construction of the term place of safety encompasses protection from threats to lives and freedoms at the core of the international refugee law. It also involves the safeguard of access to fair and effective refugee status determination procedures and the safeguard against penalisation on grounds of irregular entry and protection mechanisms in the restriction of movement. Outside the refugee law realm, international human rights law complements the latter with the safeguard against arbitrary detention and security. The protection envisaged in this integrating interpretation finally includes freedom from torture, or cruel, inhuman or degrading treatment or punishment, whether or not related to conditions of detention, and the safeguard against refoulement.

The relevance of the rules invoked is based on the subject matter of the protection sought in this reasoning, namely, the physical and mental integrity of the rescued, a common *telos* in the legal regimes involved.

The applicability of the rules invoked in the relation between the parties may initially present some degree of uncertainty where the rules do not constitute customary international law. However a careful examination of the norms invoked allows arguing in favour of a generalised tolerance and common understanding of the protections they contain. Protection against torture, inhuman or degrading treatment or punishment, whether or not related to conditions of detention, and safeguard against refoulement undoubtedly meet this requirement as rules of customary international law. Furthermore, the consideration given in the Guidelines to the protection from threats to lives and freedoms of those alleging a well-founded fear of persecution on refugee law grounds evidences the existence of a common understanding of this fundamental protection amongst States parties to the SAR Convention, that may nevertheless not be parties to the Refugee Convention or the 1967 Protocol or related instruments. The safeguard of access to fair and effective refugee status determination procedures invoked in the present interpretative reasoning, is directly linked to the effective protection against exposure to persecution on refugee law grounds. The same is valid for the safeguard against penalisation on grounds of irregular entry. It is therefore argued that these considerations go hand in hand and can be assimilated in that common understanding of refugee law protection as reflected in the Guidelines. The protection in the restriction of movement in the international refugee law system is complemented by the

safeguard against arbitrary detention and the protection of security of persons, which, as a norm of customary international law, expresses a common understanding within the international community.

Consequently, an integrating construction of the notion of place of safety, grounded in international human rights law and refugee law considerations is viable, at any rate to the extent of the specific safeguards considered here primarily linked to the integrity of those retrieved from distress at sea.

The test proposed in this interpretative reasoning to determine whether the disembarkation constitutes delivery at a place of safety draws on the test applied in cases determining the infringement of the principle of non-refoulement. Therefore, delivery at a place of safety would necessarily exclude locations where there are substantial grounds for believing that there is a real risk for the rescued of being subjected to ill-treatment in the forms described above. It would also exclude locations where there are substantial grounds to believe that there is a real risk for those alleging a well-founded fear of persecution on refugee law grounds to have their lives and freedoms threatened. The same threshold would apply to the risks involving penalisation on grounds of irregular entry and arbitrary detention.

Consequently, in making the necessary arrangements to identify the most appropriate place for disembarkation of the rescued, and their delivery at a place of safety, account should be taken of the above considerations of humanity and correlative protection safeguards. In doing so, mechanisms of cooperation and coordination designed in the SAR Convention should contemplate the recourse to and exchange of up-to-date information and reports that evidence States' systematic failures on human rights law or refugee law that would not meet the test proposed. Finally, cooperation and coordination among States parties to the SAR Convention should consistently guarantee at every stage of the search and rescue services the safety of the persons involved, safety construed in the integrating manner proposed in this thesis.

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In the present political tide of increasing-migration restrictive policies and securitisation at sea, the SAR Convention and therefore the SAR system appear vulnerable to conflicting rationalities and deterrence policy strategies at sea. In this context, it is imperative to uphold and advance considerations of humanity in the reading of the SAR Convention. It becomes urgent to adopt a dynamic approach towards this living instrument, capable of adapting and remaining relevant to the challenges irregular crossings present. Against this backdrop, the interpretative reasoning proposed strives to ascertain whether the SAR Convention can foster an integrating reading for a more responsive approach to search and rescue services in the context of irregular migration by sea. In particular, it endeavours to answer the question whether the construction of the concepts of persons in distress and place of safety can be grounded in international human rights law and international refugee law considerations to be more responsive to the needs arising among sea migrants.

To this end, this thesis has developed an integrating interpretative reasoning of the terms persons in distress and place of safety in the context of the SAR Convention that fosters international human rights law and international refugee law considerations, crucial to respond to the specific needs among sea migrants embarked on irregular crossings. The reading of the SAR Convention has been approached through the vulnerability reasoning lens. Vulnerability reasoning is the starting point for the integrating interpretative reasoning proposed.

As concluded in chapter 1, vulnerability reasoning plays an instrumental role in the reading of the SAR Convention and related instruments. It brings to the forefront of the interpretative reasoning the risks and needs among sea migrants during irregular crossings and at their disembarkation on land, in particular, the exposure to harm or actual harm, be it physical, psychological or moral that determines their situation of lived vulnerability. Vulnerability reasoning underpins the interpretative reasoning proposed, grounded in the principle of systemic integration, to invoke international human rights law and international refugee law considerations as a mechanism of redress. It therefore paves the way to exploring a more responsive approach to search and rescue at sea, tailored to the needs involved among sea migrants to enhance their protection with a more robust response at sea. The key role of vulnerability reasoning in the integrating interpretative reasoning of the SAR Convention encourages further exploratory research on the potential role vulnerability reasoning could

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play in future discussions on the maintenance and promotion of an effective search and rescue system, including the capacity building at sea, the cooperation among States and the responsibility sharing in the implementation of the SAR Convention. It could reinvigorate the debate of the role of the SAR services at sea and the relevance of the SAR Convention in the present state of affairs in the light of the needs accruing at sea.

As considered in chapter 2, the SAR Convention embodies a universal duty to render assistance at sea and proceed to the rescue of persons in situations of distress, grounded in considerations of humanity. It allows a dynamic approach to its reading, based on a duty of due diligence among States whose efforts to operate and maintain adequate search and rescue services are to adapt to the changing circumstances and needs at sea. The SAR Convention further articulates the adaptability of UNCLOS to meet new challenges in the context of irregular crossings.

However, as seen in chapter 2, the SAR Convention presents a compartmentalised approach to its operative design where the needs of maritime traffic are prioritised. Chapter 2 has explained this sectoral approach to the SAR Convention and has scrutinised some functional limitations in the context of irregular crossings and the difficulties that arise therefrom. These include an extraordinary share of responsibility for coordination of SAR operations among front-line coastal States and mechanisms of cooperation that do not offer a sound counterbalance to the effect of the responsibility-sharing system. The latter present their own functional limitations in the context of search and rescue of sea migrants. These shortcomings do not safeguard the interests and protection needs among migrants at sea and upon their disembarkation to a place of safety.

Against this backdrop, chapter 2 has acknowledged the existence of refugee law considerations, notably with regards the principle of non-refoulement. It has suggested that further refugee law and also human rights law considerations are urgent in the interpretation of the notion of persons in distress and the concept of place of safety. Both concepts have a profound significance in the SAR system, the former triggering the commencement of a search and rescue operation and the latter marking its end. The sectoral approach to the SAR system remains the background against which an integrating reading of these key concepts is proposed.

Chapter 3 has scrutinised this sectoral approach to the SAR system against the backdrop of a wide and evolving obligation to promote the establishment, operation and maintenance of adequate and effective SAR services, in accordance with Article 98 of UNCLOS. This

chapter has introduced the concept of underlap to highlight what is presented as an underdevelopment of the SAR Convention. This has been examined in the context of the fragmentation of international law. In the analysis of the fragmentation of international law and its relevance to the present underlap, this chapter has concluded that the latter is a consequence of the former, that differs from the much-studied risk of overlap and the potential for norm conflict. In particular, this underlap has been presented as a consequence of the maritime SAR system being left to a highly specialised body, the IMO, whose remit is fundamentally concerned with the safety, security and environmental performance of the international shipping industry. It has also been presented as a consequence of the maritime SAR plan being framed in an instrument originally designed to respond to the needs of maritime traffic. This has consequently set the course to the study of the doctrinal formula of systemic integration contained in Article 31(3)(c) of the VCLT and its suitability as a guiding interpretative mechanism to achieve a more integrating reading of the SAR Convention, particularly with regards to the notion of persons in distress and the concept of place of safety.

Chapter 3 has further touched upon underlying political and social fragmentation to approach the differing and at times conflicting priorities among interventions at sea. This reinforces the argument in favour of an interpretative legal reasoning and a normative approach for an integrating reading of the SAR Convention to advance human rights law and refugee law considerations in order to further the debate on the role of the maritime SAR system in the context of irregular crossings. The interpretative reasoning of the key terms distress, in particular persons in distress, and place of safety remains key to ascertain whether advancing an integrating reading is possible.

Chapter 4 has therefore focused on the initial stages of this interpretative process, grounded in Article 31 of the VCLT, with regards to the terms defining 'distress'. Particular emphasis has been given to the generic term danger and its qualifying words grave and imminent, as thresholds to the required degrees of intensity and proximity of the danger for search and rescue purposes in the context of irregular crossings, widely acknowledged as unsafe. Chapter 4 has further maintained that vulnerability reasoning brings a corrective mechanism to the weighing of these qualifying words. It remains therefore instrumental in addressing the needs of migrants at sea in this interpretative process. The construction is necessarily informed by the principle of good faith and takes into account the context, the object and purpose of the SAR Convention. This chapter has further concluded that the terms defining 'persons in distress' allow a broad and a dynamic reading, based on their characteristics as

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generic terms, in the context of the SAR Convention as a living instrument, that can accommodate the specific needs of sea migrants and allow enhancing the protection of their integrity at sea. It has also underscored the preventive approach that these terms bring to the SAR Convention and therefore the SAR system. This chapter has finally introduced initial considerations, as part of the interpretative process, of the principle of systemic integration contained in Article 31(3)(c) of the VCLT in order to enhance a *pro homine* approach to the notion of distress and particularly ‘persons in distress’ where the specific needs of sea migrants stand at the centre of the inter-regime dialogue.

Chapter 5 has examined the functioning of Article 31(3)(c) as the last stage of this interpretative process in the construction of the central notion of danger defining the term persons in distress. In the interpretative reasoning proposed, it invokes international human rights law considerations, in particular the safeguard against cruel, inhuman and degrading treatment. In doing so, the interpretative reasoning sustained in chapter 5 has furthered the existing considerations of humanity in the law of the sea and the maritime law realms in the context of search and rescue operations when construing the notion of persons in distress in the sphere of irregular crossings, bearing in mind the crossing conditions sea migrants endure. This stems from the widespread patterns of unsafe practices and ill-treatment inflicted upon undocumented migrants, examined in this chapter, whose effects prolong and even worsen during irregular sea crossings. The physical and psychological effects associated with the hardship of these crossings and the widespread violence allow establishing with reasonable certainty the risks involved during irregular crossings. These dangers are therefore not limited to the endemic unsafe practices but also concern the exposure to pain or harm, physical and / or psychological, the levels of which, it is concluded, fall within the scope of the provisions safeguarding against cruel, inhuman and degrading treatment. Chapter 5 has concluded that the functionality of Article 31(3)(c) of the VCLT, as a legal mechanism in the present interpretative reasoning, is manifest. The international rules on the prohibition of cruel, inhuman and degrading treatment invoked meet the requirement of relevance to the subject matter at stake, that is, the protection of the integrity of persons at sea. They constitute rules of customary international law and therefore meet the requirement of applicability in the relations between the parties to the SAR Convention. Consequently, the integrating interpretative reasoning proposed allows the notion of danger defining ‘distress’ to integrate the exposure to, or the actual suffering of cruel, inhuman or degrading treatment during sea crossings. Accordingly, the rules invoked and the standards applied thereto inform the construction of the term persons in distress in the SAR

Convention, and consequently in the relevant provisions in the SOLAS Convention and UNCLOS. This legal guiding interpretative mechanism consequently enhances the humanitarian *telos* of these legal instruments and allows an interpretation more responsive to the needs of sea migrants embarked in irregular crossings. In this sense, chapter 5 has claimed that this interpretative reasoning, based on Article 31(3)(c) of the VCLT, becomes a mechanism of redress when considering the vulnerability reasoning.

Chapter 6 has considered the construction of the notion of place of safety, relevant to the disembarkation of survivors retrieved from situations of distress at sea. It has followed the interpretative process developed in the previous chapters. The scope of protection invoked in this chapter, however, is wider. It includes international refugee law as well as international human rights law considerations to permeate in the construction of a term conceived in the maritime legal arena. The principle of non-refoulement plays an important role as a matter of application of this rule of customary international law in the last stage of a rescue operation at sea, and it is relevant to the construction of the term ‘place of safety’. However, recent events, such as the official declaration of the Libyan search and rescue region and the support received by Libya to build capacity at sea in order to undertake search and rescue operations, underscore the importance and the urgency to explore further the extent to which an integrating interpretative reasoning could enhance the protection of sea migrants upon disembarkation.

The initial stages of this interpretative reasoning confirm the dynamic reading of the generic term place of safety in the context of a living instrument. In the continuing adaptability of the notion of place of safety to changing circumstances, the vulnerability reasoning remains a key factor in the construction of the term and its assessment on a case-by-case basis as it addresses the protection needs among sea migrants for the purpose of disembarkation. The potential for redress starts at the very stage of interpretation of this concept by invoking protection considerations within international human rights law and, where relevant, international refugee law.

The scope of protection invoked in chapter 6 through the principle of systemic integration contained in Article 31(3)(c) of the VCLT includes protection from threats to lives and freedoms, at the core of international refugee law, available to refugees and asylum-seekers. It further includes the safeguard for the access to fair and efficient refugee status determination procedures, the safeguard against penalisation on grounds of irregular entry and protection mechanisms in the restriction of movement. The latter is complemented in

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international human rights law with the safeguard against arbitrary detention and the protection of the security of persons. The protection envisaged in this integrating interpretative reasoning also includes freedom from torture, cruel, inhuman or degrading treatment or punishment, whether or not related to conditions of detention, and the safeguard against refoulement.

Chapter 6 has confirmed the relevance of the norms invoked. The relevance remains anchored in the subject matter of the protection sought in this reasoning, that is, the physical and mental integrity of the rescued, a common *telos* in the legal regimes invoked.

The applicability of the rules safeguarding against torture, cruel, inhuman or degrading treatment or punishment in the relations between the parties to the SAR Convention presents no difficulty, based on their legal status of customary international law, as seen the previous chapter. Chapter 6 has further established that, in the absence of this legal status and in the absence of an identity of parties to the SAR Convention and to the Refugee Convention or the 1967 Protocol, the argument in favour of the applicability of the norms invoked under refugee law relies on a sufficiently wide degree of consensus and a common understanding among the parties to the SAR Convention of the protection considerations invoked, for the purpose of guiding the construction of the term place of safety. Chapter 6 has concluded that the Guidelines unequivocally convey a wide acceptance on the need to offer international protection to refugees and asylum-seekers recovered at sea. Accordingly, protection considerations for construing the notion of place of safety are to include access to fair and efficient refugee status determination procedures, undoubtedly key to avail refugees and asylum-seekers the effective protection against exposure to persecution on refugee law grounds, in accordance with the Refugee Convention and the 1967 Protocol, considered in the Guidelines. Equally, safety considerations are to foster protection from penalisation on grounds of irregular entry, in accordance with Article 31.1 of the Refugee Convention, as this protection is directly linked to the guarantee of access to fair and effective refugee status determination procedures, at any rate where the penalty consists of the denial of these procedures. Furthermore, the protection afforded in refugee law regarding the restriction of movement is to be contemplated in the construction of the notion of place of safety. This is complemented by the safeguard in international human rights law against arbitrary detention, which, as a norm of customary international law, expresses a common understanding within the international community.

Chapter 6 has therefore concluded that an integrating construction of the notion of place of safety, grounded in international human rights law and refugee law considerations is viable, at any rate to the extent of the norms invoked therein.

For the purpose of this interpretative reasoning, this chapter has further proposed a test to determine whether disembarkation at specific locations constitute delivery at a place of safety that draws on the test applied in cases determining the infringement of the principle of non-refoulement. Therefore, delivery at a place of safety would necessarily exclude locations where there are substantial grounds for believing that there is a real risk for the rescued of being subjected to ill-treatment. It would also exclude locations where there are substantial grounds to believe that there is a real risk for those alleging a well-founded fear of persecution on refugee law grounds to have their lives, integrity and freedoms threatened. The same threshold would apply to the risks involving penalisation on grounds of irregular entry and arbitrary detention. This would necessarily have an impact on the procedures to determine the most appropriate place for disembarkation of the rescued, and their delivery at a place of safety. As considered in chapter 6, mechanisms of cooperation and coordination designed in the SAR Convention should contemplate the recourse to and exchange of up-to-date information and reports that evidence States' systematic failures on human rights law or refugee law that would meet the test proposed. Finally, cooperation and coordination among States parties to the SAR Convention should consistently guarantee at every stage of the search and rescue services the safety of the persons involved, safety construed in the integrating manner proposed.

An integrating reading of the SAR Convention is therefore viable for an interpretative approach that addresses the needs among sea migrants during sea crossings and upon disembarkation. The construction of the concepts of persons in distress and place of safety can be further grounded in international human rights law and international refugee law considerations for a more responsive approach to these needs, at any rate to the extent of the norms invoked in this research. The rules invoked in chapters 4 to 6 for the purpose of the interpretative reasoning proposed do not constitute an exhaustive list of human rights and refugee law considerations that are to be contemplated in the realm of maritime search and rescue. They are rather a starting point for reinvigorating the on-going discussions on the interpretative approach to SAR duties. Considering these rules in the interpretative reasoning suggested will hopefully stimulate further exploratory work in this integrating interpretative process to buttress considerations of humanity in the SAR system, sorely pressing in the context of search and rescue of sea migrants.

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The integrating interpretation reasoning proposed in this thesis has implications for the mechanisms of cooperation and coordination within the SAR system to ensure they take into account protection needs among sea migrants and the norms invoked for the safeguard of their integrity and ultimately their lives. To this end, further exploratory work could be undertaken to scrutinise how it could influence the cooperation between States parties to the SAR Convention and among their rescue coordination centres to promote and maintain effective SAR services, as well as States' capacity building in the implementation of the SAR Convention. The very notion of effective SAR services would integrate the vulnerability reasoning and considerations of humanity to guarantee the protection of the integrity, physical and psychological, of those embarked on irregular crossings, to respond to the specific needs arising therefrom.

Outside the legal interpretative reasoning that looks into existing provisions, institutional collaboration, key in the interaction between international legal regimes, may have important implications for future normative developments. The existing regime interaction initiatives and inter-agency on-going work intended to enable a comprehensive approach to maritime search and rescue with the involvement of UN specialised agencies,¹ focused on States' duties for non-rescue issues, such as immigration and asylum that are outside IMO's mandate,² could be the subject of an exploratory study. The aim would be to assess the potential impact this inter-regime cooperation could have in further developing and promoting human rights law and international refugee law considerations within maritime search and rescue in future normative crafting. Following the integrating interpretative reasoning proposed here, this exploratory path could assess further whether this inter-agency

¹ IMO Resolution A.920(22), adopted 29 November 2001 (Agenda item 8) 'Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea' A 22/RES.920, 22 January 2002 <[http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20A.920\(22\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20A.920(22).pdf)>.

The inter-agency group includes the United Nations High Commission for Refugees (UNHCR), the International Organization for Migration (IOM), the United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS), the United Nations Office on Drugs and Crime (UNODC) and the United Nations Office of the High Commissioner for Human Rights (OHCHR).

² The Guidelines, para 2.2: 'Pursuant to resolution A.920(22), the Secretary-General brought the issue of persons rescued at sea to the attention of a number of competent United Nations specialized agencies and programmes highlighting the need for a co-ordinated approach among United Nations agencies, and soliciting the input of relevant agencies within the scope of their respective mandates. Such an inter-agency effort focusing on State responsibilities for non-rescue issues, such as immigration and asylum that are beyond the competence of the IMO, is an essential complement to IMO efforts'.

initiative could assist not only to maintain a comprehensive approach to search and rescue of sea migrants but also to advance an integrating one, whereby the relevant UN specialised agencies, within their own mandates, have a say on search and rescue issues involving needs and aspects pertaining to their respective scopes of mandate. Inevitably, this would lead to question whether the present models of regime interaction in place are adequate and in the negative, whether they can be developed further to ensure an integrating dialogue between different legal arenas of international law that would enhance protection of sea migrants, and hence their safety, within the SAR system.

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