HUMAN RIGHTS AT SEA

Deprivation of Liberty on board Private Ships: Typology and Cases

Annex I

to the 'Independent International Guidance on Deprivation of Liberty at Sea by Shipmasters, Crew and/or Privately Contracted Armed Security Personnel' *(June 2015)*

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September 2020

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Foreword

This Annex complements the 'Independent International Guidance on Deprivation of Liberty at Sea by Shipmasters, Crew and/or Privately Contracted Armed Security Personnel' issued in June 2015 (hereafter: '2015 DoL Guidance').[1] It consists of two Parts: Part I introduces a typology of potential instances of deprivation of liberty (DoL) on board private ships; Part II illustrates these categories by presenting a series of real cases where persons have arguably been deprived of their liberty on board private ships.

1 David Hammond and Anna Petrig, 'Deprivation of Liberty at Sea: Independent International Guidance on Deprivation of Liberty at Sea by Shipmasters, Crew and/or Private Contracted Armed Security Personnel' (hereinafter: '2015 DoL Guidance') <www.humanrightsatsea.org/wp-content/uploads/2015/06/HRAS_DoL-dps.pdf> accessed 15 August 2020.

Part I: Typology

A. The Threshold of 'Deprivation of Liberty'

This Part introduces a typology of potential instances of deprivation of liberty (DoL) on board private ships. Whether a specific situation amounts to deprivation of liberty – and not to a mere restriction of liberty or even no restriction of movement at all – can only be assessed with regard to a specific case. Generally, three elements must be present for a measure or situation to amount to a deprivation of liberty: space (confinement to a specific place or area), coercion (the person does not consent to be confined to that space) and time (the confinement in that space lasts for a certain time). These three elements are interdependent and must be assessed together.[2]

B. Deprivation of Liberty of Criminal Suspects

The focus of the '2015 DoL Guidance' is on criminal suspects, who are deprived of their liberty by Shipmasters, Crew and/or Privately Contracted Armed Security Personnel (PCASP) up until their handover to competent law enforcement officials for investigation and prosecution purposes.[3] Among the scenarios highlighted in the '2015 DoL Guidance' figure the detention of persons suspected of trafficking in human beings or of engaging in an act of piracy.[4]

Not only trafficking in human beings and migrant smuggling at sea remains a serious concern today (notably in the Mediterranean),[5] but so does piracy and armed robbery at sea in different areas of the world.[6] In addition to mentioned transnational crimes, the United Nations Secretary General designated terrorist acts involving shipping, offshore installations and other maritime interests; illicit trafficking in arms and weapons of mass destruction; illicit trafficking in narcotic drugs and psychotropic substances; illegal, unreported, and unregulated fishing; and intentional and unlawful damage to the marine environment as maritime security threats.[7] It is against this background that it remains a likely scenario that Shipmasters, Crew and/or Privately Contracted Armed Security Personnel find themselves in a situation where they hold criminal suspect on board their ship – be it, for example, persons overpowered in the exercise of their right to self-defence in response (see Part II) to an attack against their ship or persons identified as suspects among people taken on board in the course of a search and rescue operation.

What is more, also the commission of 'ordinary crimes' by crew members or passengers on board a ship may result in them being deprived of their liberty until handover to competent authorities for further investigation and prosecution. For example, cases of deprivation of liberty of persons suspected of having committed sexual offenses on board cruise have been reported (see Part II, Cases 'MSC Divina' and 'Mein Schiff 6').

It is against this background that criminal suspects remain an important category of persons who may be potentially deprived of their liberty on board private ships. However, there are further categories that must equally be contemplated and to which we turn next.

2 Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects*, Brill-Nijhoff, 2014, 156-164.
3 See 2015 DoL Guidance, Section I/1 defining the scope of the guidance.
4 See 2015 DoL Guidance, Foreword.
5 *Ibid*.
6 For an overview on affected areas see '10 Maritime Piracy Affected Areas Around the World' (Marine Insights, 7 October 2019) <www.marineinsight.com/marine-piracy-marine/10-maritime-piracy-affected-areas-around-the-world/> accessed 13 September 2020.
7 UNGA, 'Oceans and the law of the sea: Report of the Secretary-General' (10 March 2008) UN Doc A/63/63, paras 54-113.

C. Deprivation of Liberty for Reasons Other than the Alleged Criminal Conduct

The alleged commission of a criminal offense at sea or on board a ship is not the only instance where Shipmasters, Crew and/or Privately Contracted Armed Security Personnel may potentially deprive a person of his or her liberty until handover to competent authorities. Situations outside a criminal law framework where deprivation of liberty on board a private ship may occur notably include the following: It may, for instance, be necessary to deprive a person of his or her liberty because he or she inflicts or threatens to inflict harm to him- or herself; for example, an attempt or a threat to jump overboard on the open sea (see Part II, Case 'Kaunas Seaways'). It may further be possible that measures amounting to a restriction or even deprivation of liberty may be taken for public health reasons. Most recently, for instance, persons have been quarantined aboard cruise ships due to the SARS-CoV-2 virus (see Part II, 'Diamond Princess') and crews could not be exchanged as foreseen (see Part II, 'Capt. Nilesh Gandhi's oil). Moreover, it is conceivable that deprivation of liberty occurs for imperative reasons of security, notably to protect crew and passengers, before or without a crime being committed and thus for preventive purposes only (see Part II, Case 'Kaunas Seaways'). Another constellation is where private ships are used for the involuntary return of migrants (see Part II, 'Dar al Salam 1') or to hold rescued migrants during negotiations about their disembarkement, like those persons held on board the 'Europa II' and the 'Bahan' (see Part II, 'Captain Morgan Cruises'). Related to these two former constellations, it is also worth considering the challenges faced by NGO-owned migrant rescue ships in times of pandemic (see Part II, 'Alan Kurdi').

D. Terminology Irrelevant

Whether a certain type of measure or situation amounts to deprivation of liberty cannot be said in general but must rather be assessed on a case-by-case basis (see above Section I/A). Importantly, the labelling of a specific act or measure is not decisive in order to decide whether it actually amounts to deprivation of liberty. This is important to remind since in many cases, instances the act of deprivation of liberty is 'hidden' under language such as 'locked', 'kept under guard' and 'held captive' or 'held hostage'; while the terms 'arrest', 'detention' or 'taken into custody' are usually not used in cases where Shipmasters, Crew and/or Privately Contracted Armed Security Personnel deprive persons of their liberty on board private ships.

Part II: Cases

This Part provides an overview on various real cases where persons may have actually been deprived of their liberty. A caveat is in order here: Instances of deprivation of liberty on board private ships are difficult to research given the often scarce, generally not verifiable and at times contradictory information, which is publicly available. It is against this background that for each case, the sources where the information has been taken from, are indicated in the footnotes. They are insufficient to allow for a definite conclusion whether a situation indeed amounted to deprivation of liberty – but since they may do so, they fulfil their purpose to illustrate the various categories of deprivation of liberty on board private ships.

A. 'Monte Rosa': employment of PCASP to prevent criminal attacks

Summary of facts: In light of peaking piracy incidents off the coast of Somalia and beyond from 2006 on, and in later years in the Gulf of Guinea, merchant ships started hiring PCASP in order to harden their ships against potential attacks. Although it is likely that in case of an attack piracy suspects are overpowered by private guards and/or the crew in the course of self-defence and held of board until hand-over to competent authorities for investigation and prosecution, it is virtually impossible to find information about such instances of deprivation of liberty in the public domain. In the following, the example of the Swiss-flagged vessel 'Monte Rosa' serves to illustrate the complexity in terms of states involved if PCASP are used and if an overpowered suspect is deprived of his or her liberty and the reasons why it may amount to deprivation of liberty and the problem in ending deprivation of liberty on board a private ship in a timely manner.

States involved: Swiss-flagged ships are allowed to carry PCASP to prevent their ships becoming victims of criminal attacks, provided they receive a respective authorization by the competent public authority. In 2016, the employment of private armed guards was reported aboard the Swiss-flagged 20'000 tones chemical cargo tanker 'Monte Rosa',[8] whose Shipmaster was of Russian nationality and the crew of Ukrainian and Filipino nationalities.[9] Two guards of Ukrainian nationality and their chief of Romanian nationality, a former police officer, were in charge of securing the cargo from potential pirate attacks; he was commissioned by an Israeli company based in Malta and Cyprus, Seagull Maritime Security.[10] The guards embarked on the Port of Said (Egypt) in order to reinforce the security of the cargo during its passage through the Gulf of Aden, which is part of the so-called High Risk Area.[11] The security personnel received a delivery of weapons, ammunition, and protection equipment and performed training exercises aboard the chemical cargo and off the coast of Sudan (island of Barr Musa Kabir).[12] While on its way to Djibouti, a vessel with 7 to 8 people on board was spotted, which ultimately turned out to be a fishing vessel.[13] While in this case the spotted ships was not engaged in any criminal activity, many merchant ships passing the High Risk Area became subject to a piracy attack. If in the course of self-defence against such criminal attack PCAS overpower piracy suspects, the issue of DoL becomes acute.

8 Olivier Grivat, 'Un cargo suisse armé jusqu'au pont dans le Golfe d'Aden' (Swissinfo, 8 March 2016) <www.swissinfo.ch/fre/politique/pirates-des-mers-chaudes_un-cargo-suisse-arm%C3%A9-jusqu-au-pont-dans-le-golfe-d-aden-manque-photos/41969558> accessed 13 September 2020.

9 *Ibid*.

10 *Ibid*.

11 *Ibid*.

12 *Ibid*.

13 *Ibid*.

Reasons for DoL: The persons are deprived of their liberty because they are suspected of criminal activity of have been caught red-handed while engaging in a criminal offense at sea. While PSCAP are not allowed to actively overpower criminal suspects (this right is reserved to law enforcement officials as per Article 107 UNCLOS), they are clearly allowed to keep suspects overpowered in the course of self-defence on board the merchant ship until hand-over to law enforcement authorities is possible.[14]

Indica of DoL: All three elements mentioned above – space, time, coercion – are fulfilled if suspects are held by PSCASP, who act under the ultimate authority of the shipmaster, on board a private ship. In some jurisdictions, the master even possesses over the public authority to formally arrest and detain criminal suspects.[15]

End of DoL on board: To timely end DoL on board private merchant ships may be challenging. Even for patrolling naval states engaged in counter-piracy operations off the coast of Somalia were at times not able to find a state willing to take over the piracy suspects for criminal prosecution. This led to the so-called 'catch-and-release'-practice.[16] For the master of a private ship, it may be equally challenging to identify a port state willing to receive the piracy suspects.

B. 'MSC Divina': alleged sexual assault on board a cruise ship

Summary of facts: In April 2019, a sexual offence was reported to have allegedly taken place aboard the cruise-ship 'MSC Divina'.[17] The incident involved a 17-year-old victim from the United Kingdom and the 18-year-old suspect of Italian nationality. The alleged crime took place while the ship was flying a Panamanian flag and sailing between Palma de Mallorca and Valencia. The alleged crime is said to have occurred around 5 am in the morning of 11 of April 2019.[18] Shortly after, the victim knocked on the door of the office of security officer(s) and reported that an Italian person raped her, that she had no doubt about his identity and provided details of the alleged crime.[19] The security officer(s) thereupon informed the shipmaster and steps to secure evidence have been taken.[20] What exactly happened with the suspect while on board is not reported, but when the ship docked in Valencia at 7.35 am, the shipmaster handed the suspect over to the Spanish police.[21] The cruise-ship left the port for Marseille the same day without the suspect,[22] who was kept imprisoned in Valencia by Spanish authorities for two days until a Spanish court decided that Spain had no jurisdiction over the offence.[23]

States involved: The United Kingdom (victim's state of nationality); Italy (suspect's state of nationality); Panama (Flag State); Switzerland (MSC Cruise Ships' headquarters); and Spain (Port State).

14 Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates', *62 International and Comparative Law Quarterly* (2013), 693-694. See also Art. 8 SUA Convention on the delivery of suspects to competent law enforcement authorities by the master of a private ship.

15 See distinction in 2015 Guidance, 'Section III Authorisation and requirements for DoL (Fundamental Rule I), item 8, Private Arrest and Detention'.

16 Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects, Brill-Nijhoff,* 2014, 282.

17 'MSC Divina' (*Vessel Tracker*) <www.vesseltracker.com/en/Ships/Msc-Divina-9585285.html> accessed 13 September 2020.

18 Andrea Pasqueletto, '"Mi ha violentata in crociera": lo stupro e il vuoto legislativo che ha rimesso in libertà l'accusato' *Corriere* (17 April 2019) <www.corriere.it/cronache/19_aprile_17/mi-ha-violentata-crociera-stupro-l-intrigo-internazionale-f4e51012-608a-11e9-b055-81271c93d411.shtml> accessed 13 September 2020.

19 *Ibid*.

20 *Ibid*.

21 *Ibid*.

22 *Ibid*.

23 *Ibid*.

Reasons for DoL: Measures potentially amounting to DoL have been taken for the suspicion of criminal conduct up until the person could be handed over to competent authorities on shore.

Indicia for DoL: According to the narrative of facts, the suspect was deprived of his liberty aboard the cruise-ship by the security officer(s) and the shipmaster for some hours until he was handed over to the Spanish police in the port of Valencia.

End of DoL on board: A Spanish court decided that Spain has no jurisdiction over the criminal offence, arguing that the offence took place on the high seas, and ordered the release of the suspect.[24] The judge further argued that Panama, the Flag State, would have criminal jurisdiction over the case and that Italy (state of nationality of the suspect) or the United Kingdom (state of nationality of the alleged victim) should take the lead in the investigation of the offense.[25]

C. 'Schiff 6': alleged sexual assault on board a cruise-ship

Summary of facts: In mid-May 2017, the German-flagged and German-owned TUI cruise-ship 'Mein Schiff 6',[26] set sail from Kiel to Hamburg, i.e. from the North Sea coast to the river Elbe (German internal waters) on a 'test-voyage' organized for its employees, their families and friends before officially launching the new cruise ship to the general public. According to media reports, two men of German nationality, one a 30-year old finance employee of TUI Cruise and his 27-year old friend, have allegedly raped a British woman, who was also a TUI Cruise employee, during this 'test-voyage'.[27] It is stated that after intense alcohol consumption at a bar on board, the victim accompanied one of the suspects to his cabin, where the second suspect was supposedly asleep. Shortly thereafter, the three engaged in sexual activity together.[28] The next morning, the victim reported that she would have been raped by two men[29] The suspects denied the accusation and argued that they had consensual sex.[30] According to a detailed narrative, the two suspects alleged that the victim left their cabin at 9 a.m. in the morning following the alleged rape, at 4 p.m. of the same day, while the two were at the pool, when two security guards approached them and took them hostage to a windowless 8m2 cabin on the bottom of the ship.[31] The men further reported that there was a language barrier, poor communication, lack of answers to their request of the reason for their arrest onboard by the cruise-ship security guards.[32] According to the suspects, only five hours and a half after they were held captive in the ship's cabin, that is at 9:30 p.m., they understood the reason for their imprisonment and denied that they forced the woman into sex.[33] Between 9 p.m. and 11 p.m. the alleged suspects were investigated by the ship's doctor, the cabin was also investigated by ship personnel and the men were taken back to their onboard 'cell', where

24 Elizabeth Malkin, 'Report of Sexual Assault on Cruise Ship Shows Gaps in International Law' *The New York Times* (19 April 2019) <www.nytimes.com/2019/04/19/us/cruise-ship-crimes-laws.html> accessed 13 September 2020.

25 Lindsey Bever, 'Why authorities in Spain were forced to release an alleged cruise-ship rapist?' *The Washington Post* (15 April 2019) <www.washingtonpost.com/world/2019/04/15/cruise-ship-rape-suspect-set-free-due-international-waters-loophole/> accessed 13 September 2020.

26 'Mein Schiff 6' (*TUI Cruise entdecken*) <www.tuicruises.com/mein-schiff-6> accessed on 13 September 2020.

27 'Mein Schiff 6: Frau vergewaltigt?' (*Schiffe und Kreuzfahrten*, 2 June 2017) www.schiffe-und-kreuzfahrten.de/news/mein-schiff-6-frau-vergewaltigt/129379/> accessed 13 September 2020.

28 'Mein Schiff 6' (*Crew Center*, 4 June 2017) <https://crew-center.com/british-woman-reports-rape-cruise-ship-mein-schiff-6#:~:text=TUI%20Cruises%20confirmed%20the%20incident,is%20an%20accusation%20of%20rape.%E2%80%9D> accessed 13 September 2020.

29 *Ibid*.

30 *Ibid*.

31 Sebastian Kempkens 'Kreuzfahrtschiffe: Verdächtig' *Die Zeit* (24 Mai 2017).

32 *Ibid*.

33 *Ibid*.

they were to remain imprisoned until noon the next morning until handed over to the police.[34] The suspects' lawyer/the defence lawyer alleged serious breach of human rights, criminal law and forensic procedures, .e.g. suspects were denied the right to remain in silence, to have a translator or answer the interrogation in their mother tongue, were also denied the right to speak to family and friends, the right to know at first hand the reason for their arrest, and had to pay for the medical examination themselves.[35] Most notably the ship personnel did not issue an arrest warrant. [36]

States involved: Germany (state of nationality of the suspect, Coastal, Port and Flag State, and TUI Cruises headquarters) and the United Kingdom (state of nationality of the alleged victim).

Reasons for DoL: Measures potentially amounting to DoL have been taken for the suspicion of criminal conduct on board the ship.

Indicia for DoL: The three elements of DoL seem to be fulfilled in present case. The suspects were locked in a small cabin on the bottom deck of the ship (place); they were kept there for around 20 hours (time); and from the facts accrue that they did not consent to be placed in the small cabin for almost one day and one night (coercion).

End of DoL on board: Deprivation of liberty onboard lasted for approximately 20 hours between 4 p.m. and noon of the next morning.[37] Thereafter, the suspects were handed to the police in Hamburg.[38]

D. 'Kaunas Seaways': migrant stowaways

Summary of facts: Between July and October 2017, twelve migrants were locked in four cabins of a Danish-owned sailing freight and passenger ferry 'Kaunas Seaways',[39] at that time, sailing under the Lithuanian flag in the Black Sea.[40] The ferry company 'Det Forenede Dampskibs-Selskab' (hereafter: DFDS) reported that the migrants embarked on 27 July 2017.[41] The DFDS suspected that the young men, in spite of various security measures, boarded by hiding in a trailer that was loaded onto the ferry, at the port of Ankara in Turkey.[42]

States involved: A series of states had links with the incident and where involved various capacities: Algeria and Morocco (the migrants' respective state of nationality); Denmark (DFDS is a Danish company owning the 'Kaunas Seaways'); Lithuania (the Flag State); Turkey (the Port State where the migrants embarked); Ukraine (another Port State as at some point of the voyage the ferry docked there).[43]

34 *Ibid*.
35 *Ibid*.
36 *Ibid*.
37 Sebastian Kempkens 'Kreuzfahrtschiffe: Verdächtig' *Die Zeit* (24 Mai 2017).
38 'Vergewaltigung auf Kreuzfahrtschiff? Polizei ermittelt' *Die Welt* (2 June 2017) <www.welt.de/regionales/hamburg/article165206159/Vergewaltigung-auf-Kreuzfahrtschiff-Polizei-ermittelt.html> accessed 13 September 2020.
39 'Kaunas Seaways' (*Marine Traffic*) <www.marinetraffic.com/en/ais/details/ships/shipid:353240/mmsi:353468000/imo:8311924/vessel:KAUNAS> accessed 13 September 2020.
40 Julie Thomsen, 'No country for migrant stowaways caught on ferry between Ukraine and Turkey' *Reuters* (Copenhagen, 14 September 2017) <www.reuters.com/article/us-denmark-migrants-ferry/no-country-for-migrant-stowaways-caught-on-ferry-between-ukraine-and-turkey-idUSKCN1BP28I> accessed 13 September 2020; 'Migrants on Kaunas Seaways flow back to Algeria' (*Det Forenede Dampskibs-Selskab*), hereafter: DFDS, Copenhagen, 9 April 2018) <www.dfds.com/en/about/media/news/migrants-on-kaunas-seaways-flown-to-algeria> accessed 13 September 2020.
41 'Migrants on Kaunas Seaways flow back to Algeria' (*DFDS*, Copenhagen, 9 April 2018) <www.dfds.com/en/about/media/news/migrants-on-kaunas-seaways-flown-to-algeria> accessed 13 September 2020.
42 Julie Thomsen, 'No country for migrant stowaways caught on ferry between Ukraine and Turkey' *Reuters* (Copenhagen, 14 September 2017) <www.reuters.com/article/us-denmark-migrants-ferry/no-country-for-migrant-stowaways-caught-on-ferry-between-ukraine-and-turkey-idUSKCN1BP28I> accessed 13 September 2020.
43 *Ibid*.

Reasons for DoL: Two main reasons are reported as justifications for taking measures vis-à-vis the migrants, which potentially amount to deprivation of liberty. First, the migrants reportedly threatened to commit suicide by jumping overboard; DoL is thus be said to be taken in order to protect the migrants. Second, it is reported that the migrants acted with violence and aggression[44] and that DoL measures have been necessary to ensure the safety and security of the crew and passengers of the ferry.[45]

Indicia for DoL: The migrants were kept locked in cabins under guard by Turkish security personnel hired by the Danish ferry company for approximately three months (from 27 July until 31 October 2017).[46]

End of DoL: The states involved ultimately found a diplomatic solution, which consisted in flying the migrants to their respective home states.[47]

E. 'Dar al Salam 1': migrants held on board fishing vessel during involuntary return

Summary of facts: On the evening of 12 April 2020, three aging blue trawlers, among them the 'Dar Al Salam 1',[48] departed the Grand Harbour in Valletta, the Maltese capital, within an hour of each other, at the request of the Maltese authorities.[49] The trawlers were sent to intercept a migrant vessel attempting to reach Malta from Libya, and which had been issuing mayday calls for some 48 hours.[50] The migrant vessel in question was still in international waters, but has reached Malta's search and rescue zone.[51] On April 15, the privately-owned 'Dar al Salam 1' intercepted the migrant boat carrying 40 men, 8 women, and 3 children, and returned them to Libya, where they were brought to the Tarik al Sikka detention centre in Tripoli.[52]

States involved: Malta requesting the owner and crew of private vessels to carry out a search and rescue and return operation (Coastal State). The fishing vessel 'Dar al Salam 1' is registered in Tobruk, a port in east Libya controlled by opponents of the authorities in Tripoli, but physically based in Malta and owned by a Maltese shipowner.[53] Libya is therefore the flag State.

Reasons for DoL: Malta, as the Coastal State, had the duty to rescue the migrant vessel in distress and take the rescued asylum seekers to a safe port. Against this background, one may justify this Maltese measure as a safety one.

44 'Migrants stick on endless ferry journey as countries refuse their entry' *The Guardian* (14 September 2017) <www.theguardian.com/world/2017/sep/14/migrants-locked-in-ferry-cabins-for-seven-weeks-as-countries-refuse-entry> accessed 13 September 2020; Julie Thomsen , 'No country for migrant stowaways caught on ferry between Ukraine and Turkey' *Reuters* (Copenhagen, 14 September 2017) <www.reuters.com/article/us-denmark-migrants-ferry/no-country-for-migrant-stowaways-caught-on-ferry-between-ukraine-and-turkey-idUSKCN1BP28I> accessed 13 September 2020.

45 'Migrants on Kaunas Seaways flow back to Algeria' (*DFDS*, Copenhagen, 9 April 2018) <www.dfds.com/en/about/media/news/migrants-on-kaunas-seaways-flown-to-algeria> accessed 13 September 2020.

46 *Ibid*.

47 *Ibid*.

48 'Dar Al Salam 1' (*Shipspotting*) <www.shipspotting.com/gallery/photo.php?lid=3002949> accessed 13 September 2020.

49 Patrick Kingsley and Haley Willis, 'Latest Tactic to Push Migrants from Europe? A Private, Clandestine Flee' *The New York Times* (30 April 2020) <www.nytimes.com/2020/04/30/world/europe/migrants-malta.html> accessed 13 September 2020.

50 *Ibid*.

51 *Ibid*.

52 Rupert Colville, 'Press briefing note on migration rescues in the Mediterranean: Spokesperson for the UN High Commissioner on Human Rights' (*Relief*, Geneva, 8 May 2020) <https://reliefweb.int/report/world/press-briefing-note-migrant-rescues-mediterranean-spokesperson-un-high-commissioner> accessed 13 September 2020.

53 Patrick Kingsley and Haley Willis, 'Latest Tactic to Push Migrants from Europe? A Private, Clandestine Fleet' *The New York Times* (30 April 2020) <www.nytimes.com/2020/04/30/world/europe/migrants-malta.html> accessed 13 September 2020.

Indicia for DoL: While the orders to rescue and return migrants to Libya were issued by the Maltese authorities, the state relied upon private vessels to carry out the operation. Between 'interception' by the crew of the trawlers and being brought to Libya, the migrants were arguably deprived of their liberty on board the fishing trawlers (space) from the moment the crew decided to bring them to Libya (time) against their will (coercion). From this moment on they have been confined to the ship for a certain amount of time and against their will because they have no longer been on board the ship for the purpose of rescue but rather of involuntary return.

End of DoL on board: Once landed on Libyan shore, the migrants were brought to the Tarik al Sikka detention centre in Tripoli.[54]

F. 'Captain Morgan Cruises': migrants held on board tourist ferries

Summary of facts: Since the 30 April 2020, the Maltese government has been paying a private company to keep persons rescued on the high seas on vessels designed for pleasure cruises.[55] On 30 April 2020, the Maltese government arranged for the transfer of 57 people rescued the day before by a private fishing vessel to the 'Europa II',[56] a 34.75-meter tourist ferry boat owned by Captain Morgan Cruises Ltd.[57] On 7 May 2020, a patrol boat of the Maltese Armed Forces rescued 45 people and coordinated the rescue by a fishing boat of 78 people.[58] While all 18 women and children rescued during these two incidents were reportedly taken ashore, the other 105 rescued persons were transferred the same day from the vessel of the Armed Forces and the fishing vessels employed to the 'Bahari',[59] a 23.59-meter tourist ferry boat owned by the same company.[60] On 15 May 2020, that same group of migrants was transferred to the 'Atlantis',[61] a 39.6-meter ferry boat equally owned by Captain Morgan Cruises.[62]

State(s) involved: Malta is the flag State of the Captain Morgan Ldt. ferries.

Reasons for DoL: Despite the fact that the Maltese government did not communicate whether holding persons on board these tourist boats was a form of mandatory quarantine to limit the potential spread of the coronavirus in land or that any evidence of isolation or testing onboard took place straight away,[63] the sanitary crisis in light of this pandemic is believed to be the main reason behind this unprecedented measures taken by the Maltese authorities.

54 Rupert Colville, 'Press briefing note on migration rescues in the Mediterranean: Spokesperson for the UN High Commissioner on Human Rig hts' (*Relief*, Geneva, 8 May 2020) <https://reliefweb.int/report/world/press-briefing-note-migrant-rescues-mediterranean-spokesperson-un-high-commissioner> accessed 13 September 2020.

55 'Malta: Disembark Rescued People End Arbitrary Detention on Tourist Ferry Boats' (*Human Rights Watch*, 22 May 2020) <www.hrw.org/news/2020/05/22/malta-disembark-rescued-people> accessed 13 September 2020.

56 'Europa II' (*Captain Morgan*) <www.captainmorgan.com.mt/europa2?l=1> accessed 13 September 2020.

57 Diana Cacciottolo, 'Malta charters Captain Morgan's boats to house rescued migrants: 57 migrants rescued will stay on a boat that usually ferries tourists' *Malta Times* (30 April 2020) <https://timesofmalta.com/articles/view/malta-charters-captain-morgan-boat-to-house-rescued-migrants-off-shore.789095> accessed 13 September 2020.

58 Matthew Xuereb, 'Large Captain Morgan ferry deployed for rescued migrants: Another vessel has been at sea for almost two weeks with 57 migrants on board' *Malta Times* (15 May 2020) <https://timesofmalta.com/articles/view/larger-captain-morgan-ferry-deployed-for-rescued-migrants.792263> accessed 13 September 2020.

59 'Bahari' (*Captain Morgan*) <www.captainmorgan.com.mt/bahari?l=1> accessed 13 September 2020.

60 'Malta: Disembark Rescued People End Arbitrary Detention on Tourist Ferry Boats' (*Human Rights Watch*, 22 May 2020) <www.hrw.org/news/2020/05/22/malta-disembark-rescued-people> accessed 13 September 2020.

61 'Atlantis' (*Captain Morgan*) <www.captainmorgan.com.mt/atlantis?l=1> accessed 13 September 2020.

62 Matthew Xuereb, 'Large Captain Morgan ferry deployed for rescued migrants-Another vessel has been at sea for almost two weeks with 57 migrants on board' *Times Malta* (15 May 2020) <https://timesofmalta.com/articles/view/larger-captain-morgan-ferry-deployed-for-rescued-migrants.792263> accessed 13 September 2020.

63 *Ibid*.

Indicia of DoL: The three criteria – space, coercion and time – seem to be fulfilled since the migrants spent a longer time of period (between weeks to over a month depending upon the moment of their rescue and transfers to the cruise-ships) against their will on board small vessels destined for tourism purposes and not equipped to accommodate persons for longer than a couple of hours. The orders to the Shipmaster and company to engage in described conduct have been issued by Maltese authorities, while the migrants have been held on board private ships for a longer period of time.

End of DoL on board: It was only between the 6th and the 7th of June 2020 that the Maltese government decided to take the asylum-seekers aboard the Captain Morgan chartered vessels to shore, implying that some of them, i.e. the ones that were first rescued were locked abroad for over a month, while other lately rescued remained aboard for weeks.[64] At the time disembarkment took place, there were over 400 migrants aboard, and the decision seems to be taken after the deterioration of safety and security conditions onboard, i.e. in 'Europa II', a group of migrants held 30 crew members and security officers on the bridge.[65]

G. 'Alan Kurdi': NGO rescue ship

Summary of facts: The German-flagged 'Alan Kurdi', which is owned by the charity Sea-Eye,[66] is engaged in migrant rescue operations in the Mediterranean Sea. On 6 April 2020, the 'Alan Kurdi' rescued 150 migrants from two wooden boats and was denied the permission to land at the harbour of Parlemo on the Italian island of Sicily. The decision of the Italian authorities was based on a decree of 8 April 2020 stating that the 'On April 8, the Italian country's ports were not safe harbours for persons rescued at sea by non-Italian flagged vessels during the coronavirus emergency.[67] Italy made it clear that it will not allow vessels with rescued migrants to land even in case the distribution of the migrants to other European Union States had already been agreed beforehand.[68] It argued that due to the Covid-19-pandemic, the military and health care system would already be overburdened and not having the capacity to receive new migrants. Against this background, the 'Alan Kurdi' has been denied entry into port for eleven days; and a subsequent two-week quarantine of the crew and rescued migrants.[69] 'The situation on board the vessel, which was not designed to accommodate so many people over such a long period of time, became increasingly acute.'[70] Reports included suicide attempts by onboard rescued migrants, as well as reports of violence and aggression among migrants themselves and migrants versus and crew.[71] Media sources also reported that the 'Alan Kurdi' was initially denied urgently needed drinking water, food, and fuel.[72] On April 12, the crew was promised that an Italian quarantine ship would receive the rescued refugees within a few hours, but it was not for another five days that the ship even set sail.[73] The Italian authorities promised to transfer the migrants to another vessel, equipped with a medical care centre, Italian medical officials and Red Cross employees to provide

64 'Migrants allowed to disembark from tourist boats amid takeover fears' *Times Malta* (6 June 2020) <https://timesofmalta.com/articles/view/all-captain-morgan-migrant-boats-to-be-brought-in-to-malta.796974> accessed 13 September 2020.

65 *Ibid*.

66 'Alan Kurdi' (*Marine Traffic*) <https://cdn.marinetraffic.com/pt/ais/details/ships/shipid:130686/mmsi:211215130/imo:5285667/vessel:ALAN_KURDI> accessed 13 September 2020.

67 Martin Kreienbaum, 'Rescue of refugees in the Mediterranean Sea halted' (*World Socialist Website*, Published by the International Committee of the Fourth International, 23 April 2020) <www.wsws.org/en/articles/2020/04/23/medi-a23.html> accessed 13 September 2020.

68 *Ibid*.

69 'Sea Eye gelingt die Befreiung des Rettungsschiffes Alan Kurdi' (*Sea-Eye*, 26 June 2020) <https://sea-eye.org/sea-eye-gelingt-die-befreiung-des-rettungsschiffes-alan-kurdi/> accessed 13 September 2020.

70 Martin Kreienbaum, 'Rescue of refugees in the Mediterranean Sea halted' (*World Socialist Website*) 23 April 2020 <www.wsws.org/en/articles/2020/04/23/medi-a23.html> accessed 13 September 2020.

71 *Ibid*.

72 *Ibid*.

73 *Ibid*.

the migrants with basic health care.[74] On April 17 2020, the migrants rescued by 'Alan Kurdi' were transferred to the 'Rubattino' ferry, which already counted with 34 migrants rescued by a Spanish-flagged ship.[75] The 'Rubattino' is owned by the Italian company Tirrenia and is built to carry a total of 1,471 passengers and has 289 cabins and a medical center.[76] According to the news agency AFP, it is not clear if each migrant would be confined to an individual cabin, but they were to stay on board for at least 14 days before being distributed among various EU States.[77] Later, after the quarantine of the 'Alan Kurdi' crew was over, the Italian coast guard alleged non-compliance with security standards. Accordingly, the Italian coast guard seized the 'Alan Kurdi' docked in the Port of Palermo from the 5 May to, approximately, the beginning of June 2020.[78] Nonetheless, the crew change and maintenance work was allowed by the Italian coast guard.[79]

States involved: Germany (the Flag State of 'Alan Kurdi'), Italy (the Port State and the Flag State of the 'Rubattino') and Spain (as the next Coastal State to 'Alan Kurdi' as the NGO vessel departed from the Port of Palermo to the coast of Spain).

Reasons for DoL: Sanitary reasons in light of Covid-19-pandemic.

Indicia of DoL: There are two different, subsequent instances of DoL. Both meet the criteria set out in Part I/A. Firstly, the crew and rescued migrants were confined on board the ship 'Alan Kurdi' (space) and denied entry into port (coercion) for approximately 11 days (time). Thereafter, they were imposed a 14-day (time) compulsory quarantine (coercion) in a privately-owned Italian chartered vessel (space) until they were allowed to disembark on the 6 May 2020- a month after the rescue action took place.[80]

End of DoL on board: After being quarantined in the Italian chartered vessel, both 'Alan Kurdi' crew and the rescued migrants reached land on 4 May 2020.[81] At a meeting in Rome, on June 10, Sea-Eye agreed with the Italian coast guard that the 'Alan Kurdi' may leave the port of Palermo if the Flag State consents and the Spanish authorities agree to the arrival of the ship, which eventually occurred, and the ship set sail to Spain.[82] As concerns the migrants, Italy said that they would be allocated to other EU States, but up to early June 2020 there was no report on this allocation plan.[83]

74 'Italy to move Alan Kurdi migrants to another ship', *Deutsche Welt* (12 April 202) <www.dw.com/en/italy-to-move-alan-kurdi-migrants-to-another-ship/a-53101670> accessed 13 September 2020.

75 Emma Wallis, '180 migrants quarantined on board a ferry a ferry near Palermo' (*Info Migrants*, 20 April 2020) <www.infomigrants.net/en/post/24224/180-migrants-quarantined-on-board-ferry-near-palermo> accessed 13 September 2020.

76 *Ibid*.

77 *Ibid*.

78 'Sea Eye gelingt die Befreiung des Rettungsschiffes Alan Kurdi' (*Sea-Eye*, 26 June 2020) <https://sea-eye.org/sea-eye-gelingt-die-befreiung-des-rettungsschiffes-alan-kurdi/> accessed 13 September 2020.

79 'Hamburg is the new port of the Sea Eye ship' (*Sea Eye*) <https://sea-eye.org/en/rescue-ship-alan-kurdi-leaves-palermo-for-the-central-mediterranean/> accessed 13 September 2020

80 *Ibid*.

81 'Italy blocks German migrant rescue ship Alan Kurdi for "irregularities"' *Daily Sabah* (6 May 2020) <www.dailysabah.com/world/europe/italy-blocks-german-migrant-rescue-ship-alan-kurdi-for-irregularities> accessed 21 August 2020.

82 'Sea Eye gelingt die Befreiung des Rettungsschiffes Alan Kurdi' (*Sea-Eye*, 26 June 2020) <https://sea-eye.org/sea-eye-gelingt-die-befreiung-des-rettungsschiffes-alan-kurdi/> accessed 13 September 2020.

83 Marion MacGregor, 'Italy impounded migrants rescue ship Alan Kurdi' (*Info Migrants*, 5 June 2020) <www.infomigrants.net/en/post/24565/italy-impounds-migrant-rescue-ship-alan-kurdi> accessed 15 August 2020.

H. 'Diamond Princess': cruise ship passengers quarantined during Covid-19-pandemic

Summary of facts: The 'Diamond Princess'[84] hosted 621 passengers diagnosed with Covid-19 while floating alongside the Port of Yokohama, Japan, for 14 days in February 2020.[85] The cruise originally hosted 3,711 people between crew members and guests aboard.[86]

States involved: The United Kingdom (Flag State, State where the operator is based and State of nationality to some of the passengers and crew members), Japan (Port State), Hong Kong, Australia and Canada (all States of nationality of the passengers and crew members).

Reasons for DoL: Sanitary reasons in light of SARDS Covid-19 outbreak onboard.

Indicia of DoL: This regards a contemporary example of DoL, where extraordinary measures are employed by States, particularly Port States, backed by their sovereignty to deny disembarkment in their ports and close their borders, in light of sanitary, health and anti-epidemic reasons. If we assess closely the three elements of DoL (enumerated in Part 1/A) all of them are present to this case: i) passengers and crew members were confined in cabins (space); ii) this 'confinement' was against their will (coercion); and iii) lasted approximately 2 weeks (time).

End of the DoL on board: Guests and crew members originally from Hong Kong, Canada and Australia on the ship have been given the option to fly home (on government chartered flights) to dry land for another 14-day period of isolation, and the most elderly, vulnerable passengers over 80 years old on the ship have been offered rooms and bento boxes on land to finish out their quarantines.[87] Whereas, the United States did not allow any passengers who have stayed aboard to come home for another two weeks after they left the ship.[88] According to the ship operator, all the passengers/guests were disembarked, and less than 500 crew members remained onboard, by the 27th of February 2020, with some awaiting government chartered flights and for those other team members who had not depart by government chartered flights, the operator had finalized plans with the Japan Ministry of Health for a quarantine shoreside facility in Japan.[89]

84 'Diamond Princess' (*Marine Traffic*) <www.marinetraffic.com/en/ais/details/ships/shipid:201389/mmsi:235103359/imo:9228198/vessel:DIAMOND_PRINCESS> accessed 13 September 2020.

85 'False claim: the Diamond Princess quarantine was fake' *Reuters* (28 February 2020) <https://br.reuters.com/article/asia/idUSKCN20M15M> accessed 13 September 2020.

86 *Ibid*.

87 'Diamond Princess Updates' <www.princess.com/news/notices_and_advisories/notices/diamond-princess-update.html> accessed 13 September 2020; 'Experts say the cruise ship quarantine was unjustified and violated human rights, letting the coronavirus 'literally pick them off one by one' (*Business Insider*, 12 February 2020) <www.businessinsider.com/covid-19-coronavirus-quarantines-have-failed-health-law-ethics-experts-2020-2> accessed 13 September 2020.

88 'Experts say the cruise ship quarantine was unjustified and violated human rights, letting the coronavirus literally pick them off one by one' (*Business Insider*, 12 February 2020) <www.businessinsider.com/covid-19-coronavirus-quarantines-have-failed-health-law-ethics-experts-2020-2> accessed 18 August 2020.

89 'Diamond Princess Updates' (*Princess*) <www.princess.com/news/notices_and_advisories/notices/diamond-princess-update.html> accessed 13 September 2020.

I. 'Capt. Nilesh Gandhi's' oil tanker': crew prohibited to disembark during the Covid-19-pandemic

Summary of the facts: In February 2020, Capt. Nilesh Gandhi's crew has successively been prohibited to disembark and fly home along the oil tanker's journey. Initially, the oil tanker attempted to dock in China without success, then it kept working until Singapore, where by the time it arrived there authorities had already imposed prohibition upon all crew changes, thereafter the commercial ship attempted to dock in Sri Lanka, where the government banned crew members from getting off the ship, and the next two stops of the voyage, i.e. Saudi Arabia and the United Arab Emirates, have also forbidden crew members from leaving the ship.[90] Some of the crew members of this oil tanker were from India, whose government at the time advised crew members to keep working indefinitely in all but the most extreme emergencies.[91] This example generally illustrates the hardship faced by seafarers in the outbreak of the Covid-19-pandemic, many of whom worked over-contract, and faced shortage of food and drinking water supplies abroad, in short, they were deprived of their workers and human rights guarantees as governments adopted unprecedented border-closure measures worldwide. It was estimated, in March 2020, that 150,000 crew members with expired work contracts have been forced into continued labour aboard commercial ships worldwide to meet the demands of governments that have closed their borders and yet still want fuel, food and supplies. Further figures from the World Economic Forum show that since the coronavirus crisis began, as many as 1 in 6 of the 1 million crew on 60,000 cargo ships at sea have been marooned as crew changes were suspended in March 2020, as a short-term solution to avoid disruption to approximately 90% of the world's supply system by volume, which is transported at sea.[92] As of mid-June 2020, as many as 300,000 seafarers a month needed international flights to enable the changeover of crews, according to the International Maritime Organisation and the United Nations Conference on Trade and Development.[93] This unprecedented reality led the UN Secretary General, António Guterres, to recognise a humanitarian crisis at sea.[94]

States involved: India and the Philippines (States of nationality of the seafarers), China, Singapore, Sri Lanka, Saudi Arabia and the United Arab Emirates (all are Port States).[95]

Reasons for DoL: Sanitary measures taken by Port States in light of SARS Covid-19 outbreak that prohibited disembarkement and changes crew members.

Indicia of DoL instances: It again illustrates a contemporary scenario of deprivation of liberty aboard commercial ships, where seafarers who have been forced to stay onboard and work over contract, with minimum or if any workers rights standards. Here the three DoL elements (Part I/A) are present: i) space (the merchant ship i.e. their workplace), ii) coercion (deprived of their freedom of movement to return home and work against their will or much longer than the contracts allowed) and iii) time (this situation went through weeks and months depending on each case by case).

90 Matt Apuzzo and Selam Gebrekidan 'Trapped at Sea by COVID 19 Lockdowns, Crew Members Plead for Help' *The New York Times* (25 March 2020) <www.nytimes.com/2020/03/25/world/europe/coronavirus-ship-crews-trapped.html> accessed 13 September 2020.

91 *Ibid*.

92 Kate Whiting, 'Stuck at sea: How to save the world's seafarers and the supply systems they support' (*World Economic Forum*, 19 June 2020) <www.weforum.org/agenda/2020/06/shipping-seafarers-covid-19-mental-health-supply-systems/> accessed 13 September 2020.

93 *Ibid*.

94 'UN Secretary-General speaks out on seafarers' (*International Maritime Organisation News*, 12 June 2020) <https://imo-newsroom.prgloo.com/news/un-secretary-general-speaks-out-on-seafarers> accessed 13 September 2020.

95 Matt Apuzzo and Selam Gebrekidan 'Trapped at Sea by COVID 19 Lockdowns, Crew Members Plead for Help' *The New York Times* (25 March 2020) <www.nytimes.com/2020/03/25/world/europe/coronavirus-ship-crews-trapped.html> accessed 13 September 2020.

Overall picture of the crew-members DoL on bord due to Covid-19-pandemic - a 'humanitarian crisis at sea': Although there was no public information about whether and how the oil tanker crew members were allowed to dock and changeover, and returned home, general figures draw the complexity of this contemporary challenging 'humanitarian crisis at sea'. Overall, the result has been a string of desperate emails, text messages and calls to shore, pleading for governments and human rights groups' aid from seafarers who have been forced to stay onboard and work without their consent.[96] Another, much smaller group was able to leave ships. Nevertheless, the one who were able to leave the merchant ships were not able to go home straight away, due to travel restrictions imposed by their own governments or shortage of flights available, and remained helpless ashore without salaries, saddled with hotel bills.[97] In May 2020, a coalition of industry associations, including the International Trade Federation, the International Chamber of Shipping and the Federation of National Associations of Ship Brokers and Agents issued its 12-step protocol, advising governments on how to facilitate ship crew changes during the pandemic, which was endorsed by the International Maritime Organisation and had input from the International Air Transport Association.[98] Crew changes took place in 50 countries that month, according to the International Chamber of Shipping, including the Netherlands, the United Kingdom, Germany and Canada, while Singapore completed its first crew change on 8 June 2020.[99] Yet, many States remained reluctant to lift these restrictions, which led the International Maritime Organisation to raise awareness and advocate to address the challenge through the 2020 Seafarers Day.[100]

96 *Ibid*.

97 *Ibid*.

98 Kate Whiting, 'Stuck at sea: How to save the world's seafarers and the supply systems they support' (*World Economic Forum*, 19 June 2020) <www.weforum.org/agenda/2020/06/shipping-seafarers-covid-19-mental-health-supply-systems/> accessed 13 September 2020.

99 *Ibid*.

100 'Day of the Seafarers 2020' (*International Maritime Organisation*, 25 June 2020) <www.imo.org/en/About/Events/dayoftheseafarer/Pages/Day-of-the-Seafarer-2020.aspx> accessed 13 September 2020.

Who We Are

BACKGROUND

Human Rights at Sea was established in April 2014. It was founded as an initiative to explore issues of maritime human rights development, review associated policies and legislation, and to undertake independent investigation of abuses at sea. It rapidly grew beyond all expectations and for reasons of governance it became a registered charity under the UK Charity Commission in 2015.

Today, the charity is an established, regulated and independent registered non-profit organisation based on the south coast of the United Kingdom. It undertakes **R**esearch, **A**dvocacy, **I**nvestigation and **L**obbying specifically for human rights issues in the maritime environment, including contributing to support for the human element that underpins the global maritime and fishing industries.

The charity works internationally with all individuals, commercial and maritime community organisations that have similar objectives as ourselves, including all the principal maritime welfare organisations.

OUR MISSION

To explicitly raise awareness, implementation and accountability of human rights provisions throughout the maritime environment, especially where they are currently absent, ignored or being abused.

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STAY IN CONTACT

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HUMAN RIGHTS AT SEA

Deprivation of Liberty on board Private Ships: Typology and Cases

Annex I

to the 'Independent International Guidance on Deprivation of Liberty at Sea by Shipmasters, Crew and/or Privately Contracted Armed Security Personnel' *(June 2015)*

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VBS Langstone Technology Park, Langstone Road HAVANT PO9 1SA, United Kingdom
ISBN 978-1-913252-25-0