

UNIVERSITY OF ESSEX

SCHOOL OF LAW / HUMAN RIGHTS CENTRE

LL.M International Human Rights and Humanitarian Law

2015/2016

Supervisor: Steve Peers

DISSERTATION

**Search and rescue: shared responsibilities in
international law of Member States, the European
Union and Frontex in the Mediterranean.**

**Name: Luisa Zappalà
Registration Number: 1506858
Number of Words: 17.082
Date Submitted: 8/09/2016**

INDEX

Introduction	3
I. The weakness of the SAR system	6
II. The duty of disembarkation: an important lacuna of the SAR system	20
III. A shared responsibility? the "blame game"	33
IV. The application of the principle of the non- refoulement	45
Conclusion	58
Bibliography	67

Introduction

In this dissertation I ask what problems impede the development of a more satisfactory regime for dealing with the migration of people by sea. This dissertation seeks to provide a basis for future discussion regarding the imprecise interactions between international law, law of the sea, human rights law and humanitarian law which are, together with a serious legal lacuna, the reasons of the inefficiency of the Search and Rescue (SAR) system. It achieves this by identifying the multitude of international Conventions and other legal instruments which a myriad of actors, among which the European Member States, European Union and Frontex, apply in the SAR context. The debate is about the reconciliation of humanitarian aspirations with the migrant burden, i.e. in terms of international law the duty of the States to provide assistance at sea and, on the other hand, the sovereign right of States to control their borders. The law of the sea is not very susceptible to developments in international human rights law, and this has tended to isolate its content from the humanitarian considerations.

The dissertation focuses on issues of effectiveness, compliance and enforcement of relevant obligations under the Law of the Sea, in particular the first chapter examines overall the SAR system, its legal sources and challenges related to the effective cooperation and

burden sharing among Member States, the overlapping SAR zones, the amendments to the Conventions and the interpretative disagreements, the fragmentation of the sources and the opaqueness regarding the responsibility which cause arguments between States. The second chapter highlights that the rescue operations do not exhaust the duty to render assistance, which is only fully met if the rescued can disembark in a place of safety. The law of the sea neither establishes where rescuees are to be disembarked nor does it clearly allocate responsibility in their regard. The SAR regime is under pressure due to the fact that the States accepting disembarkation are subsequently bound to assume responsibility of asylum seekers, and this is the reason why Member States refuse disembarkation or make it dependent on certain conditions. Moreover the concepts of 'safe place' and 'distress at sea' are ambiguous due to the absence of a common definition.

The third chapter focuses on the shared/parallel competences between the European Union (EU) and Frontex: troubles are due to the role of the EU which is a member of neither International Maritime Organization nor some maritime Conventions. Although the SAR activities are coordinated at the european level, the institutional framework does not allow such a development because the competence of the Member States to legislate on SAR matters has not been transferred to the EU. Moreover there is no clear rule relating to Frontex's liability: it is not a SAR body, however in practice it coordinates joint operations at sea that turn into SAR

operations. Criticism against Frontex focuses on the limits of the mandate, allegations of violations and lack of transparency.

Corollary issues are the extraterritorial or not application of the Schengen Borders Code, States bilateral agreements and human rights violations in the joint operations. Member States, taking part in joint patrols, cannot avoid responsibility by transferring powers to Frontex.

Finally the fourth chapter concerns the extraterritorial application of the principle of non-refoulement, the States' responsibility where they exercise effective control over a territory or authority over people concerned (extraterritorial jurisdiction), and lastly the extraterritorial applicability of human rights with regard to interception measures which have been conducted in the territorial waters of third States or on the high seas as a part of an extraterritorial border control operations or under the SAR framework.

I chapter

The weakness of the SAR system

Under the Search and Rescue (SAR) Convention, the oceans have been divided into 13 search and rescue regions in which each State is responsible in addition to its territorial waters. The coastal States are obliged to establish a SAR system and the State, where the operations take place, holds the responsibility for distress communication and coordination (International Convention for Safety of Life at Sea (SOLAS) Regulation V/7). The creation of SAR zones fulfills the duty to render assistance at sea which is set out by the United Nations Convention on the Law of Sea (UNCLOS) Article 98¹ which is one of the most ancient and fundamental features of the law of the sea, regarded as a part of customary international law even though it has recently been recognized as such.² Article 98 requires an adequate transpositional

¹"Every State shall require the master of a ship flying its flag, in so far as he can do without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; [. . .]."

²This view was shared by the International Law Commission with regard to Article 12 of the Geneva Convention on the High Seas 1958. See UN doc A/3179 (1956); article 11 of the 1910 International Convention for the Unification of Certain Rules Relating to Assistance and Salvage at Sea; Chapter V SOLAS; Art 10 of the International Convention on Salvage 1989; ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)', [2007] Gen. List No. 91, para 385: "...gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility". See Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 Int'l J. Marine & Coastal L. 523, 527.

law which imposes the obligation as it is not a self-executing norm nor the duty to assist contained in SOLAS Convention is self-executing. The duty to rescue at sea is enshrined in both treaties, as expressly stated by the International Law Commission with regard to its draft of Article 12 of the 1958 Convention on the high seas.

The SAR Convention (Chapter 2.1.10) requires States, either individually or in cooperation, to provide assistance at sea to all asylum seekers found in distress, irrespective of their status indeed the obligation applies regardless of the persons' nationality, status or the circumstances in which they are found. That is enshrined also in article 98 UNCLOS 'the duty is owed to anybody' and the 1910 Salvage at Sea Convention which underlines this point by using the phrase 'everybody, though an enemy'.³

The United Nations High Commissioner for Refugees (UNHCR) welcomes the clarification of such obligation to provide assistance also to "economic refugees". UNHCR has suggested that the SAR activities should be initiated wherever the conditions of the ship or persons on board do not allow for safe travel, as an instance in case of severe overcrowding, poor conditions of vessels, lack of necessary equipment, absence of professional personnel and weather conditions. UNHCR therefore welcomes the inclusion of such elements when assessing the situation of SAR operations.

³ Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002)14 Int'l J. Refugee L. 329, 338.

The SAR Convention provides a comprehensive search and rescue system whose aim can be distinguished from the preventive approach adopted by the SOLAS Convention which establishes minimum standards for the construction, equipment and operation of ships (so-called CDEM measures). Also the UNCLOS, a quasi constitution for the oceans, contains detailed provisions on vessel safety and conduct at sea. Although the UNCLOS mentions this duty in the exclusive economic zone and on the high seas, a State cannot ignore this obligation in its territorial sea.⁴

The principal challenge to the effectiveness of the SAR regime is the lack of cooperation and the burden-sharing among States. Even though the presence of refugees in a State is the determining factor of the responsibility, the burden must be shared more equitably. The UNHCR Model Framework could be developed as a cooperative arrangement to increase the collaboration among States, that would be a necessary next step.⁵ The UNHCR's expert meeting in Djibouti⁶ focused on enhancing cooperation through facilitative tools such as the model agreements, State parties are indeed invited to conclude SAR agreements with the neighbouring States to regulate the SAR operations in the designated maritime zones.

In order to make the responsibilities of coastal States more transparent, the Maritime Safety Committee of the International

⁴ Richard Barnes, 'Refugee law at sea' (2004) 53 *Int'l & Comp. L.Q.* 47, 48-49.

⁵ Anja Klug, 'Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing', *International Journal of Refugee Law* (2014) Vol. 26 No. 1 48, 54-58.

⁶ 'Refugees and Asylum-Seekers in Distress at Sea – how best to respond?', Djibouti November 2011.

Maritime Organization (IMO) on 20 May 2004 decided to amend the SAR and SOLAS Conventions. The new rules, which came into force on 1 July 2006, determine that the State responsible for a certain SAR area is also responsible for finding a place of safety to disembark shipwrecked people: it means to provide an harbour on its own territory or to negotiate with other States to allow disembarkation. Some scholars claim the duty to receive rescued persons only when no other State accepts the disembarkation. The SAR region does not seem to be under an unconditional duty: it must be admitted that the language of the 2004 amendments is carefully drafted to avoid any automatism. These amendments closed the gap in the SAR regime, however may also favour interdiction strategies by altering international protection obligations.⁷

Interpretative disagreements arise in particular with regard to the duty to render assistance set out by article 98 UNCLOS: although it is placed in the section concerning the high seas, this duty applies in all maritime zones. States have interpreted the rules differently as they operate independently from refugee and human rights law.⁸

The humanitarian law of the sea concerning the search and rescue comprises various maritime laws, refugee law, human rights law, customary international law, soft laws and traditions which are put into practice by various actors and that raises conflicts between

⁷ Marcello Di Filippo, 'Irregular migration across the Mediterranean sea: problematic issues concerning the international rules on safeguard of life at sea', (janvier-décembre 2013) *Paix et Sécurité Internationales* Num. 1, 67.

⁸ Seline Trevisanut, *EU Migration law*, 'Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management' (2014 Oxford University Press) at 128.

different legal regimes and gaps in the protection of refugees.⁹ These difficulties due to the fragmentation of international law are manifest. An adequate interpretation of the SAR obligations need to be read jointly with refugee law and human rights law, both relevant in guiding States in the maritime interceptions. Refugee law may be considered as a *lex specialis* of the international human rights law as migrants warrant specific protection; also bilateral agreements become *lex specialis* against the general law of the sea, and the SOLAS is *lex specialis* due to the special regulation relating to the 'Distress Messages- Obligations and Procedures'.¹⁰

The lack of clarity in the intersection between the refugee and maritime law causes delays in the rescues up to the disincentive to undertake rescue obligations at all, indeed the nearest coastal States, flag States of the rescued vessels and States of the next port of call for merchant vessels, all argue about having responsibility.¹¹ According to Italy, Greece, Spain, Malta, France and Cyprus, the SAR rules are unacceptable because fall within the exclusive competence of some Member States. Malta (which refused to accept the 2004 amendments) maintains that the rescued persons should be taken to the nearest safe port (usually Lampedusa or Sicily) from the place of rescue, regardless of the zone they are found in. Malta insisted that migrants rescued in Libyan SAR waters should be

⁹ Silja 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 Int'l J. Refugee L. 538, 543

¹⁰ Natalie Klein, 'Case for harmonizing laws on maritime interceptions of irregular migrants', (2014) International and Comparative Law Quarterly Volume 63 Issue 04, 806-807.

¹¹ Thomas Gammeltoft-Hansen, The refugee, the sovereign and the sea: EU interdiction policies in the Mediterranean, *DIIS Working Paper no 2008/6* Copenhagen 2008 - Danish Institute for International Studies.

disembarked there, separating SAR matters and refugee law regarding migrants in distress. According to this point of view, there is a safe place in terms of SAR and another one in terms of humanitarian law.¹² If Malta does not want to lose its reputation, it should accept that the law of the sea is not isolated from the other parts of the law, and that refugee law must be taken into account in SAR operations. Moreover under the SAR Convention, States have to guarantee continuous and efficient SAR services in the area under their responsibility; whereas Malta, being a small island with an enormous SAR zone, may not ensure the timely disembarkation of rescued persons. The SAR zone's extension should be approved taking into account the capacity of each State to fulfil its international obligations.¹³ The draft of a Memorandum of Understanding is positive for Malta as it takes into consideration the particular circumstances of the case, i.e. the capacities of a State in providing a place of safety. Italy replied that the competent State for the SAR zone must allow the disembarkation: given the extension of the Maltese SAR area, this would mean La Valletta's port in the majority of cases.¹⁴ Two SAR zones can overlap and this may lead to evading responsibility by pointing the finger at each other, and it can cost lives as there are no fixed mechanisms to automatically regulate such responsibilities.¹⁵ All actions taken by Italy in the

¹² Silja Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea', 549-550.

¹³ Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean', 532.

¹⁴ Jasmine Coppens, 'Migrants in the Mediterranean: Do's and Don'ts in Maritime Interdiction Ocean', (2012) *Development & International Law*, 43:342-370.

¹⁵ Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean', 538.

Maltese SAR area are based on *ad hoc* agreements between the SAR forces of the two countries. However Italy complained that Malta, even though being responsible for the SAR region, have failed to provide a safe place for the disembarkation of rescued persons, and that *de facto* permitted the disembarkation in Italy in view of a serious humanitarian emergency. In light of an excessive burden of responsibility, Italy proposed further amendments to the SAR and SOLAS Conventions in order to strengthen the obligations of the State responsible of the SAR zone. The wide majority of States, even though approve the point of balance reached by the 2004 amendments, call for flexibility of *ad hoc* bilateral agreements among parties. Anyway no State can avoid responsibility by contracting out its obligations either to another State or to an international organization (as an instance Frontex). Hand vessels over to the national authorities of the third country or cooperate in joint patrols does not release Member States from their international engagements. Transfer such responsibility would be incompatible with the purpose and the object of the European Convention of Human Rights (ECHR).¹⁶ States that are not parties to the ECHR may well be responsible under the International Law Commission: when a plurality of States is responsible for the same wrongful act,

¹⁶ ECtHR, Case of *Bosphorus v. Ireland* (Application No. 45036/98) 30 June 2005, para. 154; Compare ECtHR, *T.I. v. the United Kingdom* (Application No. 43844/98) 7 Mar. 2000, at 15: "Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution"; ECtHR *K.R.S. v. the United Kingdom* (Application No. 32733/08) 2 Dec. 2008, at 15 "the Court considers necessary to recall the general principles on Contracting States' obligations under Articles 3 and 13 of the Convention before considering the particular questions of the United Kingdom's responsibility under the Convention."

responsibility is not diminished. Thus with regard to the joint maritime operations, each State which exercises an effective control over the persons is separately responsible for its conduct. Even when crimes are committed by the State officials, the State itself is responsible for the failure to prevent or punish them.¹⁷ Neither extraterritoriality releases Member States from their international obligations. Whether *de facto* or *de jure*, the extraterritorialisation of migration control aims to deconstruct or shift the responsibilities among European Member States.

Different points of interception in the journey towards Europe divert responsibilities: if boats are intercepted in the extra european SAR zone, the incentive would be to define it as a rescue operation and shift any disembarkation obligation to that State however the question whether the rescue mission supersedes any direct responsibility towards the asylum-seekers remains unclear; whereas where interdiction is conducted inside the european SAR zone, the incentive would be to define it as migration control in order to evade any disembarkation responsibility and deal with the issue in terms of jurisdiction.¹⁸ Before the SAR and SOLAS amendments, coastal

¹⁷ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] Gen. List No. 91, para. 173: “The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” “Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.” (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)

¹⁸ Thomas Gammeltoft-Hansen, The refugee, the sovereign and the sea at 26-28.

States denied the disembarkation through the sovereign right of migration control and that has been described as "a non cooperative sovereignty game"; whereas the present regime provides "a cooperative sovereignty game" among States anywhere in the Mediterranean. The sovereignty game, thus, has changed the mechanism from the previous territorial retraction into a system in which African coastal States may "commercialise" their territorial waters and high sea rescue zones in which Frontex can intercept migrants without incurring responsibilities for disembarkation and asylum procedures.¹⁹

In its communication on "Reinforcing the management of the European Union's Southern Maritime Borders,"²⁰ the Commission noted the lack of clarity and predictability regarding Member State obligations and consequently stated the need to analyse the circumstances under which States may be obliged to assume responsibility for asylum claims, particularly in joint operations or those taking place within the territorial waters of another State or in the high sea. Finally, the likelihood that responsibilities are settled have been improved by shifting the attention to the Westphalian notion of territorial jurisdiction.²¹

According to the UNHCR²², the question of responsibilities is clear: where a State exercises jurisdiction, it is responsible for all asylum

¹⁹ Ibid.

²⁰ Ibid, see COM (2006) 733, 30.11.2006, par. 34.

²¹ Ibid.

²² See UNHCR, Advisory Opinion on the Extraterritorial Application, Geneva 26 January 2007.

claims. The exercise of authority over the conduct of individuals at sea is a question of jurisdiction whose assessment depends on what and where activity is occurring. States are held accountable for their actions where they have exercised 'effective control' over individuals at sea. However different legal regimes have made the State obligations towards asylum-seekers a field of contestation in which the extraterritorial applicability of refugee rights is open to different interpretations.²³ The potential for "jurisdiction shopping"²⁴ is aggravated by the absence of a solid definition of what constitutes distress in the maritime conventions, *de facto* the master of the intercepting ship has been given the authority to evaluate when a vessel is in need of rescue. It is unclear which State, under the international refugee law, is obliged to examine asylum claims of those intercepted at sea particularly in the territorial waters of another State or on the high seas.²⁵ The key question is which country has the jurisdiction to enforce the obligation to assist at sea beyond the territorial waters. A State has to establish some basis to prosecute the shipmaster who failed to provide assistance (adjudicative jurisdiction), it must also justify enforcement measures against him, especially if he is not in its territory (enforcement jurisdiction), however the crucial matter is whether the country can effectively apply its law to the master's conduct at

²³ Thomas Gammeltoft-Hansen, *The refugee, the sovereign and the sea* at 28.

²⁴ *Ibid* at 26.

²⁵ Silja Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea', at 540.

all (prescriptive jurisdiction).²⁶ There are different bases for the exercise of jurisdiction by a State: territoriality is the most significant because a State can exercise its jurisdiction over the conduct occurring on a ship flying the State's flag. The primacy of the law of the flag is stated in article 92 UNCLOS: ships shall be subject to the flag State's exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call. For incidents in the territorial waters, both the flag State and the coastal State can exercise jurisdiction under the territoriality principle however since the territorial waters are subject to the sovereignty of the coastal State, this country's jurisdiction is of primary importance.²⁷ International law, however, recognizes that ships have a right of innocent passage through the territorial sea, the article 27 UNCLOS resolves the overlap of jurisdiction. The jurisdiction of the coastal State should not be exercised on board of a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation, except when the peace or the good order of the territorial sea has been disturbed. Leaving people at sea without assistance disturbs the good order and has consequences to the coastal State under the SAR Convention. In summary, enforcement jurisdiction is much stronger in territorial waters than on the high sea. The primary jurisdiction lies with the coastal State, whereas the flag State would still be entitled to take action if the

²⁶ Martin Davies, 'Obligations and implications for ships encountering persons in need of assistance at sea', (2003) 12 *Pac. Rim L. & Pol'y J.* 109, 116.

²⁷ *Ibid* at 126.

coastal State did not.²⁸ The problem remains the ineffective enforcement which is linked to the flags of convenience States. The IMO has made effort to improve the safety record of the ships registered under the flags of convenience, actually just focusing on the safety of the ships themselves.²⁹

More in general, there are limited mechanisms for enforcing obligation to rescue individuals at sea so enforcement needs to be accomplished through the threat of a criminal sanction in order to provide the incentive to comply with such an obligation. It has been suggested that where the shipmaster refused to comply with such obligation, the party who provides assistance could exercise criminal jurisdiction over him as well as a civil action however it must be said that the civil lawsuit is a poor mechanism due to the small likelihood that all the following conditions are satisfied: to have standing in a civil action, those who claimed failure to assist must (a) survive the ship's failure, (b) identify the ship that could have pick them up, and (c) establish jurisdiction over the shipmaster. The civil action is not likely to be a deterrent.³⁰

The UNHCR suggested the development of the "Standard Operating Procedures" for the shipmasters in the event of a distress at sea. Also the IMO have called upon the flag States to ensure that masters observe the duty to rescue persons in distress at sea. The Brussels International Assistance and Salvage at Sea Convention in the

²⁸ Ibid at 127- 128.

²⁹ Ibid at 140.

³⁰ James Z. Pugash, 'The Dilemma of the Sea Refugee: Rescue Without Refuge', (1977) 18 Harv. Int'l. L. J. 577.

article 2 provides that every master is bound, so far as without serious danger (see SOLAS article 4 'cases of force majeure'), to render assistance to everybody found at sea in danger. The Convention provides also that every act of useful assistance gives the mastership the right of an equitable remuneration (article 9). The SOLAS Convention provides that the master of a ship is bound to inform the Rescue Coordination Centre (RCC) responsible for the search and rescue region with the following information: details of the assisting ship, position of the vessel and the next port of call, current safety and security status, details of the rescued persons and location for disembarking. Compliance with these obligations is essential in order to preserve the integrity of the SAR services.

Political issues should never interfere in the SAR actions, they should only play a role after the rescue once the migrants are safely disembarked.³¹ The humanitarian law of the sea is ignored and the political manoeuvres of the coastal States dominate the situation at sea: the negotiation over irregular migration, border protection and humanitarian law of the sea have become heated in the Mediterranean Sea. These ongoing debates between European Member States confirm the difficulties in adopting a common interpretation of the law of the sea obligations, and that ultimately undermines the effectiveness of humanitarian principles at sea.

Rescuing people in peril is a moral duty that should be embodied in

³¹ Silja Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea' at 551.

the law however some scholars stated that the majority of the people already view law as a reflection of morality so they embrace the moral position. Even though moral principles have an influence on the creation of the legal rules, not all moral obligations should be legal duties. Others want the law to encourage better behavior: utilitarians support the duty to rescue as it produces the greatest net pleasure, then utility is maximized.³²

Moral standards have been linkened to a yardstick where the moral ideals are at the top of the human achievement and the moral duties at the bottom. The difficulty lies in the determination of the balacing point between the top of the yardstick where the moral desire for rescue is revered and the bottom where the moral duty to rescue is required.³³ Society's interests in punishing "Bad Samaritans" must be balanced against society's interests in personal liberty, or should be considered alternative means to legal sanctions to encourage rescues. It is the legislature which determines the need for and the scope of a general duty to rescue, not a judge.³⁴

³² Philip W. Romohr, 'A right/duty perspective on the legal and philosophical foundations of the no duty to rescue rule', (2005-2006) 55 Duke L.J. 1025, 1036-1037.

³³ Martin B. Rosenberg, 'The Alternative of Reward and Praise: The Case against a Duty to Rescue', (1985) 19 Colum. J.L. & Soc. Probs. 1, 5.

³⁴ Ibid, 13.

II chapter

The duty of disembarkation: an important lacuna of the SAR system.

Even though the duty of the master to render assistance is clear, the law relating to the disembarkation of those who have been rescued is lacking clarity. The gap between rescue and disembarkation could be addressed by creating a duty incumbent on the rescuing vessel to disembark at the next port of call together with the duty on coastal States to allow disembarkation. Neither the flag State nor the coastal State have the obligation to accept the rescued persons in their territories.³⁵

Rescue and disembarkation should be linked to the concept of safety of life, their gap needs to be reduced.³⁶ The question to be resolved is the absence of a duty of disembarkation following the rescue: to bring rescuees to a place of safety is not equivalent to the duty to disembark indeed it may happen that a ship may itself be a place of safety without disembarking. The thorny question is whether the coastal States are under the obligation to accept the disembarkation

³⁵ Richard Barnes, 'Refuge law at sea', (2004) 53 *Int'l & Comp. L.Q.* 47, 71; Efthymios Papastavridis, 'Interception of human beings on the high seas: a contemporary analysis under international law', (2008-2009) 36 *Syracuse J. Int'l L. & Com.* 145, 204.

³⁶ Guy S. Goodwin-Gill, 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action', Jean Monnet Centre of Excellence on Migrants' Rights in the Mediterranean University of Naples 'L'Orientale' - 11 May 2015 at 8.

which ultimately is a matter of territorial sovereignty. Despite the existence of a duty on the flag and the coastal States to ensure assistance, none of the international Conventions contain such an obligation on the flag State to disembark and ultimately it could be seen as undermining the rescue. Consequently, a right to disembarkation must exist along with the duty on the flag State to disembark and on the coastal States to accept that respectively.³⁷

In order to deduce such a duty, a unified notion of rescue should be considered as an act beginning with removing people from the waters until they have reached a safe place, that would unburdens the shipmaster's responsibility and would reflect the article 98 UNCLOS and other SAR and SOLAS norms. In the 2004 amendments to SAR and SOLAS Conventions there is indeed an assumption (expressed through the weak language "should") of duty of disembarkation, except reasons of public order.³⁸ The SAR and SOLAS Conventions were amended to impose for the first time an obligation on States to "cooperate and coordinate" to ensure the disembarkation of rescued persons to a place safety, irrespective of the nationality or status of those rescued.

The primary responsibility to provide a place of safety falls on the Government responsible for the SAR region in which the survivors were found, nevertheless it does not imply an obligation for States to disembark rescued persons on their territory: they can make it

³⁷ Killian S. O'Brien, 'Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem', (2011) 3 Goettingen J. Int'l L. 715, at 723-724.

³⁸ Ibid. at 724- 725.

dependent on certain conditions such as the division of the financial burden, resettlement, readmission or immediate return to a safe third country. The burden-sharing decisions must be made *ad hoc* therefore it can take weeks before arrangements have been made. No clear guidance is given about the extent of the responsibility of Member States who are not responsible for the search and rescue region in which the rescues occur.³⁹ The relevant obligation is only "to cooperate and coordinate", namely an obligation of conduct rather than of result.⁴⁰ The law of the sea neither establishes precisely where rescuees are to be disembarked nor does it clearly allocate responsibility in their regard. Indeed it is for the shipmaster and the States to determine a default port of disembarkation, be it the geographically closest to the emergency, the next port of call or that of intended destination, through *ad hoc* arrangements every time. Member States must find an answer to disembarkation: neither should it be the responsibility of the master of the vessel to decide where rescuees should be disembarked, nor it should be the responsibility of those planning Frontex operations, nor it should be the State of disembarkation which would have jurisdiction to determine asylum claim especially where interception occurred outside the SAR region. This is perceived as an important lacuna, the identification of a place of disembarkation put the SAR system

³⁹ Jasmine Coppens, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) *The International Journal of Marine and Coastal Law* 25 377, 378-380.

⁴⁰ Efthymios Papastavridis, 'Interception of human beings on the high seas: a contemporary analysis under international law', at 206.

under high pressure.

The mention to the ‘next port of call’ lacks a precise legal meaning and is absent from maritime law treaties.⁴¹ According to the United Nations High Commissioner for Refugees' (UNHCR) Executive Committee, the persons rescued at sea should be disembarked at the next port of call and that can mean the nearest port of call, the next scheduled port of call, the port of embarkation or even the best equipped port of call.⁴²

The soft law relieves the humanitarian concerns of rescued persons because coastal States are likely to reject the obligations to allow disembarkation unless the system takes into account the resettlement guarantees, however to refuse or to permit disembarkations only under strict resettlement guarantees poses its own difficulty since it indirectly discourages rescues at sea.⁴³

The shipmaster’s freedom to choose an appropriate port of disembarkation may be limited by the bad circumstances on board after a rescue operation, it is indeed common that rescuing vessels find themselves in distress therefore in such cases the shipmaster can only deliver the rescued persons to the nearest port without further delay.⁴⁴ The nearest port of call may be not appropriate and

⁴¹ Marcello Di Filippo, “Irregular Migration and Safeguard of Life at Sea: International Rules and Recent Developments in The Mediterranean Sea”, in Del Vecchio, A. (ed.), *International Law of the Sea: Current Trends and Controversial Issues*, Eleven International Publishing, The Hague, 2013, see at 65.

⁴² M. den Heijer, 'Europe and Extraterritorial Asylum', 2011at 247.

⁴³ Richard Barnes, 'Refuge law at sea', (2004) 53 Int'l & Comp. L.Q. 47, 71; Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes', (2002) 14 Int'l J. Refugee L. 329, 360.

⁴⁴ M. den Heijer, 'Europe and Extraterritorial Asylum', 2011at 248.

the next scheduled port of call too far away; moreover the safety of the rescue ship, the severity and the nature of the survivors' distress, the rescue ship's ability to provide food, water and medical requirements are all elements that should be taken into account.

A clarification of the concept of place of safety by the International Maritime Organization (IMO) is really welcomed to strengthen the humanitarian regime at sea.⁴⁵

The 'primary responsibility' to arrange disembarkation lays on the States in whose SAR region the persons have been rescued, States are under a joint duty to disembark them as soon as possible. Such an obligation is addressed to both governments and shipmasters under the Law of the Sea, whereas the prohibition of refoulement applies to States only. The private shipmasters, indeed, being not aware of the nationality or status of the persons in distress, cannot reasonably be expected to assume any responsibility.⁴⁶

The Facilitation Committee responsible for the implementation of the Convention on Facilitation of International Maritime Traffic (FAL Convention) approved in 2009 some interpretative guidelines aimed at facilitating disembarkation: in the overlapping SAR area, it is unclear which State is primarily responsible for finding a place of safety. When disembarkation cannot be arranged elsewhere, the Government of the SAR area should disembark the persons rescued into a place of safety under its control and that means that coastal

⁴⁵ Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea', (2004) 17 J. Refugee Stud. 50, 61.

⁴⁶ M. den Heijer, 'Europe and Extraterritorial Asylum', 2011 at 249.

States have the ultimate responsibility.⁴⁷ A number of observations have been made with regard to the use of vague terms: the word 'swiftly' can mean hours, days or even weeks so that it is not very clear what exactly means; another ambiguous expression regards 'the disembarkation at a place of safety under its control' whose meaning is not clear, such a place could be even an isolated island. The last issue is about the overlapping SAR area that makes difficult to determine the Government responsible. Finally, the obligation to accept the disembarkation when it cannot be swiftly executed elsewhere, has disappeared. This was controversial, therefore no duty to disembark is imposed upon States.⁴⁸

In 2010, the Council adopted the Decision 2010/252/EU with the aim of establishing clear rules for the disembarkation of intercepted or rescued migrants and to overcome the different interpretations of international maritime law adopted by Member States. The Decision is an example of how a regional instrument can contribute to the proper implementation of obligations. Though it was a non-binding text, the Council decision was the most detailed instrument adopted at the European level that brought legal clarity to the rules applicable to Frontex operations regarding interception, rescue at sea and disembarkation.⁴⁹ Then, two years later, the Decision 2010/252 was

⁴⁷ Marcello Di Filippo, "Irregular Migration and Safeguard of Life at Sea: International Rules and Recent Developments in The Mediterranean Sea" at 70; Compare Jasmine Coppens, 'Towards New Rules on Disembarkation of Persons Rescued at Sea', at 388-389.

⁴⁸ Ibid at 391-395.

⁴⁹ UNHCR comments on the Commission proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) COM 2013(197) final at 2-3.

annulled by the Court of Justice of the European Union (CJEU) because it exceeded the powers of the Council by introducing the surveillance of the external sea borders which normally requires the involvement of the European Parliament as co-legislator. Moreover the conferral of such enforcement powers on border guards might interfere with the fundamental rights of the persons concerned. In April 2013, the Commission reframed the rules on Frontex sea operations in a Regulation to strengthen the protection of fundamental rights and the respect of the principle of non-refoulement, taking into consideration the European Court of Human Rights' (ECtHR) sentence *Hirsi Jamaa and Others v. Italy*. In case of disembarkation in a third country, those intercepted or rescued must be identified and they must be given the opportunity, preferably before disembarkation, to express the refusal due to the principle of non-refoulement. During the negotiations, six member States (Cyprus, France, Greece, Italy, Malta and Spain) strongly opposed the introduction of rules on SAR and disembarkation into the Regulation due to the interference to national sovereignty and the denial of flexibility. Finally, the articles on SAR and disembarkation were kept in the final text of the Regulation.

Moreover, the Guidelines for Frontex operations at sea proposed that priority is to be given to disembarkation in the third country from which the ship departed or through the territorial waters or the search and rescue regions of which it transited. Otherwise, disembarkation should take place in the Member State hosting the

Frontex operation. Malta reacted very critically, announcing it would have not hosted Frontex operations on its territory anymore: they specified that the rescued would have been disembarked at the nearest safe port i.e. Lampedusa or Sicily. The EU decision did not succeed in solving the place of disembarkation, the thorny problem went to the IMO.⁵⁰ The IMO's Sub-Committee on Radiocommunications and Search and Rescue (COMSAR) endorsed a regional agreement on disembarkation of persons rescued at sea as a 'pilot scheme' which could have been extended to other parts of the world experiencing similar situations.⁵¹ The swift identification of a safe place of disembarkation is essential for the effectiveness of SAR regime, therefore innovative formulas such as delinking the acceptance of disembarkation and the assumption of responsibility must be explored.⁵² The key elements of his proposal are the following: 1) through the interviews to migrants, the EU Member State accepting disembarkation must facilitate the process of determining the responsible State; 2) potential responsibility on other Member State should be verified; 3) the State accepting the transfer of the asylum seekers would receive a financial contribution by the EU Asylum, Migration and Integration Fund in order to face the costs of

⁵⁰ Marcello Di Filippo, "Irregular Migration and Safeguard of Life at Sea: International Rules and Recent Developments in The Mediterranean Sea" at 72.

⁵¹ Ibid at 73-74: bilateral consultations have continued and some differences have been smoothed.

⁵² Marcello Di Filippo, 'Delinking disembarkation and assumption of responsibility for asylum seekers, Proposal for an EU Pilot Project not Requiring an Amendment of the Dublin Regulation', High Commissioner's Dialogue on Protection Challenges, 2014 - International Institute of Humanitarian Law, at 2.

reception; finally 4) Member State would afford the fundamental rights to the concerned persons. This proposal may implement the Article 17 of the Dublin Regulation and reduce the tensions regarding the needs of the asylum seekers and the States' burden sharing.⁵³

According to the UNHCR, a place of disembarkation should address immediate post-disembarkation needs and should be used as a tool for solidarity between EU Member States.⁵⁴ Nevertheless a system of predetermined place of safety is not so easy: the notion of 'safety' has no single meaning and the place of safety is not predefined in the maritime Conventions. In the non-binding Guidelines on the Treatment of Persons Rescued at Sea, a place of safety is the place where the rescue operations terminate, human needs can be met and the state responsible is the one of the SAR area.⁵⁵ By interpreting a place of safety consistently with the refugee obligations, that place will be safe not only when distress at sea has been prevented, but when the non-refoulement will be guaranteed too.⁵⁶ The concept of the non-refoulement provides a temporary right to disembark in order to process asylum applications.⁵⁷

For some States the vessel must be on the point of sinking, for others it is sufficient to be unseaworthy. The Council Decision

⁵³ Ibid. at 4.

⁵⁴ UNHCR comments on the Commission proposal COM 2013(197) final, at 11.

⁵⁵ Ibid at 10.

⁵⁶ COE RES 1821(2011). See Natalie Klein, 'A case for harmonizing laws on maritime interceptions of irregular migrants', (2014) *International and Comparative Law Quarterly* Volume 63 787, at 811.

⁵⁷ Killian S. O'Brien, 'Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem' at 716.

2010/252/EU adopted guidelines regarding the concept of "distress" and the following elements that should be taken into account: a request for assistance; the likelihood that the ship will not reach its destination; the overcrowding, the supplies, the qualified crew, the urgent need of medical assistance and the weather conditions.

By accepting that a serious health risk would suffice to justify a plea of distress, overcrowded dinghies would be in distress and would need assistance. The problem is where to locate any lower limit.⁵⁸

Disagreements about the identification of the place of safety and the concept of distress postpone the disembarkation and act as a disincentive for rescuing. For example, in the aftermath of the 'Arab Springs', the Italian authorities declared Lampedusa to be an unsafe port under the SAR Convention by putting in place an 'excision strategy' in the context of the place of disembarkation and the closest safe port in order to avoid responsibility. The State responsible for the SAR region, due to its inertia or limited will to fulfil its duty, may discharge upon the other States the burden of SAR activities (see the mentioned dispute between Malta and Italy), however the SAR Convention provides joint SAR zones where States carry out cross-border operations through joint patrols.

Given the geographical configuration of the Mediterranean, a regional agreement on the coordination among coastal States should

⁵⁸ Efthymios Papastavridis, 'Fortress Europe' and Frontex: Within or Without International Law?', (2010) 79 *Nordic J. Int'l L.* 75, 87.

be considered.⁵⁹ The IMO proposed a ‘Regional agreement on concerted procedures relating to the disembarkation of persons rescued at sea’ to strengthen the implementation of maritime obligations under the SAR and SOLAS Conventions and to find an appropriate place of safety.⁶⁰ The IMO underlined that the selection of a place of safety must depend only on a case-by-case approach which leaves enough room for the particularities of each situation on board the ships, the nature itself of the disembarkation in a safe place requires flexibility. It is not the flexibility of the Law of the Sea which undermines compliance with relevant maritime obligations, but the fact that the concerned persons are migrants.⁶¹

What is needed is an internationally agreed scheme of disembarkation guarantees and shared responsibility: key prerequisites are international cooperation and burden-sharing regarding the protection at sea, in particular the flag-State responsibility in case of rescue or interception by public ships together with the compensation to the ships’ owners for the costs incurred when fulfilling international duties.⁶²

It is crucial to solve the disembarkation problem starting from States’ sovereignty: the judgement in the *Aramco Case*⁶³ stated that

⁵⁹ Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?', (2010) 25 *Int'l J. Marine & Coastal L.* 523, 525-526.

⁶⁰ IMO Facilitation Committee, 37th session, FAL 37/6/1 of 1 July 2011. See Anja Klug, 'Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing' at 57-58.

⁶¹ M. den Heijer, 'Europe and Extraterritorial Asylum', 2011at 251.

⁶² Anja Klug, 'Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing', (2014) *International Journal of Refugee Law*, 2014, Vol. 26, No. 1 48, 53.

⁶³ which deals with a dispute between Saudi Arabia and the Arabian American Oil Company (ARAMCO). See Jasmine Coppens, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?', 398.

the ports of every State must be opened to foreign merchant vessels which may implicitly carry persons rescued at sea, even when these are migrants. Does a ship in distress have an absolute right to enter foreign ports? The Statute on the International Regime of Maritime Ports does not specify that and also in the customary law there is no right of entry of such a ships, therefore States can refuse any obligation. A possible solution is to link disembarkation duty to financial arrangements and burden-sharing agreements.⁶⁴

As long as such a duty to disembark could be imposed, the definition of a place of safety could become binding.⁶⁵

The Rescue Coordination Centre may designate where disembarkation will occur on behalf of the rescuing vessel, regardless of its status whether private or State-owned, military or non-military.⁶⁶ In the absence of binding requirements of disembarkation following a rescue and political will, it is difficult to establish how international human rights and refugee law can be harmonized with the search and rescue system.⁶⁷ The principle of harmonization can reconcile the law of the sea and the international human rights law: the former does not only set out the rights and the obligations of States and their vessels, but also it extends to the individuals at sea. The Law of the Sea has not been designed to

⁶⁴ This would be in line with UNHCR EXCOM Conclusion No. 38 'Rescue of Asylum-Seekers in Distress at Sea' 1985. Spain and Italy have bilateral agreements with countries of transit, that means that the burden is shared however a real duty to disembark is not included.

⁶⁵ Jasmine Coppens, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?', 398-402.

⁶⁶ Natalie Klein, 'A case for harmonizing laws on maritime interceptions of irregular migrants', 810-811.

⁶⁷ Ibid at 812.

regulate the migrant burden sharing, and one may question whether the Law of the Sea constitutes the appropriate framework; whereas the latter, the international human rights law, applies both at land and sea activities as the maritime environment cannot justify the denial of human rights.⁶⁸ Moreover 'considerations of humanity must apply in the law of the sea as they do in other areas of international law'.⁶⁹ These perspectives do not imply that international human rights law defeats the law of the sea: the ECtHR (Hirsi Case) considered how the former can be harmonized with the latter, however the absence of a duty of disembarkation remains a dissonant feature of harmonization. The fragmentation of the laws may only be overcome through an agreement between these bodies of law regarding when persons are stopped, detained or rescued: it is indeed due to these uncertainties and gaps in the search and rescue regime that other bodies of international law must be taken into account to improve the SAR regulation.⁷⁰

⁶⁸ M. den Heijer, 'Europe and Extraterritorial Asylum', 2011at 251; 263.

⁶⁹ The International Tribunal for the Law of the Sea in the *MV Saiga* (No 2) (Saint Vincent and the Grenadines v. Guinea) (Admissibility and Merits) (1999) 38 ILM 1323, para 155, see Natalie Klein, 'A case for harmonizing laws on maritime interceptions of irregular migrants', 809.

⁷⁰ *Ibid* at 809-813.

III chapter

A shared responsibility? the "blame game".

The role of the European Union (EU) in the SAR activities is problematic as it is not a member of the International Maritime Organization (IMO) and thus is not a party to SOLAS and SAR Conventions, however the EU has shown interest in maritime affairs: as instance the European Commission elaborated the Integrated Maritime Policy (IMP) whose central concept is the 'EU maritime domain' that encompasses the EU Member States' Territorial waters, Exclusive Economic Zones and Continental Platforms. Though the SAR activities are coordinated at the EU level, the existing institutional framework does not allow that.⁷¹

The EU is bound to the Conventions only with regard to matters for which Member States have transferred their respective competences, and the search and rescue ones have not been transferred consequently the European Union does not have competence to legislate in relation to such operations.⁷²

European law makes worse controversies concerning SAR activities: under the Dublin Regulation, the Schengen Borders Code

⁷¹ Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 Int'l J. Marine & Coastal L. 523, 536.

⁷² Natalie Klein, 'Case for harmonizing laws on maritime interceptions of irregular migrants', (2014) International and Comparative Law Quarterly Volume 63 787, 792-793.

and the Return Directive, migrants must be taken in charge by the State whose borders have been first crossed. Despite the principle of intra-EU solidarity (article 80 TFEU), there is not any mechanism of burden sharing among Member States regarding the management of migratory flows.⁷³ In favour of a particular Member State, some tools may be activated: Joint Frontex operations; Rapid Border Intervention Teams (RABITs) deployed by Frontex after a request of help; financial assistance; Asylum Support Teams deployed by the European Asylum Support Office (EASO); voluntary relocation scheme and temporary protection. The EU has created different fora of information exchange, after all the EU is party to the UNCLOS and consequently should have to comply with the duty to render assistance set out in article 98. The EU established a specific Task Force Mediterranean (TFM) for an integrated approach for the whole Mediterranean, calling for cooperation and burden-sharing between the EU and neighbouring countries, to combat irregular migration and prevent tragedies at sea by establishing legal migration channels.⁷⁴ A study of the European Commission regarding the illegal immigration aims to identify obstacles stemming from the Law of the Sea for the effective exercise of maritime surveillance and to draft guidelines for Frontex operations which should specify the competences of States in sea border

⁷³ Marcello Di Filippo, 'Irregular Migration and Safeguard of Life at Sea: International Rules and Recent Developments in The Mediterranean Sea', in Del Vecchio A. (ed.), *International Law of the Sea: Current Trends and Controversial Issues*, Eleven International Publishing, The Hague 2013 at 59.

⁷⁴ Anja Klug, 'Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing', (2014) *International Journal of Refugee Law* Vol. 26, No. 1 48, 63.

controls in compliance with the norms of international maritime law and human rights law.⁷⁵ The joint operations, indeed, entail the exercise of external competences of the EU with the risk of overlapping with Member States in particular concerning the implementation of international obligations deriving from the law of the sea, a field of shared competences.

The EU and its agencies have no mandate to conduct SAR operations as this remains a competence of Member States, however Frontex is in charge of coordinating cooperation between them and promoting good practices though without any direct responsibility for its conduct.⁷⁶ Frontex is purely a technical actor whose task is to coordinate operations which protect the external borders of the EU, and it represents a shift from the previous intergovernmental management of the external borders to a supranational one. The Regulation limits Frontex's accountability by establishing that "the responsibility for the control and surveillance of external borders lies with Member States", even though Frontex's structure suggest otherwise.⁷⁷ There is uncertainty in the demarcation of responsibilities between Member States and the Agency in operational activities, and it is detrimental to establishing the shares responsibilities in the joint operations.⁷⁸ Although Frontex is not a

⁷⁵ Maarten den Heijer, *Europe and Extraterritorial Asylum* (2011) at 228.

⁷⁶ Analysis Criticism of Frontex's operations at sea mounts "I try to avoid giving the impression I'm somehow sneaking out of the responsibility", Frontex's Executive Director on search and rescue at sea, at 4.

⁷⁷ Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in Bernard Ryan- Valsamis Mitsilegas *Extraterritorial Immigration Control Legal Challenges* (2010) Leiden Boston, at 230-233.

⁷⁸ *Ibid* at 235.

search and rescue body, in practice it assists Member States to render assistance to persons in distress however in case of uncertainty and alert, Frontex can limit its action to informing the Rescue Coordination Centre. The ultimate responsibility is with the national authority of the Member State which hosts the Frontex Operation however responsibilities should be clarified between the International Coordination Centre of that country and its Maritime coordination centre who is responsible for the SAR joint maritime operations.⁷⁹ Frontex has gained operational powers in the SAR field due to the amendment of its mandate in 2011, it does not limit its interventions to detection, SAR and to escorting migrants, push back operations have occurred even though forbidden because outside of its scope. The large number of people rescued shows that SAR operations are not exceptional in the Agency's activities: vessels and aircraft are equipped with blankets, food and water. Push-back without an assessment of a person's individual case constitutes refoulement in breach of international refugee law and search and rescue duties. Search and rescue is an international obligation incumbent on Frontex as it has been established by States which are subject to international law, so it is bound too by that law.⁸⁰ The search and rescue obligation is the legal justification for many Frontex surveillance operations which very often turn into SAR operations. It is not possible to draw a sharp distinction

⁷⁹ Analysis Criticism of Frontex's operations at sea mounts, at 5.

⁸⁰ House of Lords European Union Committee 9th Report of Session 2007–08, Frontex: the EU external borders agency Report with Evidence at 44.

between them, maritime surveillance consists of all activities regarding the security of the EU therefore its will is to extend the monitoring of such Member States' activities.

Frontex had stretched its mandate beyond the Regulation as it does not have a mandate to operate beyond the borders of the EU. The Schengen Borders Code only covers checks in the immediate vicinity of the border, extraterritorial controls fall outside the aim of the Code.⁸¹ If Frontex acted extraterritorially, its role would be expressly set out, therefore the border surveillance on the high seas, interception and disembarkation are governed by the law of the sea and so based on the jurisdiction of the flag State. Sea operations which take place beyond the EU external borders are generally based on bilateral agreements between European States and third countries which govern the surveillance and interception operations, Frontex relies on such agreements regarding the operations on the high seas and the law enforcement in the territorial sea of other States.⁸² Frontex is bound by all obligations under such agreements "irrespective of whether or not it has competence for a certain matter under its internal rules" so it is regrettable that Member States' agreements are often not public, this undermines the legitimacy of Frontex operations and calls for more transparency.⁸³

⁸¹ Maarten den Heijer, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in Bernard Ryan- Valsamis Mitsilegas, *Extraterritorial Immigration Control Legal Challenges* (2010) Leiden Boston at 177.

⁸² Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' at 251; Natalie Klein, 'Case for harmonizing laws on maritime interceptions of irregular migrants' at 792.

⁸³ Efthymios Papastavridis, 'Fortress Europe' and Frontex: Within or Without International Law?', (2010) 79 *Nordic J. Int'l L.* 75, 88-91.

On the other side, since the primary aim of the Schengen Borders Code is to provide a ‘common corpus’ of legislation applicable to external border controls, it makes sense that the Code recognises extraterritorial controls.⁸⁴ The extraterritorial application of the Code is implied in the Annex VI paragraph 3 which deals with the specific rules for the procedures at sea borders, there is also a relevant European law from the asylum acquis that applies at the external borders: the Council in the Decision 2010/252/EU supplements the Schengen Borders Code and specifies how measures during Frontex sea operations can be taken in different maritime areas including the high seas⁸⁵; the Directive 2013/32/EU 'Asylum Procedures Directive on common procedures for granting and withdrawing international protection' requires Member States to accept all asylum applications made in the territory including at the border (article 3); the EU Regulation 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 Frontex-led operations at sea is a source of reference for identifying and responding to distress situations, facilitating disembarkation and taking into account non-refoulement obligations and other refugee

⁸⁴ Evelien Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the responsibility of the EU and its Member States' in Bernard Ryan- Valsamis Mitsilegas, *Extraterritorial Immigration Control Legal Challenges* (2010) Leiden Boston at 206.

⁸⁵ The European Parliament brought the Decision before the ECJ for annulment as adopted in violation of legislative prerogatives: the rules on borders surveillance have modified the Schengen Borders Code therefore it should have been adopted with legislative procedure. See Luisa Marin, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border', (2011) *Journal of Contemporary European Research* Volume 7, Issue 4, at 482.

and human rights safeguards.⁸⁶ It is questionable whether the Code applies in every situation of external border controls as the term “sea borders” is not defined, in the author’s opinion sea borders should not be interpreted too narrowly.⁸⁷ Anyway in case of extraterritorial controls, does a refusal of entry involves protection? The Refugee Convention and general human rights treaties provide a comprehensive framework for holding States accountable for violations which may occur during extraterritorial controls.⁸⁸ Also Frontex is obliged to respect human rights when carrying out maritime surveillance operations within the territorial waters and contiguous zones, it might terminate a joint operation if fundamental rights are not met, or in case of serious or persisting violations of fundamental rights. The European Parliament can do little in terms of Frontex's compliance with human rights law: it has only informal ways of supervising the work of the Agency, as an instance by calling for report and answer questions.⁸⁹ Member States remain primarily responsible for the implementation of legislation and law enforcement actions to ensure the respect of fundamental rights during the Frontex coordinated joint operations, though Frontex must create the conditions for ensuring such compliance, guarantee

⁸⁶ Jasmine Coppens, 'Migrants in the Mediterranean: Do's and Don'ts in Maritime Interdiction', (2012) *Ocean Development & International Law*, 43:342, 357-358; House of Lords European Union Committee 9th Report of Session 2007–08 at 44-45; Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' at 245-246.

⁸⁷ Evelien Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the responsibility of the EU and its Member States' at 206.

⁸⁸ Maarten den Heijer, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' at 171; 179.

⁸⁹ Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' at 236.

the right of access to legal remedies and the States' liability under civil law or criminal law.⁹⁰ States participating in Frontex joint operations, indeed, cannot circumvent human rights law by declaring border control measures to be rescue measures.⁹¹

There is the need to balance security imperatives and human rights obligations in the surveillance of the sea external borders. In June 2008 Frontex has established with the United Nations High Commissioner for Refugees (UNHCR) a working agreement providing the framework for training of border guards with regard to refugee law and international regime on search and rescue. Moreover by adopting the Fundamental Rights Strategy, Frontex stepped forward to ensure the respect of fundamental rights in its activities nevertheless the question of the extraterritorial application of human rights remains complex on the high seas and in the territorial waters of a third country. Criticism against Frontex Joint Operations mainly focuses on alleged violations of the principle of non-refoulement, ill-treatment as well as collective expulsions.

Frontex has to face the difficulty of having two masters, the EU and its Member States: the Agency is a body under the budgetary control of the European Parliament but is managed by Member States, this mixture of governance raises questions about Frontex's

⁹⁰ Contribution by the Committee on Migration, Refugees and Displaced Persons to the public consultation in the context of the European Ombudsman's own-initiative inquiry on Frontex, AS/Mig (2012) 28 Rev. 17 September 2012 at 7-8; Evelien Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the responsibility of the EU and its Member States' at 201.

⁹¹ Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' at 243.

accountability.⁹² The lack of transparency in combination with a weak framework of accountability often leads to the view that Frontex does not respect international obligations, for instance there is no independent monitoring of joint operations although Member States have the legal obligation to provide that.⁹³ Member States cannot entrust more powers to Frontex whose activities are not considered to comply with obligations under international law. Any further extension of Frontex's mandate should go hand in hand with the development of its accountability.⁹⁴ Member States should conduct independent investigations into losses of life whose results should be assessed by the Commission in the report on the Schengen system, however the Commission's unwillingness to bring proceedings allows Member States' impunity and undermines the Charter.⁹⁵ The Parliamentary Assembly of the Council of Europe would like the European Parliament to be entrusted with the supervision of the activities of Frontex since its policies are linked with the lack of clarity regarding the responsibilities of Member States.⁹⁶ Furthermore, Member States never liked being monitored

⁹² Ibid at 235-236.

⁹³ Frontex: Human Rights Responsibilities, Parliamentary Assembly of the Council of Europe Report Doc 13161, 08 April 2013 Committee on Migration, Refugees and Displaced Persons Rapporteur: Mr Mikael Cederbratt, Sweden, Group of the European People's Party at 420- 421.

⁹⁴ Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' at 254.

⁹⁵ Steeve Peers: New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean? in <http://eulawanalysis.blogspot.it/2014/06/new-eu-rules-on-maritime-surveillance.html> accessed on 18 August 2016.

⁹⁶ Jasmine Coppens, 'Migrants in the Mediterranean: Do's and Don'ts in Maritime Interdiction', 359-360.

and the situation on the ground is complicated as they have different laws.⁹⁷

Frontex Regulation attributes civil and criminal liability to Member States regarding the deployment of officers, whereas there is no clear rule regarding its liability when damages occur due to its action. The Frontex Regulation does not establish a process before the European Court of Human Rights (ECtHR) for unlawful actions by border control guards as the responsibility for legal protection lies with the national court of the host Member State. Though Frontex has an independent legal personality (article 15 of the Frontex Regulation), it claims that persons whose rights have been violated should use national and EU mechanisms to file complaints. Despite that, following the accession of the EU to the European Convention on Human Rights (ECHR), Frontex is legal accountable before the ECtHR for human rights violations.⁹⁸ Frontex operations at sea are not carried out within a clear european legal framework, and this triggers consequences for Member States whose liability can be called upon before the ECtHR.⁹⁹ Also the responsibility of the EU linked to an operation coordinated by Frontex is answerable to the ECtHR, it would therefore be up to the Court to define the limits of a shared responsibility between Frontex, Member States

⁹⁷ Contribution by the Committee on Migration, Refugees and Displaced Persons to the public consultation in the context of the European Ombudsman's own-initiative inquiry on Frontex, at 10.

⁹⁸ Ibid; Frontex: Human Rights Responsibilities, Parliamentary Assembly of the Council of Europe Report Doc 13161 at 423-424.

⁹⁹ Luisa Marin, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border', at 482.

and the European Union: that leaves the door open to a “blame game”.¹⁰⁰ Member States are also subject to the control of the European Court of Justice (ECJ) which is competent to exercise an 'indirect review' of the actions of EU agencies at their borders to the extent the Member States implement such acts.¹⁰¹ Frontex is accountable to the ECJ for failure to act, the preliminary rulings and its legal acts in the name of the EU.¹⁰² Though the jurisdiction of the ECJ does not cover the responsibility of the agency, Article 19 of the Frontex Regulation provides that Frontex should assume its non contractual responsibility for damages caused by the staff in the performance of duties.¹⁰³ Though Frontex supported the Code of Conduct for its activities, it did not clarify its accountability however it should recognise that as coordinator of projects.¹⁰⁴ On the other side, since the Agency coordinates and supports the European Member States in external border control just like a service provider, the ultimate responsibility is on Member States who host a Frontex operation.¹⁰⁵ Frontex has been a ‘lightning rod’ for critics of the EU’s external borders control policy, whereas attention should have focused on Member States’ authorities. The rules on the accountability of Frontex are a ‘red herring’ of the

¹⁰⁰ Ibid at 425.

¹⁰¹ Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' at 237-238.

¹⁰² Jasmine Coppens, 'Migrants in the Mediterranean: Do's and Don'ts in Maritime Interdiction', 360.

¹⁰³ Frontex: Human Rights Responsibilities, Parliamentary Assembly of the Council of Europe Report Doc 13161 at 424.

¹⁰⁴ Ibid at 427.

¹⁰⁵ Leonhard Call, 'Eu border control: a mission to save lives and promote human rights? A critical perspective', at 45.

national authorities' misconduct.¹⁰⁶ In case of interception in the territorial sea: the coastal State is responsible; in the interception on the high sea, the third country from which the vessel have departed and the coastal Member States, either neighbouring participating or non that allowed the disembarkation, are respectively responsible.¹⁰⁷ All the interception operations coordinated by Frontex are based upon informal agreements between States and not upon 'working arrangements' which would either constitute international agreements or non-binding Memoranda of Understanding.¹⁰⁸

Where the Frontex operations have been carried out with the coastal State, the jurisdiction will be addressed on *ad hoc* basis; whereas on the high sea, the jurisdiction is on Member State which proceeds to the interception; finally in the RABIT operations, the jurisdiction is on the host State.¹⁰⁹

¹⁰⁶ Steeve Peers: New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean? in <http://eulawanalysis.blogspot.it/2014/06/new-eu-rules-on-maritime-surveillance.html> accessed on 18 August 2016.

¹⁰⁷ Frontex' Annual Report on the implementation on the EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

¹⁰⁸ The distinguishing factor is the intention of the parties, according to the ICJ "where ... the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it", see Efthymios Papastavridis, 'Fortress Europe' and Frontex: Within or Without International Law?', 98. Through working arrangements, a technical low-level operational agreements, Frontex establishes cooperation with a third country's border control authority to exchange information; see Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea', 252.

¹⁰⁹ Efthymios Papastavridis, 'Interception of human beings on the high seas: a contemporary analys (2008-2009) 36 Syracuse J. Int'l L. & Com. 145, 185-186.

IV chapter

The application of the principle of the non-refoulement

The Article 33 of the 1951 Convention is a broad formulation which covers a wide range of actions and though the territorial scope is not explicitly defined, it is indicative of the intention of the drafters of the Convention to prevent any circumvention of the non-refoulement principle. The *ratione loci* scope of the Convention extends beyond the territory of a State provided that it exercises an effective control through its organs over the persons concerned. There are five points with reference to the extraterritorial application of the Convention: the meaning of “return” includes “to bring, send, or put back to a former or proper place”, whereas “refouler” include ‘repulse’, ‘repel’ and ‘drive back’. These words are not limited to refugees who have already entered the territory of a State, the scope *ratione loci* of the non-refoulement is not limited to a State’s territory.¹¹⁰ Despite that, a restrictive reading of Article 33 based on the choice of the key words “expel or return” suggests that non-refoulement is limited to only asylum seekers who have

¹¹⁰ 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, Geneva 26 January 2007 at 13.

already entered the territory of the State.¹¹¹

In the United Nations High Commissioner for Refugee (UNHCR)'s view¹¹², based on the ordinary meaning, context and purpose of the Refugee Convention as well as the case law, the principle of non-refoulement applies whenever a State exercises its jurisdiction, including persons intercepted on board of vessels on the high seas or in the territorial waters of the States of departure. Also the United Nations Committee Against Torture has taken the view that the non-refoulement obligation applies in all territory under a State's jurisdiction, including all areas under the *de facto* effective control of the State. The Permanent International Court of Justice stated¹¹³ that States exercise criminal jurisdiction extraterritorially whenever their jurisdiction does not conflict with international law, and upon a special entitlement established by treaty, customary law or the consent of the State on whose territory jurisdiction is exercised. States have to advance a "legitimate interest based on personal or territorial connections of the matter to be regulated", this definition leaves wide discretion of interpretation and it has lowered the threshold of the criteria of the "effective control".¹¹⁴

¹¹¹ Jasmine Coppens, 'Migrants in the Mediterranean: Do's and Don'ts' (2012) *Maritime Interdiction Ocean Development & International Law* 43:342, 354.

¹¹² UNHCR comments on the Commission proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) COM 2013(197) final at 7.

¹¹³ Case of the S.S. Lotus, Decision of 7 September, PCIJ Series A, No.10 (1927), see Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' in Bernard Ryan- Valsamis Mitsilegas *Extraterritorial Immigration Control Legal Challenges* (2010) Leiden Boston, at 73.

¹¹⁴ *Ibid* at 74, 87.

Extraterritorial jurisdiction have been established in case of an effective control over an area outside national territory, authority over individuals abroad, and activities of officials on board vessels flying the flag of that State. The determination of jurisdiction can be adapted to the level of control exercised.¹¹⁵ Not only *de jure*, but also *the facto* control may be decisive in the exercise of extraterritorial jurisdiction. Jurisdiction can be based on *de jure* entitlement on the high seas which derive from the flag state jurisdiction over the acts committed on board its ships, or on *de facto* jurisdiction when a State exercises an effective control over persons. Where States carry out migration controls extraterritorially, the extraterritorial jurisdiction depends on the level of control over the territory and authority over individuals (Al Skeini judgement); whereas in the Bankovic case, the European Court of Human Rights (ECtHR) observed a strict effective control test (a minimum level of physical constraint), explicitly denying a 'cause and effect' approach to jurisdiction.¹¹⁶ The principle of non-refoulement applies when States exercised effective control over the vessels and those on board: escorting, blocking or diverting the passage of vessels carrying migrants could constitute an 'effective control'.¹¹⁷ This very low benchmark promotes the application of human rights at

¹¹⁵ See the ECHR *Banković and Others v. Belgium and 16 Other Contracting States*, Application no. 52207/99 of 12 December 2001.

¹¹⁶ Compare *Al-Skeini and Others v. United Kingdom*, ECtHR Application no. 55721/07, 7 July 2011 with *Bankovic and Others v. Belgium and 16 Other States*, Application no. 52207/99.

¹¹⁷ *Medvedyev and Others V. France*, ECtHR Appl no 3394/03, 29 March 2010.

sea.¹¹⁸

The Committee against Torture considered Spain liable for having provided assistance at sea and then overseen the repatriation of rescued in Mauritania.¹¹⁹ The possibility to hand over persons to third unsafe countries should be brought in line with the explicit reference to the customary obligation of non-refoulement. The extraterritorial application of the Refugee Convention should be harmonized with the SAR obligations: if Member States disembark persons to a country where they face a risk of being tortured or suffered an analogous treatment, they will incur in international responsibility under the human rights and refugee law. The extraterritorial jurisdiction triggers States' human rights law obligations under the European Convention of Human Rights (ECHR).¹²⁰ According to the ECtHR, a State may exercise extraterritorial jurisdiction for the purpose of human rights law where it “through the consent, invitation or acquiescence of the Government of a territory, exercises all or some of the public powers normally to be exercised by that Government.”¹²¹ Nevertheless, two requirements applied by the ECtHR (the need for a legal entitlement

¹¹⁸ Natalie Klein, 'Case for harmonizing laws on maritime interceptions of irregular migrants', (2014) *International and Comparative Law Quarterly* Volume 63 Issue 04 787, at 801-802.

¹¹⁹ *J.H.A. v. Spain*, CAT/C/41/D/323/2007, UN Committee Against Torture (CAT), 21 November 2008.

¹²⁰ See Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' at 78 : *Loizidou v. Turkey* (merits), Application No. 15318/89, Judgment of 18 December 1996; at 85: *Xhavara and fifteen v. Italy and Albania*, Application no. 39473/09, Admissibility decision of 11 January 2001 and *Medvedyev and others v. France*, Application no. 3394/03, Judgment of 10 July 2008; at 88: *Drozd and Janousek v. France and Spain*, Application no. 12747/87, Judgment of 26 June 1992. Compare to Violeta Moreno, 'Hirsi Jamaa and Others v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) *Lax Human Rights Law Review* 12:3, 574 at 580.

¹²¹ See Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' at 90: ECHR, *Bankovic and Others v. Belgium and 16 Other States* (application no. 52207/99).

and the high level of factual control) seem to limit the application of human rights law and the non-refoulement principle: when the extraterritorial applicability of human rights law depends on a high level of factual control, even situations of extraterritorial *de jure* jurisdiction could be excluded from human rights scrutiny.¹²²

Even more with regard to interception measures not carried out on fully controlled territory or without full physical control over the intercepted persons, non-refoulement obligations are less applicable.¹²³ Interception measures are those mechanisms which directly or indirectly prevent or stop individuals from reaching a State. Examples of extraterritorial interception measures are the interdiction of vessels on the high seas or in the territorial waters of third States, anyway States are bound to provide for an extraterritorial application of human rights and refugee law. The existing studies do not, however, specify the criteria of an extraterritorial jurisdiction and the non-refoulement principle in the context of interception measures.¹²⁴

States are under an obligation not to return refugees from territorial or international waters to their countries of origin, if States do it without determining the status of the rescued, they would breach the non-refoulement obligation (in the case of refugees on board). Interception and repatriation at sea without access to refugee protections are international wrongful acts, the agreements with

¹²² Ibid at 100-110.

¹²³ Ibid at 96-97.

¹²⁴ Ibid at 72.

third countries can cause harm and a "*de facto* criminalization of the act of seeking asylum", whereas the European Union has the obligation to protect them.¹²⁵ The policies of returning asylum seekers to the first country of entry and of intercepting migrants in the high seas ultimately result in indirect refoulement.¹²⁶ The absence of safeguard in the receiving States should lead to the suspension of such measures: States cannot expose people to a real risk of ill-treatment as a result of a chain through more States. Bilateral agreements to share responsibility or list of safe third countries are prohibited: the principle of complicity forbids 'sending any person to another country, knowing that the latter will violate rights which the sending country is itself obligated to respect'.¹²⁷ The removal to an intermediary country does not affect the responsibility of the Member State under the article 3 of the ECHR which prohibits States from returning individuals where they would face the risk of torture or inhuman or degrading treatment.¹²⁸ Also the Rule 39 of the ECHR Rules of Court provides interim measures (though not automatically applied) protecting from refoulement. Nevertheless, the prohibition on refoulement applies to the contracting States and not to the private vessels so if the shipmasters that have rescued refugees cannot find a port of disembarkation,

¹²⁵ Lori A. Nessel, 'Externalized borders and the invisible refugee', (2008-2009) 40 Colum. Hum. Rts. L. Rev. 625, 689.

¹²⁶ Moira Sy, 'UNHCR and Preventing Indirect Refoulement in Europe', (2015) International Journal of Refugee Law Vol. 27 No. 3 457, at 459. See the following section regarding the maritime regime on the high sea.

¹²⁷ Ibid at 465.

¹²⁸ Violeta Moreno, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' at 585.

they have no alternative to return them to the countries of origin. There is no bar to such actions and that raises the number of refugees who are ignored by ships on the high seas: the solution would be to reimburse shipmasters for expenses incurred in the rescues or a convention obligating all to give a temporary asylum until the refugees can be relocated.¹²⁹ Although the principle of non-refoulement does not provide an absolute right to disembark, it requires a temporary grant of access to a territory until the refugee status can be determined.¹³⁰

- The extraterritorial maritime regime:

Member States are obliged to respect human rights during the maritime border surveillance in their territorial waters, whereas the question is more complex on the high seas and in the territorial waters of a third country where maritime regime and SAR obligations fail to take account of obligations arising under refugee law and international human rights law. As an instance, EU Member States should take the responsibility of those intercepted or rescued in the high seas because, except for the EU's qualification Directive whose text does not limit the territorial scope, political

¹²⁹ James Z. Pugash, 'The Dilemma of the Sea Refugee: Rescue Without Refuge', (1977) 18 Harv. Int'l. L. J. 577, 599-602.

¹³⁰ Killian S. O'Brien, 'Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem', (2011) 3 Goettingen J. Int'l L. 715, 716.

asylum does not apply on the high seas.

Under the SOLAS Convention and the 1910 Salvage at Sea Convention, the duty to search and rescue applies without geographical limitation; under the article 98 UNCLOS the duty to render assistance applies fully on the high seas but it is not clear in the territorial sea.¹³¹ It is important to clarify the geographical scope of the duty. What would happen whether the asylum application made on the high seas then was brought to the territorial waters of a Member State?¹³² Up to 12 nautical miles, the territorial sea is an area under the coastal State's sovereignty and that entails the State to enforce its domestic migration laws, intercept and arrest those in violation of such laws, and prevent the non-innocent passage under the article 25 of UNCLOS. That does not mean that the coastal State's laws automatically apply to the territorial sea: ships found in the territorial waters of a Member State are subjected to either domestic, european or international law. Coastal States may exercise the criminal jurisdiction against ships passing through the territorial sea if the consequences of the crime on board extend to the coastal State, disturbing the peace or good order of the territorial sea, or when assistance is requested by the mastership or measures are required to suppress drug trafficking.¹³³ However it is difficult

¹³¹ Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 Int'l J. Refugee L. 329, 335-336.

¹³² See Steeve Peers: New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean? <http://eulawanalysis.blogspot.it/2014/06/new-eu-rules-on-maritime-surveillance.html> last access on 27 August 2016.

¹³³ Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan- Valsamis Mitsilegas *Extraterritorial Immigration Control Legal Challenges* (2010) Leiden Boston, at 120.

to define whether or not the entry of persons onboard ships into the territorial sea amounts to entry within the territory of that State, thereby triggering the application of asylum law. According to the Executive Committee of the UNHCR, the State in whose territorial waters an interception takes place has the responsibility to address the protection needs.¹³⁴ Is the passage of migrant vessels traversing the territorial waters of a State to enter into another subjected to interdiction? According to the European Commission, though it is non-innocent and prejudicial to the good order and security of the coastal State, any interdiction carried out by a State in the territorial sea of another one requires prior authorization of the coastal Member State. It may also raise issues of indirect refoulement: the law of the sea which requires the ships to leave the territorial waters may be in conflict with refugee law.¹³⁵ Interceptions on the high seas may be conducted as a part of an extraterritorial border control operations or under the SAR framework. In the former, the use of force by naval officers is much wider than in the SAR interventions. Labelling the interceptions as border control operations expose States to legal liability under the Article 4 which implies the screening of individual situation like it happens ashore.¹³⁶ The UNHCR is concerned that interception on the high seas does not adequately differentiate the types of migrants arriving by boats:

¹³⁴ Ibid at 121.

¹³⁵ M. Den Heijer, *Europe and Extraterritorial Asylum* (2011) at 229-231.

¹³⁶ Matteo Tondini, 'The legality of intercepting boat people under search and rescue and border control operations' (2012) 18 *Journal of International Maritime Law* 59 at 60; ECtHR *Hirsi Case*.

migrants are in fact stopped before entering the territorial waters. The interdiction is preferred to be effectuated as close as possible to the State of origin rather than in the territorial waters of the State of destination or even on the high seas due to the non application of the 1951 Refugee Convention whose article 1 applies to individuals outside the countries of their nationalities and thus asylum seekers should have to exit the territorial sea in order to invoke the non-refoulement principle.¹³⁷ On the other side, interceptions carried out under the SAR framework are much wider, even though not immune from problems: the intercepted vessel must be 'in distress' (a status that is not clear in the international maritime law) moreover, in the case of active resistance, the interceptions cannot fall within the SAR regime.¹³⁸ There is the need to distinguish between border control and SAR measures. A warship encountering a boat in precarious safety conditions is duty-bound to intervene however, even though every operation begins as a pure SAR intervention, the choice can be based on the concern to prevent irregular migration or on the humanitarian reason to disembark in a 'place of safety'. It is fundamental to ascertain the purpose of the action whether to prevent people from crossing maritime borders or rather to save lives.¹³⁹ From such ambiguity concerning the interceptions on the

¹³⁷ Nb: the prohibition against refoulement to torture or other inhumane treatment enshrined in article 3 of the ECHR does not have such this limitation. See Thomas Gammeltoft-Hansen, 'The refugee, the sovereign and the sea: EU interdiction policies in the Mediterranean', *DIIS Working Paper no 2008/6* Copenhagen 2008- Danish Institute for International Studies, at 20.

¹³⁸ Matteo Tondini, 'The legality of intercepting boat people under search and rescue and border control operations' at 62.

¹³⁹ *Ibid* at 71-73.

high seas, States took extraterritorial actions to stop migration by sea.¹⁴⁰ The interception on the high seas may be deemed lawful if implemented under the SAR legal regime and in compliance with the prohibition of refoulement: the interception does not violate *per se* the prohibition of refoulement because the international maritime law does not impose upon States the obligation to grant them access to their territory, the rescued are instead disembarked in a safe third country, and this practice is in principle lawful however entails an 'indirect refoulement'.¹⁴¹ As an instance, Italian interceptions of migrants in absence of assessment of protection were an example of indirect refoulement on the high seas: Italy had violated article 3 of the ECHR because the return of migrants to the countries of origin as well as the collective expulsions under the Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms represent a real risk of facing prohibited treatments.¹⁴² According to Italy, people have been rescued under the Law of the Sea Convention and the intervention did not create a link between the State and the persons concerned establishing the State's jurisdiction. The ECtHR stated that asylum procedures on board of Italian vessels fall within the Italian jurisdiction under the article 92 of the 1982 Law of the Sea Convention, i.e. ships sailing under a flag are subject to the exclusive jurisdiction of that State on the high

¹⁴⁰ Richard Barnes, 'The International Law of the Sea and Migration Control' at 128-129.

¹⁴¹ Matteo Tondini, 'The legality of intercepting boat people under search and rescue and border control operations' at 63-67.

¹⁴² ECtHR - Hirsi Jamaa and Others v Italy [GC], Application No. 27765/09. Hirsi case drawn the attention to the impossibility for States to anticipate border control on the high seas without applying refugee law.

seas.¹⁴³ Nevertheless, any other bases of jurisdiction may authorize the application of other's laws to acts on a foreign-flagged ship on the high seas, consequently creating conflicts between laws of two countries. In general international law gives priority to the flag State's jurisdiction but, in case of denial of assistance, allows jurisdiction by non-flag States.¹⁴⁴ The Regulation COM (2013) 197 clarifies the conditions of the interception on the high seas and the jurisdictional basis of action against stateless ships.

The coastal States are not allowed to interfere with foreign-flagged vessels pursuant to the flag State jurisdiction and the freedom of the high seas, except in case of bilateral treaties which confer the right to visit on the high seas the respective State parties. Ships are subject to the exclusive legislative and enforcement jurisdiction of the flag State, however it has been observed that the European States have circumvented such a rule by interdicting vessels under the pretext of search and rescue operations. Despite that, in the absence of authorization of the flag State, a Member State may only survey the ship at a prudent distance (Council Decision 2010/252/EU).¹⁴⁵ Freedom of navigation only applies to vessels under a flag and not to the small refugee boats without nationality, that means that they may be stopped and controlled on high seas to ascertain the ship's flag or confirm the stateless (article 110 UNCLOS). UNCLOS is

¹⁴³ Hirsi para 77; see also UNCLOS arts 95-96.

¹⁴⁴ Martin Davies, 'Obligations and implications for ships encountering persons in need of assistance at sea' (2003) 12 *Pac. Rim L. & Pol'y J.* 109 at 118-119.

¹⁴⁵ *Ibid* at 235.

silent on the question whether boarding States seize stateless vessels and subject them to their laws, particularly when they endanger the international regime of the high seas. There is no international law that forbids that: stateless vessels *ipso facto* are vulnerable to the exercise of a foreign jurisdiction in order to be abided by international regulations, and this does not result in impermissible interference as jurisdiction exists as a consequence of the vessel's stateless.¹⁴⁶

¹⁴⁶ Jasmine Coppens, 'Migrants in the Mediterranean: Do's and Don'ts in Maritime Interdiction' at 349-350.

Conclusion

Even though the effectiveness of the search and rescue system has been enhanced thanks to the contributions from coastal States, Frontex-led joint naval operations, non-governmental SAR actors and international shipping (this integrated approach should continue), I express my concern over the sustainability of the existing SAR regime which is not able to address the high level of SAR needs in view of the burden placed on coastal States, naval missions with non SAR mandate and the large scale of migrant movements. There is need for greater clarity and uniformity in the interpretation and application of international law relating to SAR of migrants; whereas the phenomenon of the migration, appearing as a threat to security and sovereignty, is considered a humanitarian crisis which implicates emergencial national rules instead of international law. The key principles prescribed by international refugee law need to be upheld. The cooperative approach tailored to the region is the correct way to proceed, a cohesive European Union would be more credible interacting with origin and transit countries. At the Workshop on 'Search and rescue of refugees and migrants in the Mediterranean'¹⁴⁷, it has been discussed to create an international

¹⁴⁷ Workshop on Search and rescue of refugees and migrants in the Mediterranean: Practitioners' perspectives IIHL, Sanremo 7-9 March 2016.

SAR mission which could meet the SAR needs in the immediate term. In order to achieve that, such a mission would require a military support to concentrate on core tasks. At a previous stage, the tools proposed at the Expert Meeting in Djibouti¹⁴⁸ were the identification of a country for disembarkation according to the geographical proximity, the needs of rescued persons and the efficient asylum procedures; Standard Operating Procedures for shipmasters; the possibility to link the responsibility for disembarkation to the responsibility for the SAR area in which the rescue operation is carried out; the establishment of a Task Force and Mobile Protection Response Teams to provide support for reception arrangements and finally a Draft Model Framework for cooperation to apply outside the SAR area of the rescuing flag State. Regarding the topics which have been discussed in the first chapter, a key challenge is the lack of willingness of the coastal States to fully implement their obligations under the amended SAR and SOLAS Conventions, moreover many of the UNCLOS's provisions are not self-executing and must be implemented through the domestic legislation. In regard to the fragmentation of the legal sources, bilateral agreements are *lex specialis* of the law of the sea and *lex posterior* to UNCLOS. Anyway "the Law of the Sea and the law of human rights are not separate planets rotating in different orbits"¹⁴⁹, the rules of the Law of the Sea are inspired by human

¹⁴⁸ Refugees and Asylum-Seekers in Distress at Sea – how best to respond? Expert Meeting in Djibouti, 8-10 November 2011 Background Paper.

¹⁴⁹ Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley J. Int'l L. 1 at 12.

rights considerations and should be interpreted in light of such considerations.

Member States point the finger at each other in determining who has to intervene in the overlapping SAR zones instead of sharing the burden more equitably. An effective system of burden sharing among Member States could pave the way for the disembarkation procedures. This was the issue which I have debated in the second chapter: carrying out rescue operations do not exhaust the duty to render assistance which extends to the disembarkation of the rescued persons in a place of safety. Although the duty to rescue (article 98 UNCLOS) is clear, the related duties such as bringing the rescued persons to a place of safety remain unclear. Once the initial rescue has occurred, international law is silent about the obligations owed by the shipmaster and it imposes only partial duties on flag and coastal States. A right to disembarkation should exist along with the duty on the flag State to disembark and on the coastal States to accept that respectively. Coastal States should develop adequate search and rescue services: the absence of a default port of disembarkation is perceived as an important lacuna, however the benefits of a predetermined place of safety are not straightforward and only a case-by-case approach leaves enough room for the particularities of each situation.

The crucial gap between rescue and disembarkation could be addressed by the creation of a duty incumbent on the rescuing vessel, though it has been observed that if this duty were laid down

in binding amendments it would never be accepted. Clarification of the fact that the coordinating State is under the primary responsibility to ensure the disembarkation, and so find a suitable place of safety in line with non-refoulement, is to be welcomed. Delays in rescue operations are due to differing views on responsibilities: a solution is to link the disembarkation duty to financial arrangements, burden-sharing agreements or relocation schemes; otherwise delinking the acceptance of disembarkation and the assumption of responsibility for rescued persons. Under the Guidelines for Frontex operations, priority has been given to disembarkation in the third country from which the interdicted ship departed or through the territorial waters or SAR region of which it transited or Member State hosting the Frontex operation.

The lack of the duty of disembarkation remains an obstacle to the harmonization between the law of the sea and international human rights law, Member States should adopt a unified notion of rescue understood as an act beginning with removing people from the waters until they have reached a safe place, together with a clarification of the concept of place of safety and a regional agreement on the coordination among coastal States, disembarkation guarantees and shared responsibility. In order to achieve that, it is crucial to start from States' sovereignty.

As it has been said in the third chapter, there is a “blame game” between Member States, European Union and Frontex, it would therefore be up to the European Court of Human Rights (ECtHR) to

define the limits of such responsibility. The responsibility of each Member State participating in the joint maritime operations may be invoked: the responsibility for the control and surveillance of external borders lies with the national authority of the Member State which hosts the Frontex Operation. Member States cannot entrust more powers to Frontex whose activities are not considered to comply with obligations under international law and this undermines its legitimacy and calls for more transparency. Member States remain primarily responsible for the implementation of legislation and law enforcement actions to ensure the respect of fundamental rights during the Frontex coordinated joint operations. Also the European Union is responsible for the operations coordinated by Frontex before the ECtHR. Even though Frontex has taken considerable steps to strengthen its reporting and monitoring mechanisms, yet we are aware of the failure of a control mechanism to hold Frontex accountable for human rights violations. The Agency is under the budgetary control of the European Parliament but is managed by Member States, that raises questions about Frontex's accountability. The default rule must be that Frontex operations on the high seas are under the jurisdiction of the individual Member State which proceeds to the interception; whereas, in the cases of joint patrols, the question of jurisdiction will be addressed on *ad hoc* basis and in accordance with the rules on State conduct. The Agency coordinates and support Member States just like a service provider, then the ultimate responsibility is on

Member States who host a Frontex operation; whereas others assert that Frontex should recognize its accountability as coordinator of projects. Actually, following the accession of the European Union to the European Convention on Human Rights (ECHR), Frontex is legal accountable before the ECtHR. Moreover article 19 of the Frontex Regulation provides that Frontex should assume its non contractual responsibility for damages caused by the staff in the performance of duties. Lastly, Frontex does not have a mandate to operate beyond the borders of the European Union, it is evident that any further extension should go hand in hand with the development of its accountability.

The extraterritorial application of the Refugee Convention and the customary obligation of non-refoulement remain the challenges to be resolved in harmonizing this body of law with the law of the sea. I talked about this issue in the fourth chapter where it emerged the gap between the obligation to grant refugees their rights set out in the 1951 Convention and the obligation of non-refoulement. For instance the flag State is in no way required to provide the rescuees on high sea with asylum, despite the ECtHR found that whenever a State exercises authority over individuals outside its territory it is required to guarantee the human rights obligations.

The aggressive extraterritorial border controls have increased the powers of States without extending the responsibility and this has undermined the right to seek refugee status: any interdiction of vessels amounts to a breach of the obligation to determine the status

of any refugees. Moreover States should suspend such measures knowing that other States will violate rights which they themselves are obligated to respect. The removal to an intermediary State does not affect the responsibility of the Contracting Party as States should provide adequate safeguard from wrongful returns which constitute a threat of persecution prohibited by the article 33 of the Geneva Convention. It is fundamental to ascertain the purpose of the interception on the high sea whether to prevent irregular migration or rather to save lives: from such ambiguity, States took extraterritorial actions to stop migration by sea and deconstruct or shift their responsibilities. The sovereign right of States to decide who should be allowed into their territory has prevailed over humanitarian principles.

In May 2014, the Council and the European Parliament adopted Council Regulation (EU) 656/2014 establishing rules for the surveillance of the external sea borders during joint operations coordinated by Frontex, including the search and rescue of distressed vessels, interception and disembarkation of persons.

A Member State hosting a Frontex operation should assess the general situation in the third States/ the personal circumstances of rescued and intercepted persons whenever the joint operations allow to disembark or respect the principle of non-refoulement in hand over persons to third States. This was envisaged in cases of disembarkation upon interception in high seas or upon search and rescue. The National Coordination Centre are responsible to define

the port of disembarkation of those intercepted or rescued. According to Frontex, this new Regulation contributed to the reinforcement of the capacity of saving lives at sea, promoting the fundamental rights of migrants without prejudice to the border surveillance. Although recognizing that States have a legitimate interest in controlling migration, there is an indiscriminate application by States of interception measures to asylum-seekers without taking into account the adequate treatment they deserve. States within whose sovereign territories, or territorial waters, interceptions take place have the responsibility for addressing any protection needs of intercepted persons. The application of interception measures should not obstruct the ability of asylum-seekers and refugees to benefit from international protection. As the United Nation High Commissioner for Refugees (UNHCR) stated in its policy paper¹⁵⁰, the preferred option where responsibility is transferred to a third State is for the intercepting State to determine asylum claims including resettlement. Agreements between intercepting States and third States should delineate the protection responsibilities; otherwise *ad hoc* agreements can be concluded for interception operations. In all cases, the intercepting States maintain responsibilities for intercepted persons as long as they have jurisdiction. Depending on the interception operations, there may be some ambiguity about which State has jurisdiction because it can be

¹⁵⁰ UNHCR Protection Policy Paper: Maritime Interception Operations and the Processing of International Protection Claims-Legal Standards and Policy Considerations with Respect to Extraterritorial Processing, November 2010, see par. 41.

shared by intercepting State, host State and State undertaking processing. Clarify in advance which States have responsibility will avoid to minimize responsibilities or to shift burdens onto other States. I express my hope that these policies will receive the widest possible support of governments.

Bibliography

- Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in Bernard Ryan- Valsamis Mitsilegas *Extraterritorial Immigration Control Legal Challenges* (2010) Leiden Boston.
- Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan- Valsamis Mitsilegas *Extraterritorial Immigration Control Legal Challenges* (2010) Leiden Boston.
- Richard Barnes, 'Refugee law at sea' (2004) 53 Int'l & Comp. L.Q. 47.
- Evelien Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the responsibility of the EU and its Member States' in Bernard Ryan- Valsamis Mitsilegas *Extraterritorial Immigration Control Legal Challenges* (2010) Leiden Boston.
- Jasmine Coppens, 'Migrants in the Mediterranean: Do's and Don'ts in Maritime Interdiction Ocean', (2012) Development & International Law, 43:342.
- Jasmine Coppens, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) The International Journal of Marine and Coastal Law 25 377.
- Martin Davies, 'Obligations and implications for ships encountering persons in need of assistance at sea', (2003) 12 Pac. Rim L. & Pol'y J. 109.
- M. Den Heijer, 'Europe and Extraterritorial Asylum', 2011.
- Maarten Den Heijer, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in Bernard Ryan- Valsamis Mitsilegas *Extraterritorial Immigration Control Legal Challenges* (2010) Leiden Boston.
- Marcello Di Filippo, 'Irregular migration across the Mediterranean sea: problematic issues concerning the international rules on safeguard of life at sea', (janvier-décembre 2013) Paix et Sécurité Internationales Num. 1.
- Marcello Di Filippo, 'Irregular Migration and Safeguard of Life at Sea: International Rules and Recent Developments in The Mediterranean Sea', in Del Vecchio, A. (ed.), *International Law of the Sea: Current Trends and Controversial Issues*, Eleven International Publishing, The Hague, 2013.
- Thomas Gammeltoft-Hansen, 'The refugee, the sovereign and the sea: EU interdiction policies in the Mediterranean', DIIS Working Paper no 2008/6 Copenhagen 2008 - Danish Institute for International Studies.
- Natalie Klein, 'A case for harmonizing laws on maritime interceptions of irregular migrants', (2014) International and Comparative Law Quarterly Volume 63 Issue 04.

- Silja 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 Int'l J. Refugee L. 538.
- Anja Klug, 'Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing', International Journal of Refugee Law (2014) Vol. 26 No. 1 48.
- Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' in Bernard Ryan-Valsamis Mitsilegas *Extraterritorial Immigration Control Legal Challenges* (2010) Leiden Boston.
- Luisa Marin, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border', (2011) Journal of Contemporary European Research Volume 7, Issue 4.
- Violeta Moreno, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) Lax Human Rights Law Review 12:3, 574.
- Lori A. Nessel, 'Externalized borders and the invisible refugee', (2008-2009) 40 Colum. Hum. Rts. L. Rev. 625.
- Killian S. O'Brien, 'Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem', (2011) 3 Goettingen J. Int'l L. 715.
- Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002)14 Int'l J. Refugee L. 329.
- Eftymios Papastavridis, 'Fortress Europe' and Frontex: Within or Without International Law?', (2010) 79 Nordic J. Int'l L. 75.
- Eftymios Papastavridis, 'Interception of human beings on the high seas: a contemporary analysis under international law', (2008-2009) 36 Syracuse J. Int'l L. & Com. 145.
- Steeve Peers: New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean? in <http://eulawanalysis.blogspot.it/2014/06/new-eu-rules-on-maritime-surveillance.html> accessed on 18 August 2016.
- James Z. Pugash, 'The Dilemma of the Sea Refugee: Rescue Without Refuge', (1977) 18 Harv. Int'l. L. J. 577.
- Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea', (2004) 17 J. Refugee Stud. 50.
- Philip W. Romohr, 'A right/duty perspective on the legal and philosophical foundations of the no duty to rescue rule', (2005-2006) 55 Duke L.J. 1025.

- Martin B. Rosenberg, 'The Alternative of Reward and Praise: The Case against a Duty to Rescue', (1985) 19 Colum. J.L. & Soc. Probs. 1.
- Moira Sy, 'UNHCR and Preventing Indirect Refoulement in Europe', (2015) International Journal of Refugee Law Vol. 27 No. 3 457.
- Matteo Tondini, 'The legality of intercepting boat people under search and rescue and border control operations' (2012) 18 Journal of International Maritime Law 59.
- Tulio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley J. Int'l L. 1
- Seline Trevisanut, *EU Migration law*, 'Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management' (2014) Oxford University Press.
- Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 Int'l J. Marine & Coastal L. 523.

Other documents

- Workshop on Search and rescue of refugees and migrants in the Mediterranean: Practitioners' perspectives IHL, Sanremo 7-9 March 2016.
- Frontex Risk Analysys for 2016.
- Guy S. Goodwin-Gill, 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action', Jean Monnet Centre of Excellence on Migrants' Rights in the Mediterranean University of Naples 'L'Orientale'- 11 May 2015.
- Frontex' Annual Report on the implementation on the EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.
- Frontex General Report 2014.
- Marcello Di Filippo, 'Delinking disembarkation and assumption of responsibility for asylum seekers, Proposal for an EU Pilot Project not Requiring an Amendment of the Dublin Regulation', High Commissioner's Dialogue on Protection Challenges, 2014 - International Institute of Humanitarian Law.
- Frontex: Human Rights Responsibilities, Parliamentary Assembly of the Council of Europe Report Doc 13161, 08 April 2013 Committee on Migration, Refugees and Displaced Persons Rapporteur: Mr Mikael Cederbratt, Sweden, Group of the European People's Party.

- UNHCR comments on the Commission proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) COM 2013(197) final.
- Analysis Criticism of Frontex’s operations at sea mounts “I try to avoid giving the impression I’m somehow sneaking out of the responsibility”, Frontex’s Executive Director on search and rescue at sea- November 2012.
- Contribution by the Committee on Migration, Refugees and Displaced Persons to the public consultation in the context of the European Ombudsman's own-initiative inquiry on Frontex. PACE-Sept. 2012
- UNHCR 'Refugees and Asylum-Seekers in Distress at Sea – how best to respond?', Expert Meeting in Djibouti, 8-10 November 2011 Background Paper.
- UNHCR Rescue at sea, Stowaways and maritime interception-Selected Reference Materials 2nd Edition – December 2011 (Division of International Protection (DIP) UNHCR Geneva).
- House of Lords European Union Committee 9th Report of Session 2007–08, Frontex: the EU external borders agency Report with Evidence.
- 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, Geneva 26 January 2007.
- UNHCR, Advisory Opinion on the Extraterritorial Application, Geneva 26 January 2007.
- ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58.

UNIVERSITY OF ESSEX

DISSERTATION

SCHOOL OF LAW/HUMAN RIGHTS LAW

LLM/MA IN:

STUDENT'S NAME:

SUPERVISORS'S NAME:

DISSERTATION TITLE:

SUPERVISOR'S COMMENTS: (PLEASE WRITE BELOW YOUR COMMENTS)

MARK:

SIGNATURE:

DATE: