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Article

***89 THE ESSENTIAL ROLE OF MALTA IN DRAFTING THE NEW REGIONAL AGREEMENT ON
MIGRANTS AT SEA IN THE MEDITERRANEAN BASIN**

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I

INTRODUCTION

The Arab Spring recently highlighted the problem of **migrants at sea** and the shortcomings of the international legal framework. Indeed, due to the social uprisings in Tunisia and Libya, thousands of people tried to reach Europe by **sea**. This is a dangerous journey, as these asylum seekers often travel in unseaworthy vessels. As a result of the Arab Spring, it is estimated that more than 1,500 people drowned or went missing while attempting to cross the **Mediterranean** to reach Europe in 2011. [FN1] These events are a reminder of the extreme actions that desperate people will take. The international community is aware that this problem has to be tackled as soon as possible in order to prevent further loss of life.

This article first deals with the current international legal framework concerning **migrants at sea** and its shortcomings. Second, we take a look at how **Malta** interprets the existing obligations. Third, recent developments within the International Maritime Organization (IMO) on the **Draft Regional Agreement** for the **Mediterranean Basin** - an **agreement** hoping to solve the problem of disembarking **migrants at sea in the Mediterranean** - will be highlighted. Finally, we will discuss how **Malta** - a small State of only 316 km² - influences the content of the **agreement** and how this island itself is being affected by it.

***90 II**

THE UNDEFINABLE DEFINED - DISTRESS, RESCUE AND PLACE OF SAFETY

A. Between Duty And Discretion

It is a legal obligation for shipmasters and States under customary international law, [FN2] as well as under Articles 58(2) and 98(1) of the 1982 Law of the Sea Convention (LOSC), to render assistance to persons in danger of being lost and to proceed with all possible speed to the rescue of persons in distress. Although the LOSC only mentions this duty in the exclusive economic zone (EEZ) and on the high seas, [FN3] a State cannot rely on its sovereign powers to disregard this obligation in its territorial sea. [FN4] As assistance must be given to any person, [FN5] the obligation applies regardless of the persons' nationality or status or the circumstances in which they are found. [FN6] Therefore, **migrants** cannot be excluded from

this obligation.

Although there is a duty to assist persons **in danger of** being lost, **only** a distress situation requires a rescue. There is a variety **of** acts that may constitute assistance, for example to tow the vessel to safety, extricate a grounded vessel, fight a fire aboard a ship, provide food and supplies, embark crewmen aboard to replace the tired or the missing, secure aid or assistance from other nearby ships, or simply stand-by to provide navigational advice. [FN7] The *91 1989 International Convention on Salvage (Salvage Convention) also mentions this general duty to provide assistance. [FN8]

The actual distress phase is defined by the International Convention on Maritime Search and Rescue (SAR Convention) [FN9] as: "A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance." [FN10] Exactly when a situation requires immediate assistance can be subject to different interpretations according to which State is handling the situation. For some States the vessel must really be on the point of sinking. [FN11] However, the International Law Commission stated that - although a situation of distress may at most include a situation of serious danger - it is not necessarily one that jeopardizes the life of the persons concerned. [FN12] In contrast, for other States it is sufficient for the vessel to be unseaworthy. [FN13] MORENO-LAX even suggests that unseaworthiness *per se* entails distress. [FN14]

Council Decision 2010/252/EU [FN15] adopted additional guidelines that must be respected by European Member States during search and rescue situations*92 at sea. When deciding whether a vessel is in distress, search and rescue units should take all relevant elements into account, in particular:

- (a) the existence of a request for assistance;
- (b) the seaworthiness of the ship and the likelihood that the ship will not reach its final destination;
- (c) the number of passengers in relation to the type of ship (overloading);
- (d) the availability of necessary supplies (fuel, water, food, etc.) to reach a shore;
- (e) the presence of qualified crew and command of the ship;
- (f) the availability of safety, navigation and communication equipment;
- (g) the presence of passengers in urgent need of medical assistance;
- (h) the presence of deceased passengers;
- (i) the presence of pregnant women or children; and
- (j) the weather and sea conditions. [FN16]

Thus - according to these guidelines - although unseaworthiness is certainly an element to take into consideration when assessing the situation, it does not automatically imply a distress situation. Indeed, every situation is different and whether persons at sea are in distress or not will depend on the specific circumstances. Therefore, an assessment can only be made on a case-by-case basis. Although the definition of distress is quite vague, it is essential that shipmasters and States have the discretion to take all relevant elements into account in order to decide whether persons are in distress. However, one element that is indisputable is that the existence of an emergency should not be exclusively dependent on, or determined by, an actual request for assistance. [FN17]

B. The SAR Convention To The Rescue

Every flag State must require the master of a ship flying its flag to proceed with all possible speed to the rescue of persons in distress when informed of their need of assistance. [FN18] Coastal States shall establish adequate and effective search and rescue services (for example, through the creation of a Rescue Co-ordination Centre or RCC) and, where circumstances so require, cooperate with neighbouring States for this purpose. [FN19] The basic elements*93 for a search and rescue service are a legal framework, the assignment of a responsible authority, the organization of available resources, communication facilities, coordination and operational functions and processes to improve the service including planning, domestic and international cooperative relationships and training. [FN20]

Rescue can be described as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.” [FN21] Until the adoption of the SAR Convention, there was actually no international system covering search and rescue operations. Consequently, in some areas there was a well-established organization able to provide assistance promptly and efficiently, whereas in other areas there was nothing at all. The SAR Convention thus aims at developing an international search and rescue plan. As a result, no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a search and rescue organization and - when necessary - by co-operation between neighbouring search and rescue organizations. [FN22]

Basically, the world's oceans are divided into 13 search and rescue areas, in each of which the countries concerned have delimited search and rescue regions for which they are responsible. [FN23] States must ensure that sufficient Search and Rescue Regions (SRR) are established within each sea area. These regions should be contiguous and - as far as practicable - not overlap. [FN24] Each SRR shall be established by agreement among the parties concerned. [FN25] The delimitation of an SRR is not related to, and shall not prejudice, the delimitation of any boundary between States. [FN26]

Parties are required to ensure the closest practicable coordination between maritime and aeronautical services. [FN27] The International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual) - which was jointly published by IMO and the International Civil Aviation Organization (ICAO) - provides guidelines for a common aviation and maritime approach to organizing and providing search and rescue services. [FN28] For the moment, *94 several States in the Mediterranean have unilaterally declared a SRR. However, there is no regional agreement yet on the coordination among them. [FN29]

C. Place Of Safety: A Guarantee For A Safe Place?

Rescue implies that persons in distress have to be delivered to a place of safety. [FN30] The IMO Guidelines on the Treatment of Persons Rescued at Sea state that a place of safety can be defined as a location where rescue operations are considered to terminate, where the survivors' safety or life is no longer threatened, basic human needs (such as food, shelter and medical needs) can be met and transportation arrangements can be made for the survivors' next or final destination. [FN31] Disembarkation of asylum-seekers recovered at sea, in territories where their lives and freedom would be threatened, must be avoided [FN32] in order to prevent the violation of the *non-refoulement* principle. [FN33] Also Council Decision 2010/252/EU [FN34] stated that the *non-refoulement* principle should be respected. [FN35]

The Government responsible for the SRR in which survivors were recovered will be responsible for providing a place of safety, or ensuring that such a place of safety is provided. [FN36] Although an assisting ship may only serve as a temporary place of safety, [FN37] there is no actual duty for States to disembark *95 the persons rescued. [FN38] Both the International Convention on Safety of Life at Sea (SOLAS Convention) and the SAR Convention state that States must arrange for the disembarkation of persons rescued at sea as soon as reasonably practicable. [FN39] In other words, a State can refuse disembarkation onto its own territory or make this dependent on certain conditions. [FN40]

Ironically, the ‘place of safety’ provision often hinders migrants from being brought to a safe place in an efficient way. Because there is no clear disembarkation duty, persons rescued at sea can spend weeks on a ship at sea before a State allows them to go ashore. [FN41] On 11 July 2011, the *Almirante Juan de Borbón* - a Spanish frigate participating in NATO *Operation Unified Protector* - rescued 114 migrants from drowning in the Mediterranean. After the vessel left Libya, the engine broke down and the persons on board drifted for two days without food or water. When the warship was informed about their condition, they provided immediate assistance. On 13 July 2011, a man and his pregnant wife were brought to Malta for medical

treatment. Spain agreed to receive a 10-month-old baby. However, Spain, Italy and Malta all refused to accept disembarkation onto their territory. Malta stated that NATO was responsible for the problem. Eventually, the migrants were transferred to Tunisia on 16 July 2011. [FN42] This was a violation of the *non-refoulement* principle because some of the asylum-seekers were of Tunisian origin and there is political turmoil in the country.

The fact that the Government of the SRR in which the survivors were recovered is responsible for providing a place of safety, or ensuring that such a place of safety is provided, means that migrants in distress at sea are sometimes ignored or brought to the SRR of another State. Indeed, States know that they will not only be responsible for providing assistance, but also for the place of safety. In March 2011, a boat carrying 72 migrants spent 16 days drifting in the Mediterranean after it had left Tripoli destined for Italy. *96 Migrants stated that several ships and even a NATO aircraft carrier ignored their pleas for help. The out-of-fuel ship eventually washed up on a western Libyan beach. Only 11 people survived while the others had died of thirst and starvation at sea. [FN43] There are even testimonies of asylum-seekers that the Greek Coast Guard, for example, tows ships carrying migrants into the Turkish SRR. [FN44]

Although recent international and European soft law initiatives do focus on a real disembarkation duty, they also put too much burden on the coastal States. Indeed, the 2009 IMO Guidelines on Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea mention that if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SRR should accept the disembarkation. [FN45] Similarly, Council Decision 2010/252/EU states in its guidelines regarding disembarkation that priority should be given to the third country from where the ship carrying the persons departed, or through the territorial waters or SRR through which that ship transited. [FN46] If this is not possible, priority should be given to disembarkation in the Member State hosting the surveillance operation at sea. [FN47] Without any prior agreement on burden-sharing between States, the life of many migrants is being jeopardized. It is estimated that for every 100 people safely landing after a dangerous journey in the Mediterranean, 5 people drown without leaving any trace. [FN48] However, some States fear that clarifying obligations and solving the problem through burden-sharing would produce an enormous pull factor, thus encouraging migrants to come to Europe by sea. [FN49]

*97 III

MALTA - A DISTINCT VIEW ON MIGRANTS AT SEA?

A. *Setting The Scene*

Malta is a small island of only 316 km². Nevertheless, in some ways Malta has a bigger stake in the Mediterranean than most of the other coastal States. It is an island State with an important fishing industry, a high level of tourism, and other marine-related industries such as shipbuilding and ship repair. Therefore, Malta is clearly one of the Mediterranean's most ocean-dependent States. As a result, maritime affairs - especially those of a political kind - are followed keenly by the Maltese people. [FN50] Due to its population density, the island feels under pressure from migrants arriving by boat across the Mediterranean. [FN51]

Malta is a party to the 1982 LOSC [FN52] and is thus bound by the legal obligations therein. Although Malta accessed the 1974 SOLAS Convention on 8 August 1986 and the 1979 SAR Convention on 24 September 2002, [FN53] it has not yet signed the 2004 SOLAS and SAR Amendments. On 22 December 2005, the IMO received a communication from the Ministry of Foreign Affairs of Malta declaring that Malta

“is not yet in a position to accept these amendments.” [FN54] The Armed Forces of Malta (AFM) are responsible for the search and rescue operations. The Department of Civil Aviation (DCA) operates jointly with the AFM in the event of an aeronautical incident. [FN55] Although there is a certain amount of discretion in deciding whether a person is in distress, the AFM has been accused of not fulfilling their duty, by for example only helping persons who are actually requesting assistance. [FN56]

***98 B. Coping With An Enormous SRR**

In 2001, COMSAR/Circ.27 invited States to submit all details concerning the current availability of their SAR services as well as the exact coordinates of their SRR. [FN57] Malta submitted this information on 30 September 2005. [FN58] Although Malta is only a small country, it claimed a maritime SRR that coincides with the Malta Aeronautical SRR and the Malta Flight Information Region (FIR). [FN59] Since the country ‘inherited’ an enormous Flight Identification Region (FIR) from Great Britain, Malta is now responsible for a region that amounts to 250,000 km². Toward the west, the Maltese SRR almost reaches the territorial waters of Tunisia. Toward the east, it nearly stretches to Crete. Moreover, toward the north, Malta claimed part of the same area as Italy. This is reflected on the map which was attached to SAR.8/Circ.3. [FN60] For example, the Italian island of Lampedusa is both part of the Maltese and the Italian SRR. Migrants coming from the North African coast and crossing the Mediterranean to reach Italy, have to pass through the Maltese SRR.

Although Italy is pressuring Malta to give up part of this vast area, this is definitely not an option for the Maltese government. One of the reasons is that this area is connected to the lucrative income the island derives from its Flight Information Region (FIR), as the size of the latter is bound to the SRR. Malta earns millions of euros a year from air traffic control charges on aircraft using the area. In addition, there are rumours that Malta thinks the SRR could be an asset when delimiting its continental shelf. [FN61] Indeed, Malta's maritime boundary system is only partially delimited [FN62] and there are strong indications of oil and gas resources in the areas between Tunisia and Malta on the one hand, and Sicily and Malta on the other. [FN63] However, the SAR Convention is very clear on this issue. It states that the delimitation of the SRR is not related to, and shall not prejudice, the delimitation of any boundary between States. [FN64]

***99** But is Malta actually able to operate this unilaterally declared SRR? First of all, the unilateral declaration of the Maltese SRR is subject to the principle of good faith. This principle creates a need to ensure compliance with unilateral commitments. [FN65] However, the SAR Convention only asks States to coordinate search and rescue services in the area under their responsibility. Thus, there is no obligation for States to do this individually as they can act in cooperation with other States. [FN66]

For example, on 6 April 2011, Malta informed the Italian Maritime Rescue Coordination Centre of the presence of a boat in distress, 45 miles from the Italian island of Lampedusa. As Maltese patrol boats were temporarily unavailable, Italian search and rescue assets were shipped to the area. The boat - which had departed from the Libyan port of Zuara - carried some 300 persons who were fleeing the north coast of Africa in search of a better life. However, that type of vessel normally only held a maximum of 40 people. Moreover, the engine was severely damaged, which made it impossible to manoeuvre the boat. Over 250 migrants were lost after their vessel capsized due to flooding. Eventually, only 52 persons could be saved by the Italian Coast Guard. [FN67]

The fact that Italy was asked to deal with the rescue does not mean that Malta did not live up to its obligations under the SAR Convention. However, is the Maltese coordination efficient enough if 250 migrants are lost? Moreover, due to an overlap of the Maltese and the Italian SRR, there can be a delay in deciding who is responsible, thus jeopardizing the lives of migrants in distress. Although the SAR Convention mentions

that overlaps have to be avoided as far as practicable, [FN68] it also states that SRR's should be established by agreement among parties. [FN69] That has not been the case up until today.

***100** *C. Humanitarian Aspect*

According to Malta there is a safe place in terms of search and rescue, and in terms of humanitarian law. [FN70] However, as Malta did not sign the 2004 SOLAS and SAR Amendments, and as it does not accept the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, it does not recognize the link between the two concepts which was established in these instruments. Malta does not accept any link between the responsibility for the search and rescue, and the responsibility for providing a place of safety or ensuring that such a place of safety is provided.

Nevertheless, the Council Decision 2010/252/EU also mentions that no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*. [FN71] However, these guidelines are only applicable with regard to the surveillance of the sea external borders in the context of operational cooperation coordinated by Frontex, the European Agency for the management of operational cooperation at the external borders of the Member States. [FN72] This means that when Malta is acting outside a Frontex surveillance operation, these guidelines will not be applicable. Due to the 2012 ECtHR judgment in *Hirsi Jamaa and Others v. Italy*, the principle of non-refoulement will be applicable when a State has continuous and exclusive control over persons. [FN73]

It is however understandable that Malta wants to separate the two concepts as the country is situated at the frontline of European border controls. The Dublin II Regulation is regarded as unfavourable for Malta as the Member State responsible for an asylum claim will be the State through which the asylum seeker first entered the European Union. Therefore, the country considers burden-sharing a crucial element. [FN74] De Blouw believes that the modification of the Dublin Regulation is the first and most important step to eradicating human rights abuses in Southern Europe as this could lessen the immigration burden on coastal **Mediterranean** Member States. [FN75] To help **Malta** to cope with the migration problem, EUREMA (European ***101** Relocation **Malta**) - a pilot project for intra-EU re-allocation of beneficiaries of protection from **Malta** - was launched in July 2009. It was co-funded by the EU under the ERF and supported by IOM and UNHCR. Its objectives are the implementation of the principle of solidarity among States, the identification of resettlement solutions for people in need and the improvement of the situation for those who remain in **Malta**. However, this project is not a solution to the negative impact of the Dublin II Regulation. [FN76]

IV

A TAILOR-MADE SOLUTION FOR THE MEDITERRANEAN

*A. From An International To A **Regional** Approach*

1. A Slow Start

At the meeting of the IMO Sub-Committee on Radio Communications and Search and Rescue (COMSAR) in March 2010, the United States stated that the discussions between **Mediterranean** countries concerning rescue and disembarkation of migrants at sea represent a **regional** problem requiring a **regional** solution. However, Italy, **Malta** and Spain expressed their disappointment that other countries seemingly did

not recognize that the problem was more than simply a **regional** one. Indeed, other parts **of** the world are also confronted with similar difficulties and, even more importantly, ships **of** all flags are currently involved **in** the resulting rescue operations. Therefore, the IMO Secretary-General proposed to develop a pilot project for a **regional** solution **in** the **Mediterranean**. If this project works, it could be applied **in** other parts **of** the world. [FN77]

One **of** the primary concerns **of** the IMO is the integrity **of** the search and rescue and, consequently, the safety **of** life **at sea** regime. [FN78] Therefore, the IMO wants to prevent incidents which cause loss **of** life **at sea** from recurring. [FN79] COMSAR launched the idea **of** developing a pilot project for a **regional** solution **in** the **Mediterranean** **in** March 2010. **On** the one hand, the system **of** rescuing **migrants in the Mediterranean Basin** has to be improved. *102 **On** the other hand, these persons also have to be disembarked **at** a place **of** safety **in** accordance with the SAR and SOLAS Conventions. [FN80] If the project works, it could be extended to other parts **of** the world experiencing similar situations. [FN81]

Meanwhile, the IMO is even waiting to take steps **on** the international level - for example amending the Facilitation Convention [FN82] - until the results **of** this **Regional Agreement** are ready. [FN83] **In** May 2010 the IMO Secretary-General made available his good offices to take this matter forward for informal consultations with a group **of** interested parties. [FN84] A first **draft of** the Terms **of** Reference for such a consultation group was established by the IMO Secretariat **in** co-operation with interested parties, including Italy, **Malta** and Spain. [FN85]

A first meeting **of** the consultation group was held under the auspices **of**, and chaired by, the IMO Secretary-General **on** 28 July 2010. It was attended by representatives from Italy, **Malta**, Spain and the IMO Secretariat. The meeting agreed upon the Terms **of** Reference for the group and finalized a list **of** issues to be discussed **in** the development **of** a **Regional Agreement on** concerted procedures relating to the disembarkation **of** persons rescued **at sea**. The IMO Secretariat prepared a **draft** for this **Regional Agreement** which was tabled for the parties concerned to consider and to comment. [FN86] However, the delegations **of** Italy, **Malta** and Spain requested an extension **of** the target completion date to 2012 because there has not been sufficient progress made. [FN87] Indeed, a second meeting had to be postponed due to the non-availability **of** delegations. [FN88] Italy requested that the consultation group **of** interested parties should be extended to the other relevant **regional** institutions, for instance the European Union, **in** order to avoid the stalling **of** future consultations due to the non-availability **of** delegations. [FN89]

*103 2. *Arab Spring - A Speed Up*

In 2011, States however realized that the situation **in** the **Mediterranean region** had deteriorated over the months following the first meeting. The urgency **of** making progress **on** the issue was stressed, as a consequence **of** a wave **of** social uprisings affecting the northern part **of** the African continent, resulting **in** a massive migration by **sea** towards Europe. [FN90] **In** March 2011, NATO warships as well as aircraft started patrolling the approaches to Libyan territorial waters as part **of** 'Operation Unified Protector.' As called for **in** United Nations Security Council Resolution 1973, [FN91] their purpose was to reduce the flow **of** arms, related material and mercenaries to Libya. This operation is part **of** the broad international effort to protect civilians **in** Libya from the violence committed by the Gaddafi regime. [FN92]

However, there were growing signs that Gaddafi's regime was trying to force a migration crisis to use as a weapon against his NATO enemies. [FN93] Indeed, according to the International Organisation for Migration (IOM), some migrants stated that they were forced onto boats by Libyan troops and police. Migrants who were brought to safety on the Italian island of Lampedusa said they witnessed a boat - carrying between 500 and 600 people - sink off the Libyan coast. Although some of the persons were able to swim to the

shore, it is not clear how many migrants survived. After seeing what had happened to the first boat, many of the migrants - who had been waiting on land to take another boat - changed their mind about making the sea journey to Italy. However, they claim that Libyan soldiers and officials forced them onto a waiting boat by firing their guns indirectly. [FN94]

On 6 April 2011, a second meeting - again under the auspices of and chaired by the IMO Secretary-General - was held to further this debate. It was once again attended by representatives from Italy, Spain and the IMO Secretariat. [FN95] On that same day over 250 migrants were lost after their vessel*104 capsized in the Mediterranean Sea, which proved again how urgent this matter was. [FN96] The Terms of Reference were reviewed and accepted. [FN97] It was concluded that the development of the Regional Agreement was to:

1. establish and strengthen co-operation among Parties to enable them to cope with incidents involving persons rescued at sea;
 2. establish a system of communication between the countries in the region to exchange information on the movement of persons by sea;
 3. ensure the safety of persons rescued at sea, pending a decision as to the place where such persons will be safely delivered, taking into account the prevailing weather and other conditions, including the safety of the delivering ships and the capacity of the places where they are delivered to provide care as may be necessary under the circumstances;
 4. arrange that delivery of persons takes place without undue delays to the rescuing ships which should be allowed to promptly proceed to their destination once the delivery operation is over; and
 5. promote co-operation for the delivery of persons rescued at sea to a port of a place of safety.
- [FN98]

The meeting then prepared the draft text for the Regional Agreement to be used as a basis for consideration at a future meeting. [FN99] It was agreed that the group should be expanded to include other interested parties concerned in the region, such as relevant regional and international organizations. [FN100] Malta stated that it was unable to attend the second meeting and that it did not completely agree with the outcome of that meeting. While they had no difficulties with the essence of the Terms of Reference, Malta believed that the text needed to be revised in the interest of clarity and consistency. Moreover, Malta had reservations on both the expansion of the consultation group and the draft text of the Regional Agreement. The country therefore proposed another meeting to discuss all these issues. [FN101]

The third meeting of the consultation group was held on 15 June 2011. That meeting further developed the Terms of Reference and discussed a draft Regional Agreement on concerted procedures relating to the disembarkation of persons rescued at sea. It was also agreed that the consultation group *105 should be expanded. [FN102] As a first expansion step, all of the Mediterranean countries were invited through Circular letter No. 3203 of 18 August 2011. This regional meeting is being held back-to-back with the parallel celebration of the World Maritime Day in Rome on 12 October 2011. The ultimate goal here will be the development of a Regional Agreement in the form of a Memorandum of Understanding (MoU) on concerted procedures relating to the disembarkation of persons rescued at sea. [FN103] At COMSAR 16, it was considered beneficial - in order to make significant progress towards finalizing the draft Regional MoU - to hold informal consultations among interested parties to agree on some of the more contentious issues and associated draft texts before organizing the next regional formal meeting. Accordingly, informal consultations were held at IMO Headquarters on 21 February 2012. Some of the most contentious aspects were discussed and agreements reached on sensitive subjects and the draft text of the Regional MoU was improved accordingly. However, after some discussion, taking into account that the work on this matter was still in progress, COMSAR decided to invite the MSC to extend the target completion year to 2013. MSC has agreed to postpone the deadline to 2013. [FN104]

A MoU is a well-accepted legal instrument in international law and practice, and is identified as “an in-

formal but nevertheless legal agreement” between two or more parties. [FN105] Whether this MoU is meant to be binding is not clear at the moment. However, a soft law agreement would not necessarily be a negative factor. Hard and soft law are used as alternatives, and can interact in complementary ways. Legal positivists tend to favor hard law as it refers to legal obligations of a formally binding nature; soft law refers to duties that are not formally binding but may nonetheless lead to binding hard law. Rationalists, in contrast, contend that hard and soft law have distinct attributes that States choose for different contexts, and thus can build upon each other. Lastly, constructivists maintain that State interests are formed through socialization processes of interstate interaction which hard and soft law can facilitate. Therefore, constructivists often favour soft law instruments for their capacity to generate shared norms and a sense of common purpose and identity, without the constraints raised by concerns over potential litigation. [FN106]

*106 Regardless of their views about the strengths and weaknesses of hard and soft law, all three schools examine how hard and soft law can serve as mutually supporting complements to each other. [FN107] Moreover, soft law can sometimes be more effective than hard law. Whether a law is effective goes beyond looking **at** implementation or compliance to determine whether an international norm - whatever its source **in** domestic or international law - achieves its policy objective. [FN108] A rule is deemed effective when it leads to certain behaviour which may or may not meet the legal standard **of** compliance. [FN109] The development **of** a soft law framework has been successfully applied to address gaps **in** international law **in** the past. [FN110] Barnes states that - consistent with the general trend towards the use **of** soft law instruments - **new** legal initiatives concerning **migrants at sea** are most likely to take the form **of** non-binding measures. [FN111]

B. From An Interagency To A Maritime Approach

During the meetings, it was stressed that the development **of** a **Regional Agreement** should be restricted to purely maritime matters. [FN112] Although the competences **of** the IMO **only** extend to the search and rescue part **at sea** and to the provision **of** a place **of** safety afterwards, [FN113] it is definitely a shift **in** view towards the issue. Indeed, William O'Neil - the former IMO Secretary-General - stated **in** 2001 that the implementation **of** measures for safety **at** *107 **sea** would not suffice since the problem **of migrants at sea** is not solely a maritime issue. **In** a situation involving asylum-seekers, certain principles **of** refugee law and human rights must be respected. [FN114] As a result, an Interagency Group was set up **in** July 2002 to deal with the problem **of migrants at sea**. [FN115] The IMO, the United Nations High Commissioner for Refugees (UNHCR), the United Nations Division for Ocean Affairs and the Law **of the Sea** (UNDOALOS), the United Nations Office **on** Drugs and Crime (UNODC), the United Nations Office **of** the High Commissioner for Human Rights (OHCHR) and the International Organization for Migration (IOM) are all participating **in** this Interagency Group. Countries outside the **region** have also been invited to future meetings. [FN116]

It is clear that past developments did not occur **in** the isolation **of** particular fields **of** law, but with a considerable degree **of** cooperation between international organizations and experts from across a number **of** fields. This integrated approach must thus continue. [FN117] The International Tribunal for the Law **of the Sea** affirmed **in** the *M/V Saiga Case* that considerations **of** humanity must apply to the Law **of the Sea** as they do **in** other areas **of** international law. [FN118] As Treves correctly stated:

The Law **of the Sea** and the law **of** human rights are not separate planets rotating **in** different orbits. Instead, they meet **in** many situations. Rules **of** the Law **of the Sea** are sometimes inspired by human rights considerations and may or must be interpreted **in** light **of** such considerations. [FN119]

Even the IMO itself recognizes this. **In** April 2011, the IMO stated that the problem is not entirely **in** IMO's hands, as political developments - due to the Arab Spring - had exacerbated the situation beyond its

competence. [FN120]

***108 IV**

MALTA AND THE REGIONAL AGREEMENT: A MUTUAL IMPACT

A. The influence of Malta on the Regional Agreement

Why did the IMO suddenly shift towards a purely maritime approach? One **of** the reasons could be that they definitely wanted **Malta** to be part **of** the **agreement**. As **Malta** does not accept a link between the maritime and the humanitarian elements **of** the problem, the country could have restraints due to the fact that the **agreement** could contain similar provisions as incorporated **in** the 2004 SOLAS and SAR Amendments and the IMO Guidelines **on** the Treatment **of** Persons Rescued **at** Sea. It was indeed remarkable that **Malta** was absent during the second meeting **of** the consultation group **in** April 2011. The problem is that if **Malta** is not willing to negotiate, or decides not to be part **of** the MoU, there would simply not be an efficient **agreement**. Since **Malta** has an enormous SRR, it is **of** utmost importance that **Malta** is included. Including **Malta in the agreement** would ensure coordination between the several SRRs **in** the **Mediterranean**.

It is also essential that any **agreement** include a system **of** burden-sharing, especially if other countries want **Malta** to cooperate. However, a few problems arise **in** this respect. First, some European States fear that clarifying obligations and solving the problem through burden-sharing would produce an enormous pull factor, thus encouraging **migrants** to come to Europe by sea. [FN121] Second, the United States **of** America has begun to play a small yet important **role in** resettling refugees from **Malta in** order to reduce the burden for this country. [FN122] Yet, since this **agreement** is a **regional** one, this kind **of** burden-sharing cannot be included. Third, burden-sharing clearly goes beyond a purely maritime approach.

B. The Influence of the Regional Agreement on Malta

On the one hand, the **Regional Agreement** is positive for **Malta**, since a system **of** burden-sharing could be established. **On** the other hand, **Malta *109** could be obliged to accept certain provisions **in** the 2004 SOLAS and SAR Amendments and the IMO Guidelines **on** the Treatment **of** Persons Rescued **at** Sea. Moreover, due to the **agreement** **Malta** could be forced to give up part **of** its SRR.

However, if **Malta** takes part **in** this **new agreement** it would definitely improve its reputation. Indeed, for the moment **Malta** does not have a very good reputation concerning the treatment **of migrants at sea**. First, the reputational theory **in** international law - as part **of** the rational choice theory - will be explained. Second, this theory will be applied to **Malta**.

1. The reputational theory

Guzman introduced the reputational theory **in** international law by stating that reputation plays a very important **role in** compliance. He identified three factors which enhance the compliance **of** States with international law, namely reciprocity, retaliation and reputation. [FN123] Reciprocity works best **in** bilateral situations: if one **of** the two cooperating States refuses to comply with a legal norm, the other may react **in** the same way. Consequently, both States lose the benefit **of** cooperation. However, reciprocity does not work **in** all cases. For example norms that concern human rights cannot be based **on** a reciprocal basis since reciprocal behaviour would not affect the violating State **at** all. [FN124]

The second factor is the possibility of retaliation. A State may punish another State for non-compliance. However, imposing a sanction on another State may be very costly for the punishing State. Moreover, in multilateral situations States have an incentive to free-ride and to hope that another State will punish the violator. [FN125] Therefore, Guzman stipulates that the third factor - reputation - is the most important one. A State's calculus over the reputational costs of non-compliance is thus the primary factor for explaining a State's compliance with international law.

This theory is based upon the assumption that States are rational, self-interested actors. [FN126] States want to cooperate with other States when it makes them better off. Nonetheless, States need a "good" reputation as this allows them to make more credible promises. As a result of this reputation for cooperativeness, States may be able to extract higher returns in exchange for their cooperation. [FN127] A reputational theory must take into account the fact that not all agreements are the same. [FN128] Lipson is convinced that the more formal and public the agreement - for example a treaty - the higher the reputational costs of non-compliance. [FN129] Moreover, the more uncertain a performance standard (e.g. vague terms in the treaty), the less clear it is that a State's behaviour is violating that standard.

However, Guzman's reputational theory does not explain why States *überhaupt* enter into treaties. Indeed, as a State's reputation is influenced by its compliance with legal obligations, reputational forces become relevant after a State has accepted legal obligations. Therefore, reputational harm can only occur if a legal obligation already exists. [FN130] Nevertheless, Geisinger and Stein suggest that reputation also plays a role in treaty formation. A State will enter into a treaty when the benefits it receives outweigh the costs of entry and compliance. [FN131] Indeed, compliance with international law is only one of the many dimensions by which States are judged. Hence, it is important to differentiate between the global standing of the State - or global public opinion - on the one hand and the State's reputation for compliance with international law on the other hand.

For example, the refusal to take on a legal obligation could influence the popular perception of the State more than a violation of legal obligations. [FN132] Brewster illustrates this by giving the example of the United States' refusal to join the Kyoto Protocol on Global Climate Change. This is widely perceived to have hurt the reputation of the United States. [FN133] On the other hand, violations of international law might sometimes even improve the popular perception of States. [FN134] Although the NATO bombing of Serbia to stop the ethnic cleansing in the former Yugoslavia was a violation of international law on the use of force, the Independent International Commission on Kosovo used the term "*illegal but legitimate*" to describe the bombing of Serbia. [FN135]

Therefore, Brewster puts forward a distinction between 'legality reputation' and 'reliability reputation.' A legality reputation implies strict compliance with legal commitments, while a reliability reputation entails commitment to the goals of the regime. For instance, a State can completely fulfil its legal obligations but still develop a reputation for being unreliable. Similarly, the two types of reputations will have different effects on States' decision making. The United States withdrew from the ABM Treaty in 2001. [FN136] Although this withdrawal was completely legal - the United States gave the notice required by the terms of the treaty - many States criticized the United States for not upholding international goals of arms limits. A reputation for legal compliance can thus be maintained as long as the State acts in accordance with the treaty's terms. However, actions that are formally in compliance with a treaty regime might nonetheless signal that a State is unreliable. By contrast, a reliability reputation might permit some violations of the agreement. Which kind of reputation is better will be often context specific. If the treaty is very specific, then a reputation for strict legal compliance might be better. [FN137]

2. Reputation - An incentive for change?

Assuming **Malta** is a rational, self-interested State, its reputation will be important **in** both treaty compliance and treaty formation. We start by taking a look **at** the current international obligations **of Malta**, namely the rescue **of** persons **in** distress and the establishment **of** an efficient SRR. As both legal provisions are vague, we cannot say that **Malta** is not **in** compliance with its obligations. Indeed, there is a certain amount **of** discretion **in** deciding when a person is **in** distress. It is also not strictly forbidden to have a disproportionate SRR that overlaps with other countries. Therefore, **Malta's** "legality reputation" remains intact.

But what about **Malta's** 'reliability reputation?' Until now, **Malta** was able to keep this reputation quite high. This is a result **of** the particular circumstances, namely a small island being flooded by **migrants** and not getting enough help from other countries. This is also the reason why **Malta's** refusal to join the 2004 SOLAS and SAR Amendments, and the IMO Guidelines **on** the Treatment **of** Persons Rescued **at Sea**, did not harm its reputation **in** such a way that it felt under pressure to actually subscribe to these obligations. Indeed, **Malta** officially declared "that it is not yet **in** a position to accept these amendments." [FN138] It thus seems that **Malta** does want to accept *112 these amendments, but that it simply cannot do so because **of** the current situation.

However, **Malta** cannot invoke these arguments to avoid negotiating the **new Regional Agreement**. After the absence **of Malta** during the second meeting **of** the consultation group, the country stated that they would be available for future meetings. [FN139] Indeed, **Malta** feels pressure to cooperate **in** order to find a solution to the problems arising from the Arab Spring.

The 2004 SOLAS and SAR Amendments and the IMO Guidelines **on** the Treatment **of** Persons Rescued **at Sea** were **drafted** after the Tampa incident **in** 2001. The captain **of** the Norwegian container ship Tampa rescued 438 asylum seekers from drowning **in** international waters between Christmas Island (Australia) and Indonesia. The master **of** the ship first headed towards Indonesia, but this elicited threats from some **of** the **migrants**, who insisted **on** being taken to Christmas Island. As the captain wanted to enter Australian territorial waters, Australian Special Air Services intercepted and boarded the ship. The whole incident gave rise to a very complex international political situation.

Malta's interest **in** acceding to the Conventions may have changed now that **Malta** is facing similar issues **in** the **Mediterranean Sea**. Thus, **Malta's** reputation is without any doubt **at** stake.

V

CONCLUSION

The Arab Spring highlighted once more the problem **of migrants at sea**. Due to the increased loss **of** life **in** the **Mediterranean** **in** 2011, the negotiations **on** the **Draft Regional Agreement** **on** concerted procedures relating to the disembarkation **of** persons rescued **at sea** **in** the **Mediterranean Basin** were speeded up. **Malta** plays an important **role** **in** this **agreement** due to its enormous SRR. One **of** the problems that should be tackled is the coordination between the several SRRs **in** the **Mediterranean**. Also, a system **of** burden-sharing has to be part **of** the **agreement**. If the **Regional Agreement** meets part **of** the concerns **Malta** has, it could go beyond addressing purely maritime matters to include provisions **on** human rights and humanitarian law. Indeed, if **Malta** wants to avoid losing its 'good' reputation it should accept that the law **of** the **sea** is not isolated from other parts **of** the law. **On** the one hand the **draft** MoU contains certain elements that are negative for **Malta**, such as the provision that the primary responsibility rests with the *113 Government responsible for the respective SRR, and the definition **of** what constitutes a distress phase. **On** the other hand, the **draft** MoU is positive for **Malta** as it takes into consideration the respective capacities **of** a State

when providing a place of safety and the particular circumstances of the case. Finally, States have to cooperate in providing a suitable place of safety, taking into account relevant factors, risks and circumstances, particularly when the number of survivors exceeds the capacity of the responsible State.

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[FN1]. UNHCR, 'Mediterranean Takes Record as Most Deadly Stretch of Water for Refugees and Migrants in 2011,' Briefing Note (31 January 2012), available at: <http://www.unhcr.org/4f27e01f9.html>.

[FN2]. INTERNATIONAL LAW COMMISSION, 'Commentary on Draft Article 12 of the United Nations Convention on the High Seas,' UN Doc. A/3179 (1956).

[FN3]. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC). Article 98(1) LOSC states: "Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call."

[FN4]. MSC 76/22/8, 'Any other business. Review of safety measures and procedures for the treatment of persons rescued at sea' (31 July 2002), Annex "Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea," para. 6, available at: [http:// docs.imo.org/](http://docs.imo.org/); RICHARD BARNES, 'Refugee Law at Sea' 53 *Int'l & Comp. L.Q.* 47 (2004), 50-52.

[FN5]. LOSC, Article 98(1).

[FN6]. International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention), Chapter V Regulation 33 para. 1.

[FN7]. MARTIN J. NORMS. *The Law of Salvage* (Mount Kisco NY: Baker/Voorhis, 1958), 15-31; INA H. WILDEBOER, *The Brussels Salvage Convention: Its Unifying Effect in England, Germany, Belgium, and The Netherlands* (Leiden: A.W. Sijthoff, 1965) 95; FREDERICK J. KENNEY & VASILIOS TASIKAS, 'The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea,' 12 *Pac. Rim. L. & Pol'y J.* 143, 151-152.

[FN8]. International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996), 1953 UNTS 194. Article 10 stipulates: "(1) Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea. (2) The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1. (3) The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1." Before the Brussels Salvage Convention of 1885 there were no formal international conventions that addressed rendering assistance at sea. In 1897, the Comité Maritime International (CMI) held its first international conference in Brussels to advance issues regarding collisions and salvage, as well as the duty to render assistance at sea. As a result, the new text of the Brussels Convention on Salvage was signed on 23 September 1910. In 1989, the IMO concluded the International Convention on Salvage, which replaced the 1910 Brussels Convention.

[FN9]. International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force

22 June 1985) 405 UNTS 97 (SAR Convention).

[FN10]. SAR Convention, Annex Chapter 1 para. 1.3.13.

[FN11]. European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final. Explanatory Memorandum, para. 2.

[FN12]. INTERNATIONAL. LAW COMMISSION, *ILC Yearbook* Vol. II Part II (1979), 135, para. 10, available at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1979_v2_p2_e.pdf. Although this definition was given during the discussions on the concept of 'distress' as one of the grounds for excluding wrongfulness with regard to the Draft Articles on State Responsibility, the definition is often being used to describe the situation of distress of persons at sea. See for example: RICHARD BARNES, 'Refugee Law at Sea' 53 *Int'l & Comp. L.Q.* 47 (2004), 60.

[FN13]. European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final, Explanatory Memorandum, para. 2.

[FN14]. VIOLETA MORENO-LAX, "Seeking Asylum in the Mediterranean; Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", 23 *Int'l J. Refugee L.* 174 (2011), 195.

[FN15]. Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external 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, OJ L 111/20 (4 May 2010). Although the European Court of Justice (ECJ) annulled Council Decision 2010/252, and thus also the guidelines therein, the effects of the Council Decision have to be maintained until a new act can be adopted in accordance with ordinary legislative procedures. See: ECJ, *European Parliament v. Council of the European Union*, 17 April 2012, Opinion of Advocate General Mengozzi, Case C-355/10 (2012) and ECJ, *European Parliament v. Council of the European Union*, 5 September 2012, Case C-355/10 (2012).

[FN16]. *Id.* Annex Part II para. 1.3.

[FN17]. *Id.* Annex Part II para. 1.4.

[FN18]. LOSC, Article 98(1).

[FN19]. LOSC, Article 98(2); SAR Convention, Annex Chapter 2 para. 2.1.1. For a detailed overview on search and rescue under the LOSC and the SAR Convention, see: Amy M. Moen, 'For Those in Peril on the Sea: Search and Rescue under the Law of the Sea Convention', in Aldo Chircop, Scott Coffen-Smout & Moira McConnell (Eds.), *Ocean Yearbook* (Leiden: Martinus Nijhoff Publishers, 2010), 377-410.

[FN20]. SAR Convention, Annex Chapter 2 para. 2.1.2.

[FN21]. *Id.* Annex Chapter 1 para. 1.3.2.

[FN22]. IMO, 'Search and rescue,' available at: <http://www.imo.org/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/Default.aspx>.

[FN23]. IMO, 'SAR Convention,' available at: <http://www.imo.org/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/SARConvention.aspx>.

[FN24]. Id. para. 2.1.3.

[FN25]. Id. para. 2.1.4.

[FN26]. Id. para. 2.1.7.

[FN27]. Id. para. 2.4.

[FN28]. IMO/ICAO, 'International Aeronautical and Maritime Search and Rescue Manual,' London/Montreal (2003). For an extensive discussion on the IMO-ICAO search and rescue regions and the IAMSAR Manual see: Isavella Maria Vasilgeorgi, 'Delimitation of IMO-ICAO Search and Rescue regions - A Case of Jurisdictional Compilation and complication', 36 *Ann. Air & Sp. L.* 251 (2011), 251-278.

[FN29]. See SELINE TREVISANUT, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?', 25 *Int'l J. Marine & Coastal L.* 523 (2010), 523-542.

[FN30]. SAR Convention, Annex Chapter 1 para. 1.3.2.

[FN31]. MSC Res. 167(78) Annex 34: 'Guidelines on the Treatment of Persons Rescued at Sea' (20 May 2004), at para. 6.12, available at: [http:// docs.imo.org/](http://docs.imo.org/).

[FN32]. Id. para. 6.17.

[FN33]. Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 *UNTS* 137 (Refugee Convention). Article 33 of the Refugee Convention states that: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." This principle is not only applicable to refugees but also to all asylum-seekers. See for example: DANIEL BETHLEHEM & ELIHU LAUTERPACHT, "The Scope and Content of the Principle of Non-Refoulement: Opinion" in: ERIKA FELLER, VOLKER TURK & FRANCES NICHOLSON (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 116-118; UNHCR, 'The Protection of Asylum-Seekers and Refugees Rescued at Sea', in: ALEXANDER T. ALEINIKOFF & VINCENT CHETAIL (Eds.), *Migration and International Legal Norms* (The Hague: Asser Press, 2003).

[FN34]. Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external 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, OJ L 111/20 (4 May 2010).

[FN35]. Id. Preamble para. 10.

[FN36]. MSC Res. 167(78) Annex 34: 'Guidelines on the Treatment of Persons Rescued at Sea' (20 May 2004), at para. 2.5, available at: <http:// docs.imo.org/>.

[FN37]. Id.

[FN38]. See for example: KILLIAN S. O'BRIAN, 'Refugees on the High Seas: International Refugee Law

Solutions to a Law of the Sea Problem,' 3 *Goettingen J of Int'l L* 715 (2011), 723-725.

[FN39]. SOLAS Convention, Chapter V Regulation 33; SAR Convention, Chapter 3 para. 3.1.9.

[FN40]. GUY S. GOODWIN-GILL., *The Refugee in International Law* (Oxford: Clarendon Press, 1996), 157.

[FN41]. See JASMINE COPPENS & EDUARD SOMERS. 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' 25 *Int'l J Marine & Coastal L* 377 (2010), 377-404.

[FN42]. MIGRANTS AT SEA, 'Italy and Malta Turn Back NATO Ship Carrying 100 Rescued Migrants' (14 July 2011), available at: <http://migrantsatsea.wordpress.com/2011/07/14/italy-and-malta-turn-back-natoship-carrying-100-rescued-migrants/>; MIGRANTS at SEA, 'Malta Says the 111 Rescued Migrants Aboard Spanish Frigate Are NATO's Problem, Not Malta's Problem' (15 July 2011), available at: <http://migrantsatsea.wordpress.com/2011/07/15/malta-says-the-111-rescued-migrants-aboard-spanishfrigate-are-nato%E2%99s-problem-not-malta%E2%99s-problem/>; MIGRANTS at SEA, 'NATO Transfers Rescued Migrants to Tunisia' (16 July 2011), available at: <http://migrantsatsea.wordpress.com/2011/07/16/nato-transfers-rescued-migrants-to-tunisia/>.

[FN43]. THE GUARDIAN, 'Aircraft carrier left us to die, say migrants' (8 May 2011), available at: <http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants>.

[FN44]. EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) 'What Price Does a Refugee Pay to Reach Europe?' (10 February 2009), 6-7, available at: http://www.ecre.org/resources/ECRE_actions/1313.

[FN45]. FAL 3/Circ.194, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea' (22 January 2009), available at: http://www.imo.org/incIudes/blastDataOnly.asp/data_id%3D24818/194.pdf, para. 2.3.

[FN46]. Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external 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, OJ L 111/20 (4 May 2010).

[FN47]. *Id.* Annex Part II para. 2.1.

[FN48]. LEG 98/14, 'Report of the Legal Committee on the work of its ninety-eight session' (18 April 2011), Annex 9, available at: <http://docs.imo.org/>.

[FN49]. European Union Committee of the House of Lords, 'FRONTEX: the EU external borders agency,' 9th Report of Session 2007-08, para. 115, available at: <http://www.publications.parliament.uk/pa/Id200708/ldselect/ldecom/60/60.pdf>. See also: Violeta MORENO-LAX, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea,' 23 *Int'l J. Refugee L.* 174 (2011), 176.

[FN50]. GERALD H. BLAKE, 'Coastal state sovereignty in the Mediterranean Sea: the case of Malta,' 41 *GeoJournal* 173(1997), 173.

[FN51]. 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,' 23 *Int'l J. Refugee L.* 538 (2011), 545.

[FN52]. **Malta** accessed the convention on 26 June 1996.

[FN53]. IMO, 'Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions' (11 August 2011), available at: <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202011.pdf>.

[FN54]. Id.

[FN55]. COMSAR 5/INF. 2, 'Matters Concerning Search and Rescue Including Those Related to the 1979 SAR Conference and the Introduction of the GMDSS' (17 April 2000), para. 52.

[FN56]. 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**', 23 *Int'l J. Refugee L.* 538 (2011), 551-554.

[FN57]. COMSAR/Circ.27, 'Data Format for a **New** Combined SAR.2 and SAR.3 Circular Concerning Information on the Current Availability of SAR Services' (12 October 2001), para. 4.

[FN58]. SAR.8-Circ.1-Corr.3, 'Global SAR Plan Containing Information on the Current Availability of SAR Services' (20 October 2005), Annex 2, 25.

[FN59]. Id.

[FN60]. Id. Annex 4, 7.

[FN61]. TIMES OF MALTA, 'Shrinking **Malta's** search and rescue area is 'not an option' - Italy applying pressure directly and indirectly' (26 April 2009), available at: <http://www.timesofmalta.com/articles/view/20090426/local/shrinking-maltas-search-and-rescue-area-is-not-an-option.254380>.

[FN62]. See for example GERALD H. BLAKE, 'Coastal state sovereignty in the **Mediterranean Sea**: the case of **Malta**,' 41 *GeoJournal* 173 (1997), 173-180.

[FN63]. See for example UMBERTO LEANZA, 'The Delimitation of the Continental Shelf of the **Mediterranean Sea**,' 8 *Int'l J. Marine & Coastal L.* 373, 373-395.

[FN64]. International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 405 UNTS 97 (SAR Convention), Annex Chapter 2 para. 2.1.7.

[FN65]. INTERNATIONAL LAW COMMISSION, 'Ninth Report on unilateral acts of States' (6 April 2006), Doc. A/CN.4/569/Add.1, para. 12, available at: <http://daccess-dds-ny.un.org/doc/UNDOaGEN/N06/300/32/PDF/N0630032.pdf?OpenElement>; INTERNATIONAL LAW COMMISSION, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,' para. 1, available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf. The declaration can be regarded as a unilateral act *stricto sensu* as it is not part of a treaty relationship. Although the declaration was made during a meeting within the IMO (the depositary of the SAR Convention), it was not officially registered by the Secretary-General in the context of the SAR Convention.

[FN66]. SAR Convention, Annex Chapter 2.

[FN67]. LEG 98/14, 'Report of the Legal Committee on the work of its ninety-eighth session' (18 April

2011), para. 13.25 and Annex 9. available at: [http:// docs.imo.org/](http://docs.imo.org/).

[FN68]. SAR Convention, Annex Chapter 2 para. 2.1.3.

[FN69]. Id. para. 2.1.4.

[FN70]. 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**,' 23 *Int'l J. Refugee L.* 538 (2011), 549.

[FN71]. Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external 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, OJ L 111/20 (4 May 2010), Annex para. 1.2.

[FN72]. Id. Preamble para. 11.

[FN73]. ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012).

[FN74]. 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,' 23 *Int'l J. Refugee L.* 538 (2011), 546.

[FN75]. NICHOLAS DE BLOUW, 'Drowning Policies: A Proposal to Modify the Dublin Agreement and Reduce Human Rights Abuses in the Mediterranean.' 40 *Cat. W. Int'l L.J.* 335 (2010), 368.

[FN76]. UNHCR, 'EUREMA (2010-2011) - A pilot project for intra-EU re-allocation of beneficiaries of protection from Malta', Presentation at the Expert Meeting on Refugee and Asylum Seekers in Distress at Sea, Djibouti (8-10 November 2011), available at: <http://www.unhcr.org/4ef338859.html>.

[FN77]. COMSAR 14/17 'Report to the Maritime Safety Committee' (22 March 2010), paras. 10.1-10.26, available at: <http://docs.imo.org/>.

[FN78]. MSC 87/26, 'Report of the Maritime Safety Committee on its eighty-seventh session' (25 May 2010), para. 14.18, available at: <http:// docs.imo.org/>.

[FN79]. LEG 98/14, 'Report on the Legal Committee on the work of its ninety-eighth session' (18 April 2011), para. 13.25, available at <http:// docs.imo.org/>.

[FN80]. Id.

[FN81]. COMSAR 14/17, 'Report to the Maritime Safety Committee' (22 March 2010), paras. 10.1-10.26, available at: <http://docs.imo.org/>.

[FN82]. Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967) 591 UNTS 265 (Facilitation Convention).

[FN83]. COMSAR 15/16, 'Report to the Maritime Safety Committee' (25 March 2011), para. 10.3, available at: <http://docs.imo.org/>.

[FN84]. MSC 87/26. 'Report of the Maritime Safety Committee on its eighty-seventh session' (25 May 2010), para. 14.18, available at: <http:// docs.imo.org/>.

[FN85]. Id. para. 14.20.

[FN86]. COMSAR 15/16, 'Report to the Maritime Safety Committee' (25 March 2011), para. 10.4, available at: <http://docs.imo.org/>.

[FN87]. Id. para. 10.5.

[FN88]. Id. paras. 10.4.4 and 10.6.

[FN89]. Id. para. 10.6.

[FN90]. COMSAR 15/16, 'Report to the Maritime Safety Committee' (25 March 2011), para. 10.6, available at: <http://docs.imo.org/>.

[FN91]. UNSC Resolution 1973, *UN Doc. S/RES/1973* (17 March 2011), available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement>.

[FN92]. NATO, 'Operation Unified Protector - Factsheet' (25 March 2011), available at: http://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110325_110325-unified-protectorfactsheet.pdf.

[FN93]. THE TELEGRAPH, 'Libya: Col Gaddafi trying to force refugee crisis on Europe,' 10 May 2011, available at: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8505447/Libya-Col-Gaddafi--trying-to-force-refugee-crisis-on-Europe.html>.

[FN94]. IOM, Press Briefing Note, 'Migrant Survivors Speak of Boat Tragedy off the Coast of Libya' (9 May 2011), available at: <http://www.iom.int/jahia/Jahia/media/press-briefing-notes/pbnAF/cache/offonce?entryId=29620>.

[FN95]. MSC 89/INF.23, 'Measures to protect the safety of persons rescued at sea' (12 April 2011), para. 4.

[FN96]. Id. para. 5.

[FN97]. Id. para. 6.

[FN98]. Id. Annex.

[FN99]. Id. para. 7.

[FN100]. Id. para. 8.

[FN101]. MSC 89/25, 'Report of the Maritime Safety Committee on its eighty-ninth session' (27 May 2011), para. 13.15, available at: <http://docs.imo.org/>.

[FN102]. FAL 37/6/1, 'Formalities Connected with the Arrival, Stay and Departure of Persons - Measures to Protect the Safety of Persons rescued at Sea,' para. 10.

[FN103]. FAL 37/INF. 5, 'Address of the Secretary-General at the Opening of the Thirty-Seventh Session of the Facilitation Committee' (5 September 2011), 3-4.

[FN104]. COMSAR 16/17, 'Report to the Maritime Safety Committee' (23 March 2012), para. 10.3 and 10.4.

[FN105]. ARNOLD MCNAIR, *The Law of Treaties* (Oxford: Clarendon Press, 1961), 1.5.

[FN106]. GREGORY C. SHAFFER & MARK A. POLLACK, '[Hard vs. Soft Law: Alternatives, Comple-](#)

ments, and Antagonists in International Governance,' 94 *Minn. L. Rev.* 706 (2010), 707-708.

[FN107]. Id.

[FN108]. JOSE E. ALVAREZ, 'Why Nations Behave,' 19 *Mich. J. Int'l L.* 303 (1998), 305.

[FN109]. Compliance as a concept merely identifies a conformity between a legal rule and behaviour. However, it does not draw a causal linkage between these two. For example, compliance may occur without implementing legislation. On the other hand, it is also possible that a State may not be in compliance with international law, even with implementing legislation in place. See: KAL RAUSTIALA, 'Compliance & Effectiveness in International Regulatory Cooperation,' 32 *Case W. Res. J. Int'l L.* (2000), 398; JOSE E. ALVAREZ, 'Why Nations Behave,' 19 *Mich. J. Int'l L.* 303 (1998), 305.

[FN110]. BETTS illustrates this by giving the example of the soft law framework for IDP's. ALEXANDER BETTS, 'Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants,' 22 *Int'l J. Refugee L.* 209 (2010), 224-225.

[FN111]. RICHARD BARNES, 'The International Law of the Sea and Migration Control,' in Bernard Ryan and Valsamis Mitsilegas (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 113-114.

[FN112]. MSC 89/INF.23, 'Measures to protect the safety of persons rescued at sea' (12 April 2011), para. 9. HARTMUT HESSE, 'Persons rescued at Sea', Presentation by the Senior Deputy Director, IMO Maritime Safety Division at the Expert Meeting on Refugee and Asylum Seekers in Distress at Sea (8-10 November 2011), available at: <http://www.unhcr.org/4ef3061c9.html>.

[FN113]. Convention on the International Maritime Organization (adopted 6 March 1948, entered into force 17 March 1958) 289 *UNTS* 48 (IMO Convention) Arts. 1 and 15(j); Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967) 591 *UNTS* 265 (Facilitation Convention); SOLAS Convention, op. cit., supra note 4; SAR Convention, op. cit., supra note 5.

[FN114]. Speech by WILLIAM O'NEIL, IMO Secretary-General, IMO Headquarters Londen (19 November 2001); available at: http://www.imo.org/Newsroom/mainframe.asp?topic_id=82&doc_id=1703.

[FN115]. First Interagency Group Meeting 'The Treatment of Persons Rescued at Sea,' Geneva (2-3 July 2002); MSC 76/22/8. op. cit., supra note 3.

[FN116]. LEG 98/14, 'Report of the Legal Committee on the work of its ninety-eighth session' (18 April 2011), para. 13.25, available at: <http://docs.imo.org/>.

[FN117]. RICHARD BARNES, 'The International Law of the Sea and Migration Control,' in Bernard Ryan and Valsamis Mitsilegas (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 149.

[FN118]. M/V Saiga (No.2) Case (St. Vincent and the Grenadines v. Guinea), ITLOS Reports 1999, Judgment 1 July 1999, para. 155, available at: http://www.itlos.org/fileadmin/itlos/docuements/cases/case_no_2/merits/Judgment.01.07.99.E.pdf.

[FN119]. TULLIO TREVES, 'Human Rights and the Law of the Sea,' 28 *Berkeley J. Int'l L.* 1 (2010), 12.

[FN120]. LEG 98/14, 'Report of the Legal Committee on the work of its ninety-eighth session' (18 April 2011), para. 13.25, available at: <http://docs.imo.org/>.

[FN121]. EUROPEAN UNION COMMITTEE OF THE HOUSE OF LORDS, 'FRONTEX: the EU external borders agency,' 9th Report of Session 2007-08, para. 115, available at: <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/60/60.pdf>. See also: VIOLETA MORENO-LAX, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea,' 23 *Int'l J. Refugee L.* 174 (2011), 176.

[FN122]. ALEXANDER BETTS, 'Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants,' 22 *Int'l J. Refugee L.* 209 (2010), 235.

[FN123]. ANDREW T. GUZMAN, *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press, 2008), 32-33.

[FN124]. *Id.* at 65.

[FN125]. *Id.* at 66.

[FN126]. *Id.* at 379-391.

[FN127]. *Id.* at 34.

[FN128]. ANDREW T. GUZMAN, 'Reputation and International Law,' 34 *Ga. J. Int'l & Comp. L.* 379, 384.

[FN129]. CHARLES LIPSON, 'Why Are Some International Agreements Informal?', 45 *Int'l Org.* 495 (1991), 508.

[FN130]. ALEX GEISINGER & MICHAEL A. STEIN, 'Rational Choice, Reputation, and Human Rights Treaties,' 106 *Mich. L. Rev.* 1129 (2008), 1137.

[FN131]. *Id.* at 1138.

[FN132]. RACHEL BREWSTER, 'Unpacking the State's Reputation,' 50 *Han: Int'l L. J.* 231 (2009), 238-239.

[FN133]. *Id.*

[FN134]. *Id.*, at 240.

[FN135]. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000), 4.

[FN136]. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems Sea (adopted 26 May 1972, entered into force 3 October 1972) 944 *UNTS* 13.

[FN137]. RACHEL BREWSTER, 'Unpacking the State's Reputation,' 50 *Han: Int'l L. J.* 231 (2009), 262-266.

[FN138]. IMO, 'Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs Sdepositary or other functions' (11 August 2011), available at: <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202011.pdf>.

[FN139]. MSC 89/25, 'Report of the Maritime Safety Committee on its eighty-ninth session' (27 May

2011), paras. 13.15-13.16, available at: [http:// docs.imo.org/](http://docs.imo.org/).
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