

Lampedusa: The Impact of Seaborne Migration on States and Shipping

Jasmine COPPENS

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Introduction

Lampedusa is an Italian island barely 70 miles from northern Africa and 100 miles from Malta. Therefore, it has become a gateway to Europe for migrants. In some seasons, boats filled with migrants and asylum seekers arrive almost daily. Between January and September 2013, more than 31.000 migrants arrived in the EU using the Central Mediterranean route, mainly via Sicily and Lampedusa, but also – although to a lesser extent – on the Coasts of Calabria, Puglia and Malta. The main nationalities include Eritreans, Somalis and other sub-Saharan Africans, as well as Syrian nationals. The migratory pressure over the summer months of 2013 was comparable to the same period in 2011.¹

For example, on 3 October 2013, a trawler carrying over 500 migrants from Libya to Italy sank off the Italian island of Lampedusa. The boat – that had sailed from Misrata in Libya – carried mainly migrants from Eritrea, Somalia and Ghana. After a journey of two days, the vessel began taking on water when its motor stopped working. Some passengers set fire to a piece of material to try to attract the attention of passing ships. However, the fire spread to the rest of the boat, creating a panic. As the migrants all moved to one side, the boat capsized. So close to reaching Lampedusa, the migrants – of which many could not swim – were tossed into the sea. Although an emergency response involving the

¹. Frontex, “Update on Central Mediterranean Route”, available online: <<http://frontex.europa.eu/news/update-on-central-mediterranean-route-5wQPyW>>.

Italian Coast Guard resulted in the rescue of 155 survivors, the total number of dead was reported as more than 360.¹

Reportedly, the migrants had each paid at least \$3,000 to the Libyan, Somali and Sudanese smugglers before making the sea crossing from Libya. Women – who were unable to pay the amount of money – were said to have been raped and men who rebelled were tied up and tortured. The alleged captain of the boat, a 35-year-old Tunisian named as Khaled BENSALAM, was arrested under suspicion of being responsible for the sinking and charged with manslaughter. On 8 November, a Somali and a Palestinian man were also arrested under suspicion of having been among the smugglers that organized the voyage.²

On 11 October 2013, a second shipwreck occurred 120 kilometres from Lampedusa, near Malta. The boat, carrying over 200 migrants from Syria and Palestine, capsized when people on board moved to one side of the vessel as they tried to get the attention of a passing aircraft. The rescue operation was coordinated by the Maltese authorities, with the assistance of the Italian Coast Guard. At least 34 individuals were confirmed dead. Most survivors were taken to Malta. The Maltese Prime Minister of Malta, Joseph MUSCAT, complained about the lack of solidarity among European countries on the problem of seaborne migration. He stated: *“As things stand we are building a cemetery within our Mediterranean Sea”*.³

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1. The New York Times, “Migrants Die as Burning Boat Capsizes Off Italy” (3 October 2013), available online: <http://www.nytimes.com/2013/10/04/world/europe/scores-die-in-shipwreck-off-sicily.html?_r=0>; BBC News, “Italy Boat Sinking: Hundreds Feared Dead Off Lampedusa” (3 October 2013), available online: <<http://www.bbc.co.uk/news/world-europe-24380247>>; Deutsche Welle, “Police in Italy arrest Somalia National Accused of Organizing Deadly Migrant Voyage” (9 November 2013), available online: <<http://www.dw.de/police-in-italy-arrest-somalia-national-accused-of-organizing-deadly-migrant-voyage/a-17215308>>.
 2. BBC News, “Lampedusa Boat Tragedy: Migrants ‘Raped and Tortured’” (8 November 2013), available online: <<http://www.bbc.co.uk/news/world-europe-24866338>>.
 3. BBC News, “Mediterranean ‘A Cemetery’ – Maltese PM Muscat” (12 October 2013), available online: <<http://www.bbc.co.uk/news/world-europe-24502279>>.

Also Ban KI-MOON, the UN Secretary-General, called on the international community 'as a whole' to take action to prevent such tragedies in the future.¹

Two months after these two tragedies off the Italian and Maltese coasts, EU Home Affairs Commissioner Cecilia MALMSTRÖM presented a communication identifying actions in five main areas: reinforced border surveillance, assistance and solidarity between Member States, fight against trafficking, smuggling and organized crime, legal ways for migrants to access Europe and cooperation with third countries. The Communication proposes the establishment of a coordinated approach to border surveillance operations in the Mediterranean, led by the EU Border Agency Frontex, and focusing on the main migratory routes, from Cyprus to Spain as of Spring 2014.² One of the main actions is the additional funding in support of Mediterranean Member States.³

This paper deals with the obligations of States and shipmasters towards seaborne migrants in distress situations. First, the duty to render assistance and the disembarkation will be discussed. Secondly, we will take a look at why these obligations prove to be difficult in the Lampedusa area. Lastly, we will elaborate on the responsibility of both States and shipmasters.

1. UN News, "After Latest Lampedusa Tragedy, Ban Calls for Action to Protect Human Rights of Migrants" (12 October 2013), available online: <http://www.un.org/apps/news/story.asp?NewsID=46255&Cr=lampedusa&Cr1=#.Up8oy-LxH_Z>.

2. Communication from the Commission to the European Parliament and the Council on the Work of the Task Force Mediterranean, COM(2013) 869 final of 4 December 2013, available online: <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131204_communication_on_the_work_of_the_task_force_mediterranean_en.pdf?>.

3. Communication from the Commission to the European Parliament and the Council on the Work of the Task Force Mediterranean, COM(2013) 869 final of 4 December 2013, 19, available online: <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131204_communication_on_the_work_of_the_task_force_mediterranean_en.pdf?>.

I. Duty to render assistance

3. Request for assistance needed?

It is a legal obligation for shipmasters and States under customary international law, as well as under Articles 58(2) and 98(1) 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.¹ 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.*" According to Article 98(2) LOSC, where circumstances so require, coastal States have to cooperate with neighbouring States.

The actual distress phase is defined by the 1979 International Convention on Maritime Search and Rescue (SAR Convention)² – a treaty monitored by the International Maritime Organization (IMO) that imputes multi-State coordination of search and rescue systems – 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.*"³ When exactly a situation is identified as requiring immediate assistance, can be different according to which State is handling the situation. For some States the vessel must really be on the point of sinking.⁴ However, the

1. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 [LOSC].

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

3. SAR Convention, Annex Chapter 1 para. 1.3.13.

4. 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

International Law Commission (ILC) 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.¹ In contrast, for other States it is sufficient for the vessel to be unseaworthy.² MORENO-LAX even suggests that unseaworthiness *per se* entails distress.³

The 2014 EU Regulation establishing Rules for the Surveillance of the External Sea Borders adopted additional rules that must be respected by European Member States during search and rescue situations at sea when operating within a Frontex – the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union⁴ – joint operation at sea.⁵ When

by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final, Explanatory Memorandum, para. 2.

1. ILC, *Yearbook of the International Law Commission* (New York: ILC, 1979), Vol. II, Part II, 135, para. 10, available online: <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: BARNES, Richard A., “Refugee Law at Sea”, 53 *International and Comparative Law Quarterly* 47 (2004), 60.
2. 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.
3. MORENO-LAX, Violeta, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, 23 *International Journal of Refugee Law* 174 (2011), 195.
4. Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJ L* 349/1 of 25 November 2004.
5. Compromise text following the Proposal of 12 April 2013 for a Regulation of the European Parliament and of the Council establishing Rules for the Surveillance

deciding whether a vessel is in distress or not, search and rescue units should take all relevant elements into account, in particular: "(a) the existence of a request for assistance, although such a request shall not be the sole factor for determining the existence of a distress situation; (b) the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination; (c) the number of persons on board in relation to the type of vessel (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 vessel; (f) the availability of safety, navigation and communication equipment; (g) the presence of persons on board in urgent need of medical assistance; (h) the presence of deceased persons on board; (i) the presence of pregnant women or children; and (j) the weather and sea conditions."¹

Thus – according to this EU Regulation – although unseaworthiness is certainly an element to take into consideration when assessing the situation, it does not automatically imply a distress situation. As every situation is different, the fact 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, this allows shipmasters and States to take all relevant elements into account. Their margin of appreciation to decide

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, 2013/0106 (COD) (20 February 2014), available online: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/2013_0016_cod_pe_cons_/2013_0016_cod_pe_cons_en.pdf?>.

1. Compromise text following the Proposal of 12 April 2013 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, 2013/0106 (COD) (20 February 2014), Article 9(2)(f), available online: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/2013_0016_cod_pe_cons_/2013_0016_cod_pe_cons_en.pdf?>.

whether persons are in distress or not is regarded as being essential. 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.¹

4. *Self-induced distress situations*

Due to increased interception measures at sea, smugglers are often sending migrants to navigate the sea on their own, rather than risk being caught with the passengers. Also, because of the likelihood that the vessels will not return, smugglers are utilizing less expensive materials to build the boats. With no need to transport fuel for a return trip, migrants are making use of this extra space by loading their boats with more people, resulting in more drownings.² Illegal migrants are often transported on ships that are not properly manned, equipped or licensed for carrying passengers on international voyages and that States should take steps to eliminate these unsafe practices.³ For example, every year tens of thousands of Somalis and Ethiopians – often fleeing violence, human rights abuses and poverty in the Horn of Africa – pay smugglers to ferry them across the Gulf of Aden to Yemen. Many never make it, as the boats capsize or smugglers beat some of the passengers to death, force them overboard, or disembark people too far from shores.⁴

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- ¹. Council Decision (EU) No. 2010/252 of 26 April 2010 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, *OJ L* 111/20 of 4 May 2010, Annex Part II para. 1.4.
 - ². CARLING, Jorgen, "Migration Control and Migrant Fatalities at the Spanish-African Borders", 41 *International Migration Review* 316 (2007), 327. See also: NESSEL, Lori A., "Externalized Borders and the Invisible Refugee", 40 *Columbia Human Rights Law Review* 625 (2009).
 - ³. MSC, "Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea", *IMO Doc. MSC.1/Circ. 896/Rev. I* (12 June 2001), para. 4.
 - ⁴. Early 2012, a migrant vessel – crewed by three smugglers and carrying 58 passengers – set sail for Yemen. However, the boat's engine broke down and smugglers forced 22 passengers overboard. After five days, the boat capsized in rough seas and bad weather. At least 11 people drowned following this boat

Smugglers are generally well informed about States' protection obligations in case of distress situations and thus they act to exploit them. They are able to instruct migrants what to do upon interception to increase their chances of gaining entry into and remaining in countries of destination. For instance, States have been faced with situations of people sabotaging their own vessels to force authorities to carry out rescues.¹ As the concept of distress is not qualified, it also includes 'self-induced' distress as a type of distress in need of rescue.² PUGH argues that a group of determined people who have set out on a risky voyage in a substandard vessel may not be easily recognized as being in a condition of distress. Therefore, this argument cannot be supported.

Moreover, so-called 'rescuers' are in fact smugglers. On 9 September 2012, Italian authorities questioned survivor reports that the boat on which they were sailing from Tunisia actually sank or capsized near Lampedusa on 7 September. Italian authorities raised the possibility that the survivors were intentionally landed on the small island of Lampione – approximately 20 km west of Lampedusa – by a smuggler's 'mother ship' and that the smugglers then returned to Tunisia. Some of the 56 survivors who were rescued from Lampione reported that their boat sank and they were forced to swim to the island. However, Italian authorities did not find sufficient debris, bodies, or other evidence that would indicate that their boat sank. Although two bodies were recovered, the locations of the recovered bodies are not consistent with

incident. See: UNHCR, "Somalis Perish in New Boat Disaster in Gulf of Aden", Briefing Note (10 February 2012), available online: <<http://www.unhcr.org/4f35146d9.html>>.

1. UNODC, "Smuggling of Migrants by Sea", Issue Paper (2011), 7, available online: <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf>.
2. MALLIA, Patricia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (The Hague: Martinus Nijhoff Publishers, 2009), 98.

the location where the migrant boat is reported to have sunk.¹ These kind of practices can result in criminalization of seafarers, as almost happened in the case of the *Cap Anamur*. The fear of criminalization by those who go to the rescue of boats carrying migrants is one of the reasons why commercial vessels fail to go to the rescue of persons in distress at sea.²

II. Disembarkation of rescued persons

1. No disembarkation duty

Neither treaty law nor customary international law requires States to let rescued persons disembark onto their territory. Both the International Convention on Safety of Life at Sea (SOLAS Convention)³ – a treaty seeking to ensure protection of passengers aboard ships in distress through the prevention of situations of distress – and the SAR Convention⁴ only provide that States must arrange for the disembarkation of persons rescued at sea as soon as reasonably practicable.⁵

As a result, persons rescued at sea can spend weeks on a ship at sea before a State allows them to go ashore. The case of the *Marine I* provides an example. On 30 January 2007, the Spanish Coast Guard received a distress call from the vessel *Marine I*. It was alleged that over 300

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1. Migrants at Sea, “Question Raised Whether Migrant Boat Sank Off Lampedusa Last Week” (9 September 2012), available online: <<http://migrantsatsea.wordpress.com/2012/09/09/question-raised-whether-migrant-boat-sank-off-lampedusa-last-week/>>.
 2. PACE launched an inquiry in 2011 to investigate why over 1.000 migrants had died or perished in the Mediterranean Sea while trying to reach European soil from North Africa. See PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), para. 13.4, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.
 3. International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 [SOLAS Convention].
 4. International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 405 UNTS 97 [SAR Convention].
 5. SOLAS Convention, Chapter V Regulation 33; SAR Convention, Chapter 3 para. 3.1.9.

migrants from Guinea were on board. Although the *Marine I* was within the Senegalese Search and Rescue Region (SRR), Senegal requested Spain to proceed with a rescue operation, claiming that Senegal did not have the proper means to assist. Because the Mauritanian port of Nouadhibou was closest to the emergency, Senegal also informed Mauritania of the situation. On 4 February, a Spanish maritime rescue tug reached the *Marine I* and provided immediate relief by handing out supplies of water and food. The Spanish government also commenced negotiations with Senegal and Mauritania on the fate of the migrants. On 12 February (two weeks after the distress call), Spain, Senegal and Mauritania finally reached an agreement regarding the passengers. It was reportedly agreed that Spain would pay €650,000, in return for Mauritania allowing the passengers to disembark. Repatriation commenced the day after the migrants had disembarked. Guinea agreed to readmit thirty-five passengers, all of African origin.¹ In total, Spain reported 18,000 irregular arrivals by sea from West Africa that year.² The fact that Spain was prepared to pay as much as €650,000 to prevent the disembarkation of 300 migrants shows that some States are reluctant to allow disembarkation of rescued persons onto their territory. Consequently, in practice some shipmasters will ignore migrants at sea because they know that their entrance into ports will be refused.

It must be noted that – within Frontex operations – however, the 2014 EU Regulation establishing Rules for the Surveillance of the External Sea Borders establishes a disembarkation duty: the host Member State will be the ultimate responsible country to accept disembarkation.³

1. WOUTERS, Kees & DEN HEIJER, Maarten, "The Marine I Case: A Comment", 22 *International Journal of Refugee Law* 1 (2010), 2-3.

2. UNHCR, "All in the Same Boat: The Challenges of Mixed Migration", available online: <<http://www.unhcr.org/pages/4a1d406060.html>>.

3. Compromise text following the Proposal of 12 April 2013 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 Members States of the European Union, 2013/0106 (COD) (20 February 2014), Article 10, available online:

2. *Delivery to a place of safety*

In the SAR Convention, rescue is 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.*”¹ Although the SAR Convention states that rescue implies that persons in distress have to be delivered to a place of safety,² it does not define what a place of safety is. The 2004 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.³ Disembarkation of asylum-seekers recovered at sea, in territories where their lives and freedom would be threatened, must be avoided⁴ in order to prevent the violation of the non-refoulement principle.⁵ The government in charge of the SRR in which the survivors

<http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/2013_0016_cod_pe_cons_/2013_0016_cod_pe_cons_en.pdf?>.

1. SAR Convention, Annex Chapter 1 para. 1.3.2.
2. SAR Convention, Annex Chapter 1 para. 1.3.2.
3. MSC, “Guidelines on the Treatment of Persons Rescued at Sea”, MSC Resolution 167(78) (20 May 2004), para. 6.12.
4. MSC, “Guidelines on the Treatment of Persons Rescued at Sea”, MSC Resolution 167(78) (20 May 2004), para. 6.17.
5. 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: BETHLEHEM, Daniel & LAUTERPACHT, Elihu, “The scope and content of the principle of non-refoulement: Opinion”, in FELLER, Erika, TÜRK, Volker & NICHOLSON, Frances (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

were recovered is held responsible for providing a place of safety on its own territory or ensuring that such a place of safety is granted in another country.¹ Although an assisting ship may only serve as a temporary place of safety,² there is still no actual duty for States to disembark the persons rescued.³

However, Malta does not accept the 2004 IMO Guidelines.⁴ Therefore, according to Malta there is a safe place in terms of search and rescue and there is a safe place in terms of humanitarian law.⁵ The 2004 Guidelines, however, do state that a place of safety has to fulfil humanitarian requirements too. On 5 August 2013, the Liberian-registered tanker *Salamis* rescued 102 migrants aboard a damaged dinghy about 45 nm off Libya and 140 nm from Malta. The crew responded to an alert from Rome's Maritime Rescue Co-ordination Centre (MRCC) to help the migrants. After the rescue – co-ordinated by authorities in Rome – the *Salamis* headed for Malta, the destination for its cargo of gasoil. However, Maltese authorities told the shipmaster to proceed to the closest port of safety in Libya. Although the AFM was supplying food

and Refugees Rescued at Sea', in ALEINIKOFF, Alexander T. & CHETAIL, Vincent (Eds.), *Migration and International Legal Norms* (The Hague: Asser Press, 2003).

1. MSC, "Guidelines on the Treatment of Persons Rescued at Sea", MSC Resolution 167(78) (20 May 2004), para. 2.5.
2. MSC, "Guidelines on the Treatment of Persons Rescued at Sea", MSC Resolution 167(78) (20 May 2004), para. 6.13.
3. See for example: O'BRIAN, Killian S., "Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem", 3 *Goettingen Journal of International Law* 715 (2011), 723-725.
4. IMO, "Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions" (30 November 2012), available online: <<http://www.imo.org/about/conventions/statusofconventions/documents/status%20-%202012.pdf>>.
5. KLEPP, Silja, "A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea", 23 *International Journal of Refugee Law* 538 (2011), 549.

and water to the migrants, the ship was refused entrance to Maltese waters. The EU stated that – as the migrants included four pregnant women, one injured woman who needed immediate hospital care and a five-month-old infant – it was the humanitarian duty of the Maltese authorities to allow these persons to disembark. Sending the ship back to Libya would have been contrary to international law.¹ This is certainly true after the *Hirsi Case*, where the European Court of Human Rights decided that bringing migrants back to Libya constituted a violation of Article 3 of the European Convention of Human Rights² because *in casu* the applicants had been exposed to: (1) the risk of ill-treatment in Libya; and (2) of repatriation to Somalia or Eritrea.³

III. Lampedusa: A Unique Situation

The Italian island of Lampedusa is both part of the Maltese and the Italian Search and Rescue Region (SRR). According to the LOSC and the SAR Convention, coastal States shall establish adequate and effective search-and-rescue (SAR) services (for example, through the creation of a Rescue Co-ordination Centre (RCC)) and, where circumstances so require, cooperate with neighbouring States for this purpose.⁴ States must ensure that sufficient SRRs are established within each sea area. These regions should be contiguous and – as far as practicable – not overlap.⁵ Each SRR shall be established by agreement among parties concerned.⁶ The delimitation of SRRs is not related to and shall not prejudice the delimitation of any boundary between States.⁷ Parties are

¹. Sea-Web, “Tanker in Limbo after Rescuing 102 Migrants” (6 August 2013), available online: <http://www.sea-web.com/authenticated/authenticated_handler.aspx?control=ArticleDisplay&bp=1&articlename=dn0020130806000005>.

². European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 [ECHR].

³. ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012).

⁴. LOSC, Art. 98(2); SAR Convention, Annex Chapter 2 para. 2.1.1.

⁵. SAR Convention, Annex Chapter 2 para. 2.1.3.

⁶. SAR Convention, Annex Chapter 2 para. 2.1.4.

⁷. SAR Convention, Annex Chapter 2 para. 2.1.7.

required to ensure the closest practicable coordination between maritime and aeronautical services.¹ 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.²

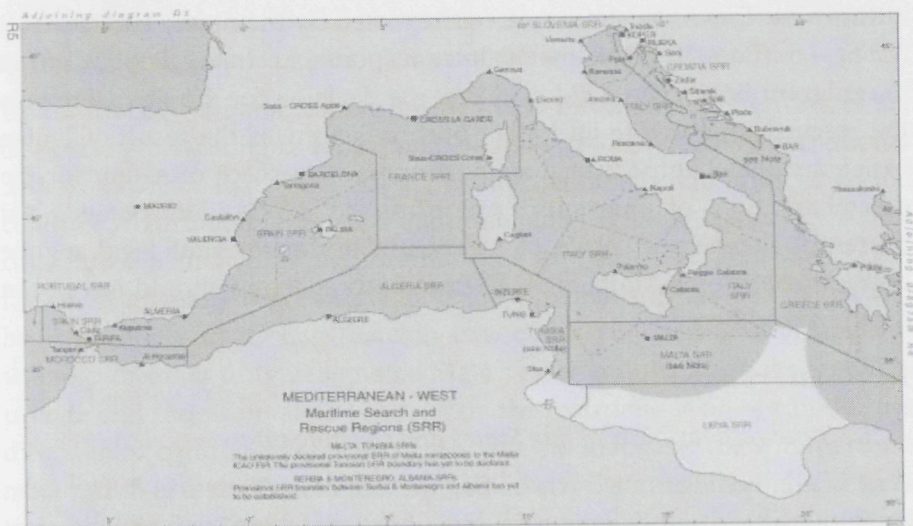
The SAR Convention aims to create an international system for coordinating rescue operations and therefore State parties are invited to conclude SAR agreements with neighbouring States to regulate and coordinate SAR operations and services in the agreed maritime zone.³ Such agreement do not only technically and operatively implement the obligation laid down in Article 98(2) LOSC, they also diminish the risk of non-rescue incidents. Next to this, they can offer an economic advantage to the extent that the contracting parties can share costs arising from organizing and carrying out SAR operations.⁴ However, for the moment, several States in the Mediterranean have for example unilaterally declared a SRR, resulting in overlaps, such as the area around Lampedusa. This often results in delays when deciding who is responsible, thus jeopardizing the lives of migrants in distress.

1. SAR Convention, Annex Chapter 2 para. 2.4.

2. 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: VASILOGEORGI, Isavella Maria, "Delimitation of IMO-ICAO Search and Rescue regions – A Case of Jurisdictional Compilation and Complication", 36 *Annals of Air and Space Law* 251 (2011), 251-278.

3. SAR Convention, Chapter 3.

4. TREVISANUT, Seline, "Search and Rescue Operations in the Mediterranean: Factor for Cooperation or Conflict?", 25 *International Journal of Marine & Coastal Law* 523 (2010), 528-529.



Maritime Search and Rescue Regions – Mediterranean West¹

For example, on 9 November 2011, 44 people – mostly sub-Saharan – were rescued by the Italian navy ship *Foscari* after two days of sending out distress calls from a satellite phone in the Mediterranean Sea. The delay in rescuing the boat led to huge risks to the lives of the persons in distress. Risks for example included drowning, dehydration and exposure. After the rescue, the migrants were transported to Sicily, not to Lampedusa or Malta which were the two closest ports. UNHCR spokesman Adrian EDWARDS stated that UNHCR was grateful that the Italian navy took this initiative despite the fact that the boat was in Maltese SRR.² In response, the AFM and the Maltese SAR authorities both rejected what they characterized as the “*impression conveyed*” by the UNHCR spokesperson that Maltese SAR authorities abdicated from their responsibilities and did not cooperate with the relevant Italian

1. IMO, “Global SAR Plan Containing Information on the Current Availability of SAR Services”, *IMO Doc. SAR.8/Circ.1/Corr.3* (20 October 2005), Annex 4, 7.
2. UNHCR, “UNHCR Thanks Italian Navy for Rescuing Boat in Distress Packed with Refugees from Libya”, Briefing Notes (11 November 2011), available online: <<http://www.unhcr.org/4ebd29809.html>>.

authorities. The AFM statement – as reported by the newspaper *Times of Malta* – outlines in detail the Maltese response to the distress call from the migrant boat. The AFM said that the decision for the *Foscari* to take the rescued migrants to an Italian port in Sicily was the result of Italian insistence that Lampedusa does not represent a place of safety for the disembarkation of migrants. According to Malta, Lampedusa did represent the nearest place of safety under the relevant legal regime applicable with the Malta SRR. Therefore, the persons should have been disembarked here.¹

IV. State responsibility

1. State responsibility of flag States and coastal States

First of all, the flag State – whose flag the vessel in distress is flying – can be responsible. Indeed, under the law of the sea, there is an obligation of every State to exercise its jurisdiction and control over ships flying its flag. According to Article 94(3) LOSC “[e]very State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to the construction, equipment and seaworthiness of ships”. Therefore, with regard to migrants at sea, it is deemed critical that flag States exercise effective jurisdiction and control over their vessels in order to ensure strict compliance with safety standards set out in relevant international instruments. Unseaworthy vessels should not be permitted to sail.² The situation, wherein a State permits unseaworthy vessels carrying migrants to fly its flag, will raise questions of international responsibility of that State. Nevertheless, this State is not in

1. Times of Malta, “UNHCR Comments Give the Wrong Impression – AFM” (14 November 2011), available online: <<http://www.timesofmalta.com/articles/view/20111114/local/unhcr-comments-give-the-wrong-impression-afm.393791>>.

2. UNHCR, “The Treatment of Persons Rescued at Sea: Conclusions and Recommendations from Recent Meetings and Expert Round Tables Convened by the Office of the United Nations High Commissioner for Refugees – Report of the Office of the United Nations High Commissioner for Refugees,” *UN Doc. A/AC.259/17* (11 April 2008), para. 11, available online: <http://www.un.org/Depts/los/consultative_process/consultative_process.htm>.

this capacity subject to the obligation of Article 98 LOSC, which only refers to the flag States in the vicinity of the vessel in distress.¹

Under the law of State responsibility, every internationally wrongful act of a State – consisting of an action or omission – entails the international responsibility of that State. An act is internationally wrongful when the conduct is attributable to the State under international law and when it constitutes a breach of an international obligation of the State.² The failure of a vessel to provide assistance to persons in distress at sea can be attributable to its flag State in two cases: (1) when the vessel is a warship or other duly designated State vessel and (2) when the vessel is private and the shipmaster is acting on the instructions of – or under the direction or control of – the flag State.³ In the first case, the shipmaster – with which the pertinent duty to provide assistance lies – is a *de jure* organ of the flag State. His conduct will be attributable to the flag State pursuant to Article 4 ILC Draft Articles. In the second case, should the flag State instruct the shipmaster to turn a blind eye to persons in distress at sea, this omission would be attributable to the flag State according to Article 8 ILC Draft Articles. However, there must be stressed that flag States – which enact a duty of assistance in their domestic legislation and exercise disciplinary control and jurisdiction over potential infringements of this duty in accordance with their

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1. PAPASTAVRIDIS, Efthymios, "Rescuing Migrants at Sea: The Responsibility of States under International Law", Working Paper Series Social Science Research Network (27 September 2011), 16-17, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.
 2. ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (adopted 9 August 2001), *UN Doc. A/56/10* (24 October 2001), Supp. No. 10, Artt. 1-2, available online: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf>. [ILC Draft Articles]
 3. PAPASTAVRIDIS, Efthymios, "Rescuing Migrants at Sea: The Responsibility of States under International Law", Working Paper Series Social Science Research Network (27 September 2011), 17-18, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

legislation – should be considered to meet their obligations under Article 98(1) LOSC.¹

The obligations for coastal States under Article 98(2) LOSC as well as under the SAR and SOLAS Conventions are to promote the establishment, operation and maintenance of an adequate and effective search and rescue service, where circumstances so require cooperate with neighbouring States for this purpose and to ensure that a place of safety is provided. The conduct of a Rescue Co-ordination Centre (RCC) will always be attributed to its coastal States, as the RCC administrators are necessarily *de jure* organs of the State.² Although an RCC can be operated either unilaterally by personnel of a single military service (eg. an Air Force or a Navy) or either by a single civilian service (eg. a national Police force or a Coast Guard), it will always be regarded as a State organ. Article 4(1) ILC Draft Articles reads: “*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*”

The words of Article 98(2) indicate that coastal States shall promote – not provide – a certain level of search and rescue services. Indeed, search and rescue services have to be ‘adequate and effective’. However, it is not always clear what ‘adequate and effective’ means. MOEN gives the example of the recent Arctic luxury eco-tourism. Cruise ships – icebreaking vessels that need no escort to navigate – now take advantage of ice-free conditions during the summer months to sail from Iceland to Alaska through the Northwest Passage. Nevertheless, travelling along

1. PAPASTAVRIDIS, Efthymios, “Rescuing Migrants at Sea: The Responsibility of States under International Law”, Working Paper Series Social Science Research Network (27 September 2011), 19, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

2. PAPASTAVRIDIS, Efthymios, “Rescuing Migrants at Sea: The Responsibility of States under International Law”, Working Paper Series Social Science Research Network (27 September 2011), 19, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

the Northwest Passage still imposes serious risks, making the potential for a humanitarian disaster real. Canada should therefore adapt its search and rescue services in order to adequately and effectively deal with these new risks.¹ It can be concluded that coastal States are under an obligation of conduct, not an obligation of result.² For State Parties to the 2004 SAR and SOLAS Amendments, there is an additional obligation to ensure that a place of safety is being provided for the persons rescued at sea. Whether this requirement will be met, will have to be decided on a case-by-case basis. According to Article 98(2), coastal States also have to cooperate where appropriate. However, it is very difficult to establish a breach of the duty to cooperate.

2. *An example: the left-to-die-boat*

A recent incident that gave rise to a discussion on responsibility for failing to meet search and rescue obligations, involved a disabled boat filled with migrants fleeing Libya. It was left to drift for two weeks in the Mediterranean before finally landing back in Libya on 10 April 2011. The boat ran into trouble not long after its departure from Tripoli. Despite several distress calls as well as sightings by survivors of a military helicopter and a warship, the boat received no help. It is almost certain that the helicopter must have come from a ship.³ The warship was of an off-white or light grey colour and the boat was close enough for them to see people on board wearing different coloured military uniforms. However, none of the survivors could remember seeing the ship's flag.⁴

1. MOEN, Amy E., "For Those in Peril on the Sea: Search and Rescue under the Law of the Sea Convention", 24 *Ocean Yearbook* 377 (2010), 377-410.

2. PAPASTAVRIDIS, Efthymios, "Rescuing Migrants at Sea: The Responsibility of States under International Law", Working Paper Series Social Science Research Network (27 September 2011), 20, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

3. PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 138, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

4. PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012),

The situation on board the boat when they encountered the ship was very different to the situation when they encountered the helicopter. Indeed, when the ship came across them, many persons had already died and there was no food and water. In an attempt to approach the ship, the migrants jumped into the sea and started pushing their boat in its direction. They even held up the dead babies and the sick women as well as the empty fuel tanks. However, no assistance was provided and after a short while, the military vessel sailed away.¹ It should have been clear that the survivors and the boat were in distress and that the situation required immediate rescue. As a result, in these circumstances there was a clear failure to intervene.² Ultimately, 63 persons – including 20 women and two babies – out of the 72 passengers died. As of 24 March 2011 – two days before the migrant boat left Tripoli – NATO and France, Great Britain, Italy, Spain, the United States, and Canada all had warships patrolling NATO's Maritime Surveillance Area, to enforce the arms embargo on Libya.³

But which military vessel ignored the calls for assistance? According to the fact finding PACE report of Tineke STRIK of 29 March 2012, at least two vessels involved in NATO's operations were in the boat's vicinity when the distress call was sent, namely the Spanish frigate *Méndez Núñez*

Explanatory Memorandum para. 41-43, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

1. PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 43, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.
2. PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 99, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.
3. FIDH, "NATO: Clarify Response to Deaths at Sea" (26 March 2012), available online: <http://www.fidh.org/IMG/article_PDF/article_a11532.pdf>.

(11 miles away) and the Italian *ITS Borsini* (37 miles away).¹ Tineke STRIK met with NATO officials in Brussels on 28 November 2011.² Next to this, she also requested written information from NATO and from the ministers of defence of countries involved in NATO operations with vessels with aircraft and/or helicopter-carrying facilities (Canada, France, Greece, Italy, Romania, Spain, Turkey, the United Kingdom and the United States).³ However, NATO stated: *"In all cases, NATO warships did everything they could to respond to distress calls and provide help when necessary. In addition, through coordination with national authorities, NATO has indirectly facilitated the rescue of many hundreds more. Commanders of warships under NATO command were, and remain, fully aware of their obligations under the International Law and Law of the Sea and responded appropriately."*⁴ As – at that time – all vessels in the area were under NATO command, the vessel must have been under the command of NATO, whatever its nationality was. As a result, according to Ms. STRIK, NATO must take responsibility for the ship's ignoring the calls for

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1. PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Draft Resolution para. 8, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.
 2. PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 8, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.
 3. PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 10, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.
 4. EVANS, Stephen, "Letter from Mr Stephen Evans, Assistant Secretary General for Operations of NATO, to Ms Strik, rapporteur of the Committee on Migrations, Refugees and Displaced Persons" (27 March 2012), available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_LET.APENDIX.E.N.pdf>. See also: FROH, Richard, "Letter from Mr Richard Froh, Deputy Assistant Secretary General, Operations Directorate of NATO, to Ms Strik, rapporteur of the Committee on Migrations, Refugees and Displaced Persons" (8 February 2012), available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.APENDIX.E.N.pdf>.

assistance from the "left-to-die boat".¹ The report of Tineke STRIK was adopted by the PACE Committee on Migration, Refugees and Displaced Persons. It demanded that NATO would conduct an inquiry into the incident. Next to this, national parliaments of the States concerned should also carry out inquiries.²

The survivors of this incident – with the support of a coalition of NGO's³ – lodged complaints in Italy, France, Belgium and Spain.⁴ Also, requests for information have been submitted under freedom of information laws in the UK, the US and Canada, in order to obtain details on the precise positions and actions of their armed forces at the time of these events.⁵ For example, on 11 April 2012, three NGO's – *La Fédération internationale*

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1. PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 148, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.
 2. PACE, "PACE Committee Finds a 'Catalogue of Failures' that Led to Deaths of 63 People Fleeing Libyan Conflict by Sea", Press Statement (29 March 2012), available online: <http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=7567&L=2>.
 3. The NGO Coalition supporting the survivors is composed of the following organisations: The Aire Centre, Agenzia Habeshia, Associazione Ricreativa e Culturale Italiana (ARCI), Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), Boats4People, Canadian Centre for International Justice, Coordination et initiatives pour réfugiés et immigrés (Ciré), Fédération internationale des ligues des droits de l'Homme (FIDH), Groupe d'information et de soutien des immigré.e.s (GISTI), Ligue belge des droits de l'Homme (LDH), Ligue française des droits de l'Homme (LDH), Migreurop, Progress Lawyers Network, Réseau euro-méditerranéen des droits de l'Homme (REMDH), Unione Forense per la Tutela dei Diritti Umani (UFTDU).
 4. See for example: FIDH, "63 Migrants Left to Die in the Mediterranean: Survivors File a Complaint Against the Belgian Army" (last update 4 March 2014), available online: <<http://www.fidh.org/en/migrants-rights/14293-63-migrants-left-to-die-in-the-mediterranean-survivors-file-a-complaint?>>.
 5. ECRE, "Survivors of 'Left to Die' Boat Accuse the Belgian Army of Failing to Aid Persons in Distress" (29 November 2013), available online: <<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/512-survivors-of-left-to-die-boat-accuse-the-belgian-army-of-failing-to-aid-persons-in-distress-.html>>.

des ligues des droits de l'homme (FIDH), Groupe d'information et de soutien des immigrés (GISTI) and Migreurop – held a press conference to announce the filing of a legal complaint against the French military with the Procureur de la République du Tribunal de Grande Instance de Paris, alleging that military forces failed to render assistance to a migrant boat within the NATO military zone during Operation Unified Protector.¹ FIDH, GISTI and Migreurop conclude that the French military must have had knowledge of the distress situation, based upon three reasons: “(1) Compte tenu de la connaissance de la présence et de la localisation (33°45mn de latitude nord et 13°05 mn de longitude est) de ce bateau par un avion de reconnaissance français le 27 mars à 14h55. (2) Compte tenu de la présence de l’armée française dans le périmètre de 50 milles nautiques, à partir de la localisation de l’embarcation, lors de la diffusion du message de détresse le 27 mars à 20h54 (18H54 GMT) par les garde-côtes italiens. (3) Compte tenu de l’importante présence de l’armée française dans le périmètre de la diffusion du message Hydrolant en date du 28 mars 2011 à 06h06 et de sa diffusion durant les dix jours suivants toutes les quatre heures.”²

Indeed, information provided by the Rome MRCC indicates a sighting of a boat full of migrants by a French aircraft on 27 March 2011. According to the French sighting, the boat was a rubber dinghy, had about 50 persons on board and was under propulsion. A photograph taken by the aircraft was provided to Ms. STRIK by the Rome MRCC, showing distinctly a blue boat packed with people and steadily moving ahead. The boat in the picture was identified as the boat in question by two of the survivors.³ According to information provided by the French military, no such event occurred off the Libyan shores during the NATO

1. FIDH, GISTI & Migreurop, “Plainte Contre X.” (11 April 2012), available online : <http://www.gisti.org/IMG/pdf/plainte_2012-04_c-armee-francaise.pdf>.

2. FIDH, GISTI & Migreurop, “Plainte Contre X.” (11 April 2012), 18, available online : <http://www.gisti.org/IMG/pdf/plainte_2012-04_c-armee-francaise.pdf>.

3. PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 85-87, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

operations. The French Minister of Defence stated that the French vessel *Meuse* encountered a vessel carrying migrants on 28 March 2011, approximately 12 nautical miles south of Malta. However, this could not have been the boat in question. The Minister went on to say that all other French assets were operating in the Gulf of Sidra. Therefore, they were not in the area of concern. NATO's written reply that "*based on a review of existing records in NATO operational headquarters, there is no record of any aircraft or ship under NATO command having seen or made contact with the small boat in question*". These responses fail to provide any concrete answers as to the identity of the French aircraft that took a picture of the boat.¹

One of the problems is the isolated nature of the ocean. Therefore, it is difficult to prove a failure of search and rescue obligations. Nevertheless, satellite images for example could provide for proof. The European Union Satellite Centre (EUSC) gathers a great deal of data and pictures across the globe.² In the light of the PACE fact finding report "*Lives Lost in the Mediterranean Sea: Who is Responsible?*", Tineke STRIK asked EUSC for satellite images. However, EUSC replied that the Centre did not have archived products available for the indicated area and the indicated time frame. It continued stating that – considering that the area of interest coincided with the area of NATO *Operation Unified Protector* – the envisaged investigation could involve classified "NATO confidential" information. Nevertheless, EUSC admitted that access to satellite imagery of the area would have been an invaluable tool to identify the location of ships as military vessels are certainly large enough to be spotted and possibly identified from such data.³

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1. PACE, "*Lives Lost in the Mediterranean Sea: Who is Responsible?*", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 90-91, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.
 2. For information on the European Union Satellite Centre see: <<http://www.eusc.europa.eu/>>.
 3. PACE, "*Lives Lost in the Mediterranean Sea: Who is Responsible?*", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 141-143, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

The United States is already using 'Predator drones' to monitor land and sea borders. However, serious questions have been raised about the effectiveness of surveillance drones operating over the sea as – until now – the drones have had limited success in for example spotting drug runners in the open ocean.¹ The use of drones for land and sea border surveillance is contemplated by in the EU Commission's proposal on the establishment of the European Border Surveillance System (Eurosur).² The EU Regulation on the establishment of the European Border Surveillance System (Eurosur) offers the possibility to use new technologies during border surveillance.³ Although the main purpose of Eurosur is to improve the situational awareness and reaction capability at the external borders of the Member States and of the European Union,⁴ it definitely has the potential of being a life-saving instrument, by facilitating the detection and tracking of small vessels by using UAVs, satellites and shipboard monitoring systems.⁵ Nevertheless, Eurosur is not transparent and covers up a lack of substance. First, maritime search and rescue services are not part of Eurosur.⁶ Secondly, Eurosur does not specifically mention the obligation to assist vessels in distress at sea, nor

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1. Los Angeles Times, "U.S. plans more drone flights over Caribbean" (23 June 2012), available online: <<http://articles.latimes.com/2012/jun/23/nation/la-na-drugs-caribbean-20120623>>.
 2. European Commission Proposal of 12 December 2011 for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR), COM (2011) 873 final.
 3. Regulation (EU) No. 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), *O.J. L* 295 of 6 November 2013. The system became operational as of 2 December 2013.
 4. European Commission Proposal of 12 December 2011 for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (Eurosur), COM (2011) 873 final, Article 1.
 5. Human Rights Watch, "Hidden Emergency – Migrant Deaths in the Mediterranean" (August 2012), 11, available online: <http://www.hrw.org/sites/default/files/related_material/2012_EU_Hidden%20Emergency.pdf>.
 6. HAYES, Ben & VERMEULEN, Mathias, "Borderline – The EU's New Border Surveillance Initiatives", Heinrich Böll Foundation (June 2012), 74-76, available online: <<http://www.statewatch.org/news/2012/jun/borderline.pdf>>.

does it clearly state which countries are responsible. As a result, operationalizing the data – from seeing a distress situation to carrying out a SAR operation – could provide difficulties.¹ Thirdly, Eurosur does not explicitly absolve shipmasters from criminal responsibility when rescuing migrant boats.² Lastly, it is being questioned whether Eurosur is able to meet the specific needs that asylum seekers may have.³

Eurosur images were for example already used in the Farmakonisi incident. In January 2014, 12 migrants, including several children, died when their vessel sank near a Greek island while being towed by the Greek Coast Guard. Allegedly, the Greek Coast Guard was towing the boat toward the Turkish coast at high speed when the boat capsized. The survivors declared that no attempt was made by the coast guard to save the people drowning. In contrast to the survivors' accounts, the Greek Port Authority stated that due to bad weather conditions the Coast Guard had launched a rescue operation to tow the boat toward the Greek island of Farmakonisi. During this operation, a large number of those on board gathered on one side of the boat, which resulted in its overturning and sinking.⁴ A few months before this incident, Pro Asyl

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1. JUMBERT, Maria Gabrielsen, "Controlling the Mediterranean Space Through Surveillance – The Politics and Discourse of Surveillance as an All-Encompassing Solution to EU Maritime Border Management Issues", 3 *Espace Populations Sociétés* 35 (2012), 35-48.
 2. IRIN Humanitarian News and Analysis, "Migrant deaths in Mediterranean spark debate, but little action" (18 October 2013), available online: <<http://www.irinnews.org/report/98963/migrant-deaths-in-mediterranean-spark-debate-but-little-action?>>.
 3. LIBE, Draft Report on the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (Eurosur) by Rapporteur Jan Mulder, COD (2011) 0427; Meijers Committee – Dutch Standing committee of experts in international immigration, refugee and criminal law, "Note on the proposal for a Regulation establishing the European Border Surveillance" (12 September 2012), available online: <<http://www.statewatch.org/news/2012/sep/eu-meijers-cttee-eurosur.pdf?>>.
 4. ECRE, "12 Refugees Die During Alleged Push-Back Operation Off Greek Island", (24 January 2014), available online: <<http://www.ecre.org/component/content/article/70-weekly-bulletin->

had already detailed how refugees attempting to cross the EU's external borders with Turkey are systematically pushed back from Greek territorial waters, the Greek islands and from the land border.¹ Due to a lack of transparency during the investigation, however, it is not clear whether the images could provide any answers or proof.

V. *Sanctions for the master and the ship owner*

1. *Shipmaster*

When the 1989 Salvage Convention added Article 10(2), it placed the obligation to give effect to the duty to render assistance on the States, rather than on masters.² Although Article 10(1) says that 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, para. 2 says: “*The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.*” Also other multinational instruments do not directly obligate masters to render assistance. At first sight the treaties refer to the masters of ships and they appear to create obligations for them. However, the binding element is on States parties.³ Also Article 98(1) LOSC says “*Every State shall require the master of a ship flying its flag [...] to render assistance*”. Indeed, international law seldom imposes obligation directly on individuals.⁴

articles/574-12-refugees-die-during-alleged-push-back-operation-off-greek-island.html>.

- ¹. Pro Asyl, “Pushed Back” (7 November 2013), available online: <http://www.proasyl.de/fileadmin/fm-dam/l_EU_Fluechtlingspolitik/proasyl_pushed_back_24.01.14_a4.pdf>.
- ². SEVERANCE, Arthur Alan, “The Duty to Render Assistance in the Satellite Age”, 36 *California Western International Law Journal* 377 (2006), 382.
- ³. DAVIES, Martin, “Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea”, 12 *Pacific Rim Law & Policy Journal* 109 (2003), 109-143, 128; SEVERANCE, Arthur Alan, “The Duty to Render Assistance in the Satellite Age”, 36 *California Western International Law Journal* 377 (2006), 384.
- ⁴. JENNINGS, Robert & WATTS, Arthur (Eds.), *Oppenheim's International Law* (Harlow: Longman, 9th ed. 1992), paras. 374-375.

Article 2 of the 1989 Salvage Convention provides that States must bring judicial and arbitral proceedings regarding a breach of the duty to render assistance. Despite the fact that the duty to render assistance has been widely accepted, sometimes it still remains unenforced against masters.¹ There are several reasons for this. First of all, failures to render assistance are rarely reported, as a survivor of a disaster at sea would have to be able to somehow identify a vessel whose master had failed to render assistance.² Second, an action against a master requires that he is subject to the enforcing State's jurisdiction.³ It may be possible for States other than the flag State to assert criminal jurisdiction due to failure by a shipmaster to assist persons in need of assistance on the high seas.⁴ Third, many States – such as flags of convenience – are either unable or unwilling to enforce the duty.⁵ Moreover, even otherwise responsible flag States are unwilling to enforce the duty. For example, in the case *Korpi v. United States*, the Court held that as a matter of law “[a] private party has no affirmative duty to rescue a vessel or person in distress.”⁶ Last, as the master has a discretionary power to decide whether or not to provide assistance, as well as what kind of assistance to give, it is difficult to actually prove a breach of the duty he has.

Article 16(1) of the 1989 Salvage Convention says: “1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject. 2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment

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1. LONG, Patrick J., “The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea”, 48 *Buffalo Law Review* 591 (2000), 627.
 2. LONG, Patrick J., “The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea”, 48 *Buffalo Law Review* 591 (2000), 610.
 3. O'CONNELL, Daniel P. (Ed. by SHEARER, Ivan A.), *The International Law of the Sea* (Oxford: Clarendon Press, 1982/1984), Vol. II, 907.
 4. DAVIES, Martin, “Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea”, 12 *Pacific Rim Law & Policy Journal* 109 (2003), 109-143.
 5. BARNES, Richard A., “Refugee Law at Sea”, 53 *International and Comparative Law Quarterly* 47 (2004), 51.
 6. *Korpi v. United States*, 961 F. Supp. 1346, N.D. Cal. (1997).

awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment." Therefore, States do not need to grant masters the right to a reward unless their national laws provide otherwise. Nevertheless, this could be an incentive to fulfil the legal duty to assist. However, one has to be careful that this does not amount to the act of smuggling. Smuggling is the explicit and mutually beneficial arrangement between two parties involving illegal entry (crossing borders without complying with the necessary requirements for legal entry into the receiving State) into a given country.¹

2. Ship owner

Could a ship owner be liable for damages to a stranger in peril on the high seas to whom the shipmaster has failed to give aid? In the case *Warschauer v. Lloyd Sabaudo* (1934),² the plaintiff WARSCHAUER – a United States citizen – brought an action against an Italian corporation which owned and operated the steamship *Conte Biancamano*. The complaint alleged that on the afternoon of 31 October 1931, the plaintiff and a companion were adrift on the high seas in a disabled motorboat. They had no gasoline and no food and when the defendant's operating personnel of the *Conte Biancamano* observed the distress signals, they refused to heed them or to stop and take the plaintiff aboard. In the case at hand, they could have done so without peril to themselves or their vessel. Although WARSCHAUER was rescued by the Coastguard two days later, he had suffered permanent physical injuries due to the exposure and deprivations to which he was subjected by the failure of the defendant's steamship to render assistance. Therefore, WARSCHAUER demanded damages for the pain and subsequently incurred medical expenses. This situation involved no personal dereliction by the ship owner. Such dereliction was that of the master. Only by applying the doctrine of *respondet superior* it could be imputed to the ship owner.

¹ Smuggling Protocol, Artt. 3(a) and 3(b).

² *Warschauer v. Lloyd Sabaudo, S.A.*, 71 F.2d 146, 2d Cir., cert. denied, 293 U.S. 610 (1934), as published in: SOHN, Louis B. & NOYES, John E., *Cases and Materials on the Law of the Sea* (Ardsley: Transnational Publishers, 2004), 94-97.

The Court referred to Article 11 of the 1910 Salvage Convention that the owner of the vessel incurs no liability by reason of contravention of the master's obligation to render assistance. The applicant in this case held that this provision only referred to the criminal liability of the owner. However, the Court decided that such an interpretation would seem most unlikely. It said that: "*Unless it was intended to cover civil liability, no reason is apparent for mentioning the owner's exemption from liability. It is almost inconceivable that criminal responsibility should be imputed to an owner who had not directed the dereliction of his agent. [...] A penal statute is construed to apply only to the class of persons to whom it specifically refers.*"¹ Therefore, if the 1910 Salvage Convention only refers to the master's duty, breach of which is to be enforced by the criminal law, there would have been no need to express the owner's exemption from responsibility. However, if the master's liability can be civil as well as criminal, then the provision referring to the owner serves a purpose as it clearly relieves him from civil liability.

This is confirmed by the 1989 Salvage Convention. Indeed, although Article 10(1) of the 1989 Salvage Convention requires that 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, para. 3 continues: "*The owner of a vessel incurs no liability by reason of contravention of the above position.*"

Conclusion

Under international law, it is clear that there exists a duty of rendering assistance regardless of an actual request for help. Next to this, also self-induced distress situations require assistance. However, due to overlaps of SRRs, there are delays in deciding who is responsible, thus jeopardizing the lives of migrants in distress. This is exactly what happens near Lampedusa.

¹ *Warschauer v. Lloyd Sabaudo, S.A.*, 71 F.2d 146, 2d Cir., cert. denied, 293 U.S. 610 (1934), as published in: SOHN, Louis B. & NOYES, John E., *Cases and Materials on the Law of the Sea* (Ardsley: Transnational Publishers, 2004), 95.

A possible solution would be strengthened cooperation between States. However, States cannot be obliged to cooperate. Moreover, as there is no disembarkation duty under international law, initiatives introducing such a duty – such as new EU rules on disembarkation within Frontex operations – are being criticized by coastal States.¹ It is clear that States are still reluctant towards a disembarkation duty. Next to cooperation, new technologies could be used not only to prove failure of search and rescue obligations, but also to assist in migrant patrols at sea. We should however bear in mind that States should be encouraged to share the burden, for example by engaging in resettlement and readmission agreements.

With regard to shipmasters, we can conclude that a duty to render assistance exists, but only in so far as they can do so without serious danger to the ship, the crew or the passengers. Practices such as criminalization of seafarers should be avoided as rescue cannot be regarded as being equal to smuggling. Indeed, the fear of criminalization by those who go to the rescue of boats carrying migrants is one of the reasons why commercial vessels fail to go to the rescue of persons in distress at sea. It is therefore positive that the 2014 EU Regulation establishing Rules for the Surveillance of the External Sea Borders mentions in Recital 7: *“The shipmaster and crew should not face criminal sanctions for the sole reason of having rescued persons in distress at sea and brought them to a place of safety.”*²

¹. Greek, Spanish, French, Italian, Cyprus and Maltese delegations, “Position on Articles 9 and 10”, 2013/0106 (COD) (10 October 2013), 2, available online: <<http://www.statewatch.org/news/2013/oct/eu-sea-surveillance-14612-13.pdf>>.

². Compromise text following the Proposal of 12 April 2013 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 Members States of the European Union, 2013/0106 (COD) (20 February 2014), Recital 7, available online: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/2013_0016_cod_pe_cons_/2013_0016_cod_pe_cons_en.pdf?>.

