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"BOAT REFUGEES": REFUGEE LAW ON THE HIGH SEAS

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„Prohlašují, že jsem tuto diplomovou práci zpracovala samostatně, a že jsem vyznačila prameny, z nichž jsem pro svou práci čerpala způsobem ve vědecké práci obvyklým.“

Plzeň, březen 2015

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Kateřina Šimonová

Poděkování

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List of Abbreviations

CMI – Comite Maritime International

ECHR - European Court of Human Rights

EU – European Union

EUROSUR - European Border Surveillance System

EXCOM – Executive Committe of the UNHCR

FRONTEX - European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

IMO – International Maritime organisation

PCIJ – Permanent Court of International Justice

SAR – International Convention on Maritime Search and Rescue

SOLAS – International Convention for the Safety of Life at Sea

UNCLOS – United Nations Convention on the Law of the Sea

UNHCR – United Nations High Commissioner for Refugees

USA – United States of America

1. Introduction

Dealing with refugees fleeing their homes and arriving by sea is a problem that has existed for a number of years. Nevertheless, the core of this issue has remained the same, finding some solution to reconcile the humanitarian quandary of refugees with the States´ concerns about immigration, the costs of asylum and many other consequences. In this connection, the incident of *Tampa* ferry will always be perceived as a milestone as regards to the refugees on the High seas. The boarding of the *Tampa* by Australian SAS troops in August 2001, in order to prevent disembarkation of asylum-seekers on Christmas Island, has repeatedly brought many questions regarding the conflict between the legal regime governed in particular by maritime law and refugee law, and between moral and legal considerations. Exactly this tension between legal norms or its gaps and humanitarian or moral concerns will be the core of my thesis, trying to answer the questions that automatically arise from this legally-moral conflict, such as:

What are the obligations of flag States, coastal States or Shipmasters as such and rights of people in distress at sea under the 1982 Convention on the Law of the Sea and under other maritime agreements? How do commercial or rather to say financial, security and other concerns of flag States, coastal States or Shipmasters affect the duty to provide assistance or rescue of those in distress at sea? What are the entitlements and rights of refugees under the 1951 United Nations Convention relating to the Status of Refugees and under other human rights instruments? Does the so essential principle of *non-refoulement* enshrined in the Article 33(1) of the 1951 United Nations Convention relating to the Status of Refugees apply also beyond the territory of the signatory states? What are the gaps and possible issues that international community has to solve in a near future due to the current mass influx of "boat refugees" these days in the Mediterranean but also in other parts of the world and how to do so?

Analysing the maritime law and legal obligations of coastal States and flag States in respect of asylum-seekers rescued at sea and seeking the answers to the questions mentioned above I would like to also concentrate more on the issue of the rescue of refugees on the High seas by employing relevant norms of international refugee law that should not be omitted, especially, when we want to ensure that greater consideration is paid to the current humanitarian concerns. Assuredly, one of these norms is provided in the Article 33(1) of the 1951

Refugee Convention, so called, *non-refoulement* principle. In this respect, the most questionable issue regarding this principle discussed in my thesis would be its extraterritorial applicability that could solve the uncertainty regarding the area of the High seas.

Furthermore, I would like to examine the deficiency of legislation in this matter. The law in respect of conducting search operations, providing assistance, rescue, bringing to a place of safety, duty to allow for disembarkation and many other issues is highly unsatisfactory. A number of absolutely key duties are poorly defined and on the domestic level inadequately implemented. Thus, as a final part consideration is given to identifying these gaps and suggesting possible solutions.

As to the structure of the thesis, it is sectioned into five chapters. In the first chapter I will provide a brief overview of the beginnings of the "boat refugees" phenomenon, the first ever cases of refugees on the seas. I will also introduce the most discussed incident, the case of *Tampa* and I will summarize this chapter with the relevant statistics regarding current refugee influx, the highest one since the World War II.

In the second chapter I will concisely establish the legal background and further I will deal with the duties imposed on the Shipmasters, coastal States and flag States under International law of the Sea treaties.

Consequently, the third chapter examines the impact of Human rights and the relevant provisions of Refugee law on the rights and obligations of States and refugees rescued at sea. Due to the respect of the topic of my thesis I will analyzes in a detail one of the key provisions the Article 33 (1) of the 1951 Refugee Convention and in the context of the High Seas I will tend to concentrate on proving or disproving its extraterritorial applicability.

In the fourth chapter I will provide a few brief examples or rather to say common practise and measures taken by especially EU States in response to the influx of refugees on boats reaching EU territory these days.

Finally, the last chapter considers the legal gaps and possible solutions to improve the current unflattering practice and to prevent increasing numbers of refugees losing their lives at sea trying to reach safety, especially, in the context of the deteriorating situation in the problematic regions of the world.

The core of the thesis methodology is the legislation and practise study approach, which comprises a descriptive method followed by an analysis and a synthesis. The descriptive method is used to introduce the legal context and the

factual background of the particular issues itself and the respective state practise. This is followed by the analysis of the legal and states´ approach insufficiencies. Finally, I am using synthesis to summarize the conclusions and potential implications on the further practice and revision of the relevant, mostly inaccurate, legislation and its possible improvement.

The diploma thesis has been written on the basis of the law as it stood on 12 March 2015.

2. Background

2.1 Historical Background of "boat refugees"

The sad phenomenon of people risking their lives and taking to the seas in order to search of safety, refuge, or simply better economic conditions is not new. People migrating by boats undergoing the hazards associated with such a formidable journey have always played a part in modern history. In relation to modern history the first noticeable incidents of people fleeing their homes to reach safety occurred during and due to the Nazi horrors of the Second World War, when some Jewish refugees fled their homes and countries in this manner.[1] However, the term "boat people" as such had not been applied for these cases up until another milestone in the history, the communist victory in Vietnam and the fall of Saigon in 1975. Thus, the term "boat people" or "boat refugees", referring to refugees or rather to say to asylum seekers fleeing by boat, originally referred to the thousands of Vietnamese who fled their country by sea following the collapse of the South Vietnamese government in 1975 and the subsequent mass exodus from Indo-China in the mid to late 1970s.[2] Crowded into small vessels, they were prey to pirates, and many suffered starvation and dehydration, and even death by drowning. The term was later applied to waves of refugees at sea who attempted to reach safety all over the world.

Unfortunately, this trend lasts up until today, when the issue of refugees risking their lives at sea is more than immediate. In subsequent years, the main problem was mainly Haitians and Cubans trying to reach the USA coast despite the increased attentions of the US Coast Guard. In the following years also Australia has seen a growing influx of refugees and thus, started to apply active interception measures as a reaction to refugees arriving from Indonesia and elsewhere. International attention has focused also on the movement of Somalis and Ethiopians across the Gulf of Aden, Libyans fleeing their homes in the aftermath of the Libya crisis trying to reach Europe, etc.

For a very long period of time the "boat refugees" were not considered a European problem. However, this has changed dramatically with the beginning of

[1] PAPASTAVRIDIS, Efthymios. Interception of Human Beings on the High Seas. A Contemporary Analysis under International Law. *Syracuse Journal of International Law and Commerce.* 2009, Vol. 36, Iss. 2, page 146.

[2] COPPENS, Jasmine. SOMERS, EduardTowards. New Rules on Disembarkation of Persons Rescued at Sea?. *International Journal of Marine and Coastal Law.* 2010, Vol. 25, Iss. 3, page 381-382.

the 21st century. Beginning in Italy which was forced to be part of turning back vessels from Albania, the influx of migrants but also asylum seekers in the Mediterranean has risen rapidly over the last decade. Worth mentioning is also the situation on the Spanish Canary Islands, Malta, Cyprus or on the Italian island of Lampedusa[3], which was reached from the Libyan coast by some 16,000 people over the first nine months in 2006 but it was just a beginning. Already in the first 10 months in 2014, a record 154,075 migrants have arrived in Italy by sea, with Syrians and Eritreans being the most numerous, while a total of 124,380 persons have arrived irregularly by sea across the Mediterranean to Greece, Italy, Spain and Malta. If we further compare it to the same period of time in 2013 with 38,882 migrants reaching Italy by sea, the dramatic increase is quite visible.[4] The current situation in global numbers is even worse, therefore, I will provide the description of nowadays urgent refugee influx in the separate chapter 2.3.

But in general beyond these situations, irregular maritime movements are a reality in all regions of the world and raise a number of specific protection challenges. Most irregular maritime migration movements today are "mixed movements", involving people with various personal profiles, entitlements and needs. However, almost all of these movements include at least some refugees. The boats used for these migration movements are usually overcrowded, unseaworthy or commanded by unprofessional shipmasters. Therefore, situations of distress are not rare and the scope of these cases starts to raise great humanitarian concerns. Search and rescue operations, disembarkation, processing and the identification of solutions for those rescued, all of these are urgent issues for States, international organizations, and the shipping industry. Due to dramatic development of the situation as regards refugee influx also amendments to the International Convention for the Safety of Life at Sea (SOLAS Convention) and the International Convention on Maritime Search and Rescue (SAR Convention), as well as associated International Maritime Organization (IMO) Guidelines, underline the duty of all State Parties to co-ordinate and co-operate in rescue at

[3] After the Lampedusa tragedy of October 2013, in which at least 366 people lost their lives while trying to reach the safety of Europe, the EU pledged to do more to prevent deaths in the Mediterranean. However, pretty much nothing has happened and things are still moving in the wrong direction. Almost a year-and-a-half and upwards of 3,800 deaths at sea, the EU has absolutely failed to make a genuine commitment to rescue at sea and has made virtually no progress toward creating safe and legal channels into the EU.

[4] UNHCR, Contributions Report of the Secretary General on Ocean Affairs and the Law of the Sea, August 2014, available at: http://www.un.org/depts/los/general_assembly/contributions_2014_2/UNHCR_rev.pdf

sea operations.[5] However, as always a number of key challenges remain. Some of the at most important challenges are ensuring the safety of human life at sea, which is still according to above mentioned numbers of people who have lost their lives at sea quite underestimated or ignored. The timely identification of a place of safety for disembarkation, providing access to asylum, and other procedures, and also outcomes for all rescued persons depending on their profiles and needs, these are another challenges, too.[6]

2.2 The *Tampa* incident

For the purpose of this work and especially to understand the examples and references given in the following chapters, it is also necessary to provide a brief introduction of the most discussed case of boat in distress on the High seas, the *Tampa* incident. On August 26, 2001, the Australian Rescue Coordination Centre alerted the *Tampa* boat, a Norwegian cargo ship at that time being in Indonesian territorial waters, to a ferry, the *Palapa I*, sinking approximately one hundred miles northwest of Christmas Island in the Indian Ocean.[7] The *Tampa* reversed its course and reached the sinking ferry. The *Tampa* then successfully retrieved 438 men, women and children, mostly fleeing from Afghanistan, Pakistan, Iraq, and Sri Lanka.[8]

Because the sinking ferry was found in the Indonesia's Search and Rescue (SAR) region, the *Tampa* shipmaster Ame Rinnan originally intended to return the rescuees to Indonesia before continuing its journey to its next port of call in Singapore. However, nothing was as simple as it first may seem to be, because after the rescue as such, a group of rescues learned about this intention shortly and a few them confronted the captain and threatened him with undertaking a hunger strike or throwing themselves overboard, if the ship did not head for "any Western country". These threats were not the only reasons why also even the shipmaster

[5] Regulation 33, International Convention for the Safety of Life at Sea (SOLAS), 1974; Chapter 3.1.9, International Convention on Maritime Search and Rescue (SAR), 1979; Annex 34, IMO Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, 2004; Paragraph 2.3, IMO Circular FAL.3/Circ. 194, Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, 2009.

[6] UNHCR. Rescue at Sea, Stowaways and Maritime Interception: Selected Reference Materials, 2nd Edition, December 2011, page 4, available at: http://www.unhcr.org/cgi bin/texis/vtx/home/opendocPDFViewer.html?docid=4ee1d32b9&query=refugees%20at%20sea

[7] Christmas Island is remoted Australian island located approximately 200 miles from the Indonesian island of Java and 930 miles from the Australian mainland. WILLIAMS, Daniel. Adrift and Unwanted; A Norwegian Ship Saves 438 Asylum Seekers-and Triggers an Ugly Diplomatic Row Over Their Fate, *TIME (Int'l Ed.)*, September 10, 2001, page 61.

[8] *Ibid.*.

felt compelled to alter the ship´s course to the nearest "Western country". The facts such as that the *Tampa* completely exceeded the allowed number of persons on board, luck of food and medical supplies played its rule in the following development.[9]

On the next day, August 27th, the *Tampa* was denied access to Australian territorial waters as it attempted to reach the port at already mentioned Christmas Island. After two more days during which the *Tampa* has been anchored fourteen nautical miles off the Christmas Island, because Australia claims a twelve nautical mile territorial sea, diplomatic negotiations reached an impasse. However, the situation on board the *Tampa* got worse and thus, the shipmaster Rinnan sent out a mayday call and proceeded to enter Australian waters, irrespective of the Australian government's decision to refuse entry. Thereafter a military unit from the Australian Special Armed Services intercepted and boarded the *Tampa,* directing it to leave Australian territorial waters.[10] Eight additional days at sea passed when a diplomatic agreement was reached. The result was that the rescuees were transferred to an Australian naval vessel, by which 288 refugees were taken to Nauru and 150 refugees were taken to New Zealand. [11]

Captain Rinnan's decision to change the course of his ship to save the people in distress on the sinking ferry was hailed as heroic and moreover, with no doubts, he fulfilled his duty under international law as well. As we shall see in the following chapters of this thesis, it is not that common. Thus, this reaction really was worth admiration.

2.3 Current development of the "boat refugees" phenomenon

The covert nature of the sea crossings makes it difficult to provide reliable comparisons with previous years, but available data points out that the year 2014 was a record high in this matter. According to estimated data from coastal authorities and information from confirmed interdictions and other sources revealed that at least 348,000 people have risked their lives undergoing such journeys worldwide in the year of 2014. From the perspective of the previous

[9] WILLIAMS, Daniel. Adrift and Unwanted; A Norwegian Ship Saves 438 Asylum Seekers-and Triggers an Ugly Diplomatic Row Over Their Fate, *TIME (Int'l Ed.)*, September 10, 2001, page 61.

[10]HATHAWAY, James C. Refuge Law is Not Immigration Law, World refugee survey. 2002. page 38.

[11] WILLIAMS, Daniel. Adrift and Unwanted; A Norwegian Ship Saves 438 Asylum Seekers-and Triggers an Ugly Diplomatic Row Over Their Fate, *TIME (Int'l Ed.)*, September 10, 2001, page 61.

decade it has to be noted that it has usually been mostly migration movements, however, this year the number of asylum-seekers involved has grown.

Europe, facing conflicts to its south in Libya, east and its lasting conflict in Ukraine and south-east due to the prevailing conflict in Syria/Iraq is seeing the largest number of refugees arriving by sea. Although not all of them are people needing asylum protection, more than 207,000 people have crossed the Mediterranean since the start of January. This number is almost three times the previous known high of about 70,000 in 2011, when the Libyan civil war was in full swing. For the first time in a decade, people from refugee-producing countries, mainly Syria and Eritrea, have in 2014 become a major component in this coterminous influx, accounting for almost 50 per cent of the total number of people trying to flee from their country of origin.

In addition to the now most sever Mediterranean Sea route, there are at least three other major sea routes in use today both by migrants and people fleeing conflict or persecution. In the Horn of Africa region approximately 82,680 people crossed the Red Sea and Gulf of Aden in the year of 2014 fleeing mainly from Ethiopia and Somalia to Yemen or onwards to Saudi Arabia and the countries of the Persian Gulf.

In the Caribbean region, according to available statistics at least 4,775 people are known to have taken to boats in 2014, hoping to flee poverty or in search of asylum protection. In the same year an estimated 54,000 people have undertaken sea crossings so far In Southeast Asia, most of them coming from Bangladesh or Myanmar and heading usually to Thailand, Malaysia or Indonesia. Sadly many of them die or fall victim to international organized crime of smuggling but even other criminal activity in the process of making these journeys. Worldwide, UNHCR has received information of 4,272 reported cases of death in the year of 2014. This includes the highest number of 3,419 people who died on their unprecedented journey to reach safety in the Mediterranean Sea, making the Mediterranean Sea the deadliest route of all. In the Red Sea and Gulf of Aden, at least 242 lives had been lost by the end of 2014, meanwhile in the Caribbean region the reported number of dead or missing people was 71. In Southeast Asia, an estimated number of 540 people have died in their attempts to cross the Bay of Bengal. People smuggling networks are meanwhile flourishing, operating with impunity in areas of instability or conflict, and profiting from human desperation to leave the war, conflicts or persecution and getting to a place

that can provide them even If not perfectly at least a little bit safer life conditions.[12]

[12] ÚNHCR. UNHCR urges focus on saving lives as 2014 boat people numbers near 350,000, December 2014, available at: http://www.unhcr.org/5486e6b56.html.

3. International Law of the Sea and Boat Refugees

The basic legal framework comprises a number of international treaties. Given the fact that the subject of this theses takes place at the sea it is expected that the main document in this situation undoubtedly is the 1982 Convention on the Law of the Sea (UNCLOS).[13] This convention may be considered as a quasi-constitution for the seas. Apparently because it contains wide range of very specific and detailed provisions related to conduct at sea.[14] The Convention itself in its Preamble states that *" The States Parties to this Convention, Prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea…".* However, this convention is not functioning within a vacuum, therefore, we have to take in to a consideration also other relevant rules and principles of international law.[15]

This basic document is supplemented by few more other treaties. One of the most important is the International Convention for the Safety of Life at Sea (SOLAS).[16] SOLAS convention provides us with the principal instruments dealing with safety of vessels and related matters. The SOLAS in its successive forms is generally regarded as being the most important of all international treaties concerning the safety of ships. The first version was adopted in 1914.[17] It is generally perceived to be a reaction to the Titanic disaster, which gave rise to a demand for advanced international cooperation in safety objectives. The second version was adopted in 1929, the third in 1948, and the fourth in 1960. The Convention in force today is sometimes referred to as SOLAS, 1974, as amended.[18] The other treaty, the International Convention on Maritime Search and Rescue (SAR Convention), adopted by a conference held in Hamburg in 1979, is created to improve existing arrangements, to increase cooperation between State

[13] United Nations Convention on the Law of the Sea (UNCLOS), 1982.
[14] BARNES, Richard. Refugee law at sea. *International and Comparative Law Quarterly.* 2004, Vol. 53, Iss. 1, page 48.
[15] O´BRIEN, Killian S. Refugees on the High Seas: International Refugee Law solutions to a Law of the Sea Problem. *Goettingen Journal of International Law*. 2011, Vol. 3, Iss. 2, page 718.
[16] International Convention for the Safety of Life at Sea (SOLAS), 1974.
[17] The SOLAS convention was initiated after the Titanic disaster, and the first set of international standards to enhance Safety of Life At Sea came in 1929. The main focus in this set of requirements was on watertight integrity, structural fire protection, fire resistance of bulkheads above the bulkhead deck and to create main vertical zones. SOLAS is a set of statutory requirements. This means that it is the flag state authority's responsibility to make sure that their ships are in compliance with this convention. See, OSMAŃCZYK, Edmund Jan; MANGO, Anthony. *Encyclopedia of the United Nations and international agreements.*3rd Edition. Taylor&Francis, 2003, page 1984-1985.
[18] Each SOLAS treaty replaces the previous treaty. However, it is a big advantage that previous treaties used essentially identical formulations.

Parties and to create a legal framework optimizing search and rescue operations at sea. At that time many states had already established their own rules for such cases of accidents at sea and other similar emergencies, but this convention was for the first time international procedures had been adopted on such a level.[19] Considering that the objective of the SAR Convention is to ensure a quick response following a maritime incident, it can be distinguished from the preventive approach adopted by the SOLAS Convention, which rather tries to constitute minimum standards for the equipment, construction and operation of ships (so-called CDEM measures).[20] The SOLAS and SAR treaties can be considered as a *lex specialis* in the matter of the rescue at sea. Both of these treaties contain special regulations relating to obligations and procedures in situations of distress and safety at sea. [21] Obligation of aiding those in peril at sea is also set out in the 1958 Convention on the High Seas but just to the extent that it has not been substituted by UNCLOS.[22]

All these agreements provide for a number of obligations, responsibilities and rights, mostly aimed at flag States, coastal States but also at transit States. In the following sections I would like to concentrate on the three of them, namely duty to provide assistance, duty to bring to a place of safety and last but not least duty to allow for disembarkation.

3.1 Duty to Provide Assistance and Rescue

3.1.1 Duty of the Shipmasters to provide assistance

The duty on shipmasters to provide assistance to persons in distress at sea is one of the oldest and most fundamental norms of the law of the sea. Today, this duty is broadly established as a conventional rule and it is also perceived as a part of customary international law. The humanitarian basics of this duty were reflected already in the 1880 British case, *Scaramanga v. Stamp.* [23] In this case the court stated: *"To all who have to trust themselves to the sea it is of the utmost*

[19] INTERNATIONAL MARITIME ORGANIZATION. SAR Convention: International Convention on Maritime Search and Rescue, 1979. 3rd edition. MPG Books Bodmin, 2006, page iii.
[20] O´BRIEN, Killian S. Refugees on the High Seas: International Refugee Law solutions to a Law of the Sea Problem. *Goettingen Journal of International Law*. 2011, Vol. 3, Iss. 2, page 720.
[21] PALLIS, Mark. Obligations of States towards Asylum Seekers at Sea. *International Journal of Refugee Law.* 2002, Vol. 14, Iss. 2-3, page 331.
[22] UNHCR Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea, March 2002, available at: http://www.refworld.org/docid/3cd14bc24.html
[23] BARNES, Richard. Refugee law at sea. *International and Comparative Law Quarterly.* 2004, Vol. 53, Iss. 1, page 49.

importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations which may result to a ship or cargo from the rendering of the needed aid."[24]

This basic statement of British common law and the most basic of rules was later codified in a many international conventions. The first moment when the principle of rendering assistance at sea was discussed on the international level was the Brussels Salvage Convention in 1885. Later on in 1897, the Comite Maritime International (CMI) held its first international conference in Brussels to further develope legal issues regarding the duty to provide assistance, but also in general to improve legislation of salvage and collisions at sea.[25] On September 23, 1910, the final text of the Brussels Convention on Salvage (Brussels Convention) was adopted.[26] In April 28, 1989, the 1910 Brussels Convention was replaced by newly signed International Convention on Salvage (1989 Salvage Convention) which entered into force on July 14, 1996. Therefore, the Brussels Convention was considered as a first formal international convention that addressed providing assistance at sea.[27]

At the beginning of further analysis, there has to be mentioned that the most fundamental provision of this convention, as now declared in Article 10 of the 1989 Salvage Convention, states: *"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.... [T]he owner of the vessel shall incur no liability for a breach of the master."*[28]

The same duty to render assistance to those in distress at sea is also set forth in the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[29]

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[24] Scaramanga v. Stamp (1880) 5 C.P.D. 295, paragraph 395.

[25] KENNEY, Frederick J. Jr.; TASIKAS, Vasiliospage. The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea. *Pacific Rim law & policy journal*. 2003, Vol. 12, Iss. 1, page 148.

[26] Before the final text of the Brussels Convention on Salvage was signed in 1910, the Comite Maritime International held three conferences to draft an international convention regarding salvage, one already mentioned above in 1897 and other two conferences were held in 1900 and 1902. Few more diplomatic conferences were convened to further develop the Convention in 1905, when a provision on the scope of application was added to the draft and in 1909, when other provision was added governing the joint liability of the Shipowners at fault in relation to damages arising out of injuries and death. See, BERLINGIERI, Francesco. International Maritime Conventions (Volume 2): Navigation, Securities, Limitation of Liability and Jurisdiction. Vol. 2. Informa Law from Routledge, 2014, page 7.

[27] BERLINGIERI, Francesco. International Maritime Conventions (Volume 2): Navigation, Securities, Limitation of Liability and Jurisdiction. Vol. 2. Informa Law from Routledge, 2014, page 6-7.

[28] Article 10, International Convention on Salvage (1989 Salvage Convention), 1989.

[29] United Nations Convention on the Law of the Sea (UNCLOS), 1982.

and also in the 1958 Geneva Convention on the High Seas (1958 Convention)[30]. This Convention still remains in force for State Parties that have not signed the UNCLOS. The both conventions provide us with the equal expression of this duty. They state:

"1. [E]very 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." [31]

It is important to note that this legal framework of duty to render assistance sets out a positive obligation on flag States to require the shipmaster flying its flag to render assistance. This obligation applies to all shipmaster equally, regardless of whether it is military, commercial or private ship or regardless the reason why the ship is in that particular area.[32] The other convention, where we can find obligation of a master to provide assistance at sea, is the SOLAS Convention already mentioned above.[33] The SOLAS Convention, unlike UNCLOS is addressed directly to shipmasters and in its Chapter V, Regulation 33(a) states:

"[T]he master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service, that the ship is doing so. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress and, taking into account the

[30] Convention on the High Seas (1958 Convention), 1958.
[31] Article 12(a), 1958 Convention; Article 98(1) UNCLOS.
[32] GALLAGHER, Anne T.; DAVID, Fiona. *The International Law of Migrant Smuggling* . Centre for International and Public Law: Australian National University, 2014, page 447.
[33] KENNEY, Frederick J. Jr.; TASIKAS, Vasiliospage. The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea. *Pacific Rim law & policy journal*. 2003, Vol. 12, Iss. 1, page 149.

recommendations of the Organization, inform the appropriate search and rescue service accordingly." [34]

All four above mentioned international conventions provide us with formulation of basic general tradition and practice of maritime law regarding the rendering assistance to persons or ships in distress at sea. The SOLAS Convention states that a shipmaster is *"bound to proceed with all speed to the assistance of the persons in distress"*[35]. The 1989 Salvage Convention establishes an obligation *"to render assistance to any individual* **...** *found at sea in danger of being lost"*[36]. Also UNCLOS same as the 1958 Convention obliges a shipmaster *"to render assistance to any person found at sea in danger of being lost"*[37]. All these above mentioned provisions imply the fact that the duty placed on shipmasters is only "to render assistance" but not to "rescue". This distinction will be further analyzed in the following chapters.

3.1.2 The Scope of the duty to provide assistance

As described in the previous paragraphs, there is no doubt that the duty to render assistance clearly exists, on the other hand, the exact scope of this assistance is not defined in any of the Conventions. The language adopted in the text of the 1989 Salvage Convention, the SOLAS Convention, the 1958 Convention, and UNCLOS was intentionally formulated vague to allow Shipmasters flexibility in their responses to specific cases and to be able to take into consideration the possible hazards of the High seas when responding to a call of distress[38], mostly because the term distress is also not clearly defined.[39]

In this connection, Shipmasters can take into account various factors depending on the current situation while reacting to vessels in distress such as number of persons in distress, ship size, weather, safety equipment on board, security concerns, the nature of distress and possible infectious diseases. The range of possible actions to be taken can be so wide and diverse that it is perceived to be quite difficult to regulate it in concise provisions. Therefore, the other following international instruments, including the Brussels Convention, did

[34] Regulation V/33, International Convention for the Safety of Life at Sea (SOLAS), 1974.
[35] Chapter V, Regulation 33(a), SOLAS 48.
[36] Article 10(1), 1989 Salvage Convention.
[37] Article 98(a), UNCLOS; Article 12(a),1958 Convention.
[38] CACCIAGUIDI-FAHY, Sophie. The Law of the Sea and Human Rights. Panoptica. 2007, Vol. 9, Iss. 1, page 8.
[39] In the past it was quite often suspected that some distress calls could be fake and moreover, they could be used by pirates to lure ships to come closer.

not provide us with more specific formulation of conditions and circumstances in which the assistance can be rendered.[40]

The generality of the term, "render assistance", allows the Shipmasters flexibly respond to specific situations, which may, as mentioned above, be very different. This concept helps Shipmasters to be able to choose the most appropriate means and methods to prevent a looming threat. Therefore, there are many possibilities of action or behaviour that may be considered as „assistance". Thus, a Shipmaster may for example decide to extricate a grounded vessel, embark crewmen aboard in order to replace the exhausted or the missing, extinguish a fire aboard a ship, provide navigational advice, tow the vessel to safety, secure aid or assistance from other ships in the vicinity, provide food and supplies, etc.[41]

It is also important to take into account the size and type of the ship, its supplies, crew and technical equipment inasmuch as it may be decisive factor in whether the ship is capable to provide assistance.[42] It is not just operational but also and from my point of view especially moral decision that must be made by the Shipmaster whether he is capable to provide assistance or not depending on the current situation and circumstances of every individual case.[43] The burden that rests on the Shipmaster, whether, or not to render such assistance is a serious decision that cannot be left purely on his assessment of the situation. Especially, if the number of people at risk is high and capabilities of that particular boat are limited. Therefore, it is necessary to provide shipmasters that render assistance to those in distress at sea with some kind of mechanism and moreover the burden

[40] WILDEBOER, Ina H. The Brussels Salvage Convention, Its unifying effect in England, France, Germany, Belgium en the Netherlands. *International and Comparative Law Quarterly*. 1967, Vol. 16, Iss. 2, page 95.

[41] KENNEY, Frederick J. Jr.; TASIKAS, Vasiliospage. The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea. *Pacific Rim law & policy journal*. 2003, Vol. 12, Iss. 1, page 151-152.

[42] *See* SOLAS Convention, *supra* note 22, Annex I, ch. V, reg. 14; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, July 7, 1978.

[43] In the case of the *Tampa,* Captain Rinnan more than met his obligations, taking all survivors on board and attempting to provide them with shelter, food, and medical care, even though doing so was far beyond vessel's capabilities. He continued to fulfill his obligations even after the Australian Government refused to allow him entry and forced him to suffer costly delays. This, in no small measure, is where Captain Rinnan's actions went from representing mere fulfillment of an obligation under the law to render assistance to an act of heroism. The economic and personal hardships faced by the *Tampa's* crew and owners created a situation that most others would avoid, and these hardships could create a future disincentive for those at sea to render assistance at all.

should be more likely taken over by governments instead of solely by shipmasters.[44]

Based on this reasoning, we should also distinguish the duty of assistance, which lies on the shipmasters and duty to rescue, which falls under the current legislation in particular on coastal States.[45] The only Convention governing the definition of the term „rescue" is the International Convention on Maritime Search and Rescue (SAR Convention).[46] Most of the other actions presumed by the above mentioned international instruments fall short of the term "rescue". Therefore, we depend solely on the SAR Convention defining the term "rescue" such as *"[…]an operation to retrieve persons in distress, provide for the initial medical or other needs, and deliver them to a place of safety*"[47]. It is important to note that this obligation to rescue is on coastal States, not Shipmasters or flag States. Nevertheless, the *Tampa* incident has revealed that even though the obligation to rescue was placed on ships individually, there is still an obstacle standing in the way to achieve a successful rescue the "delivery to a place of safety". [48] This assumption is based on the fact that *the Tampa,* after declaring distress, was obviously not a suitable long-term holding area for those rescued and therefore could have never been considered being a place of safety.[49]

3.1.3 Duty of flag States – the obligation to rescue

The obligation of flag States to rescue is regulated in Article 98(1) of the 1982 Convention (UNCLOS) and similarly in Chapter V, regulation 10(a) and 33 of SOLAS, both mentioned already above. In this regard, it is important to

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[44] See also GALLAGHER, Anne T.; DAVID, Fiona. *The International Law of Migrant Smuggling* . Centre for International and Public Law: Australian National University, 2014, 794 pages. page 446.

[45] Under *UNCLOS* Article 98(1) and *SOLAS* Chapter V, Regulations 7, 10(a) and 33, flag States have an obligation to rescue in so far as they must adopt domestic legislation that establishes penalties for shipmasters who violates the duty to rescue or fail to provide assistance. Yet, whilst this obligation is widely accepted, it is often only partially translated into domestic law, if not absent. As a result, the scope of the duty to assist imposed on Masters is further weakened by the fact that enforcement is problematic, if not impossible. See CACCIAGUIDI-FAHY, Sophie. The Law of the Sea and Human Rights. Panoptica. 2007, Vol. 9, Iss. 1, page 8.

[46] Paragraph 1.3.2, Annex, International Convention on Maritime Search and Rescue (SAR), 1979.

[47] *Ibid.*

[48] This conclusion is also reached in Annex, paragraph 4.8.3 of the SAR Convention regarding termination of successful search and rescue operations. It states: *„When a rescue co-ordination center or rescue sub-center considers, on the basis of reliable information, that a search and rescue operation has been successful, or that the emergency no longer exists, it shall terminate the search and rescue operation and promptly so inform any authority, facility or service which has been activated or notified."*

[49] KENNEY, Frederick J. Jr.; TASIKAS, Vasiliospage. The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea. *Pacific Rim law & policy journal*. 2003, Vol. 12, Iss. 1, page 153.

highlight that the duty of flag States to rescue lies more likely in the obligation to adopt domestic legislation that establishes penalties for Shipmasters who violates the obligation to rescue or they fail to provide needed assistance. Even thought, there are no doubts about binding effect of this obligation and it is generally accepted, its transposition into domestic law is unfortunately quite rare, mostly missing. This leads to the result that the scope of the duty to assist imposed on Shipmasters is even more weakened by the fact that enforcement is problematic. Moral and legal principles to help those in distress at sea are unprecedentedly put aside as regards to commercial interests. [50]

Even in the very rare cases of effort to implement the obligations into the domestic law, it still remains very problematic. As for example in Australia, all above mentioned treaties governing the duty to render assistance, namely UNCLOS, SOLAS and Salvage Convention, are not self-executing under Australian law, meaning that the implementation of that particular legislation is always necessary. Therefore the only relevant legislation we have to rely on is the Navigation Act, 1912, Section 317A, that states: *"The master of a ship shall, so far as he or she can do so without serious danger to his or her ship, its crew and passengers (if any), render assistance to any person, even if such person be a subject of a foreign State at war with Australia, who is found at sea in danger of being lost."*[51]

This provision is an implementation of Australia's obligations under UNCLOS, but this assumption is no absolutely correct, because section 317A applies only when *"judicial or arbitral proceedings relating to the provision of salvage operations are brought in Australia"*.[52] The Navigation act sets out the force of law of the Salvage Convention 1989, but it does not give this force to Article 10 that provides us with the duty to render assistance. The Section 317A is also not implementing the UNCLOS and SOLAS provisions relating to the duty to render assistance. Given the fact that the provisions of Navigation Act are the only provisions regarding rendering assistance in distress at sea in Australian legislation, it proves that Australian legislation does not impose a direct obligation

[50] CACCIAGUIDI-FAHY, Sophie. The Law of the Sea and Human Rights. Panoptica. 2007, Vol. 9, Iss. 1, page 8.
[51] § 317A, Navigation Act, 1912, (Australia).
[52] § 316(1), Navigation Act. 1912, (Australia.). This sub-section provides the scope of application of the Division 3 Part VII of the Navigation Act, where section 317A appears.

on shipmasters to render assistance.[53] Therefore, even though some states at least try to implement relevant treaties into their domestic law, it still remains being insufficient legislation.

3.1.4 Duty of coastal States - the obligation to rescue

Treaties placing a duty to provide assistance on shipmasters also establish relevant duties on coastal and port states. The first document demanding the establishment of coastal maritime search and rescue ("SAR") services was 1948 SOLAS Convention.[54] This Convention in its Chapter V, Regulation 15(a), for the first time obliged each signatory state to establish and whatsoever to maintain adequate search equipment and rescue assets[55] along its coast. According to SOLAS, chapter V, regulation 15(a): *"Each contracting Government undertakes to ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts. These arrangements should include the establishment, operation and maintenance of such maritime safety facilities as are deemed practicable and necessary having regard to the density of the seagoing traffic and the navigational dangers and should, so far as possible, afford adequate means of locating and rescuing such persons."*[56]

Even Though, many states, at this time, already had well grounded search and rescue facilities that were capable to provide assistance to those in distress at sea, this still has to be considered, regarding international level of cooperation, the first attempt of the international maritime community to establish a broad system where governments had responsibility for rescue at sea, rather than making masters legally responsible for rescue. Current wording of the states obligation with regard to rescue in distress at sea is, due to the considerable revision of Chapter V[57], set forth in Regulation 7, Chapter V of the SOLAS Convention.[58]

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[53] DAVIES, Martin. Obligations and implications for ships encountering persons in need of assistance at sea. *Pacific Rim Law and Policy Journal*. 2003, Vol. 12 , Iss. 1, page 133.

[54] International Convention for the Safety of Life at Sea (SOLAS 48), 1948, 164 U.N.T.S. 113. SOLAS 48 was superseded by the 1974 SOLAS Convention, for more see *supra* note 17 and 18.

[55] Paragraph 2.1.1. of 1998 amendments to S.A.R Convention provided definitions for the terms „search" and „rescue" which in turn clarified the responsibilities of coastal States.

[56] Chapter V, regulation 15, SOLAS 48.

[57] At the Maritime Safety Committee's 73rd meeting, that was in session from November 27 to December 6, 2000, Chapter V of the SOLAS Convention Annex underwent quite substantial revision. These changes came into force July 1, 2002. See Mammoth Session, available at: http://www.imo.org/Newsroom/mainframe.asp?topic_id=67&docid=383

[58] Chapter V, regulation 7.1 states: *"Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around their coasts. These arrangements shall include the establishment, operation and maintenance of such search and*

This revision was mainly implication of SAR Convention coming into force and it incorporates concepts of cooperation and rescue zones among search and rescue organizations.[59]

Another following Convention governing obligations of coastal states regarding rescue at sea, or rather SAR services, was UNCLOS in its Article 98(2). The phrase "establishment, operations and maintenance" used in SOLAS Convention mentioned above was also adopted in the text of Article 98(2) of UNCLOS. But it is important to emphasize that while SOLAS obliges state parties of this convention to "undertake" such a services, UNCLOS only requires coastal states to "promote" such a maritime SAR services. Specifically, the Article 98(2) of UNCLOS states*:"Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose."*[60]

Nevertheless, SOLAS [61] does not provide us with any details about exactly what SAR services are essential to be in accordance with the SOLAS requirements. In this regard, the needed details are enshrined in the SAR Convention.[62] The 1979 International Convention on Maritime Search and Rescue (SAR Convention) is other relevant IMO Convention that aims to establish an international system to guarantee the efficiency and safety of rescue operations and to coordinate these rescue operations. As a result, state parties of the SAR Convention exercise SAR services in certain area under their own responsibility but they are encouraged to create bilateral or multilateral SAR agreements with neighbouring states to coordinate rescue services and operations in the maritime zones set out in the agreement.[63]

The obligations to establish maritime search and rescue facilities under UNCLOS Article 98(2) and SOLAS Regulation V/7 lacked unification,

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rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons."

[59] KENNEY, Frederick J. Jr.; TASIKAS, Vasiliospage. The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea. *Pacific Rim law and policy journal*. 2003, Vol. 12, Iss. 1, page 154.

[60] Article 98(2), UNCLOS.

[61] International Convention for the Safety of Life at Sea (SOLAS), 1974.

[62] International Convention on Maritime Search and Rescue (SAR Convention), 1979.

[63] PAPASTAVRIDIS, Efthymios. *The Interception of Vessels on the High Seas, Contemporary Challenges to the Legal Order of the Oceans*. Oxford: Hart, 2013, page 297.

coordination and standardization between implementing state parties of these conventions. Therefore, the development of national maritime services in individual states evolved in different directions and as a result, it produced many functional difficulties.[64] Therefore, some unifying mechanism or rules, such as those governed in the SAR Convention, were needed to resolve these issues. SAR convention itself proclaims in its preamble that its aim is to establish *"[...]an international maritime search and rescue plan responsible to the needs of maritime traffic for the rescue of persons in distress at sea."*[65] The objective was not only to create a general but rather detailed framework to refine coordination of rescue actions, but the SAR Convention also intended to divide world's oceans into thirteen SAR areas. The main purpose was to solve conflicting situations as regards to responsibility of particular states for providing SAR services in the particular zone.[66] However, these goals of 1979 SAR Convention were actually never achieved in so far as intended, because the duties set forth in this convention were perceived by many states as being very costly and difficult to comply with. Accordingly, many states have not acceded to the Convention or they did so but have not ratified it yet.[67]

3.1.4.1 Territorial scope of duty to search and rescue

As described above, we already know who is obliged to conduct search and rescue services, we also know the content of this duty, but two more questions arise from the situation of SAR services conducted at sea. Who must be rescued, respectively, to who the duty is owed (chapter 3.1.4.2) and in which territory the particular state is obliged to do so.

Two main treaties governing the search and rescue actions, namely SOLAS and SAR Convention, do not provide us with more specific answer to the question of territorial scope of SAR actions. Neither SOLAS nor SAR Convention do not give any indication as to what the area „around a state's coasts"might be. In addition, SAR directly states that the definition is a matter for the parties.[68] Even

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[64] MANKABADY, Samir. *International Maritime Organization: Accidents at Sea*. Croom Helm, 1984, page 138.
[65] Preambule, International Convention on Maritime Search and Rescue (SAR), 1979, 1405 U.N.T.S. 23489.
[66] KENNEY, Frederick J. Jr.; TASIKAS, Vasiliospage. The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea. *Pacific Rim law and policy journal*. 2003, Vol. 12, Iss. 1, page 156.
[67] *Ibid.*
[68] SAR Convention in its Chapter II, paragraph 2.1.4. states: *"Each search and rescue region shall be established by agreement among the parties concerned."*

though any provision does not set out specific definition of the territory where search and rescue should be conducted, thus, I think we can presume from this that duty to search and rescue do create obligations for states to act in their own territorial sea, however, these obligations may not be limited solely to this territory. In this matter, interpretation of the provisions should be implemented more broadly than strictly since there may be situations where a rigid insistence on the wording of the term the area round states´ coasts may cause avoidance of purpose of these provisions, which undoubtedly is to save lives of those in distress at sea. Therefore, we have to analyze the meaning and the scope of the term area round states´ coasts rather on the pragmatic grounds.[69]

According to the 1910 Salvage at Sea Convention and the SOLAS Convention the obligation to rescue applies without geographical limitations. What is not so certain is geographical application of this duty under UNCLOS. According the Article 58(2) of UNCLOS [70] there should be no doubts that the duty applies fully in the Exclusive Economic Zone, in the Contiguous Zone and on the High seas. But what is not so clear is whether it applies also in the territorial sea.

At this point we should distinguish two different approaches answering and analyzing this question. The first approach answering this question is based on the fact that common law countries have a long-standing absence of a general "duty to assist" in regard with applying it to all domestic vessels in territorial seas. This duty as such applies only to the certain specifically designated search and rescue crafts, not to all domestic vessels in general. This could be further supported by few other arguments such as Article 31 of Vienna Convention on the Law of Treaties that enshrines very important principle for interpretation of Treaties. It states: *„ A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"[71]

[69] For example, if some incident happens and it is possible for search and rescue ships to reach a impaired boat and have an opportunity to acomplishe to rescue survivors, it could be deemed to be within the search and rescue region.

[70] SOLAS Convention in its part V, Article 58(2) states: *"Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part."* Meaning that duty to rescue apllies fully in Exclusive Economic Zone (See Article 55 of UNCLOS) same as in Contiguous Zone (See Article 33(1) and (2) of UNCLOS).

[71] Article 31, Vienna Convention on the Law of Treaties (Vienna Convention), 1969.

Because the Convention on the Territorial Sea[72] contains no provisions relating to rescue, the Convention on the High Seas in its Article 1 directly and explicitly excludes an area of „territorial sea or in the internal waters of a State" and UNCLOS in its Article 86, part VII, provides that the relevant provisions regarding rescue "apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State or in the archipelagic waters of an archipelagic state", based on this and taking into consideration rule of the 'ordinary meaning' and 'context' of treaties[73], we can assume that the intent of the provisions under UNCLOS governing the duty to rescue was not to be generally applicable for domestic boats in the territorial seas.

Another approach answering the question whether the duty to rescue under UNCLOS also applies within territorial sea could be following. The main argument is such that the duty to provide assistance exists throughout the ocean, no matter if it is in straits used for international navigation, in archipelagic waters, in the exclusive economic zone, on the High seas or in the territorial sea.[74]

Arguments supporting this claim are following. The Article 98 of UNCLOSE provides for a general duty to render assistance to persons in distress "at sea", in other words anywhere in the oceans. At first, the fact that wording of Article 98 of UNCLOS uses broader and more general term "at sea" and also for example the Convention on the High Seas uses the term "High seas" in some of its articles such as for example Article 1, 2, 4, 6, 8 etc., but at the other hand in other provisions it uses the broader term "the seas" (Article 3, 24, 25) and "at sea" (Article 10, 12). We can presume it indicates the purpose of this wording that is to refer to more general obligations. Based on this we can assume that by avoiding the term "High seas", state parties of these conventions were clarifying a broader obligation.[75]

Another provision we have to take into consideration is Article 31(1) of already mentioned Vienna Convention and its requirement that a treaty must be interpreted in light of its "object and purpose". The main object, even thought this

[72] Convention on the Territorial Sea and the Contiguous Zone, 1958.
[73] For the purpose of this argument by the term „treaties" we mean the UNCLOS, the 1958 Convention on the High Seas and the 1958 Convention on the Territorial Sea and the Contiguous Zone.
[74] See NORDQUIST, Myron in H.; NANDAN, Satya N.; ROSENNE, Shabtai. United Nations Convention on the Law of the Sea 1982. Vol. 3. The Hague: Martinus Nijhoff publisher, 1995, page 177.
[75] PALLIS, Mark. Obligations of States towards Asylum Seekers at Sea. *International Journal of Refugee Law.* 2002, Vol. 14, Iss. 2-3, page 337.

assumption may be very subjective, was not to revise the regime of safety of life at sea[76] and therefore, we are not obliged under the Vienna Convention to interpret its provisions with accordance to changes of safety at sea regime, because it does not appear to be an objective of the treaty.[77]

In the same article as a previous argument we can find also another important interpretation key. The Article 31(2) of the Vienna Convention suggests that the context for the purpose of the treaty interpretation shall comprise its preamble which means that If we examine the Preamble of UNCLOS, it emphasizes values such as "justice", "equal rights" and "needs of mankind as a whole". Especially, these terms may support the interpretation of the terms "found at sea" or "safety at sea" in a broader way, meaning it would be applicable also outside the High seas area. Because otherwise it would be inconsistent with the idea enshrined in the Preamble and it would inequitably phase out a group of people to enjoy the protection that is enshrined in the UNCLOS.[78]

To summarize, last suggested argument would be based on so called effectiveness principle mentioned by International Law Commission.[79] The effectiveness principle is based on the approach that a treaty must be interpreted so as to have the "appropriate effects". Thus, duties regarding safety of life at sea, enshrined in above mentioned treaties, could not be perceived as "appropriately effective", if they could not be applied when a ship enters the territorial sea of a particular state.

3.1.4.2 Factual application of duty to search and rescue

I have already analyzed not only the obligation to search and rescue itself but also the territorial scope of this obligation, but what is the factual application? Whom we owe this right and what exactly is the situation that triggers duties

[76] To see what is perceived as being the objectives of UNCLOS read: D. J. *Harris, Cases and Materials on International Law* (London: Sweet & Maxwell, 5th edn., 1998), page 370. Harris claims that the main changes brought about by UNCLOS to the legal regime governing the sea are the acceptance of a 12 mile territorial sea; provision for transit passage through international straits; increased rights for archipelagic states; stricter control of marine pollution; further provision for fisheries conservation; acceptance of a 200 mile exclusive economic zone for coastal states; changes in the continental shelf regime; and provision for the development of deep sea-bed mineral resources. Thus, he states that its objective was not to revise the regime of safety of life at sea.

[77] PALLIS, Mark. Obligations of States towards Asylum Seekers at Sea. *International Journal of Refugee Law.* 2002, Vol. 14, Iss. 2-3, page 337.

[78] PALLIS, Mark. Obligations of States towards Asylum Seekers at Sea. *International Journal of Refugee Law.* 2002, Vol. 14, Iss. 2-3, page 337-338.

[79] Yearbook of the International Law Commission. *New York:United Nations publications*. Vol. 2, 1966, page 219 available at: http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1966_v2_e.pdf

arising from already mentioned treaties? Every treaty governing this duty refers, using some specific term, to those who have the rights arising from that particular convention. The most austere formulation is contained probably in Article 98 of UNCLOS that uses term "to any person". The SAR Convention furthermore elaborates this term and states that states are obliged to make sure that assistance is provided not only to "any person" but it further clarifies this term with sentence "regardless of the nationality or status of such a person or the circumstances in which that person is found".[80] Also the 1910 Brussels Convention on Salvage provides more detailed term "everybody, though an enemy".[81] Therefore, especially in accordance with the objective of these theses, there is no doubt that these provisions apply also to the asylum seekers.[82]

To follow the issue of the factual application of duty to search and rescue, in general, there are two possible situations triggering the duty. The first one is expressed by phrase "persons found at sea". The first phrase was used to cover situations where persons were randomly found in a life-threatening situation at sea. The second situation and the latter phrase "persons in distress"refers to obligations with regard to a response to distress calls.

Nevertheless, the term distress does not have some general legal definition. Some scholars´ opinions regarding the term "distress"link its meaning to the "preservation of human life".[83] The partial definition of term "distress" is, however, contained in the SAR Convention that defines it as *"[...]a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance"*.[84] Very useful for specification of this term are also other sources such as relevant jurisprudence and commentary. In the case of *The Eao* it was proclaimed that distress must entail urgency, but to do so *"there need not be immediate physical necessity"*.[85] In this connection, also the decision on the *Kate A Hoff* case introduced a new approach that it is not necessary for the vessel to be *„dashed against the rocks"*before a claim of distress can be invoked.[86,87] The International

[80] Annex, paragraph 2.1.10, SAR Convention
[81] Article II, the Brussels Convention on Salvage (Brussels Convention), 1910.
[82] This interpretation is also supported by the statements of the IMO and also by the UNHCR. See C 54/17(d) IMO Council, 1985, and Addendum to the Report of UNHCR, 40 GAOR, Supplement No. 12A (A/40/12/Add. 1), paragraph 115(3), at page 32.
[83] 1929 *US vs. Mexico*, 4 UNRIAA 444 (1951).
[84] Annex, para. 1.3.13., International Convention on Maritime Search and Rescue (SAR), 1979.
[85] 1809 *The Eao*, England High Court of Admiralty, Edw., 135.
[86] *Kate A. Hoff* v United Mexican States, 4 IUAA 444, (1929) 23 *A7L* 860-5.

Law Commission has further specified that a situation of distress *„may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned"*.[88] Therefore, already unseaworthiness may as such signify distress. This presumption may play very significant rule because, for example, according to the European Commission, 80 per cent of the migration movement in the Mediterranean Sea is undertaken in very small unseaworthy vessels and thus, its passengers exposed to a serious danger. Therefore, we can conclude such a situation meets definition of distress and thus, those passengers on board of such vessel a *priori* in need of assistance.[89] In conjunction with the European Union it is worth mentioning that the term "distress" is also expressed in the EU Guidelines for Frontex operations, as *"[...]a situation in which uncertainty or apprehension exists as to the safety of a ship or of any person on board"*.[90,91]

To continue analyzing terminology used in relevant treaties, it must be highlighted once again that term "render assistance"does not have treaty contained definition. However, the term "rescues"this definition has. It is defined in the SAR Convention as *„[...]an operation to retrieve persons in distress, provide for their medical or other needs, and deliver them to a place of safety"*.[92] Notwithstanding, this provision could be perceived being weak providing only

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[87] It appears that the *Tampa* was in distress for two reasons. First, the captain had concluded that some of the asylum seekers were in need of urgent medical treatment and that „people will die soon". This alone is sufficient to trigger the „preservation of human life" criterion. Secondly, the *Tampa* was licensed to carry no more than 50 people and picked up 433 people - this has numerous consequences, including the fact that there was not sufficient food and water aboard „to sustain the passengers and crew for long", and that there was insufficient safety equipment, such as life jackets. The fact that no-one died (akin to being „dashed against the rocks") does not prevent distress from being invoked. Thus, Australia's obligation to render assistance to the *Tampa* was triggered. It should also be noted that several of the asylum seekers aboard the *Tampa* threatened to commit suicide unless the captain travelled to Christmas Island. The view of the Australian Embassy in Washington DC was that it was completely unacceptable to the Australian Government that people picked up in a distress situation then seek to dictate the country in which they are landed. Clearly, such acts do not create a right of entry, but in legal terms, it can be a factor for distress.

[88] Paragraph 4, Yearbook of the International Law Commission. *New York:United Nations publications*. 1973, Vol. 2, page 134, available at: http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1973_v2_e.pdf

[89] Commission Stuff working document: Study on the international law instuments in relation to illegal immigration by sea. SEC(2007) 691 final, May 2007, page 9 and 28, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/pdf/irregular-immigration/sec_2007_691_en.pdf

[90] Annex, Part II, para. 1.2, Council Decision 2010/252/EU: Council Decision on Frontex Guidelines. 26 April 2010.

[91] MORENO LAX, Violeta. Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations accruing at Sea. *International Journal of Refugee Law*. 2011, Vol. 23, Iss. 2, page 195-196.

[92] Paragraph 1.3.2., Chapter 1, Annex, SAR Convention

obligation to bring those rescued at sea to a place of safety it also obliges the rescuing state to act quickly. Therefore, if coastal states do not allow disembarkation it could lead to a situation when the flag state consequently breaches its obligations.[93]

Not only that the term "render assistance"does not have a clear legal definition but, furthermore, this duty is weakened by many aspects. Those I will address in the following lines. One of the weakening aspects is the provision that the Shipmaster is only obliged to rescue *"[...]in so far as he can do so without serious danger to the ship, the crew or the passengers"*.[94] Another even more weakening provision is that if a shipmaster is *„[...]unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress"*.[95]

All these aspects of duty to render assistance are giving a wide range of discretion to the Shipmasters. This discretion but also difficulties in enforcement of such a duty, unfortunately, have caused many human tragedies, where those in distress at sea could have been rescued. In these cases sometimes the economical, rather than the moral aspect, wins. In this regard, Ship-owners and Shipmasters have argued that as a consequence of delays caused by picking up and disembarking refugees, they have suffered significant financial damage.[96] It is obvious the position of those who are to be saved and are in danger of life at sea is very weak. Moreover, considering that if a person is not rescued, it is very likely that such a person will pass away, and thus not be capable to submit a claim. Consequently, it is not surprising that no prosecution has been brought under these circumstances. To conclude, we can say that despite all these above mentioned issues, the legal duty to rescue remain clearly defined, and of broad application.[97]

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[93] PALLIS, Mark. Obligations of States towards Asylum Seekers at Sea. *International Journal of Refugee Law.* 2002, Vol. 14, Iss. 2-3, page 340.
[94] Article 98, UNCLOS.
[95] Regulation 10, SOLAS.
[96] UNHCR. EC/SCP/30: Problems Related to the Rescue of Aylum seekers in Distress at Sea. EXCOM. September 1983. To solve this issue UNHCR introduced a system whereby shipowners could, under certain conditions, be reimbursed for costs of up to $5 per refugee.
[97] PALLIS, Mark. Obligations of States towards Asylum Seekers at Sea. *International Journal of Refugee Law.* 2002, Vol. 14, Iss. 2-3, page 340-341.

3.2 Duty to Bring to a Place of Safety

After the previous chapters providing an adequate analysis of the obligation to provide assistance, search and rescue as such in the next part of this thesis it is important to analyze the next step in the process of saving life at sea and it is a duty to bring those rescued at sea to a place of safety. In some resources it is sometimes merged into to one obligation, the obligation to allow for disembarkation, but I would like to provide brief examination of these duties, even thought very connected with each other, separately.

The existence of obligation of flag States to bring rescuees to a place of safety is according to some scholars not so clear.[98] The assumption about existence of the duty to bring to a place of safety is based on the logical extension of the definition of the already mentioned term "rescue" contained in the Article 1.3.2 Annex SAR Convention, that describes rescue as *"[…]an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety"*. Nevertheless, it is necessary to emphasize the fact that Article 1.3.2 Annex SAR Convention, set forth in the Chapter on "Terms and Definitions", does not oblige States Parties to take specific measures and as such it is only non-binding provision governing definition shared by States Parties to the SAR Convention on what the term rescue entails. [99]

Just for clarification is perhaps worth mentioning that Article 2.1.10 Annex SAR Convention only further specifies that *"[…]parties shall ensure that assistance be provided to any person in distress at sea"*. From this we can presume that using the term "assistance" instead of term "rescue" was done in purpose to preclude incorporation of the place of safety criterion contained in Article 1.3.2 Annex SAR Convention. The same assumption we can make with regard to Article 2.1.1 Annex SAR Convention, which is also using term "assistance" rather than "rescue".[100]

So far we have discussed the existence of the duty to bring to a place of safety as such but what is an exact meaning of this phrase? Due to absence of any detailed definition of the term "place of safety" it has become somehow general understanding and practice, that persons rescued at sea should be disembarked at

[98] RAH, Sicco. Kein Flüchtlingsschutz auf See? Flüchtlings- und seerechtliche Probleme am Beispiel der „Cap Anamur". *Humanitäres Völkerrecht*. 2005, Vol. 18, Iss. 4, page 276.
[99] PROELSS, Alexander. Rescue at Sea Revisited: What Obligations exist towards Refugees?. *Scandinavian Institute of Maritime Law Yearbook*. 2008, page 11.
[100] *Ibid*, page 11.

"the next port of call".[101] This practice, despite its general understanding, is still not reflected in terms of hard law.[102] The concept of a place of safety being the next port of call is also shared with the Executive Committee (EXCOM) of the UNHCR.[103] The EXCOM promotes a more practical approach to the problems connected with the rescue of asylum seekers[104], therefore, we can assume that in connection with the rescue of persons on the High seas, in many instances the nearest port in terms of geographical proximity will also be the next port of call.[105]

But even UNHCR has carefully avoided claiming the existence of a corresponding duty under the hard law. A Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea in its report in regard with this problem used very vague formulation: *"[…]with regard to the generally accepted principle, re-emphasized by the Working Group, that asylum-seekers rescued at sea should normally be disembarked at the next port of call, the Governments of the coastal States most concerned generally agreed with this view, provided that the port at which disembarkation is being sought is scheduled in the course of the ship's normal business."*[106] UNHCR also in its background note on the protection of Asylum-seekers and refugees rescued at sea admitted that there is a "lack of clarity" regarding the issue whether rescue implies a duty to disembark[107]. [108]

Also the International Maritime Organization had dealt with the issue of delivering to a place of safety for years and, finally, adopted Guidelines on the

[101] This practice is also in line with the position taken by the Executive Committee (EXCOM) of the UNHCR in its EXCOM Conclusion No. 23 (XXXII), paragraph 3: "In accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum seekers rescued at sea. […]", page 31.

[102] The term "next port of call" is not used in any relevant legal instruments but was introduced by the UNHCR; as to possible meanings, depending on the actual situation, see paragraph 30-1, UNHCR Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea. March 2002.

[103] EXCOM, Conclusion No. 23 (XXXII). October 1981, page 31.

[104] EXCOM, Conclusion No. 26 (XXXIII). October 1981, page 34.

[105] PROELSS, Alexander. Rescue at Sea Revisited: What Obligations exist towards Refugees?. *Scandinavian Institute of Maritime Law Yearbook*. 2008, page 11-12.

[106] Paragraph 3, UNHCR. EC/SCP/24: Preliminary Report on Suggestions Retained by the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea. October 1982.

[107] Paragraph 11-2, UNHCR, Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea. March 2002.

[108] PROELSS, Alexander. Rescue at Sea Revisited: What Obligations exist towards Refugees?. *Scandinavian Institute of Maritime Law Yearbook*. 2008, page 11.

Treatment of Persons Rescued at Sea in 2004.[109] However, IMO´s approach in this non-binding document was rather restrictive. In these guidelines the IMO provided us with the same definition of the term "place of safety"[110] as used in Article 1.3.2 Annex SAR Convention already mentioned above, but the IMO also clarified the place of safety does not have to take place on land saying that: *„A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination."*[111] It further elaborates that *"delivery to a place of safety should take into account the particular circumstances of the case."*[112] Taking into account all these aspects and also the wording of the SAR Convention it is difficult to provide evidence of a sufficiently consistent State practice relating to a duty to deliver rescues to a place of safety.[113]

As already stated at the beginning of this chapter, the obligation to deliver to a place of safety is without doubt to some extent also related to the obligation to allow for disembarkation. Therefore, it must be noted that prior to the amendments to the SAR Convention, a corresponding obligation of coastal States to accept disembarkation of refugees in their ports also did not exist. Nevertheless, making assumption that the rescue duty of shipmasters and States implies a corresponding duty of coastal States to allow for disembarkation, does not seem to be exact, because it is not taking into account the fact that such a right to enter a State´s territory directly interferes with State sovereignty.

Further analyzing treaty law, Article 3.1.2 Annex SAR Convention seems to be relevant in the context of the duty to bring to a place of safety and disembarkation addressing entry into the coastal State´s territorial sea in direct terms, but this interpretation is incorrect.[114] If we examine this provision closer it is apparent it only refers to "rescue units of other Parties who should be given

[109] IMO. Resolution MSC.167(78): Guidelines on the Treatment of Persons Rescued at Sea. 2004. Annex 34.
[110] *Ibid*, Annex, Paragraph 6.12.
[111] *Ibid*, Annex,Paragraph 6.14.
[112] *Ibid*, Annex, Paragraph 6.15.
[113] PROELSS, Alexander. Rescue at Sea Revisited: What Obligations exist towards Refugees?. *Scandinavian Institute of Maritime Law Yearbook*. 2008, page 12.
[114] Article 3.1.2, Annex, SAR Convention states: „Unless otherwise agreed between the States concerned, a Party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory of rescue units of other Parties solely for the purpose of searching for the position of maritime casualties and rescuing the survivors of such casualties. In such cases, search and rescue operations shall, as far as practicable, be co-ordinated by the appropriate rescue coordination centre of the Party which has authorized entry, or such other authority as has been designated by that Party."

access to State territory"and only to search for the location where maritime casualties occur and to rescue those surviving such casualties. Even though we would argue that the phrase "rescuing the survivors" comprises the Article 1.3.2 Annex SAR Convention and its definition of "rescue", yet it would not imply a duty to allow disembarkation, since the obligation contained in Article 3.1.2 Annex SAR Convention is only applicable "subject to applicable national laws, rules and regulations".[115] To summarize I have to state that at least prior to the amendments to SOLAS and the SAR Convention, neither were flag States obliged to deliver those rescued at sea to a place of safety, nor had coastal States duty to accept disembarkation of persons rescued at sea.[116]

In this connection, it is worth mentioning that also the European Commission expressed its position in this matter: "*[…]the obligations relating to search and rescue include the transport to a safe place".*[117] But the European Commission mainly based its opinion already on the 2004 amendments to SOLAS and the SAR Convention. Therefore, not to forget it is also important to analyze the question of place of safety in the light of these amendments to the SAR Convention[118] and SOLAS Convention[119]. The IMO highlighted that the intention in amending these conventions was: *"[…]to ensure that in every case a place of*

[115]RØSÆG, Juris Erik. Refugees as rescuees – the Tampa problem. *Scandinavian Institute of Maritime Law Yearbook*. 2002, Simply, page 62.

[116] PROELSS, Alexander. Rescue at Sea Revisited: What Obligations exist towards Refugees?. *Scandinavian Institute of Maritime Law Yearbook*. 2008, page 13.

[117] Paragraph 2.3.2, Commission Stuff working document: Study on the international law instuments in relation to illegal immigration by sea. SEC(2007) 691 final, May 2007, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/pdf/irregular-immigration/sec_2007_691_en.pdf

[118] Article 3.1.9, Annex, SAR Convention states: *„Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships´ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable."*

[119] Paragraph 1-1, Regulation 33, Annex, Chapter V, SOLAS states: *„Contracting Governments shall co-ordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships´ intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable."*

safety is provided within a reasonable time. It is further intended that the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Contracting Government responsible for the search and rescue region in which the survivors were recovered".[120]

From this new development it could be perceived that it could have brought some changes to fill a gap in legislation regarding the obligation to deliver to a place of safety but neither amendment of SAR nor amendment of SOLAS provide us with an obligation of flag States to deliver those rescued to a place of safety. Notwithstanding, both articles have mandatory character, emphasized by using the word "shall", the relevant obligation is only one to coordinate and cooperate. Therefore, it has to be perceived being comparatively soft.[121] Both provisions also only apply subject to "the particular circumstances of the case" and guidelines developed by the IMO. And moreover with regard to disembarkation it shall be arranged "to be effective as soon as reasonably practicable". Therefore, these provisions contained both in the SAR and in the SOLAS amendments provide States with a wide discretion. Thus, to conclude it is not very debatable to affirm that these amendments do not exceed the standards already set forth in the 2004 IMO guidelines, they do not bring substantive changes to the existing regime and that a straightforward obligation to deliver persons rescued at sea to a place of safety (and a corresponding duty of coastal States to allow for disembarkation) does not, from my point of view, exist.[122]

3.3 Duty to Allow for Disembarkation

In the previous chapter I have analyzed the duty of flag states to deliver rescuees to a place of safety and its existence as such. Nevertheless, it must not be forgotten that this duty is closely associated with a duty of coastal states to allow for disembarkation. The issue of whether an obligation exists to allow for the disembarkation of rescued persons at a place of safety centres is balancing between the interests of flag States, carrying those rescued at sea on their board and coastal States, that should allow the ship carrying rescuees to disembark. This

[120] See Paragraph 8, Annex 3, IMO Resolution MSC.153/78: Adoption of Amendments to the International Convention for the Safety of Life at Sea 1974. 2004; Paragraph 8, Annex, IMO Doc. Res. MSC.155/78: Adoption of Amendments to the International Convention on Maritime Search and Rescue 1979. 2004.

[121] GOODWIN-GILL, Guy.S.; McADAM, Jane.*The Refugee in International Law*. 3rd edition. Oxford University Press, 2007, page 278.

[122] PROELSS, Alexander. Rescue at Sea Revisited: What Obligations exist towards Refugees?. *Scandinavian Institute of Maritime Law Yearbook*. 2008, page 14-15.

context also implies the fact that none of these duties, especially the duty to bring to a place of safety, can be fulfilled to some point without the other one. In this respect, very accurate description of this interconnectedness was given by Proelss emphasizing that: *"Any obligation of a flag State to disembark shipwrecked persons at the next port of call would turn out to be useless, were it not logically linked with a corresponding duty of the coastal State of the next port of call to temporarily accept the rescued persons on its territory."*[123]

Therefore, question automatically arising from this statement is whether the flag State is under a duty to disembark rescuees. We should take into account that this is a huge interference in the sovereignty of the state because existence of the duty to allow for disembarkation would necessarily also involve not only the entry to the territorial waters of that particular state but also the entry on a coastal State's territory as such. Thus, confrontation with its territorial sovereignty in regard with a duty to allow for disembarkation will always be very sensitive for coastal States. [124]

The same empty space of uncertainty as exists with regard to the obligation to bring to a place of safety exists also regarding the obligation to allow for disembarkation, since neither one of the international Conventions had not clearly laid down this obligation in its provisions. In this case where there is no doubt that a provision governing this obligation directly does not exist; we must find another way of reasoning and interpretation of existing law. The most logical deductions on the basis of which existence of this duty can be demonstrated is argument that given the fact, there is a clear and unarguable duty to provide assistance at sea, any act which would endanger the providing of such rescue is substantially violation of international law. If there was an absolute refusal to accept the disembarkation, it would limit the chance or probability the rescue will proceed and therefore such a refusal could be perceived as a direct threat to the realization of the rescue as such.

Therefore, it is necessary that a right to disembarkation of rescuees must imply the corresponding obligation on the flag and coastal States to proceed and

[123] *Ibid*, page 15.
[124] O´BRIEN, Killian S. Refugees on the High Seas: International Refugee Law solutions to a Law of the Sea Problem. *Goettingen Journal of International Law*. 2011, Vol. 3, Iss. 2, page 723.

allow the disembarkation appropriately.[125] With regard to relying on paragraph 1.3.2 of the SAR Convention as being the source of more than an implicit obligation to deliver to a place of safety but also an obligation to allow for disembarkation, this approach unfortunately has to be considered as wrong because as I have already mentioned in the previous chapter this particular provision is nothing but a definition without a binding obligatory content.[126] Another point in this matter may be based on the wording of SAR Convention in which actual norm solely obliges states using term "assistance"[127] rather than "rescue". Thus, Convention avoids incorporating an explicit obligation using term "rescue"on the flag State to allow for disembarkation within the SAR Convention.[128]

Due to the gap in public international law regarding an explicit duty to disembark, we have to search for new paths of reasoning to prove the existence of such a duty. When one considers the complexity of the concept of „rescue", it should be seen as a unified action that begins with the physical act of removing persons from the waters or from a vessel in distress and extends until the point when those people, who have been rescued, have entered a place of safety and rescuing ship was disembarked. This concept and assumption regarding the term „rescue" also supports the practical approach promoted by the Executive Committee (EXCOM) of the UNHCR already mentioned above in that it helps to relief the burden carried by a shipmaster of primary responsibility as soon as possible.[129] It is also in accordance with the relevant norms of the SAR and SOLAS Conventions and with so crucial Article 98(1) of UNCLOS and its humanitarian intention. Reasoning supporting this statement is similar as presumption mentioned above, because it is based on a broad understanding of the "place of safety" criterion. This criterion, thus, cannot be considered to have been properly fulfilled if the rescuees are to be kept on board of the rescuing boat

[125] Paragraph 9, Annex 1, UNHCR, Background Note on the Protection of Asylum- Seekers and Refugees Rescued at Sea, March 2002, available at: http://www.unhcr.org/refworld/docid/3cd14bc24.html

[126] This paragraph 1.3.2 of SAR Convention is part of a section entitled "Terms and Definitions". Therefore, it is a provision of non-obligatory nature.

[127] Paragraph 2.1.10, Chapter 2, Annex, SAR Convention

[128] PROELSS, Alexander. Rescue at Sea Revisited: What Obligations exist towards Refugees?. *Scandinavian Institute of Maritime Law Yearbook*. 2008, page 16.

[129] EXCOM, Conclusion No. 26 (XXXIII). October 1981, page 34.

indefinitely.[130] Unfortunately, this reasoning is again raising the issue regarding the non-obligatory nature of the language used with respect to "rescue" and the preference for using the term "assistance". [131]

Another conceivable approach could be based on notion that, in the past years, a presumption in behalf of disembarkation has developed insofar it could oblige coastal States to allow disembarkation as long as the application of this assumption does not infringe cogent reasons of public order. Also statements made by IMO´s Maritime Safety Committee following the 2004 amendments to SOLAS and SAR Conventions could be perceived as confirmation of this development, especially with regard to the requirement to *"arrange disembarkation as soon as reasonably practicable"*[132]. Also the previously already mentioned UNHCR Working Group on the Question of Rescue of Asylum Seekers at Sea stated that *"asylum-seekers rescued at sea should normally be disembarked at the next port of call*"[133], thus, this statement could be also perceived as supporting the assumption regarding the existence of duty of disembarkation.[134]

Despite these at first sight promising statements, obligation of coastal States to allow for disembarkation strictly regulated in treaty law is still missing. To summarize, I think it is meaningful once again to note that despite these initially promising statements mentioned above and also despite the existence of a duty on the flag States to assist those in need and on the coastal States to ensure the existence of mechanisms to ensure assistance can be provided speedily, there is no duty on the flag States to disembark the rescued persons, nor a duty on the coastal States to allow for disembarkation that would be strictly and clearly regulated in treaty law.

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[130] Paragraph 12, Annex 1, UNHCR, Background Note on the Protection of Asylum- Seekers and Refugees Rescued at Sea, March 2002, , available at: http://www.unhcr.org/refworld/docid/3cd14bc24.html

[131] O´BRIEN, Killian S. Refugees on the High Seas: International Refugee Law solutions to a Law of the Sea Problem. *Goettingen Journal of International Law*. 2011, Vol. 3, Iss. 2, page 724.

[132] UNHCR. Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees. September 2006, available at: http://www.unhcr.org/refworld/docid/45b8d1e54.html

[133] Paragraph 3, UNHCR. Preliminary Report on Suggestions Retained by the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea. October 1982, available at: http://www.unhcr.org/refworld/docid/3ae68cbe1c.html; PROELSS, Alexander. Rescue at Sea Revisited: What Obligations exist towards Refugees?. *Scandinavian Institute of Maritime Law Yearbook*. 2008, page 16-17.

[134] O´BRIEN, Killian S. Refugees on the High Seas: International Refugee Law solutions to a Law of the Sea Problem. *Goettingen Journal of International Law*. 2011, Vol. 3, Iss. 2, page 725.

4 International Refugee Law and Refugees at Sea

The previous analysis of the relevant law of the sea provisions has shown that a comprehensive legal regime regarding saving refugees at sea does not exist. Predominantly, from my point of view, the most problematic is the missing duty to allow for disembarkation which leaves unprecedented gap in the protection of the refugees rescued at sea. To fill this gap it is important to search for new approaches or rather to say sources, therefore, it has to come to our mind, what and whether there is something that can fill this gap. In this respect first solution that comes to my mind is to fill this gap by applying Human rights law and predominantly Refugee law rules. Whether it is possible or not I will discuss in the following chapters. At first sight, this presumption seems to be promising due to the fact that intention of refugee law in general is to protect refugees irrespective of whether they enter the territory of a State via land, air or sea. With respect to applicability of Refugee law in this case saving lives of refugees at sea, the main source in this matter undoubtedly is with 144 signatory States the 1951 Convention relating to the Status of Refugees (Refugee Convention)[135] and its Protocol. These two documents represent substantial sources with respect to regulating the fate of refugees rescued at sea who are then faced with the prospect of not being granted the right to disembark and potentially make use of their right to asylum. [136]

In relation to the territory where the rights contained in this Convention do apply it is quite clear they are applicable at least in the territorial sea as forming part of the coastal State´s territory but what about the High seas? This I will also further analyze in the following chapters.

Above that it is necessary to mention that the law of the sea cannot be perceived as a self-contained regime, rather it is a subsystem of international law. Thus, the statement made by the European Commission that "*[...] all rules have to be applied without prejudice to the obligations deriving from international humanitarian law and international human rights law, including in particular the prohibition of refoulement*", seems to be correct.[137] Even though it does not directly result from the wording of this statement that the law of the sea provisions

[135] Convention Relating to the Status of Refugees (1951 Refugee Convention), 1951.
[136] Proelss, A., Rescue at Sea Revisited: What Obligations exist towards Refugees?, Scandinavian Institute ofMaritime Law Yearbook (2008), page 20.
[137] SEC (2007) 691 of 15 Mai 2007, Commission Staff working Document, Study on the International Law Instruments in Relation to Illegal Immigration by Sea, Paragraph 2.1.

were to be interpreted in conformity with the refugee law as such, the situation that States are generally not obliged to accept disembarkation of people rescued at sea under the rules of international law of the sea does not necessarily mean that this obligation does not exist under the provisions of humanitarian law.[138] Therefore, to analyze above mentioned issues in the following chapters we have to perceive the rules of either Law of the sea or Refugee law as being rather complementary than conflicting between each other.

4.1 Needs and entitlements of Refugees at sea: Human rights and international protection obligations

Certain human rights are perceived being inherent to everyone and moreover the existence of those rights is not dependent on the geographic location of a person, thus they have to be considered being universal.[139] Based on this concept, the international human rights law obliges all States to ensure that to all persons within jurisdiction of such a States a certain human rights are guaranteed. With regard to the topic of this thesis it is important to note already at the beginning that because States may exercise jurisdiction not only within their territory but also in areas such as the High Seas etc., it implies that persons in distress at sea including the High seas enjoy certain universal and fundamental human rights regardless of their location, nationality and status.[140] These fundamental human rights are not just limited to some more specific range of rights related to assistance at sea or asylum, but they include all sorts of rights in respect of life, liberty, freedom from harmful treatment, security and protection through due legal process, etc. Nevertheless, states must act in accordance with these fundamental human rights at any time, unfortunately this is not always the State´s practice. However, the States are not obliged only with regard to these universal and general human rights but most of the States are also under specific obligations in respect of asylum-seekers. [141] In this respect also Article 14 of the

[138] Proelss, Ibid, page 20.
[139] See Art I of the UDHR, General Assembly Resolution 217A(I11) GAOR, 3rd Session, part 1, Resolutions, 71; the preamble of the ICCPR, 999 UNTS 171; etc.
[140] See Article 2 of the Universal Declaration of Human Rights, which provides that: *„Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.“*, see also, Art 2(1) of the International Covenant on Civil and Political Rights 1966.
[141] The general applicability of general human rights as the core of every legislation is apparent, especially, when also more specific refugee rules are read in accordance with instruments such as the ICCPR. For example the Article 9 of the ICCPR provides the right *„not to be deprived of*

Universal Declaration on Human Rights provides that "everyone has the right to seek and enjoy asylum from persecution". [142]

Nevertheless, one of the main legal documents If not the main document providing rights to refugees is the 1951 Refugee Convention and its 1967 Protocol.[143] It is the principal international agreement on the status and rights of refugees and most of the States are State parties to this convention and thus, they are bound by its provisions. In conjunction with the rights of refugees, convention is the main source of these rights setting out the fundamental rules for the treatment of refugees. In connection with the topic of this thesis it is worth mentioning the Article 31 which prohibits States to impose penalties on refugees by virtue of their presence within the territory of that particular State. The following provision Article 32 prohibits States from *"expelling a refugee lawfully in their territory save on grounds of national security or public order"* and even If a State would have to expel a refugee it could be done only *"in pursuance of a decision reached in accordance with due process of law"*.

However, in the context of this thesis the key provision undoubtedly is Article 33, which 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.*" Even though this principle is well established in the international law, its application to persons rescued at sea is not entirely clear, especially in respect of its point of application. This uncertainty leads to increasing States´ practice and unwillingness to allow the disembarkation of migrants and thus to preclude them claiming rights of asylum. To be more specific when a person is rescued by some vessel, at that moment such a person falls under the immediate jurisdiction of the vessel´s flag

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[one's] liberty except on such grounds and in accordance with such procedures as are established by law".

[142] It should be noted that a number of commentators have denied Article 14 any legal status. Thus, for example Brownlie does not consider Art 14 to be indicative of a legal rule. I. Brownlie, *Principles of Public International Law* (Oxford Clarendon Press 1988), page 575. Contrary to that for example Pallis argues that subsequent declarations and statements mean that such a right cannot be ignored. M. Pallis, Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' 14 International Journal of Refugee Law (2002) 329, page 346.

[143] Convention relating to the Status of Refugees (1951 Refugee Convention), 1951. 189 U.N.T.S. 150. Protocol to the Convention relating to the Status of Refugees (1967 Protocol), 1967. 606 U.N.T.S. 267.

State. However, it does not in any way imply the flag State´s duty to grant them asylum.

Besides the universal human rights obligations metioned above, international law does not provide us with specific obligations of the flag States in respect of refugees once onboard. However, it would be contrary to the principle of *non-refoulement* and moreover it would be in breach of the universal nature of human rights if the Shipmaster would forcibly repatriate those rescued to any State where they faced danger. The practice that is established for many years is that those rescued at sea should be disembarked at the next port of call, where they should be admitted and processed. However, it is often argued that it does not amount to a rule of customary international law, yet.[144] Thus, unfortunately the ability of the Shipmasters to act in compliance with the general human rights rules and the *non-refoulement* principle solely depends on a coastal State´s willingness to allow disembarkation or not and that is the core of this issue.[145]

Following this issue there are few approaches that state, where those rescued arrive, can apply. First approach could be admitting them to its territory and processing their asylum applications. Second approach may be to refuse disembarkation absolutely and require the Shipmasters to dispose them of the jurisdiction. Finally, State may allow disembarkation upon a satisfactory guarantee as to resettlement being provided by the flag State as such, other States or by some relevant international organisations.[146] Contrary to this there is the presumption to always allow disembarkation of asylum-seekers. This is also in the line with approach advocated by the UNHCR. [147] This assumption regarding the obligation to allow disembarkation is according to UNHCR´s statement reinforced by the wording of relevant international treaties, such as the Article 12(2) of the 1958 Convention of the High Seas or the Regulation 15, chapter V of the SOLAS Convention. To this, the UNHCR Executive Committee added the following: *"To permit the disembarkation of boat people in the most liberal manner would be fully in line with these provisions. By the same token, to refuse disembarkation or to permit it only under strict resettlement guarantee conditions would not be in*

[144] GOODWIN-GILL, Guy.S.; McADAM, Jane.*The Refugee in International Law*. 3rd edition. Oxford University Press, 2007, page 138.
[145] BARNES, Richard. Refugee law at sea. *International and Comparative Law Quarterly.* 2004, Vol. 53, Iss. 1, page 63.
[146] GOODWIN-GILL, *Ibid*, page 157.
[147] UNHCR. Problems Related to the Rescue of Asylum-Seekers in Distress at Sea. August 1981, paragraph 19-20, available at: http://www.unhcr.org/3ae68ccc8.html

the spirit of accepted international principles, since this might indirectly discourage rescue at sea."[148]

With regard to territorial applicability of the *non-refoulement* principle, which I will analyze in the following chapter, it is, however, worth mentioning the issue of rejection of a person at the frontiers, which is unfortunately common practise of States and whether it amounts to a breach of *non-refoulement* principle. The UNHCR´s view is that Article 33 and its obligation of *non-refoulement* applies "whenever a State acts", thus, it includes the area territorial and extraterritorial waters. [149] Based on this statement we could assume that from the perspective of UNHCR rejection at a frontiers would lead to a breach of the *non-refoulement* principle. However, it is important to provide also other view on this issue claiming that an absolute refusal to allow disembarkation may be worthy of condemnation as for example in the *Tampa* case, however, it does not of itself amount to breach of the principle of *non-refoulement* or any other concrete treaty provision.[150] Above that, considering the case of people presenting themselves at a frontier it is important to note that most of them are in fact already within the territory of a State. Nevertheless, this does not imply that such a State has to admit everyone presenting himself at the frontier. The issue here is that if *non-refoulement* principle was intended to amount to a prohibition of rejecting persons presenting themselves at the frontier, this would automatically imply an obligation of such a State to admit those refugees, and this was certainly not the intention of the contracting State parties to the Refugee Convention.[151]

In this context, it could be interesting to mention a specific situation arising from *Tampa* incident, that Australia would legislate to reject a right to seek asylum in Australian territorial waters. These restrictive measures are certainly not what the drafters of the Refugee Convention expected to happen. In this recpect we have to insist on the assumption that human rights norms should not be subject to the technicalities of maritime zone classification. These norms are universal and should apply in all possible circumstances. Thus, we can perceive

[148] UNHCR. Problems Related to the Rescue of Asylum-Seekers in Distress at Sea. August 1981, paragraph 19-20, available at: http://www.unhcr.org/3ae68ccc8.html
[149] Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents in *McNary v Haitian Centers Council*. June 1993, available at: http://www.refworld.org/docid/3ae6b7178.html
[150] BARNES, Richard. Refugee law at sea. *International and Comparative Law Quarterly.* 2004, Vol. 53, Iss. 1, page 64.
[151] GOODWIN-GILL, Guy.S.; McADAM, Jane.*The Refugee in International Law*. 3rd edition. Oxford University Press, 2007, page 123.

these restrictive measures as being in conflict with the spirit of the Refugee Convention that a person should be able to claim asylum once they are within the jurisdiction of a State. We have to admit that Australia has a certain rights to exclude from its jurisdiction those illegal or unlawful immigrants, subject only to certain minimum or universal human rights obligations. However, the coastal State should always distinguish between illegal immigrants and genuine refugees. In fact, many States tend to a restrictive implementation of the Refugee Convention in their domestic legislation, which is one of the reassons why today´s regime of saving lives of refugees at sea failes.[152]

To summarize, International human rights law contains important rules and standards in relation to those in distress and rescued at sea. It guarantees the humane and safe treatment of all persons rescued regardless of their legal status or the circumstances in which they were found and rescued. Those basic rights and principles such as the freedom from cruel, inhuman or degrading treatment, the protection of the right to life, respect for family unity of those rescued and many others must be respected at all times. The examination I have provided above also revealed that the crucial issue is the exact point of application of the principle of *non-refoulement.* It is meaningful to make a presumption that compliance with the Refugee Convention depends upon the presence of persons within administrative competence of the State. However, it would be senseless to require boats to process asylum claims onboard or, moreover, require them to return to the territory of the flag State to process these asylum claims.[153] Finally, I would like to note that previous examination of not only the human rights of refugees but mainly the examination of *non-refoulement* principle was not discussed specificaly in conjunction with their extratorrial applicability. Thus, this analysis I would like to provide in the following chapter.

4.2 Non-Refoulement principle and its extraterritorial applicability

The principle of *non-refoulement* is absolutely essential provision contained in Article 33(1) of the Refugee Convention. This provision determines whether asylum-seekers have the right to enter the territory of the coastal State or not. Taking into account that refugee may be a very vulnerable person whose life or freedom is threatened, the *non-refoulement* principle and its purpose is to solve

[152] BARNES, Richard. Refugee law at sea. *International and Comparative Law Quarterly.* 2004, Vol. 53, Iss. 1, page 64-65.
[153] Ibid, page 67-68.

such a difficult situations and it acts to prevent any return of such a person. Therefore, in association with already discussed right to disembarkation the question arising from the existence of *non-refoulement* principle is whether there is an obligation of the coastal State not to refuse a person rescued at sea claiming the refugee status.[154]

Before I will discuss the material impact of Article 33(1) of the Refugee Convention on the rights of those rescued at sea, it think it is necessary, in accordance with the fact that this paper is mainly focused on the territory of High seas, to determined whether it could be applied also in situations where the refugee was found on the High seas, in other words, whether the *non-refoulement* principle has extraterritorial effect.

At the outset, I think it is worth a while to define the term "High seas". The term "High seas" has persistently comprised all parts of the sea except territorial sea or internal waters of a State,[155] and thus comprehends the waters over the continental shelf, the waters outside the limit of the territorial sea and contiguous zones.[156] As regards jurisdiction over Ships on the High seas, the 1958 Convention on the High Seas and the 1982 Law of the Sea Convention reassure the general principle enunciated by the Permanent Court on the *Lotus* case:[157] *"Vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, no State may exercise any kind of jurisdiction over foreign vessels upon them."*[158]

Therefore, asylum seekers rescued on the high seas will fall under the jurisdiction of the flag State, which is, however, in no way obliged to provide these persons with asylum. In fact, as I have already examined in the previous chapters, the flag State does not have any specific obligations at international law in this regard. This relates to the practice of "next port of call" described in the previous chapter. This established practice is that the asylum seekers should be disembarked at the next port of call and here the coastal State should, at first, admit them and second, process their cases. However, still this does not amount to a rule of customary international law. Based on this practise we have to admit

[154] O´BRIEN, Killian S. Refugees on the High Seas: International Refugee Law solutions to a Law of the Sea Problem. *Goettingen Journal of International Law*. 2011, Vol. 3, Iss. 2, page 726.
[155] Article 1, Convention on the High Seas (1958 Convention), 1958.
[156] BROWNLIE, Ian. *Principles of Public International Law*. 4th edition. Oxford Clarendon Press, 1990, page 232.
[157] Case No: ICGJ 248, The Case of the S.S. "Lotus" (France v. Turkey), PCIJ, Judgement of 4 January 1927, Series A, No. 10, page 25.
[158] BROWNLIE, page 249.

that, even though the cut-clear obligation does not exist, there is a certain possibility the coastal State will have to at least temporarily accept the asylum-seekers under the principle of *non-refoulement*. But the fact that coastal States will act in accordance with the principle of *non-refoulement* and thus, will accept the asylum-seekers on its territory, does not mean that asylum seekers will also be granted all rights provided under international law [159]. In this respect the real issue here, which I will discuss, is the scope of the applicability of the Refugee Convention with regard to refugees on a boat.[160]

The question is whether it is possible that a State's obligations under international law extend beyond the limits of State's territory. The European Court of Human Rights in its decision in the case of Medvedyev et al v. France stated that, even though an extra-territorial application of the Convention is exceptional, it is possible only under certain limited circumstances.[161] The Refugee Convention itself is also silent as regards the problem of its extraterritorial applicability. However, there are a few valid reasons on the basis of which we can argue and prove that Article 33(1) of the Refugee Convention ought to apply outside the State's territory.[162]

It is worth mentioning that Article 1(3) of the 1967 Protocol to the Refugee Convention states that the Protocol *"shall be applied by States Parties hereto without any geographical limitation"*. Even though its application is restricted to the Protocol, some scholars have claimed this article indicates *"a more general intention to the effect that the protective regime of the 1951 Convention [...] was not to be subject to geographic or territorial restriction"*.[163] One of these reasons is the fact that the 1951 Refugee Convention does not contain any provision or phrase that would limit the application of the 1951 Refugee Convention to a particular territory. Due to the absence of such a restricting provision we can presume that Article 33(1) applies anywhere that a State exercises jurisdiction over an asylum-seeker.[164]

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[159] BARNES, Richard. Refugee law at sea. *International and Comparative Law Quarterly.* 2004, Vol. 53, Iss. 1, page 67.
[160] O´BRIEN, Killian S. Refugees on the High Seas: International Refugee Law solutions to a Law of the Sea Problem. *Goettingen Journal of International Law*. 2011, Vol. 3, Iss. 2, page 727.
[161] Application No. 3394/03, *Medvedyev et al v. France*, ECHR , Judgment of 29 March 2010, paragraphs 63-66.
[162] O´BRIEN, *Ibid*.
[163] PALLIS, Mark. Obligations of States towards Asylum Seekers at Sea. *International Journal of Refugee Law.* 2002, Vol. 14, Iss. 2-3, page 345.
[164] O´BRIEN, *Ibid*.

So is it a valid assumption to claim that this provision applies also to the territory where a state exercises only the *de facto* control over this territory and has no valid claim to lawful jurisdiction? A state might appropriate authority over part of the *res communis*, such as the High seas. In that case, because there is no right to control such a territory, it is not possible to argue that state is obliged to respect refugee rights in such a territory as a natural implication of the state´s *de jure* jurisdiction, but at the other hand, we cannot deny that the state may exercise *de facto* jurisdiction in such a place. Therefore, we have to take into consideration that from the perspective of the refugee, state´s control over the particular refugee, no matter if it is legally justified or not, is just as capable of causing harm or providing assistance as would be the situation if the state´s jurisdiction would be utterly established. [165]

In general, states do not assume duties of international law at large, but only as constrains on the exercise of their sovereign authority. This means they assume mostly duties applicable in the territory where they are entitled to exercise jurisdiction. However, a small amount of core refugee rights applies to states which exercise *de facto* jurisdiction over refugees who are not present within their territory. These core duties would mainly be a duty of non-discrimination between and among refugees[166] and the obligation not to return refugees to a place where they are at risk of being persecuted for reasons enshrined in the Refugee convention, in other words the *non-refoulement* principle[167].

To determine the exercise of jurisdiction in the case of the High seas one of the approaches could be using the term „effective control". This term or rather test was used by many courts dealing with the extraterritorial applicability of duties arising from the international law in their decisions.[168] There can hardly be a more obvious example of a person being under the effective control of some other authority than being interdicted or having to be rescued from a sinking ship.[169]

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[165] HATHAWAY, James C. *The Rights of Refugees under International Law*. 1th edition. Cambridge: Cambridge University Press, 2005, page 160-161.
[166] Article 3, Convention Relating to the Status of Refugees (Refugee Convention), 1951.
[167] Article 33, Ibid.
[168] See, Application No. 46221/99, *Öcalan v. Turkey*, ECHR, Judgment of 12 May 2005, paragraph 91; Application No. 52207/99 *Nicaragua v. United States of America*, ICJ, Judgement of 27 June 1986, paragraph 116; Application No. 52207/99, *Banković v. Belgium*, ECHR, Judgment of 12 December 2001, paragraph 67 and others.
[169] HATHAWAY, James C. *The Rights of Refugees under International Law*. 1th edition. Cambridge: Cambridge University Press, 2005, page 161.

Another argument could be based on the fact that all of the provisions of the Refugee Convention that are indeed restricted to the territory of a State[170] do mention this restriction in their wording. Thus, if we apply an interpretation argument *a contrario*, Article 33(1) does not contain such limitation and therefore, it follows this Article is not restricted to a specific territory. Another argument consists in Article 33(1) of the Refugee Convention and its phrase that a refugee shall not be returned "in any manner whatsoever." This broadly formulated phrase is covering a wide range of actions which could potentially lead to a situation in which a refugee could be exposed to particular dangers If the *refoulement* was about to happen. In connection with the wording of Article 33(1) it is appropriate to note the use of the terms "expel or return". We can perceive this as it was an intention of drafters of the Convention to prevent any circumvention of the *non-refoulement* principle and to indicate the difference in the meaning of these terms. The term „expulsion"implies that the person to be expelled has already entered a territory of a State. On the other hand, the term „return" rather means sending a person back to an original point of origin, meaning to the point from which the person began his or her journey, regardless of where this individual has been found afterwards. Thus, the meaning of the term „return" does not support an interpretation that would provide us with the geographical restriction of the scope to conduct just within the territory of the particular State and it also does not imply that these terms were understood by the drafters of the 1951 Refugee convention to be limited in this way.[171]

Furthermore, also teleological approach to the question regarding extraterritorial applicability of the *non-refoulement* principle acknowledges the importance of upholding human rights and fundamental freedoms, thus, to ensure the broadest possible protection of refugees worldwide which hand in hand implies the broader interpretation of the Article 33(1) of the Refugee Convention. It follows, that a restrictive interpretation of the Article 33(1) of the Refugee Convention, limiting its scope of applicability just and only to the territory of a

[170] Such as Articles 4, 15 or 18 of the Convention Relating to the Status of Refugees (Refugee Convention), 1951.

[171] UNHCR. Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. January 2007, paragraphs 26-27, available at: http://www.refworld.org/docid/45f17a1a4.html
See also UNHCR. The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93. January 1994, available at: http://www.refworld.org/docid/437b6db64.html

particular State would interfere with this objective. Also, if we consider the Preamble of the Convention stipulating that one of the objects and purposes of the Convention is to "assure refugees the widest possible exercise of fundamental rights and freedoms." Thus, the approach towards interpretation of international human rights treaties in the way it results in greater recognition of extraterritorial applicability of the *non-refoulement* provision has to be considered being the most effective at ensuring refugees really has "the widest possible exercise of fundamental rights and freedoms" and what is more, some opinions have even gone further claiming that a limitation of the *non-refoulement* provision to the territory of a State would amount to an opportunity to circumvent the obligations owed by that State to the international community and that this would interfere the aim of the Convention.[172] This argument is further supported by an assumption that a refusal of the extraterritorial application could result in a breach of Article 26 of the 1969 Vienna Convention on the Law of Treaties[173].[174]

I think it is relevant to conclude this analysis with UNHCR statement on this matter which, from my point of view, represents the law as it currently stands: *"The purpose, intent and meaning of Art. 33(1) [...] are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be at risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.*"[175] Consequently, this analysis results in to the conclusion that the principle of *non-refoulement* applies also to refugees rescued on the high seas.

As regards material applicability it is quite often suggested that extra-territorial application of the *non-refoulement* principle set forth in the Article 33(1) of the Refugee Convention, would lead to an automatic right to asylum. However, If we examine the Refugee Convention closely we have to conclude there is no norm whatsoever that would oblige States to grant *eo ipso* a right of asylum. In this respect we have to once again draw a distinction between rejection

[172] FISCHER-LESCANO, Andreas; LÖHR Tillmann; TOHIDIPUR Timo. Border Controls at Sea: Requirements under International Human Rights and Refugee Law, *International Journal of Refugee Law.* 2009, Vol. 21, Iss. 2, page 270.
[173] Vienna Convention on the Law of Treaties (Vienna Convention), 1969.
[174] O´BRIEN, Killian S. Refugees on the High Seas: International Refugee Law solutions to a Law of the Sea Problem. *Goettingen Journal of International Law*. 2011, Vol. 3, Iss. 2, page 729-730.
[175] UNHCR. Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. January 2007, paragraphs 24, available at: http://www.refworld.org/docid/45f17a1a4.html

of persons at the state border and *non-refoulement*. States are in no matter obliged to admit every person standing at its borders requesting entry. Nevertheless, the core of *non-refoulement* provision in Article 33(1) prohibits States from turning away refugees. Thus, relevant authorities of that State must first precede an examination of that specific person presenting himself at the state borders in order to determine whether or not that person is a refugee and, consequently, whether the rights according to refugees, including *non-refoulement* of such a recognized refugee, apply. If a state does not carry out this examination and would returned a vessel of asylum seekers without determining their status we have to conclude it amounts to a breach of its obligations arising from the Convention if there were in fact refugees on board and thus, state is not adequately fulfilling its treaty obligations. [176]

With regard to status determination I think it is important to note that protection provided under Article 33 of the 1951 Refugee Convention is in force for an asylum seeker as long as his or her claim being refugee has not been rejected in a formal procedure by a final decision. This quite important remark is a consequence of the fact that formal recognition of a person being a refugee in an adequate and proper determination procedure is purely declaratory and thus, it does not have constitutive effect.[177] Therefore, there are no doubts that states are required to provide access to official status determining proceedings in order to clarify whether such a person is eligible to receive refugee status. However, these officially held proceedings may not necessarily take place on the territory of a coastal State. There have been several cases of such official proceedings being held on ships. For example USA implemented this approach to this procedure during Haitian refugee crisis in 1994.[178] But to conclude, not only from my point of view it should be noted that the *non-refoulement* principle require, in order to ensure that all administrative and legal procedures are properly executed and in order to ensure that the person whose status is being determined is in a position to exercise his right to effective legal protection, that States shall allow even If only

[176] O´BRIEN, Killian S. Refugees on the High Seas: International Refugee Law solutions to a Law of the Sea Problem. *Goettingen Journal of International Law*. 2011, Vol. 3, Iss. 2, page 730-731.
[177] *Ibid.*
[178] See also PALLIS, Mark. Obligations of States towards Asylum Seekers at Sea. *International Journal of Refugee Law.* 2002, Vol. 14, Iss. 2-3, pages 352-353.

a temporary admission in its territory for the purpose of verifying the need for protection and the status of the person concerned[179].

Finally, in conjunction with the duty to allow for disembark, I would like to add that, although the principle of *non-refoulement* does not provide an absolute right to disembark, established practice has shown, its practical and successful completion by coastal States will usually require a temporary granting of access to coastal State´s territory for a period of time needed to determine the refugee status of those rescued at sea properly.

[179] FISCHER-LESCANO, Andreas; LÖHR Tillmann; TOHIDIPUR Timo. Border Controls at Sea: Requirements under International Human Rights and Refugee Law, *International Journal of Refugee Law.* 2009, Vol. 21, Iss. 2, page 283-284.

5 State Policy responses to "boat refugees"

In this chapter I would like to provide a brief summary of state policy towards refugees arriving by sea. I will focus on this issue mainly in relation to the European Union, because the problem of refugees at sea is now in the Mediterranean Sea more than acute. Referring to the policy of member states of the European Union, Thomas Hammerberg, the Commissioner for Human Rights of the Council of Europe, said: *"Their silence and passivity are difficult to accept. When preventing migrants from coming has become more important than saving lives, something has gone dramatically wrong."*[180]

After the tragic death of 366 migrants and asylum-seekers at the coast of Lampedusa in 2013, the European Commission created a new framework, the "Task Force for the Mediterranean", to resolve the issue of people dying at sea on its border. Unfortunately, it is evident from both documents, namely, the Task Force's recommendations and the working document on their implementation that this new framework cannot be perceived as a new and positive contribution. It is more likely just repackaging already existing policies, placing a focus on cooperation with third countries, voluntary returns and border control.[181] It also emphasizes the need to even more strengthen Frontex's role in rescue operations and highlights the importance of EUROSUR that is presented as a system that should carry out surveillance but also save lives. EU holds this position even though it is absolutely clear that increasing border controls and surveillance do not imply saving lives. The policies already used and also the new policies proposed by the EU and its member states do not offer by no means real and comprehensive solutions to the tragedy occurring in the Mediterranean Sea. This framework is also inadequate in relation to individual EU states and their efforts to create a functioning policy scheme. Even if the Task Force's 38 recommendations would be fully implemented, it still includes several provisions which put the lives of migrants and refugees at risk. One of these common policies is for example allowing for disembarkation in third countries when interception or rescue is on the High seas. Also the emphasizing the border controls rather than other

[180] African migrants are drowning in the Mediterranean. *Council of Europe: press release*, 8 June 2011, available at: http://human-rights-convention.org/2011/06/08/african-migrants-are-drowning-in-the-mediterranean/.

[181] See The Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean. COM(2013) 869 final, December 2013, available at: 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

mechanisms encourage pushbacks of refugees and other persons in need of protection to countries where their lives may be in threatened.[182]

This was only an outline of the current situation. Here I will further provide a brief examination of the main issues regarding the EU States policy in respect to "boat refugees". The first issue is lack of clarification of responsibility at sea. As I have already mentioned many times, the obligation to provide assistance to those in distress at sea regardless of their status is clearly enshrined in international maritime law.[183] Also under the International human rights law states are required to comply with certain rights and obligations for example with the principle of *non-refoulement* whereby no one should be returned to a country where his/her life may be at risk. Even though all these obligations and rights are absolutely clear, the sovereign right of member states to decide who should be allowed onto their territory outweighs the application of these basic humanitarian principles and exactly this is also a trend reflected in EU law making.[184]

Another issue is that not all member states are bound by the same obligations. Some member states have not signed the amended versions of both in this matter fundamental conventions, the 1974 Convention on Safety of Life at Sea (SOLAS) and the 1979 Convention on Maritime Search and Rescue at Sea (SAR). The amended SAR convention requires that the conduct of a search and rescue operation is the responsibility of that state in which search and rescue area the ship being in distress is found. As I have already mentioned, several countries have not signed any of the amended versions of the SAR and the SOLAS conventions at all. The most problematic in this matter is probably the position taken by Malta. Malta has decided not to sign these conventions, arguing that migrants intercepted in its search and rescue area should not systematically be on its territory and instead of that they should be brought back to the port of embarkation.

The other problem is an interpretation of key principles. This difference in the applicable conventions is reinforced by the absence of a common

[182] Euro-Mediterranean Human Rights Network. Violations of the Rights of Migrants and Refugees at Sea. June 2014, page 1, available at: http://www.euromedrights.org/eng/wpcontent/uploads/ 2014/06/Policy-brief-ENG-2014-06-25.pdf

[183] See UNHCR. Rescue at Sea, Stowaways and Maritime Interception: Selected Reference Materials. 2nd Edition, December 2011, available at: http://www.unhcr.org/cgibin/texis/vtx/home/opendocPDFViewer.html?docid=4ee1d32b9&query=refugees%20at%20sea

[184] Euro-Mediterranean Human Rights Network. Violations of the Rights of Migrants and Refugees at Sea. June 2014, page 4, available at: http://www.euromedrights.org/eng/wpcontent/uploads/ 2014/06/Policy-brief-ENG-2014-06-25.pdf

understanding of key principles. As I have already examined in the previous chapters there is no cut-clear definition of what a "place of safety" means or there is also no common agreement on what "distress" means. This leads to uncertainty and reluctance of States to provide assistance.[185]

Consequently, another issue partially arising from the previous one is avoiding responsibility in the context of a lacking coherent EU framework. Despite the applicability of International law and also European Law, reluctance to sign amendments to the already mentioned conventions which would entail greater responsibilities reveals that in fact, no state wants to take the responsibility of saving and disembarking migrants and asylum-seekers. This approach avoiding responsibility could be partly explained by the current reception mechanisms for asylum seekers and migrants in Europe. Unfortunately, the existing legal framework puts coastal States in the front line regarding the interception, the disembarkation and the reception of migrants and asylum-seekers. It also implies that these coastal States are also responsible for examination of asylum claims in application of the Dublin III regulation[186]. This practice does not comply with the idea of burden-sharing at all. [187]

Furthermore, the next problematic policy taken by EU is impeding access to EU territory. The creation of an internal space of free movement within the EU has been automatically accompanied by the strengthening of its external borders. Despite the fact that the 2004 amended SOLAS Convention quite clearly states that rescue obligations should prevail over border management objectives, unfortunately, the opposite approach is most often the case in the current EU. The result is deterioration of the rights of migrants and asylum-seekers at sea through the increased criminalisation of solidarity and the development of border control mechanisms such as FRONTEX and EUROSUR (European Border Surveillance System) which, even though sometimes being called "life-saving" measures, have the primary objective to block access to EU territory for those intercepted at sea.[188]

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[185] *Ibid,* page 6.
[186] Regulation No 604/2013/EU of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.
[187] Euro-Mediterranean Human Rights Network. Violations of the Rights of Migrants and Refugees at Sea. June 2014, page 7, available at: http://www.euromedrights.org/eng/wpcontent/ uploads/ 2014/06/Policy-brief-ENG-2014-06-25.pdf
[188] *Ibid*, pages 8-9.

Finally, the last issue and EU policy I would like to mention and, in my opinion, the most reprehensible is "push-backs" of refugees and persons in need of protection. The UNHCR has issued clear guidelines on the main principles and practices which shall be applied to fully respect the rights of refugees and migrants at sea. Regardless these recommendations states have not only increased the border control practice as such but it has been accompanied by a growing practice of systemic push-backs of refugees and persons in need of protection. These "push-backs" are increasingly used policy of EU states, mainly used to avoid their obligations as stipulated in the 1951 Convention relating to the Status of Refugees and other international conventions.[189]

Based on all the above mentioned and examined problems, it is necessary to emphasize once again that the need for change in the EU's migration policy at sea is more than urgent.

[189] *Ibid*, page 15.

6 Identifying gaps, possible solutions and future challenges

As already mentioned in the previous chapters maritime and refugee law suffer from many inaccuracies and gaps to be filled. In this context, in the following paragraphs I would like to consider some new possible approaches or legal amendments to improve the protection of refugees and asylum-seekers rescued at sea.

The previous examination of maritime law revealed a crucial gap between rescue as such and disembarkation. From my point of view the solution of this problem from the legal perspective is not the issue, however, it is more likely about the willingness of particular states than the question of the complexity of the maritime law provisions. Thus, this issue could be easily addressed by the creation of a duty incumbent on the rescuing vessel to disembark at the next port of call in conjunction with an explicit duty on coastal States to allow disembarkation in one of the maritime legal instruments.[190] The disembarkation of rescued asylum-seekers at the next port of call has been also consistently advocated by UNHCR Executive Committee (EXCOM).[191] Even though such conclusions of EXCOM are in their nature rather recommendatory than a legally binding, they play important rule as an indicator of how policy is likely to develop and may be regarded as soft law.[192] This solution, consisting of setting out explicit obligations that are easily recognisable, would relieve some of the urgent humanitarian and safety concerns of not only rescues as such but also rescuing vessel and its crew who now have to deal with economical,[193] legal and moral concerns of the rescue operations due to this legal deficiency. Thus, this approach would prove favourable to commercial interests that are inauspicious affected by rescue operations they have to undertake and it would also remove the burden of flag States so that they can renounce their responsibility in a shorter period.

[190] UNHCR. Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea. March 2002, paragraph 30, available at: http://www.refworld.org/docid/3cd14bc24.html

[191] See EXCOM Conclusion No. 14 (XXX): General Conclusion on International Protection. October1979, paragraph C, available at: http://www.unhcr.org/3ae68c4348.html: EXCOM Conclusion No 15 (XXX): Refugees Without an Asylum Country. October 1979, paragraph C, available at: http://www.unhcr.org/3ae68c960.html

[192] See J Sztucki, 'The Conclusions on the International Protection of Refugees adopted by the Executive Committee' I International Journal of Refugee Law (1989) 285.

[193] UNHCR also admits the posibility that some cost of the rescue can be covered, especially, cost of care and disembarkation. However, with regard to delay costs UNHCR does not provide this compensation. Louis B Sohn; Erik Franckx; Kristen Gustafson Juras; Cases and materials on the law of the sea, Leiden : Brill Nijhoff, second edition 2014, ISBN: 9789004169906.

However, Coastal States would be reluctant to implement such obligation to allow disembarkation, as the *Tampa* case already indicated.

Even though this amendment to the current legal regime could have enormous positive impact on the currently most objectionable aspect of rescue actions, it does involve also some negative consequences. One aspect is that due to direct consequences of disembarking sometimes thousands of refugees in the coastal States territory it would also have to be linked to a system of resettlement guarantees to prevent uneven flow of refugees only in certain countries. Another problem may also lie in implementation of the relevant obligation as such because maritime law has traditionally never paid too much attention on humanitarian considerations. Finally, it raises the question where and how such an obligation would be enshrined. From my point of view the easiest way would be redefining already existing obligation to deliver to a place of safety contained in existing treaties.[194]

Other possible solution to the issue of refugees at seas might be to establish or improve regimes offering temporary protection for asylum-seekers. These temporary protection regimes are already partially established and used to cope with temporary mass influxes of refugees during conflicts, wars and other situations. Nevertheless, they could be also suitable to the problem of refugees at sea. The instrument of temporary refugee is not formalised under international law yet and practise in particular countries could be quite different, therefore, some coordination or regulation created on the level of international law would be needed.[195] Necessary prerequisite would be temporary admission of such a person into a State´s territory. Other measures that have to be taken are for example provision of food and shelter in accordance with basic human rights provisions. However, it is important to note that it will not be connected to grant full and permanent asylum. The reasoning for this is based on the premise it offers migrants instant protection from threats to their lives and liberty and thus, it should not lay down another added burden on the host States. This instrument should be perceived as a very useful compromise for both of the sides, the refugee and host State, with often opposite interests. So far, I have examined rather the positive impact; notwithstanding, this instrument certainly has also its negative

[194] BARNES, Richard. Refugee law at sea. *International and Comparative Law Quarterly.* 2004, Vol. 53, Iss. 1, page 71-72.
[195] GOODWIN-GILL, Guy.S.; McADAM, Jane. *The Refugee in International Law*. 3rd edition. Oxford University Press, 2007, page 200.

consequences. One of them is that it may encourage host States to regard temporary refuge as a lasting solution, and to decrease the degree of support available to refugees. Moreover, as it is not formally regulated and supervised, States may at their discretion tend to provide it rather than full asylum.[196]

Another approach that could be taken into consideration is a scheme based on institutionalised disembarkation procedures. Even though, this obligation would again burden the coastal States, the burden would be mitigated by the fact that resettlement guarantees would be institutionalised, too. This scheme was already used in response to the huge influx of the Vietnamese boat people during the 1970s and 1980s. In response to these events the UNHCR, in cooperation with a number of States, adopted the Disembarkation Resettlement Offers Scheme (DISERO) and the Rescue at Sea Resettlement Offers Scheme (RASRO). The main principle of this scheme was that the Coastal States were to allow disembarkation of refugees and would also provide temporary refugee for them in return for guarantees from third States to resettle those rescued elsewhere.[197] It is possible that a similar mechanism could be renewed to deal with the contemporary mass influx of refugees. Also UNHCR on its last High Commissioner's Dialogue on Protection at Sea held in Geneva in December 2014 acknowledged that temporary protection and stay arrangements could be a useful tool in response to complex rescue at sea. However, there was a strong call to ensure that the whole issue is looked at from a rule of law perspective at the international, regional and national levels. This would involve building rule of law systems in countries of origin, destination or transit as a key part of improving economic and social development. Such instrument of temporary refugee would also be in accordance with the policy of burden and responsibility sharing, which has been again emphasized and promoted as the key goal of the UNHCR future policy.[198]

Even though, this approach seems to be promising, the UNHCR has stressed out that the current background of contemporary migration patterns is different and much more complex than the one which caused the creation of

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[196] BARNES, Richard. Refugee law at sea. *International and Comparative Law Quarterly.* 2004, Vol. 53, Iss. 1, page 72-73.
[197] GOODWIN-GILL, Guy.S.; McADAM, Jane. *The Refugee in International Law*. 3rd edition. Oxford University Press, 2007, page 159.
[198] 7th Session, UNHCR High Commissioner's Dialogue on Protection at Sea. December 2014, available at: http://www.unhcr.org/cgibin/texis/vtx/home/opendocPDFViewer.html?docid=549990819&query=protectionatsea

Disembarkation Resettlement Offers Scheme (DISERO) and the Rescue at Sea Resettlement Offers Scheme (RASRO).[199] One of the relevant issues could be the fact it is much more difficult to identify the real status of persons seeking asylum, insomuch as most of the movements are mixed movements, meaning they include both economic migrants and asylum-seekers. It could be followed by more restrictive general practice of host States. All these aspects may negatively affect access to asylum. Even UNHCR admits that, any considerations of mechanisms analogous to RASRO and DISERO in the current context will have to take into account the fact that the most of those rescued at that time were considered *prima facie* refugees. Current movements are more complex and mixed, thus, the refugee status of those rescuees must be much more carefully determined. The compound nature of current movements, together with more restrictive asylum practices in general, makes it fairly difficult to agree on standards and policies for the processing of asylum applications of persons rescued in distress at sea.[200] Thus, it remains quite unclear whether this approach would be sufficient to cope with contemporary refugee problems. It is also worth to note that for successful functioning it is necessary to embrace cooperative, practical, and interagency approaches rather than premature amendments to underlying legal provisions.[201]

Also UNHCR is trying to assert cooperation. Thus, in this matter UNHCR created a complex framework to tackle the issue of refugees rescued at sea. As UNHCR states, the main objectives are an equitable responsibility sharing approach to the realisation of durable solutions to meet international protection needs, agreed re-admission and strengthened assistance, financial and otherwise, to first countries of asylum, easing the burden on States of disembarkation, an equitable responsibility sharing approach to the determination of refugee status and international protection needs of those rescued, support for the international search and rescue regime and agreement by countries of origin to accept the return of their nationals determined, after access to fair and efficient asylum procedures, not to be in need of international protection.[202] UNHCR also highlights that to

[199] UNHCR. Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea. March 2002, paragraph 39, available at: http://www.refworld.org/docid/3cd14bc24.html
[200] *Ibid.*
[201] BARNES, Richard. Refugee law at sea. *International and Comparative Law Quarterly.* 2004, Vol. 53, Iss. 1, page 74.
[202] UNHCR. Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea. March 2002, paragraph 40, available at: http://www.refworld.org/docid/3cd14bc24.html

reach these goals, the involvement and role of all the principal actors needs to be defined.[203]

In connection with international bodies such as UNHCR it is also important to note that even the IMO and its Sub-Committee on Search and Rescue admitted that there are certain gaps in the SOLAS and SAR Conventions in relation to the disembarkation of persons rescued from distress at sea and bringing them to a place of safety, which need to be addressed by other IMO bodies and also by other international organisations. The SAR Working Group has also stressed out that there is a special need to clarify the term "place of safety" and also suggested that the obligations of Shipmasters and relevant governments need to be more closely balanced.[204]

In relation to provide a final summary of existing gaps in the matter of boat refugees it is worth mentioning the list of UNHCR´s concerns regarding this issue that needs to be addressed such as the right to seek and enjoy asylum, *non-refoulement,* access to fair and efficient asylum procedures, conditions of treatment, the balance of responsibilities between actors, the safe return to first countries of asylum, preventing persons from getting into a distress situation, balancing search and rescue concerns with sovereignty concerns and finally, durable solutions as such.[205]

[203] UNHCR. Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea. March 2002, paragraph 41, available at: http://www.refworld.org/docid/3cd14bc24.html
[204] IMO: Report to the maritime safety committee 6th Session. March 2002, available at: http://www.navcen.uscg.gov/pdf/imo/comsar/COMSAR6_22.pdf
[205] UNHCR. Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea. March 2002, paragraph 41, available at: http://www.refworld.org/docid/3cd14bc24.html

7 Conclusion

The issue of refugee influx on the high seas is not new. However, it still raises complex legal issues and questions combined with sensitive moral dilemmas. To summarize what has been examined in the previous chapters, a few main conclusions shall be laid down. On the basis of the examination of the relevant legislation and practise I have to conclude that the problem does not lie so much in the obligation to provide assistance as such, but rather in the steps that follow after such a person is rescued from the sea.

In general, obligations in respect of rescue are insufficiently defined at the international level and furthermore, even more poorly implemented at the domestic level. The same conclusion can be easily made with respect to rights of refuge. This creates a problem not only for those rescued at sea but also for those who actually render assistance. This is further made worse by coastal States and their stubbornness with regard to disembarkation. Consequently, the first conclusion I can confidently state is that a general duty of coastal States to allow disembarkation of persons rescued at sea does not exist. As analyzed above, due to the lack of a legal requirement on coastal States to allow disembarkation and accept those persons rescued at sea within their territories, the international law of the sea has absolutely failed to provide an adequate solution. The result of this deficiency is that one of the most fundamental maritime law rules and moral obligation to provide assistance to persons in distress at sea is unprecedentedly undermined. This serious defect arises from dislocation of rights and obligations. Even though, the obligations to provide assistance to people in distress at sea is well established, the related obligation to receive those rescued does not exist in explicit and direct form. To make thing worse this shortage is even exacerbated due to the lack of relevant key provisions and also due to States´ inability to implement already existing international obligations in their domestic law.

Consequently, analysing the principle of *non-refoulement* it has been proven that with regard to the High seas the principle of *non-refoulement* applies and thus, refugees rescued at sea have a right to be allowed to disembark in order for their status to be determined for the period until the final decision on their status is made. If we would evaluate this only in terms of maritime law, the considerable authority of coastal States seems to be difficult to challenge. Notwithstanding, If we consider it in terms of human rights perspective it is quite

easy to make a conclusion that coastal States which refuse to allow disembarkation, and consequentially deny access to asylum-seekers on State´s territory, may be acting in breach of their human rights obligations. However, the failure does not consist only in the insufficient implementation of the relevant provisions of international law by states as such because also as far as the areas outside the limits of national jurisdiction are concerned, the relevant prerequisites of the law of the sea and refugee law constitute a vague and imprecise patchwork rather than a comprehensive regime either.

Even though, there have been certain attempts to solve these shortcomings, as evidenced by the latest amendments to SOLAS and the SAR Convention, approaches aiming at incorporating a next port of call approach or humanitarian requirements into the existing instruments do not appear to be promising solution either, mainly because of persisting opposition of most industrialized countries. It therefore shows that more creative and less legalistic approaches may be more suitable to solve this issue. Thus, from my perspective, the example of successful solution might be to adopt relevant provisions and measures by way of a non-binding memorandum of understanding, combining the concept of temporary refuge strongly advocated by the UNHCR with a regime of equitable burden-sharing between coastal and flag States.

With regard to the EU, up until now, challenges resulting from the boat refugees trying to reach Europe have only been met by combining restrictive measures, such as improving cooperation in the area of management of external borders, with approaches to combat the causes for migration within the countries of origin._From my perspective, this is not the path that the EU should take particular with regard to the rights of those who thus fleeing their homes to seek safety. As regards the law of the sea, current Community policy is to develop guidelines on the legal scope for action to be taken by the Community and its Member States to counter migration flows on the High seas without prejudice to the principles laid down in the international legal framework on the law of the sea and the protection of refugees.

Thus, even though amendments to the law of the sea are being considered also on the EU level, the problem as such is not addressed in any of the relevant instruments. Again as stated above we should not only consider restrictive measures to be taken such as strengthening the competences of FRONTEX and

implementing new instruments of integrated border patrol, but foremost we should enforce the establishment of a comprehensive regime of allocation of responsibilities to share the burden with regard to asylum seekers rescued at sea.

To conclude, this situation is, in the long term, untenable. It is obvious that rights of refuges are seriously threatened and also that only a certain States seem to bear the burden of such large-scale refugee influxes, thus, to achieve a long-term solution, we should increase the focus on the creation of permanent agreements and on burden-sharing. Unfortunately, adoption of such measures, in the current situation, remains purely within the realm of wishful thinking.

Thus, we can only hope that the sense of solidarity, which has been the core of interactions at sea for many centuries, can be revived to prevent human tragedies occurring at seas.

Resumé

Problematika uprchlíků, kteří utíkají přes moře, ve snaze dostat se do jiné země za lepší a především bezpečnější budoucností, není ničím novým. Nicméně i tak zůstává jádro tohoto problému stejné. I přes léta praxe, zde stále stojíme na rozhraní mezi nejen morální ale i právní povinností poskytnout uprchlíkům pomoc, pokud se při jejich cestě naleznou v nebezpečí na moři a na druhé straně stojícími zájmy jednotlivých států a jejich snaha vyhnout se povinnostem jim uloženým jak v mezinárodním mořském právu, tak i v právu uprchlickém a to zejména mezinárodními dohodami jako jsou Mezinárodní úmluva o bezpečnosti lidského života na moři (SOLAS), Mezinárodní úmluva o námořním pátrání a záchraně (SAR), Úmluva Organizace spojených národů o mořském právu (UNCLOS) či Úmluvě o právním postavení uprchlíků z roku 1951.

Na úvod své práce se věnuji počátkům problematiky uprchlíků utíkajících prostřednictvím lodí na mořích. Snažím se zde i stručně nastínit scénář doposud asi nejdiskutovanějšího případu lodi *Tampa* a dále provádím krátké shrnutí aktuální situace a bezprecedentního počtu ztracených životů v těchto dnech právě v souvislosti s problematikou uprchlíků na mořích. Poté volně navazuji kapitolou, která se již zabývá rozborem povinností, které vyplývají pro jednotlivé státy z ustanovení obsažených v úmluvách mořského práva. Tato část je stěžejní pro analýzu pojmů jako je povinnost poskytnou asistenci, povinnost záchrany či povinnost povolit vylodění lodí vezoucí osoby zachráněné na moři. Ve třetí kapitole se věnuji právům uprchlíků a povinnostem jednotlivých států, které vyplývají z norem uprchlického práva obsažených převážně v Úmluvě o právním postavení uprchlíků z roku 1951 a příslušném Protokolu z roku 1967, ale i z koncepce univerzálních lidských práv obecně. Více se zde zaměřuji i na princip *non-refoulement* a především jeho použitelnost ve vztahu k volným mořím nacházejícím se mimo jurisdikci příslušných států. V následujících kapitolách se již pouze snažím poukázat na existující a především přetrvávající mezery v mořském právu, ale i mezery v jeho aplikaci jednotlivými subjekty a státy.

Závěrem v souvislosti s touto analýzou nejzávažnějších problémů se snažím poskytnout i možná řešení a novelizace ustanovení a především definic obsažených v úmluvách mořského práva, jehož právní úpravu ve vztahu k záchraně životů již tak zranitelných osob, kterými uprchlíci beze sporu jsou, považuji za nedostačující.

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