

Limitations on the Duty to Render Assistance at Sea under International Law in the COVID-19 Era

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Abstract

The duty to render assistance at sea is a fundamental norm of international law. The genesis of this obligation lies in the overwhelming need to protect seafarers at sea; today, the duty has been extended to cover all human life at sea. With developments in technology, safety standards at sea have improved significantly; nevertheless ‘human distress at sea’ situations continue to increase. The international maritime community is now facing a wide range of practical and legal problems relating to rescue at sea which were not apparent even some decades ago. The conflict and instability existing in certain areas of the Middle East, Africa and South-East Asia have exacerbated the phenomenon of irregular migration by sea. The enormity of the problem has placed pressures on coastal State rescue services as well as members of the maritime community, in particular, shipmasters, who are increasingly asked to rescue persons

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in distress at sea. This paper examines the status of the contemporary international legal regime regulating the shipmaster's duty to render assistance at sea in light of the challenges associated with rescues involving irregular migrants. Special attention will be given to the impact of the COVID-19 pandemic on the implementation of the obligation to rescue. It will be argued that these challenges may limit further the vital duty of the shipmaster to render assistance at sea.

Keywords: Duty to Render Assistance, Shipmaster, Migrants, Search and Rescue, Law of the Sea, COVID-19

1. Introduction: The Plight of the Shipmaster and Crew in the *Maersk Etienne* Saga

In May 2021, the shipmaster and crew of the *Maersk Etienne* tanker were awarded the Danish Shipping Prize for their exceptional bravery in a historic rescue operation which occurred almost ten months earlier.¹ The rescue commenced on 4 August 2020, following a request from the Malta Rescue Co-ordination Centre to attend to a sinking fishing boat in the Gulf of Gabes.² The shipmaster changed course in order for his crew to rescue 27 migrants, including a pregnant woman and child. The *Maersk Etienne* then proceeded towards Malta in order to disembark the rescuees but was denied entry into port. The shipmaster anchored

1. Max Tingyao, 'Maersk Etienne crew wins Danish Shipping Prize for saving Libyan migrants' (TradeWinds, 27 May 2021) <<https://www.tradewindsnews.com/casualties/maersk-etienne-crew-wins-danish-shipping-prize-for-saving-libyan-migrants/2-1-1017154>> accessed 28 May 2021.

2. 'German Boxship stranded off Lampedusa with Migrants on Board', *The Maritime Executive* (6 May 2020).

the vessel outside the Maltese contiguous zone and waited for further instructions.³ A record 38-day political standoff ensued, where States involved in the incident disagreed over responsibility to offer a safe port for disembarkation.⁴ After weeks at sea, conditions onboard the *Maersk Etienne* quickly deteriorated. The frustrated rescuees were confined to the vessel's limited deck space and forced to sleep on make-shift beds.⁵ The situation escalated when three desperate migrants jumped into the sea, inducing a second rescue by the crew.⁶ The saga finally ended when the migrant rescuees were transferred to a Non-Governmental Organization (NGO) vessel and subsequently disembarked in Sicily on 13 September.⁷ Thereafter, the *Maersk Etienne* continued with its original voyage, leaving its shipowners to deal with the commercial ramifications of over a month-long delay.⁸

3. Per Fredrik Jensen and Bjørg Eikeland, 'The Maersk Etienne rescue highlights the difficulties in disembarking migrants rescued at sea', *Gard Insight* (8 October 2020) <<https://www.gard.no/web/updates/content/30502985/the-maersk-etienne-rescue-highlights-the-difficulties-in-disembarking-migrants-rescued-at-sea>> accessed 1 April 2021.

4. For an examination of the potential responsibility of States in this case, notably, Denmark, Tunisia and Malta; see Felicity G. Attard and Richard L. Kilpatrick Jr, "Reflections on the *Maersk Etienne* Standoff and its Ramifications for the Duty to Render Assistance at Sea", *EJIL:Talk!* (12 October 2020) <<https://www.ejiltalk.org/reflections-on-the-maersk-etienne-standoff-and-its-ramifications-for-the-duty-to-render-assistance-at-sea/>> accessed 1 April 2021.

5. See Julian Delia, 'Captain makes desperate appeal following four-week standoff' *The Times of Malta* (Birkirkara, 4 September 2020) <<https://timesofmalta.com/articles/view/watch-captain-makes-desperate-appeal-following-four-week-standoff.816162>> accessed 2 April 2021; and Hannah Roberts, 'Lost at sea: Ship standoff builds pressure over migrant rescues' *Politico* (20 September 2020) <<https://www.politico.eu/article/lost-at-sea-ship-standoff-builds-pressure-over-migrant-rescues/>> accessed 2 April 2021.

6. Jensen and Eikeland (n 3).

7. Matthew Vella, 'Maersk Etienne migrants to be disembarked in Sicily after NGO rescue' *MaltaToday* (San Gwann, 13 September 2020).

8. For a discussion of the commercial impacts of the rescue operation; see Attard and Kilpatrick (n 4).

Unfortunately, the plight of the shipmaster and crew of the *Maersk Etienne* has become commonplace since the escalation of the migration by sea crisis in 2013.⁹ The vessel is one of the many which are regularly engaged in similar search and rescue (SAR) operations.¹⁰ The reliance on commercial ships to conduct migrant rescue operations has become an issue of increasing concern for the international community. These vessels are not equipped to undertake such operations, which often present dangers to both the migrants and the rescuers. The shipmaster often faces formidable challenges out at sea, including delayed disembarkation and consequent disruption to the commercial voyage. Recent developments such as the COVID-19 crisis have also had significant impacts on such operations. In the wake of the pandemic, governments have imposed several border restrictions, including the closure of national ports declared to be ‘unsafe’ to land migrants.¹¹ As a result, State

9. The *Maersk Etienne* incident follows a number of high-profile migrant rescues in the Mediterranean involving commercial vessels including the *MV Salamis* in 2013, the *King Jacob* in 2015 and the *Alexander Maersk* in 2018. For a review of these cases and other similar rescues; see further Felicity G. Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (Brill Nijhoff 2020) 11-16.

10. Between 2014-2015 more than 1,000 merchant vessels saved over 65,000 migrants at sea; see Jonathan Saul, ‘In Mediterranean, Commercial Ships Scoop Up Desperate Human Cargo’ *Reuters* (21 September 2015) <<http://www.reuters.com/investigates/special-report/europe-migrants-ship/>> accessed 2 April 2021. Furthermore, the International Chamber of Shipping (ICS) has reported that: ‘...the number of merchant ships involved in rescue operations has remained relatively constant since 2015 and the average number of persons rescued by each merchant ship remains over 110’. See IMO, ‘Statement to the International Dialogue on Migration Geneva’ (19 July 2017).

11. See Inter-ministerial Decree n.150 of 7 April of the Italian Minister of Infrastructure and Transport in agreement with the Ministers of Foreign Affairs, Interior and Health <<https://www.shipmag.it/wp-content/uploads/2020/04/shipMag.pdf>> accessed 5 April 2021; and Department of Information Malta, ‘Statement of the Government - COVID-19’ P200468, (9 April 2020). <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/09/pr200648.aspx?fbclid=IwAR3bTWYjRLSoHBfzlmNbdhfJ0cig3dpx7P_VvAybX-ZIF6iWtnBOGepyFuQI> accessed 5 April 2021.

and NGO-led SAR operations were decreased significantly or halted entirely.¹² This gap in the SAR operations has – as will be seen below – amplified the burden on shipmasters of commercial vessels to rescue migrants in distress.¹³

The duty to render assistance at sea has been characterized as one of the ‘traditional hallmarks of the law of the sea’.¹⁴ This fundamental norm was formulated to protect life in the face of the perils of the seas.¹⁵ The scope and contours of the obligation to render assistance are firmly established in customary international law and reflected in various treaties.¹⁶ Despite this established legal framework, the implementation of the duty faces significant challenges as a result of increased irregular migration by sea. As exemplified by the *Maersk Etienne* rescue, this phenomenon has placed significant pressure on those who exercise the duty to render assistance, in particular, the shipmaster. This study examines

12. Council of Europe, ‘A distress call for human rights: The widening gap in migrant protection in the Mediterranean’ (March 2021) 9–11.

13. *id.*

14. Bernard H Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (1997) 36 *ColumJTransnatlL* 399, 414.

15. See the dictum of Chief Justice Cockburn in *Scaramanga v Stamp*, where he emphasizes the humanitarian considerations underlying the duty to render assistance at sea: ‘[t]he impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequence which may result to a ship or cargo from the rendering of the needed aid’. See *Scaramanga v Stamp* (1880) 5 CPD 295, 304; see also Francesco Munari, ‘Search and Rescue at Sea: Do Challenges Require New Rules?’ in Aldo Chircop and others (eds), *Governance of Arctic Shipping: Rethinking Risk, Human Impacts and Regulation* (Springer 2020) 64–65.

16. For a detailed discussion of the development of the duty under treaty law and customary international law; see Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) Chapter 3.

the status of the contemporary international regime regulating the shipmaster's duty to render assistance against the backdrop of challenges posed by maritime migration. It commences by examining these challenges, with particular focus given to new complexities generated by the COVID-19 pandemic.

The study then provides an appraisal of the major international rules regulating the shipmaster's duty to render assistance. In this respect, it will make specific reference to the importance of defining the duty to render assistance and constitutive elements of the obligation such as 'rescue' and 'distress' in the light of current developments. While the study addresses primarily the law of the sea regime, applicable rules of human rights law and refugee law which may affect his¹⁷ obligation to assist are also considered. The study concludes by offering reflections on the efficacy of the current international regime regulating the duty to render assistance in the COVID-19 era. It will be argued that the legal and practical challenges described below may unfortunately place on limitations on this essential duty.

2. Challenges Facing the Shipmaster's Duty to Render Assistance in Migrant Rescue Operations

2.1 Safety and Security Ramifications

Migrant rescue operations are generally complex and sensitive operations which may take days or weeks to be completed. Depending on the type of vessel, a rescue of this nature may raise a myriad of safety and security

¹⁷. This study will focus primarily on the position of the shipmaster of a commercial vessel. When referring to the shipmaster, the masculine gender is largely utilised in order to be consistent with the phraseology used in international treaties. This approach is adopted to reflect the author intention's to be faithful to the treaty texts. No discrimination is intended.

concerns for the shipmaster. At the outset, the shipmaster must ensure safe and swift embarkation which does not endanger the well-being of the migrants or crew members.¹⁸ Commercial vessels are not configured to retrieve persons from much smaller boats or crafts.¹⁹ This may lead to operational risks and practical difficulties in transferring large groups of panicked and weak individuals, especially in perilous weather conditions.²⁰ The crew are rarely physically or psychologically trained to undertake rescue operations of this nature.²¹ The presence of rescuees may also expose the shipmaster and crew to infectious illnesses - a concern that has become more pronounced during the COVID-19 pandemic.²² The existence of viruses onboard may result in long quarantine periods for the ship, crew and rescuees. In this respect, the COVID-19 restrictions have already had significant impacts on seafarers who are unable to process crew changes.²³ As evidenced in the *Maersk Etienne* case, the presence of migrants onboard for a prolonged time could result in unrest amongst

18. See further Amaha Senu, 'Migration, Seafarers and the Humanitarian-Security-Economic Regimes Complex at Sea' in Lisa Otto (ed), *Global Challenges in Maritime Security: An Introduction* (Springer 2020) 84-86.

19. Record of the Views of the Inter-agency meeting with the Maritime Industry on Mixed Migration, held at IMO on 30 October 2017, para 1.3 <https://refugeesmigrants.un.org/sites/default/files/stocktaking_imo_arbour.pdf> accessed 2 April 2021.

20. ICS, *Large Scale Rescue Operations at Sea: Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons* (2nd edn, 2015) 7.

21. Inter-agency meeting with the Maritime Industry on Mixed Migration (n 19) para 1.4.

22. During the pandemic, the Armed Forces of Malta, reported that the vast majority of migrants who were rescued were found to be positive for COVID-19, therefore endangering the safety of the rescuing vessel; see 'Malta plans to quarantine migrants at sea as further 19 are COVID-19 positive' *The Times of Malta* (Birkirkara, 30 July 2020).

23. United Nations General Assembly, 'Report of the Secretary General on the Oceans and Law of the Sea' (9 September 2020) UN Doc A/75/340, paras 31-34; see also IMO, 'Crew Changes: A Humanitarian, safety and economic crisis' <<https://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx>> accessed 9 April 2021.

rescuees. The shipmaster and crew may face difficulties in maintaining order on the vessel. Rescuees could wander off to restricted areas of the ship and unintentionally or deliberately tamper with navigational systems or cause damage to the ship or its cargo. It is noteworthy that a number of commercial vessels that have undertaken rescue operations involving migrants have been embroiled in serious security incidents. The shipmaster and crew of the vessels navigating in the Mediterranean, such as the *Vos Thalassa* and the *El Hiblu 1*, have been confronted by violent migrants.²⁴ During the *MV Marina* rescue, which occurred at the height of the COVID-19 pandemic, the shipmaster reported that armed migrants threatened to endanger the safe navigation of the vessel.²⁵ Other security concerns include the risk that amongst the rescued migrants may be possible terrorists attempting to gain access to a State territory.²⁶

2.2 Human Rights and Refugee Rights Concerns

The shipmaster has a duty to maintain the safety and security of his ship whilst concomitantly protecting the human rights of his rescuees and crew in accordance with flag State laws. Shipmasters who have embarked persons in distress should treat them humanely, within the capabilities of his vessel.²⁷ This is often an arduous task for the shipmaster, particularly

24. For a discussion of legal and practical challenges surrounding the *Vos Thalassa* and *El Hiblu* incidents; see Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 157-161.

25. Gary Dixon, 'Situation critical': knife fight breaks out on boxship after migrant rescue' (TradeWinds, 6 May 2020); and Jacob Borg, 'Situation worsens on stranded cargo ship after migrants rescue' *The Times of Malta* (Birkirkara, 4 May 2020).

26. See Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) 17 JRS 50-56; and Todd Bensman, 'What Terrorist Migration Over European Borders Can Teach About American Border Security' Centre for Immigration Studies (November 2019) 4-13.

27. See further Section 4.

in cases where he has rescued hundreds of migrants in need of food, water and medical attention.²⁸ Furthermore, among the rescuees may be asylum-seekers who are entitled to international protection under refugee law.²⁹ The shipmaster thus has responsibilities to uphold fundamental principles of refugee law and prevent the disembarkation of migrants in a place where their lives may be in danger.³⁰ This is often challenging for the shipmaster given the refusal of States to accept migrants into their territories, particularly during the COVID-19 pandemic. Indeed States, such as Malaysia have reportedly refused the entry of Rohingya refugees and asylum-seekers arriving at their shores due to the risk of COVID-19 transmission.³¹ Shipmasters also face mounting pressures from government authorities to disembark rescuees in their State of departure, which may not be considered to be a place of safety.³²

2.3 Commercial Implications

The shipmaster is considered to be the representative of the shipowner and is required to implement the commercial objectives of the maritime voyage.³³ He will be conscious of the financial ramifications underlying

28. Richard L Kilpatrick Jr and Adam Smith, 'The International Legal Obligation to Rescue During Mass Migration at Sea: Navigating the Sovereign and Commercial Dimensions of a Mediterranean Crisis' (2016) 28 USF MLJ 141, 152.

29. See further Section 4.

30. Jean-Pierre Gauci, 'When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations', British Institute of Comparative and International Law (24 November 2024) 12.

31. Human Rights Council, 'Report on means to address the human rights impact of push-backs of migrants on land and at sea', (12 May 2021) A/HRC/47/30, para 75.

32. See further Section 4 below.

33. For an in-depth examination of the different costs associated with irregular migrant rescue operations; see Richard L Kilpatrick Jr, 'The "Refugee Clause" for Commercial Shipping Contracts: Why Allocation of Rescue Costs is Critical During Periods of Mass Migration at Sea' (2018) 46 GaJIntl&CompL 403, 410-412; and Gauci (n 30) 18-22.

a migrant rescue operation and the attendant risks and costs.³⁴ As will be discussed further below, COVID-19 has further increased the reluctance of States to accept migrants, which not only enhances the threat to ship safety, but also presents a high possibility where the vessel itself is in quarantine further pressuring the shipmaster from a commercial point of view.³⁵ Certain expenses may be covered by the vessel's insurance policy, depending on the type of insurance cover undertaken by the shipowner.³⁶ Consequently, insufficient cover may expose the shipowner to substantial financial losses, for example, if rendering assistance entails a loss of profit or depreciation. Most commercial vessels are insured by Protection and Indemnity (P&I) Clubs.³⁷ Whilst some of these Clubs do cover certain limited expenses relating to the rescue, such as extra fuel, wages or port charges, most do not cover costs resulting from the deviation or delay of the vessel which can run into thousands of dollars.³⁸ Delays are

34. Davies argues that 'in a perfect world, the commercial cost of assisting those in danger at sea would play no part in the shipmaster's decision about whether to obey the legal and moral duty to stop and help. Sadly, because the legal duty to assist can be ignored with relative impunity, the commercial implications are likely to play a significant role in practice'; see Martin Davies, 'Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea' (2003) 12 *PacRimL&PolyJ* 109, 111.

35. Alyssa McMurty, '5 large ships quarantined at Spanish ports' (4 May 2021) *Anadolu Agency* <<https://www.aa.com.tr/en/europe/5-large-ships-quarantined-at-spanish-ports/2229622>> accessed 3 April 2021.

36. Åsne K Aarstad, 'The Duty to Assist and its Disincentives: The Shipping Industry and the Mediterranean Migration Crisis' (2015) 20 *Mediterranean Politics* 413, 415.

37. Hazelwood and Semark describe a P&I Club as '...an association of commercial shipowners and charterers and other associated parties, which provides protection against a number of risks inherent in industrial ship operation'. The type of protection offered by P&I insurance differs from hull and machinery insurance which is aimed to safeguard shipowners against losses to his vessel. P&I insurance indemnifies a shipowner in relation to the discharge of legal liabilities he has incurred in the operation his vessel; see Steven J Hazelwood and David Semark, *P & I Clubs Law and Practice* (4th edn, OUP 2010).

38. UNHCR and Mixed Migration Centre, 'A Roadmap for Advocacy, Policy Development, and Programming: Protection in Mixed Movements along the Central and Western Mediterranean Routes 2021' (2021) 121.

frequently exacerbated by States' refusal to allow disembarkation and, at times, also induced by the migrants themselves as evidenced in the 2021 *Bulk Freedom* rescue.³⁹ It is also unclear which party is responsible for absorbing these expenses and whether this should be the shipowner or charter.⁴⁰ Insurers have advised that the allocation of costs will likely depend on the underlying shipping contracts.⁴¹ However, many of these agreements do not contain explicit clauses addressing which actors bear the costs of rescue delays.⁴²

3. The Shipmaster's Duty to Render Assistance in Migrant Rescue Operations: The Law of the Sea Regime

The shipmaster's duty to render assistance at sea was developed at the beginning of the last century in order to protect seafarers who were in distress largely due to collisions or shipwrecks.⁴³ The first international rules

39. On the 4 April 2021, *Bulk Freedom's* shipmaster rescued 14 Cuban refugees approximately 50 nautical miles away from Grand Cayman. The migrants had fled from the Islands a few days earlier. The shipmaster anchored off the coast of George Town, while members of the Coastguard boarded the vessel in order to transfer the rescuees ashore. The migrants however refused to leave the vessel, claiming that they would be mistreated by Cayman authorities. After a 4-day stand-off, the migrants voluntarily disembarked. See 'Cubans refuse to leave Tanker', Cayman News Service (6 April 2021) <<https://caymannewsservice.com/2021/04/cubans-returned-after-rescue-by-passing-boat/>> accessed 9 April 2021.

40. Kilpatrick (n 33) 412-434.

41. Attard and Kilpatrick (n 4).

42. *id.*

43. Wilbur Smith, 'The Duty to Render Assistance at Sea: Is it Effective or Adrift?' (1971) 2 *CalWIntLJ* 146; and Jeffrey Maltzman and Mona Ehrenreich, 'The Seafarer's Ancient Duty to Rescue and Modern Attempts to Regulate and Criminalise the Good Samaritan' (2015) 89 *TulLRev* 1267, 1270.

imposing an obligation to assist persons in distress can be found in maritime treaties such as the 1910 International Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea,⁴⁴ the 1910 International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels,⁴⁵ and the 1914 International Convention on the Safety of Life at Sea.⁴⁶ The definition of the duty to render assistance in these early conventions had great influence on the formulation of the obligation under contemporary international law, as reflected in Article 98 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).⁴⁷ The norms found in the Convention are supplemented by the 1974 International Convention for the Safety of Life at Sea (SOLAS),⁴⁸ and the 1979 International Convention on Maritime Search and Rescue (SARCon),⁴⁹ with Amendments to both Conventions designed to deal with the safety of migrants in distress.⁵⁰ The following sections examine the adequacy of the said law of the sea regime in the light of problems specific to migrant rescue operations.

44. (adopted 23 September 1910, entered into force 1 March 1913) UKTS 4.

45. (adopted 23 September 1910, entered into force 1 March 1913) UKTS 4.

46. (adopted 20 January 1914, not in force).

47. (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3. See further; Felicity Attard, 'The Contemporary Significance of Efforts to Codify the Duty to Render Assistance' (2017) 15 BMB 61; and Arthur A Severance, 'The Duty to Render Assistance in the Satellite Age' (2006) 26 (2) CalWIntlJ 377, 378-383.

48. (adopted November 1974, entered into force 1 May 1991) 1184 UNTS 3.

49. (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97.

50. IMO Maritime Safety Committee, 'Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended' (20 May 2004) Res MSC.153 (78); and IMO Maritime Safety Committee, 'Adoption of the International Convention on Maritime Search and Rescue, 1979, as amended' (20 May 2004) Res MSC.155 (78).

3.1 The Nature and Scope of the Duty to Render Assistance under Article 98 of UNCLOS

The principle rules on the rendering assistance are found in Article 98 of UNCLOS,⁵¹ which is widely recognised as the cornerstone of the international regime regulating rescue at sea:⁵²

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
2. 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 cooperate with neighbouring States for this purpose.

51. The Convention has been ratified by the majority of the international community and presently has 168 State Parties; see United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 10 April 2021.

52. Oxman (n 14) 414-415; Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 IJRL 329, 331; Irini Papanicopolulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (2016) 98(2) IRR 491, 493; Raul Pedrozo, 'Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: A U.S. Perspective' (2018) 94 IntLS 102, 106; Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010) 137-138.

The duty to render assistance at sea has been described as an obligation of broad application that extends to all areas of the ocean space.⁵³ Article 98 imposes two distinct but complementary obligations on States aimed to protect persons in distress at sea. The first obligation, incumbent on the flag State, is to ensure that the shipmaster renders assistance and rescue persons in distress.

As noted by Papastavridis, this duty translates to an obligation of conduct which should be executed through the enactment of effective national legislation mandating the shipmaster to assist as well as vigilant enforcement of said laws.⁵⁴

Indeed, the practice of major maritime powers and large shipping registries demonstrates that the UNCLOS rules regulating the shipmaster's duty have been implemented and enforced through municipal laws.⁵⁵ The flag State duty requiring the shipmaster to render assistance

53. Satya Nanda and Shabtai Rosenen (eds), *The United Nations Convention on the Law of the Sea: A Commentary Volume III* (Martinus Nijhoff 1995) 173; Douglas Guilfoyle, 'Part VII High Seas' in Alexander Prölss (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, Hart, Nomos 2017) 726.

54. See Efthymios Papastavridis, 'Is There a Right to be Rescued? A Skeptical View' (2014) *QuestIntL* 17, 21-22; and Efthymios Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility' in Thomas Gammeltoft-Hansen and Jen Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 173. See also Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 262-266.

55. Some examples include Greek Code of Public Maritime Law, Legislative Decree 187/1973, Article 120; Malta Merchant Shipping Act, Chapter 234 of the Laws of Malta, Part V, Article 306(1), Liberian Maritime Law, Title 21 of the Liberian Code of Laws of 1956 (rlm-107 Series 2018), Chapter 10, Section 296(10); Maritime Act, Title 47 of the Marshall Islands Revised Code of Laws of 1990 (MI-07 October 2016), Chapter 8, Part II, Section 811(j), and the 46 United States Code § 2304 (2006) (a)(1). For a more detailed review of State practice which reflects the implementation and enforcement of the shipmaster's duty to render assistance; see Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 92-110.

is supplemented by the coastal State obligation to organise and undertake effective search and rescue services.⁵⁶

The duty to render assistance covers all human life at sea. UNCLOS requires that the shipmaster's duty be exercised to 'any person' in danger of being lost and to all 'persons' in distress. These requirements ensure that the duty is discharged without discrimination, the obligation therefore extends from seafarers to irregular migrants in need of assistance at sea.⁵⁷ Whilst UNCLOS requires assistance to be rendered to all persons, what constitutes such an act is not specified under the Convention. However, the text of Article 98(1) appears to differentiate between assistance and rescue, predicating the shipmaster's obligation to rescue for those in distress at sea, while allowing the lesser form of intervention (that of assistance) in cases of persons 'in danger of being lost'.⁵⁸ The latter could apply in situations such as where a migrant vessel has a malfunctioning engine or is lacking navigational equipment. In such cases, 'assistance' may constitute the provision of navigational aids, repairing the engine,

56. See further Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edn, Hart 2016) 171; Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security Through the Creation of a Cooperative Framework* (Martinus Nijhoff Publishers 2010) 101-103; and Francesco De Vittor and Massimo Starita, 'Distributing Responsibility Between Shipmasters and Different States involved in SAR Disasters' (2019) 28 *ItYBIL* 77, 81-82.

57. This view is supported by Rothwell and Stephens who argue that: '[t]he requirement in Article 98 to rescue 'any person' makes clear that there should be no distinction exercised in the rescue of persons at sea. This is important given some variable practice which has risen with respect to the rescue of asylum seekers'. See Rothwell and Stephens (n 56) 171.

58. This distinction is recognised by various scholars; see e.g. Frederick J Kenney Jr and Vasilios Tasikas, 'The *Tampa* Incident: IMO Responses and Perspectives on the Treatment of Persons Rescued at Sea' (2003) 12 *Pacific Rim L&P J* 144, 148-153; Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 449. For an opposing view; see Roland Bank, 'Introduction to Article 11' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 822.

escorting the vessel for part of its journey or towing it to safety.⁵⁹ Depending on the circumstances of the case, the provision of assistance may not always require boarding the migrants onto the assisting ship.⁶⁰ This may be significant for the shipmaster who wishes to avoid potential safety and security risks associated with the embarkation of migrants.⁶¹ Embarkation will be required if the rendering of assistance entails rescue. In such cases, the obligation under Article 98(1)(b) requires the shipmaster to act proactively in two ways: a) on receiving relevant information from a coastal State authority, take active steps to alter the vessel's course to retrieve migrants in distress; and b) to render the same assistance if, *en route*, he happens to locate migrants in distress.

The shipmaster's duty to render assistance also applies in the case of collisions. Given that frequent channels of migration traverse major international sea lanes, the risk of a collision between merchant vessels and migrant boat is a growing concern for shipmasters. Vulnerable migrants are generally transported in overcrowded and unsafe vessels, not equipped with proper engines or navigational devices.⁶² Boats are typically small unregistered rubber crafts which are difficult to detect or monitor.⁶³ The presence of unseaworthy vessels may pose a threat to the

59. IMO Maritime Safety Committee, 'Outcome of Informal Meeting on "Safety Measures and Procedures for the Treatment of Persons Rescued at Sea"' MSC 76/22/11 (27 September 2002) para 5.2.

60. For a further discussion on this point; see Marcello Di Filippo, 'Irregular Migration across the Mediterranean Sea: Problematic Issues Concerning The International Rules On Safeguard Of Life At Sea' (2013) 01 JIntLIntRel 53, 56; and Kenney and Tasikas (n 58) 151-152.

61. See Section 2.1.

62. United Nations Office on Drugs and Crime (UNODC), *Issue Paper: The Smuggling of Migrants by Sea* (UNODC 2011) 27-28.

63. See European Commission, Study on the international law instruments in relation to illegal immigration by sea, Brussels, 15 May 2007, SEC (2007) 691; United Nations Security Council, 'Report of the Secretary-General: Implementation of resolution 2437(2018)' (5 September 2019) S/2019/711, para 8.

safe navigation of other vessels and have the potential to cause serious maritime casualties. In the *King Jacob* rescue, the shipmaster of the cargo vessel proceeded to rescue over 800 migrants in distress in the Mediterranean.⁶⁴ On approaching the migrant vessel, the latter steered erratically and rammed into the *King Jacob*, forcing the migrants to shift to one side of their vessel causing it to capsize. In the wake of the incident, the ICS Secretary General stated that the ‘...tragic events of the weekend seem to have shown, merchant ships are really not best equipped to deal with such large-scale operations involving hundreds of people’.⁶⁵

It is submitted that the shipmaster’s duty to render assistance, although wide in scope, is not absolute. The general duty under Article 98(1) is qualified in so far as rendering assistance may cause ‘...serious danger to the ship, the crew or passengers’ and ‘...in so far as such action may reasonably be expected of him’. Accordingly, the duty may not sustain in certain circumstances, for instance, if a migrant rescue operation proves to be unfeasible or may compromise the safety of the vessel, passengers or crew.

A question may arise as to how to determine whether these limitations exist. In this author’s view, a major shortcoming of Article 98 is the absence of comprehensive rules to gauge the seriousness of the danger. This is particularly relevant in the context of migrant rescue operations where shipmasters are continually required to balance their duties towards persons in distress with the safety and security of their ship and crew. In the event of conflict between these duties, the shipmaster is expected to rely on his professional judgment in the light of the circum-

64. Julian Miglierini, ‘Migrant Tragedy: Anatomy of a Shipwreck’ *BBC News* (London, 24 May 2016).

65. European Community of Shipowners’ Association, ‘Shipping Industry Calls on EU Leaders to be Decisive and Immediately Increase Mediterranean Search and Rescue Resources’ (23 April 2015) < <https://www.ecsa.eu/news/shipping-industry-calls-eu-leaders-be-decisive-and-immediately-increase-mediterranean-search> > accessed 15 April 2021.

stances of the rescue, for example, the type and size of his ship and the number of individuals who need to be embarked.⁶⁶

While Article 98(1) provides the basis of the international regime regulating the shipmaster's duty to render assistance, the provision *per se* is not sufficient to deal with the contemporary problems associated with migrant rescue operations, particularly in the COVID-19 era. The text offers only general guidance to shipmasters. However, the UNCLOS formulation of the duty fails to elaborate on elements of the obligation which affect its implementation, such as, what constitutes being 'in distress'. This lack of specificity could lead to disagreement over the extent of the obligation to proceed with all possible speed to the rescue of persons.⁶⁷ Furthermore, the Convention does not appear to provide guidance to the shipmaster in cases of being unable to provide assistance. There may be circumstances which do not permit the shipmaster to embark large groups of migrants onboard his vessel. In such cases, it may be reasonable to expect to shipmaster to provide all possible assistance such supplying fuel and provisions or immediately requesting coastal State authorities or nearby vessels to assist. Significantly, Article 98(1) of UNCLOS also fails to provide any direction to the shipmaster as to his responsibilities towards rescues once assistance has been rendered. There is no elaboration, for example, on whether the shipmaster's obligation rescue also includes disembarkation.⁶⁸

The absence of detailed UNCLOS provisions addressing the rendering of assistance may not be surprising when one considers the drafting history of Article 98. As noted above, the first rules regulating the duty

66. See Myron H Nordquist and others (eds), *The United Nations Convention on the Law of the Sea 1982, Volume III: A Commentary* (Martinus Nijhoff Publishers 1995) 175; Guilfoyle (n 53) 725-726.

67. See Section 3.3.

68. Barbara Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception' (2006) 30 *FordhamIntlLJ* 75, 97.

were drafted to deal with seafarers in distress due to collisions or shipwrecks, where seafarers could easily be repatriated to their home State or next port of call with minimal difficulties.⁶⁹ This is no longer the case today as shipmasters face more complex rescues involving greater numbers of asylum-seekers and refugees.⁷⁰ The vagueness of the relevant UNCLOS provisions and the *lacunae* referred to above, impose upon the shipmaster great responsibilities. In this regard, it may be useful to refer to other international instruments, which could offer further guidance on the interpretation of the duty to render assistance at sea.

3.2 IMO Rules on the Duty to Render Assistance: SOLAS and SARCon

The formulation of the duty to render assistance at sea under UNCLOS has been expanded in other international instruments dealing with the safety of life at sea, in particular, those falling under the auspices of the IMO such as the SOLAS and SARCon. SOLAS is the centrepiece instrument regulating the safety of merchant shipping. The Convention covers matters ranging from ship construction and equipment to ship security;⁷¹ particularly important is Chapter V of the Annex to the Convention, dealing with the safety of navigation, wherein the duty to render assistance is elaborated upon. The SARCon establishes a comprehensive international system covering SAR operations.⁷² The Convention was

69. Miltner notes that: '[w]ith the advent of sea-borne refugees, the rescue framework's implied disembarkation practice was turned on its head. Boat people, unlike those formerly encountered in distress at sea, did not enjoy the protection of their State, and return to their State of origin was not a viable option'. See Miltner (n 68) 89; see also Louis B Sohn and others (eds), *Cases and Materials on the Law of the Sea* (2nd edn, Brill Nijhoff 2014) 107.

70. Mallia, *Migrant Smuggling by Sea* (n 56) 97.

71. SOLAS, Annex, Chapter 11-1 and Chapter X1-2 respectively.

72. SARCon, Preamble.

adopted as a response to the emergence of the first large-scale migratory flows by sea in South-East Asia during 1970s Indochinese crisis.⁷³ During this period, many States in the region refused to permit disembarkation of migrants fleeing Vietnam, which discouraged shipmasters from undertaking rescues.⁷⁴ The substantial loss of life at sea led the international community to develop a more uniform approach to SAR activities based on international cooperation.⁷⁵ Both SOLAS and SARCon have received general State acceptance.⁷⁶

The shipmaster's duty to render assistance required under Article 98(1) of UNCLOS is explained further in Regulation 33-1 of Chapter V of the Annex to the SOLAS:

The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons 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. This obligation to provide assistance applies regardless of the nationality or status of such person or the circumstances in which they are found. 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 logbook the reason for failing to proceed to the assistance of the persons in distress...

73. United Nations General Assembly, 'Report of the Secretary-General on Oceans and the Law of the Sea' (7 November 1979) UN Doc A/34/627, para 22.

74. Seline Trevisanut, 'Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Border Management' in Loïc Azoulay, Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (OUP 2014) 129.

75. *id.*

76. SOLAS has 167 State parties which represent 98% of world tonnage, while SARCon is ratified by 113 parties which account for over 80% of global tonnage. See IMO, 'Status of Treaties' <[https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreatiesByCountry%20\(2\).pdf](https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreatiesByCountry%20(2).pdf)> accessed 1 May 2021.

The duty to render assistance appears to be couched in similar terms under both UNCLOS and SOLAS. The latter affirms that the obligation to assist applies universally to persons in distress, regardless of ‘the nationality or status of such person or the circumstances in which they are found’. The duty to render assistance is also qualified under SOLAS, where its implementation is contingent upon whether the shipmaster is ‘...in a position to be able to provide assistance’ and whether he considers reasonable and necessary to do so. The harmonization of the UNCLOS and SOLAS rules governing the duty to render assistance is useful and avoids the potential conflict over the extent of the shipmaster’s responsibilities under different treaty regimes. Nevertheless, unlike the UNCLOS, the duty to render assistance is addressed to the shipmaster under SOLAS which increases the burden of responsibility, making him directly accountable. The duty to render assistance is also given more operational detail under SOLAS.⁷⁷ In particular, the Convention gives direction to the shipmaster that finds him unable to render assistance and imposes an additional obligation to enter into the vessel’s log-book, the reasons for failing to assist.⁷⁸ This supplementary requirement aims to ensure that shipmasters are kept accountable for their actions and may assist in avoiding cases of failure to render assistance for frivolous reasons.⁷⁹ However, this requirement may not, in today’s circumstances, prove adequate to ensure that shipmasters honour their duties. Situations where the shipmaster decides that in the ‘special circumstances of the case’, it would be unreasonable or unnecessary to render assistance, are largely unregulated. As discussed above,⁸⁰ the limited imposition also applies under UNCLOS. Nevertheless, it may be argued that in the spirit of the duty, in the event that the shipmaster is

77. Gallagher and David (n 58) 447.

78. SOLAS, Annex, Chapter V, Regulation 33-1.

79. Barnes (n 52) 138.

80. See Section 3.1.

unable to assist or rescue in the case of the exceptions allowed by law, it would be reasonable to expect him to assist in any possible manner until the appropriate assistance can be provided.⁸¹

The duty to render assistance is covered by various provisions of the SARCon,⁸² most notably Chapter 2.1.10:

Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

The general duty to render assistance under SARCon engages the responsibility of both flag and coastal/SAR States. Each of these States should ensure that the shipmaster rescues persons in distress and provide any necessary assistance in order for him to execute the duty.⁸³ However, it is generally accepted that coordination of the rescue takes place under the leadership of the SAR State.⁸⁴ This is the State which is required to assume responsibility for a delimited Search and Rescue Region (SRRs), wherein SAR services should be provided.⁸⁵ The SRR is not however classified as a jurisdictional zone.⁸⁶ It is a designated 'functional zone'

81. For e.g. assistance provided by the relevant the coastal or SAR State authorities or other private ships close to the location of the distressed vessel.

82. See for e.g. SARCon, Annex, Chapter 2.1.1 and Chapter 3.1.9.

83. See further Rick Button, 'International Law and Search and Rescue' (2017) 70 *Naval-WarCollRev* 26, 31-37.

84. Patricia Mallia (Vella de Fremaux) and Felicity Attard, 'Dehumanising the Human Element of Maritime Migrant Smuggling: A Discussion on the Application of Human Rights in the Maritime Sphere' 17 *Benedict's Maritime Bulletin* 1, 8.

85. SARCon, Annex, Chapter 2.1.3.

86. See SARCon, Article II on other treaties and interpretation which provides that:

(1) Nothing in the Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to resolution 2750 (XXV) of the General Assembly of the United Nations' nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

(2) No provision of the Convention shall be construed as prejudicing obligations or rights of vessels provided for in other international instruments.

where States commit themselves to provide effective SAR services and to assume cooperation in and coordination of rescue operations. The centralized coordination of SAR services occurs through the establishment and operation of rescue co-ordination centres (RCCs),⁸⁷ which should guide the shipmaster before and throughout the rescue.⁸⁸ As will be discussed below, ultimately, the shipmaster's success in executing the duty to render assistance depends on the SAR State's fulfillment of its own SAR obligations, especially concerning disembarkation.⁸⁹ The subsequent sections will discuss how SARCon has also attempted to further clarify elements that formulate the duty to render assistance under UNCLOS and SOLAS, in particular the notions of distress and rescue.

3.3 The Notion of Distress at Sea and the Implementation of the Obligation to Rescue

The unprecedented scale of migrant rescue operations in recent years has given rise to renewed discourse over the scope and content of SAR obligations. In this respect, particularly contentious has been the interpretation and meaning of the terms 'distress' and 'rescue'.⁹⁰ As noted above, there exists an intricate relationship between the two, as the shipmaster's obligation to rescue is brought into effect once a state of distress exists.⁹¹ The first internationally recognised definition of maritime rescue was introduced as part of the 1998 amendments to SAR-

87. SARCon, Annex, Chapter 2.3.

88. See further Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 68-71.

89. See De Vittor and Starita (n 56) 82-87. See also Section 3.4.

90. See further Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) 17 JRS 50; and Maarten Den Heijer, *Europe and Extraterritorial Migration Control* (Hart 2012) 244-245.

91. See Section 3.1.

Con.⁹² Under the Convention, rescue is described as ‘an operation to retrieve persons in distress, provide for their initial medical or other needs and deliver them to a place of safety’.⁹³ Accordingly, in order for a shipmaster to fulfil his rescue obligation, he must attend to the basic needs of the persons he has saved and also deliver them to a place of safety. While not explicitly provided for in the definition of rescue, for such delivery to be effective, it must include disembarkation.⁹⁴ This position recently affirmed by Italy’s highest Court in a decision concerning the actions of the shipmaster of the NGO operated *Sea-Watch 3*, who entered the Lampedusa port to disembark rescued migrants without authorisation.⁹⁵ The Court of Cassation found that the obligation to rescue includes a concomitant obligation to disembark in a place of safety, and that the shipmaster could not be held criminally responsible for attempting to disembarking migrants who had undergone intense physical and psychological distress after weeks at sea.⁹⁶ It may therefore be argued that the fulfilment of the rescue operation does not depend exclusively on the actions of the shipmaster. The definition of rescue gives rise to obligations

92. Amendments to the International Convention on maritime search and rescue of 27 April 1979 (concluded London, 18 May 1998) <<http://www.admiraltylawguide.com/conven/amendsearch1998.html>> accessed 15 May 2021.

93. SARCon, Annex, Chapter 1.3.2.

94. Killian O’Brien, ‘Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem’ (2010) 3 GoJIL 715, 724; Papanicolopulu, ‘The Duty to Rescue at Sea, in Peacetime and in War: A General Overview’ (n 94) 499; and Mallia, *Migrant Smuggling by Sea* (n 56) 97; De Vittor and Starita (n 56) 81.

95. For an overview of the facts of the case, see: Zara Freudenberg and others, ‘The Island of Hope in a Sea of Misery - The Italian Court of Cassation’s Unequivocal Stance on the Right to Disembark’ Verfassungsblog (10 March 2020) <<https://verfassungsblog.de/the-island-of-hope-in-a-sea-of-misery/>> 16 May 2021.

96. See Sentenza sul ricorso proposto dal Procuratore della Repubblica presso il Tribunale di Agrigento nel procedimento nei confronti di Rackete Carola, nata a Preetz Kreis Plön 1’08/05/198 <<https://www.giurisprudenzapenale.com/wp-content/uploads/2020/02/Cass-6626-2020.pdf>> accessed 17 May 2021.

for SAR States, which should provide the shipmaster with the necessary support to carry out the disembarkation. To this end, States must ‘make the necessary arrangements in cooperation with other RCCs to identify the most appropriate place(s) for disembarking persons found to be in distress’.⁹⁷

As pertinently observed by Moreno-Lax, ‘since rescue is contingent on ‘distress’, the definition of that term is central to the SAR response’.⁹⁸ A prudent interpretation of this concept is not merely an academic exercise, it has significant impacts on the implementation of the duty in practice, which may in turn affect the protection of life at sea. Distress is defined in the SARCon 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’.⁹⁹ One may question what the threshold for a rescue operation is to be made legally obligatory aside from practical necessities. According to the SAR definition, a distress situation would arise if there is a real and present danger to the vessel or migrants on board. There is little doubt that a migrant vessel on the brink of sinking would constitute a situation of distress. However, signs of distress may not always be so evident. A migrant vessel, which is proceeding normally, may *prima facie* appear not to be in distress, however this may still be the case, if – for example - migrants on board require urgent medical assistance. It would be very difficult for the shipmaster to be aware of such situations, unless he has made contact with persons on board, which is not always possible. It may be argued that the SARCon definition of distress is broad enough to cater for situations where there is

97. SARCon, Annex, Chapter 3.1.6.4.

98. Violeta Moreno-Lax, ‘The Interdiction of Asylum Seekers at Sea: Law and (Mal)practice in Europe and Australia’ (Kaldor Centre for International Refugee Law, May 2017) Policy Brief 7.

99. SARCon, Annex, Chapter 1.3.13.

a serious likelihood of danger, even if it has not yet fully materialized.¹⁰⁰ Accordingly, distress is likely to be presumed in cases where migrants are travelling in overcrowded, unseaworthy vessels which have do not have proper equipment to navigate perilous conditions out at sea.¹⁰¹

It is submitted that the wide SARCon definition of distress allows the shipmaster to assess each case in the light of the resources available to him and after taking into account the seaworthiness of the migrant vessel and/or the condition of the persons on board. However, considering that these types of rescue operations are rarely straightforward, in practice, it may not always be possible for the shipmaster to make such a satisfactory assessment out at sea. He will often have to rely on information he has received from SAR State authorities. In this respect, another problematic issue is the varying interpretations of distress in State practice.¹⁰² Certain States such as Italy consider all unseaworthy migrant vessels to be *ipso facto* in distress.¹⁰³ Drawing strictly from the SARCon definition, Malta considers distress to arise if there is an immediate danger of loss of life and where failure to intervene in the most expeditious manner possible would result in injury or death.¹⁰⁴ Greek officials have adopted a high

100. Moreno Lax, 'The Interdiction of Asylum Seekers at Sea' (n 98) 7.

101. Bank (n 58) 822; Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of States* (Hart Publishing 2013) 297; Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member State Obligations Accruing at Sea' (2011) 23 IJRL 174, 195.

102. See Moreno Lax, 'The Interdiction of Asylum Seekers at Sea' (n 98) 7; Matteo Tondini, 'The Legality of Intercepting Boat People Under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the Hirsi Case' (2012) 18 JIML 59, 62; and Gallagher and David (n 58) 459.

103. Sergio Carrera and others, *Policing Humanitarianism: EU Policies against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 104.

104. Information obtained from an interview with a former Lieutenant Colonel of Maritime and Air Plans Operations, AFM (University of Malta, Msida, 15 February 2019).

threshold and consider distress to be dependent on a call for assistance or ‘immediate risk of sinking’.¹⁰⁵ There is a fear that a very restrictive interpretation of distress may obstruct States from effectively responding to potential rescue operations in order to avoid consequent responsibilities discussed hereunder.¹⁰⁶ These concerns have become more acute in the COVID-19 era, where the unprecedented challenges posed by the pandemic have resulted in a depletion of SAR services, as national resources were focused on measures to contain the virus.¹⁰⁷

Nevertheless, this author argues for an expansive interpretation of distress in light of the object and purpose of SARCon which is to ensure effective rescue services to persons in distress. The shipmaster should implement in good faith his obligations under international law and adopt a precautionary approach to potential distress cases to prevent loss of life. This is even more necessary in cases where the operation requires the shipmaster to attend to an unseaworthy vessel laden with migrants, where generally the line between difficulties and distress at sea is undetectable in the swiftness of its development.

3.4 Contemporary Legal Response Strategies to the Duty to Render Assistance in Migrant Rescue Operations: 2004 Amendments to SOLAS and SARCon

A turning point in the development of the law on the rendering of assistance at sea was the controversial migrant rescue operation conducted

105. Carrera and others (n 58) 105.

106. See Section 4.

107. Office of the United Nations High Commissioner for Human Rights, “Lethal Disregard” Search and rescue and the protection of migrants in the central Mediterranean Sea’ (May 2021) 10 <<https://www.ohchr.org/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf>> accessed 26 June 2021.

by the Norwegian-flagged *MV Tampa*.¹⁰⁸ The rescue brought into focus the challenges of the shipmaster when implementing the duty to render assistance. On 26 August 2001, the container vessel's shipmaster saved over 400 migrants from a sinking ferry boat in the Indian Ocean and attempted to disembark at the closest port in Christmas Island.¹⁰⁹ The Australian authorities refused entry into port and the *MV Tampa* remained stranded for eight days, while States in the region agreed on a relocation process for the migrants.¹¹⁰ This incident had a catalytic role in the development of legal response strategies to enhance the implementation of the duty, particularly in cases of irregular maritime migration.¹¹¹ These efforts are reflected in the adoption of the 2004 Amendments to the SOLAS and SARCon, and supplementing IMO Guidelines on the Treatment of Persons Rescued at Sea.¹¹²

The primary aim of the 2004 Amendments was to strengthen cooperation between States to support shipmasters in their efforts to render assistance.¹¹³ The Amendments require Parties to coordinate and cooperate to

108. For a historical and legal analysis of the case; see Jessica E Tauman, 'Rescued at Sea, But Nowhere to Go: The Cloudy Legal Waters of the *Tampa* Crisis' (2002) 11 *PacRimL&PolyJ* 478; Rolf E Fife, 'The Duty to Render Assistance at Sea: Some Reflections after *Tampa*' in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff Publishers 2003); Erik Røsæg, 'Refugees as Rescues – the *Tampa* Problem' (2002) 295 *SIMPLY* 43; Kenney and Tasikas (n 58) 144.

109. Fife (n 108) 472.

110. Tullio Scovazzi, 'The Particular Problems of Migrants and Asylum Seekers Arriving by Sea' in Laura Westra, Sarvinder Juss, and Tullio Scovazzi (eds), *Towards a Refugee Oriented Right of Asylum* (Routledge 2016) 202-203.

111. IMO Assembly, 'Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea' (29 November 2001) Res A.920(22).

112. IMO Maritime Safety Committee, 'Guidelines on the Treatment of Persons Rescued at Sea' (20 May 2004) Res MSC.167 (78) (2004 IMO Guidelines on the Treatment of Persons Rescued at Sea).

113. Daniel Ghezelbash and others, 'Securitization of Search and Rescue at Sea: The Response to Board Migration in the Mediterranean and Offshore Australia' (2018) 67 *ICLQ* 315, 322.

ensure that shipmasters providing assistance are not burdened with unnecessary deviations and consequent delay.¹¹⁴ A major obligation is imposed on the State responsible for the SRR where assistance is rendered. In these cases, the SAR State has a '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' as soon as reasonably practicable.¹¹⁵ The 2004 Amendments do not, however clearly specify where the ultimate responsibility for disembarkation lies. State practice is mainly divided into two groups on the obligation to allow disembarkation. The first view holds that the 2004 Amendments impose a 'residual obligation' on the SAR State to allow disembarkation in its own territory, after all meaningful efforts to find a place of safety elsewhere have failed.¹¹⁶ The second view finds this interpretation to be inconsistent with general international law and maintains that it is the State which offers closest safe port from the location of the rescue that must accept disembarkation.¹¹⁷ It should also be noted that not all States have accepted the 2004 Amendments, for example, Malta has persistently objected to them.¹¹⁸ Malta's fol-

114. SOLAS, Annex, Chapter V, Reg 33-1-1 and SARCon, Annex, Chapter 3.1.9.

115. *id.*

116. This interpretation is supported by non-binding IMO documentation; see IMO Facilitation Committee, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea' (22 January 2009) FAL 3/Circ.194; see also Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Co-operation or Conflict?' (2010) 25 *The International Journal of Marine and Coastal Law* 523, 530; and Jasper van Berckel Smith, 'Taking Onboard the Issue of Disembarkation: The Mediterranean Need for Responsibility-Sharing after the Malta Declaration' (2020) 22 *EJIML* 493, 506-507.

117. See further Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 81-83.

118. IMO, 'Status of IMO Treaties – Comprehensive Information on the Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions' <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf>> accessed 1 June 2021; and IMO Facilitation Committee, 'Report of the Facilitation Committee on its Thirty-fifth Session' (19 March 2009) FAL 35/17, para 6.56 and anx 6.

lows the second view and considers that it is the State which can offer the closest port of safety that should be responsible for accepting the disembarkation.¹¹⁹ In a typical rescue scenario within the Mediterranean, distress situations often occur in Malta's SRR, but much closer to an Italian port of Lampedusa.¹²⁰ In such cases, it would make little humanitarian sense to delay disembarkation and have the vessel travel a longer distance to Malta with vulnerable persons on board, instead of a much closer port of safety in Italy. A shorter voyage protects not only the migrants on board but also the security of the vessel, shipmaster and crew. However, most States, including Italy, follow the first view.¹²¹ These opposing positions have often tested the good neighbourliness and friendly relations of States, particularly in the Mediterranean.¹²²

The legal SAR regimes discussed above,¹²³ require coastal/SAR States to support the shipmaster by identifying the most appropriate place for disembarkation and facilitating the completion of the rescue. As posited

119. Department of Information Malta, 'Another Amnesty International Report Riddled with Inaccuracies, Misinformation and Glaring Omissions', Press Release (28 May 2010) <<https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2010/05/28/PR0985.asp>> accessed 1 June 2021.

120. Enkelejda Koka and Denard Veshi, 'Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation' (2019) 21 EJML 26, 42-43.

121. Patricia Mallia, 'The Challenges of Irregular Maritime Migration' (2013) No. 4 Jean Monnet Occasional Papers No. 4/2013, 5, 11.

122. For examples of disputes over SAR responsibilities between Italy and Malta; see the *MV Pinar E* case described in Barnes (n 52) 142; and the *Aquarius* incident discussed in Melanie Fink and Kristof Gombeer, 'The *Aquarius* Incident: Navigating the Turbulent Waters of International Law', *EJIL:Talk!* (14 June 2018) <<https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/>> accessed 5 June 2021. See also Amnesty International Public Statement, 'Italy/Malta: Obligation to safeguard lives and safety of migrants and asylum seekers EUR 30/007/2009' (7 May 2009) <<https://www.amnesty.org/download/Documents/48000/eur300072009en.pdf>> accessed 5 June 2021.

123. See Section 3.

by Scovazzi, ‘...it is sufficiently clear that it is not for the master of the assisting ship alone to decide where survivors shall be disembarked’.¹²⁴ Unfortunately, practice has shown that State assistance in this respect is not always forthcoming. Apart from security and health risks associated with the entry of large numbers of migrants into their territories, States are concerned with having to undertake potentially lengthy and costly asylum processing procedures. As observed by Coppens and Somers, these factors have contributed greatly to a general reluctance of States to allow disembarkation ‘unless they receive financial or readmission guarantees’.¹²⁵ The unwillingness of States to offer a place for disembarkation has been especially apparent in the outbreak of the COVID-19 epidemic. Shipmasters have faced increased difficulties in locating a safe place for disembarkation as a result of port closures and other restrictions imposed in response to the global health crisis.¹²⁶

While the IMO has contributed greatly to improving the international regime on the duty to render assistance, the extent of the State responsibility to allow disembarkation remains nebulous. The absence of clearly defined legal obligations requiring States to accept disembarkation seems, at times, to be frustrating the effectiveness of the international SAR regime. The repercussions are often experienced by shipmasters who continue to face the pressures described above,¹²⁷ when called to save lives at sea. It appears that while the shipmaster is required to proceed with all possible speed to the rescue distressed persons, not all States are prepared to shoulder responsibility to release him of his obligation without ‘minimum further deviation to his voyage’.¹²⁸

124. Scovazzi (n 110) 198.

125. Jasmine Coppens and Eduard Somers, ‘Towards New Rules on Disembarkation of Persons Rescued at Sea?’ (2010) 25 *IJMCL* 377.

126. Gauci (n 30) 6.

127. See Section 2.

128. SOLAS, Annex, Chapter V, Reg 33-1-1 and SARCon, Annex, Chapter 3.1.9.

4. The Shipmaster's Duty to Render Assistance in Migrant Rescue Operations: Considerations under Human Rights Law and Refugee Law Regimes

As noted above, the shipmaster's duty to render assistance was originally formulated to cater for seafarers in distress from shipwrecks or collisions.¹²⁹ Today, it forms the foundation of a body of law designed to protect the rights of distressed migrants at sea. In recent years, human and refugee rights considerations in the treatment of migrants in rescue operations have come to the forefront.¹³⁰ In compliance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties,¹³¹ a holistic approach to SAR operations, obliges that in interpreting and applying their law of the sea obligations, States must also consider relevant humanitarian obligations. This section examines the interaction between the shipmaster's duty to assist and relevant State obligations under human rights law and refugee law in migrant rescue operations.

129. See Section 3.1.

130. For notable works on the subject see; Efthymios Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold"' (2020) 21 GLJ 417; Irini Papanicolopulu, *International Law and the Protection of People at Sea* (OUP 2018); Vassilis P Tzevelekos and Elena Katselli Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) 86 ActScandJurisGent 427, 427–469; Lisa-Marie Komp, 'The Duty to Assist Persons in Distress at Sea: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach – Integrating Maritime Security with Human Rights* (Brill Nijhoff 2016); and Stefan Kirchner, Katarzyna Geler-Noch, and Vanessa Frese, 'Coastal State Obligations in the Context of Refugees at Sea Under the European Convention on Human Rights' (2015) 20 Ocean&CoastalLJ 57.

131. (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Article 31(3)(c) provides that in interpreting treaties, States shall take into account '... any relevant rules of international law applicable in the relations between the parties'.

It is generally recognised that States have human rights obligations towards individuals falling under their jurisdiction or effective control, whether on land or at sea.¹³² The vast majority of migrant rescue operations are undertaken on the high seas where the principle of flag State jurisdiction applies.¹³³ The flag State thus owes human rights obligations in respect of all persons on board their vessels, including rescuees.¹³⁴ The shipmaster shoulders a particularly important responsibility in this context and acts as the vector in fulfilling these obligations.

Various human rights may be adversely affected in the context of a migrant rescue operation, most notably the right to life and the protection from torture, inhuman or degrading treatment or punishment.¹³⁵ The protection of said rights may be all the more necessary in cases of the rescue of migrants who are in distress, and often malnourished, dehydrated or requiring urgent medical attention. When the shipmaster is faced with a

132. UNHRCOM, ‘General Comment no 31 [80]’ in ‘The nature of the general legal obligation imposed on States Parties to the Covenant’ (26 May 2004) CCPR/C/21/Rev 1/Add 13, para 10; see also Irini Papanicopolulu, ‘Human Rights and the Law of the Sea’ in David Joseph Attard (ed), *The IMLI Manual on International Maritime Law Volume 1: The Law of the Sea* (OUP 2014) 518-522; Violeta Moreno-Lax, ‘The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the “Operational Model” (2020) 21 GLJ 385, 385-387; and Koka and Veshi (n 120) 37-39.

133. UNCLOS, Article 94(2)(b). See further Felicity Attard, ‘Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?’ (2016) 47 JMLC 219, 221-223.

134. Myron H Norquist and others (eds), *United Nations Convention on the Law of the Sea, 1982: A Commentary: Volume III* (Martinus Nijhoff 1995) 146. See also the findings of the European Court of Human rights, which in a number of its judgments has recognised that ‘instances of the extraterritorial exercise of jurisdiction by a State to include cases involving the activities on board of ships registered in, or flying the flag of, that State’; see *Bakano-va v Lithuania* App no 11167/12 (ECtHR, Judgment of 31 May 2016), para 63; see also *Banković and Others v Belgium and 16 Other Contracting States* App no 52207/99 (ECtHR, Decision (GC) of 12 December 2001) 51-61.

135. Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 206-226.

distress at sea situation, he and his crew should take immediate action to preserve life and bring individuals to safety. Once migrants in distress have been embarked, the shipmaster is required to treat them with humanity within the capabilities and limitations of the ship.¹³⁶ Prolonged disembarkation may however lead to the deterioration of conditions on board, which could potentially expose already vulnerable migrant rescuees to degrading treatment. In cases where the shipmaster is unable to meet human rights standards for reasons beyond his control, he should be able to cooperate and rely on the assistance from nearby coastal or SAR States.¹³⁷ Depending on the circumstances, cooperation may extend to disembarkation, particularly if there is a severe humanitarian crisis onboard.¹³⁸ However, as discussed above, practice has shown that States are often reluctant to accept disembarkation, which could lead to other human right challenges such as confinement or detention of rescuees for prolonged periods of time.¹³⁹

The shipmaster should act as the guardian of human rights of all persons on his vessel. In this respect, he has the sensitive task of balancing the human rights protection of migrants in distress with those of his crew. As discussed above, the duty to render assistance is not absolute and human

136. SOLAS, Annex, Chapter V, Regulation 33-6. See further Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (n 52) 498.

137. See De Vittor and Starita (n 56) 84-85 who argue that '[i]t must be kept in mind that the obligation to treat survivors humanely and, more generally, to respect the human rights of rescued persons while on board needs to be interpreted in light of the particular circumstances of maritime situations. Furthermore, the captain may find himself faced with the material impossibility of adopting positive measures aboard his ship in order to protect the life and wellness of survivors (i.e. measures of medical care) without the cooperation of the coastal State'. (footnotes excluded). See also Erik Røsæg, 'The duty to rescue refugee and migrants in distress' (25 March 2020) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/03/duty-rescue>> accessed 10 June 2021.

138. Kiara Neri, 'The Missing Obligation to Disembark Persons Rescued at Sea' (2019) 28 *ItYBIL* 47, 51. June 2021.

139. Gauci (n 30) 24-25.

rights considerations may apply.¹⁴⁰ The shipmaster has discretion in rendering assistance if his life or that of the crew/passengers are at risk. He must ensure that the human rights of his crew are safeguarded throughout the often-risky embarkation procedure, but also when hosting migrants onboard. In some respects, protection of the right to health of the crew creates a further limitation on the implementation of the duty. The COVID-19 pandemic brings new perspectives in that the shipmaster who offers assistance needs to protect his crew against contagious viruses.¹⁴¹

While human rights protection applies to all individuals onboard, some rescued migrants may be entitled to additional protection by virtue of being asylum-seekers. The central obligation applying in this context is the principle of *non-refoulement* enshrined in Article 33(1) of the Convention Relating to the Status of Refugees and its 1967 Protocol¹⁴² which mandates that no person may be sent back to a place of persecution. The extraterritorial application of this principle on the high seas in rescue operations has been judicially recognized by the European Court of Human Rights in the landmark *Hirsi Jamaa and others v Italy* case.¹⁴³ The practical implications of the *non-refoulement* rule require that persons making an asylum claim are subject to appropriate status determination procedures.¹⁴⁴ Therefore, a breach of the *non-refoulement* obligation

140. See Sections 3.1-3.2.

141. Gauci (n 30) 13-14.

142. (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

143. *Hirsi Jamaa v Italy* App no 27765/09 (ECtHR, 23 February 2012).

144. See the findings of the European Court of Human Rights in *MSS v Belgium* App no 30696/09 (ECtHR, Judgment (GC) of 21 January 2011) para 321; see also Andreas Fischer-Lescano, Tillmann Löhr, and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 IJRL 256; and Vladislava Stoyanova, 'The Principle of *Non-Refoulement* and the Right of Asylum-Seekers to Enter State Territory' (2008) 3 IJHRL 1, 5.

would arise if rescued migrants were immediately return to a place of persecution without a proper review of asylum claims.

The shipmaster's disembarkation of migrant rescuees to a place of safety is fundamental consideration for the respect of *non-refoulement*.¹⁴⁵ A problematic issue however is the lack of a firm definition of a place of safety under international law.¹⁴⁶ Some guidance is provided to States and the shipmaster in 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea which define a place of safety as one where both basic needs and human rights of migrants are protected. The Guidelines also call on the shipmaster specifically, requiring him to ensure that 'survivors are not disembarked in a place where their safety would be further jeopardized'.¹⁴⁷

Therefore, even if the shipmaster can disembark migrants at the nearest port, this may not always be possible in light of the rule of *non-refoulement*. This is particularly relevant in the Mediterranean context, where most of the rescue operations occur off the coast of Libya which is not considered to be a place of safety.¹⁴⁸

The situation in Libya is characterised by political instability and conflict, several international organisations have also reported severe human rights abuses against migrants who travel from neighbouring States including, unlawful killings, slavery, arbitrary detention and forced la-

145. See further Martin Ratcovich, 'The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?' (2016) 33 AYBIL 81, 120-121.

146. See further Yoshifumi Tanaka, *The International Law of the Sea* (3rd edn, CUP 2019) 214-215 and Ratcovich (n 145) 100-105.

147. 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, para 5.1.6.

148. UNHCR, 'Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation following Rescue At Sea' (September 2020) <<https://www.refworld.org/docid/5f1edee24.html>> accessed 9 June 2021.

bour.¹⁴⁹ These human rights violations against migrants have only increased since the outbreak of the COVID-19 pandemic.¹⁵⁰

States should take the necessary measures to prevent the shipmaster being party to violations of *refoulement*.¹⁵¹ Unfortunately, there is evidence to suggest that the opposite is happening in State practice. In the last three years, a disconcerting trend has developed where shipmasters of commercial vessels are being instructed by States to pushback migrants to Libya either directly or indirectly by transferring them to the Libyan Coastguard. During this period, there have been over 30 reported cases where migrants were pushed back to Libyan shores in this manner. One of these incidents involving the Panamanian-flagged *Nivin*, has prompted a complaint against Italy before the Human Rights Committee.¹⁵² In November 2018, the vessel's shipmaster rescued 95 migrants in the Mediterranean and was then instructed by the Italian RCC to disembark in

149. UNHCR, 'UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation following Rescue at Sea' (September 2020) <<https://www.refworld.org/docid/5f1edee24.html>> accessed 10 June 2021; OHCHR Report Lethal Disregard (n 107) 2-3; Amnesty International, European Council on Refugees and Exile, Human Rights Watch, 'Plan Of Action: Twenty Steps to Protect People On the Move along the Central Mediterranean Route' (June 2021) <https://www.hrw.org/sites/default/files/media_2021/06/Central%20Med%20Plan%20of%20Action%20June%202021_eng.pdf> accessed 1 July 2021.

150. OHCHR Report Lethal Disregard (n 107) 10.

151. Gauci (n 30) 12; see also OHCHR Recommendation which emphasizes flag State responsibility in this context: '...[s]hipmasters of private commercial and humanitarian SAR organisations should refrain from returning any rescued migrants to Libya and their flag States should ensure that rescued migrants are promptly designated a port of safety'; see OHCHR Report Lethal Disregard (n 107) 24.

152. Communication to the United Nations Human Rights Committee In the case of SDG against Italy (Anonymized version) Submitted for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights to The United Nations Human Rights Committee <https://c5e65ece-003b-4d73-aa76-854664da4e33.filesusr.com/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf> accessed 2 June 2021.

Libya.¹⁵³ Once docked in Misrata, the rescuees refused to leave the vessel. After ten days onboard, the Libyan security officials forcefully removed most of migrants, including minors, using rubber bullets and tear gas.¹⁵⁴ Similar pushbacks by continued throughout the COVID-19 era as evidenced by the *Panther* and *Vos Triton* incidents.¹⁵⁵ Whilst the pandemic has placed a magnitude of pressures on State authorities to curtail the spread of the virus, international and regional organisations have cautioned against the imposition of emergency measures which effectively allow States to derogate from their *non-refoulement* obligations.¹⁵⁶

As affirmed by the Special Rapporteur on the human rights of migrants:

...while global public health crises may require travel restrictions, screening, testing, medical quarantine or isolation measures, these measures may not result in denying effective access to asylum and protection under international law. States must ensure that such measures are

153. Forensic Oceanography, 'The Nivin Case Migrants' resistance to Italy's strategy of privatized push-back: A reconstruction of events by Forensic Oceanography, affiliated to the Forensic Architecture agency, Goldsmiths, University of London (December 2019) 12 <<https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf>> accessed 16 June 2021.

154. *ibid* 11.

155. Patrick Kingsley, 'Privatized Pushbacks: How Merchant Ships Guard Europe 'IOM and UNHCR Condemn the Return of Migrants and Refugees to Libya' *The New York Times* (New York, 16 June 2021) <<https://www.iom.int/news/iom-and-unhcr-condemn-return-migrants-and-refugees-libya>> accessed 18 June 2021.

156. See UNHCR, 'The COVID-19 Crisis: Key Protection Messages' (31 March 2020) <<https://www.refworld.org/publisher,UNHCR,POSITION,,5e84b9f64,0.html>> accessed 18 June 2021; European Commission, 'COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures on resettlement' (16 April 2020) C(2020) 2516. For an analysis of the effect of the COVID-19 pandemic on State *non-refoulement* obligations; see Salvo Nicolosi, 'Non-refoulement During a Health Emergency', EJIL:Talk! (14 May 2020) <<https://www.ejiltalk.org/non-refoulement-during-a-health-emergency/>> accessed 19 June 2021.

non-discriminatory, necessary, proportionate, subject to regular and independent review, and reasonable, in line with international law. Denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.¹⁵⁷

5. Conclusion

The above analysis demonstrates the important need to constantly keep reviewing legal terms, which though have been coined decades ago, continue to be used in contemporary international legal instruments. This requires that the constitutive elements of definitions may have to be revised to take into account new legal developments and the realities of international life. The duty to render assistance as established in the early part of the last century continues to be an important element in the protection of life at sea. It appears necessary to reconsider the duty, first established to deal mainly with shipwrecks in the face of the challenges of irregular migration by sea.

Article 98 of UNCLOS provides the basis for the execution of the shipmaster's long-standing obligation to render assistance. However, in the light of the magnitude of the problems of irregular migration by sea, and the particular risks to human life involved, the UNCLOS rules addressing the duty to render assistance are no longer sufficient. The UNCLOS framework has been strengthened, largely by the regimes set up under the auspices of IMO. In exercising their judgment, shipmasters are expected to act in good faith and to the best of their abilities while offering their utmost assistance to persons needing aid. This will require them to consider safety and security concerns relating to his ship, passen-

157. HRC, 'Report on means to address the human rights impact of pushbacks of migrants on land and at sea' (n 31) para 106.

gers and crew, commercial considerations underlying a migrant rescue operation, as well as related humanitarian concerns.

Despite the great progress that has been made in the formulation and application of the rules on the duty to render assistance, there still remain important unresolved issues affecting the obligations of the shipmasters before and after the exercise of the duty. Most notably the responsibilities associated with disembarkation and what constitutes a place of safety continue to be contentious issues amongst States. Furthermore, the multitude of commercial costs that may arise may complicate or inhibit further the shipmaster's duty to rendering assistance. These challenges appear to be seriously limiting the effectiveness of the shipmaster's duty to render assistance at sea under international law. It has been reported that shipping companies are now avoiding popular shipping routes which are also active migration hotspots or unable to find seafarers who will work on such routes.¹⁵⁸ Certain organisations have also reported that some shipmasters are allegedly switching off their Automatic Identification System to avoid being called to rescue.¹⁵⁹ There is evidence that problems posed by the COVID-19 pandemic appear to be further disincentivizing some shipmasters from providing assistance and rescue. The Office of the United Nations High Commissioner for Human Rights recently interviewed several migrant survivors who claimed that shipmasters of commercial vessels approached their vessels in distress, but

158. Speech given by Dottore Emanuele Grimaldi, President of Grimaldi Lines and Vice-President of Malta International Shipowners Association, Symposium on 'Maritime Search and Rescue: The Ship and the Shipowner' held at the IMO International Maritime Law Institute, Malta (29 May 2015).

159. Tomas Kristiansen, 'Migrants crisis has ships going off radio and rerouting near Malta' Shipping Watch (9 September 2020) <<https://shippingwatch.com/carriers/Tanker/article12401608.ece>> accessed 21 June 2021; UNHCR, 'UNHCR Proposals to Address Current and Future Arrivals of Asylum-seekers, Refugees and Migrants by Sea to Europe' (March 2015) <<http://www.refworld.org/docid/55016ba14.html>> accessed 21 June 2021.

failed to render assistance.¹⁶⁰ One migrant child reported that the crew of one vessel proceeded to take photographs of their rubber craft, but did not render assistance claiming that: ‘We can’t give you food. We cannot accept you [on board]. You have coronavirus’.¹⁶¹

It is submitted that the existing legal regime regulating the shipmaster’s duty to render assistance is adequate and reasonable when balancing on the one hand, the paramount need to protect life at sea, and on the other hand, the responsibilities the shipmaster has, particularly the safety and security of his ship, crew and passengers. However, in the face of frequent migrant rescue operations, although the existing rules may provide a certain amount of stability, it is difficult for them to offer comprehensive solutions to the contemporary challenges described above, particularly, when the political will from States may be lacking. The severity of COVID-19 has added further pressures on the shipmaster’s duty, where delays in or refusal of disembarkation by States has become more acute against the backdrop of the global pandemic.

The test of efficacy of the current international regime may be the comparison of delays faced by the shipmaster of *MV Tampa* and *Maersk Etienne* nearly two decades later. In the case of the former, the shipmaster suffered a delay of eight days. In the case of the *Maersk Etienne*, the shipmaster had to endure an unacceptable 38-day long delay. It would appear that States need to give more attention to developing effective legal mechanisms to relieve the shipmaster and crew as soon as reasonably practicable. This author agrees with the observations of Munari who postulates that: ‘... in most instances, present beneficiaries of SAR are no longer those on which the international legal regime has been developed

160. OHCHR Report Lethal Disregard (n 107) 11.

161. *id.*

162. Munari (n 15) 70.

and progressively set up, then we should question whether these differences may imply also a modified approach vis-à-vis the existing rules'.¹⁶² A possible way forward could be the development of a predictable and systemic process of disembarkation, where both coastal/SAR States and flag States share in the responsibilities for the relocation of migrant rescuees. Such a mechanism could serve as an incentive by reassuring shipmasters that they will receive the necessary support to complete the rescue through disembarkation - an approach which may contribute to enhancing the overall effectiveness of the international SAR regime.

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