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## **Relations of duty in an age of rights: a study of the supply side of human rights in the context of maritime migration**

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### **Citation**

Gombeer, K. C. N. (2022, June 23). *Relations of duty in an age of rights: a study of the supply side of human rights in the context of maritime migration*. Retrieved from <https://hdl.handle.net/1887/3421449>

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# Chapter 4 Surviving

In most cases, people use unseaworthy vessels to undertake unauthorised sea crossings. As a result, most vessels end up in situations of distress which can ultimately lead to the drowning or severe injury of the persons concerned if they are not rendered any assistance or are made the subject of a search and rescue operation.

As with locating and counting unauthorised departures, quantifying the loss of life at sea as a result of unauthorised crossings is notoriously difficult. The UN Migration Agency (IOM) has counted deaths on the main maritime routes to Europe:

Year	Western Med	Central Med	Eastern Med
2020	68	302	71
2019	552	1262	71
2018	811	1314	174
2017	224	2853	62
2016	128	4581	434
2015	102	3149	803
2014	59	3165	59

**Table 2. Estimation of the number of migrant deaths at sea**

Tamara Last has shown that these data on border deaths are unreliable.<sup>272</sup> The number of drownings can be overrated and underrated at the same time. Many, if not most, deceased migrants are never identified thus overlapping with numbers of missing persons. This creates double-counting and *overreporting*. On the other hand, there is a significant risk that undetected crossings lead to *unreported* mortality data at sea. For example, the less personnel are deployed to a certain maritime area, the less chance bodies are being counted. A drop in the official count of border death cases,

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<sup>272</sup> Last (n 16) 73-4. Her own findings are based on dead migrants documented by local authorities, which produces a much lower number: 3188 people on the Atlantic and Mediterranean routes between 1990 and 2013. Data and methodology available at: <http://www.borderdeaths.org>.

then, might not point to an actual decrease of drownings, while an actual increase of border deaths might never be captured by the official statistics.<sup>273</sup>

As did the previous chapter for the juncture of migrants leaving the coastline of states opposite Europe's southern external border, the first aim of the current chapter is to analyse how the international law of the sea regulates state power and the interests of migrants; this time focusing on their stake in *surviving* at sea. The international law of the sea contains a clear legal obligation to assist those in distress at sea but is frequently infringed when it concerns migrants. Coastal states moreover have a legal obligation to coordinate and provide search and rescue services in designated areas (1). Human rights norms, in particular the right to life, can have an important bearing on the issue of assistance and rescue (2). Yet as with the case of unauthorised departures, here too situations emerge which raise questions about the connection between states and migrants at sea sufficing to trigger relations of duty under human rights law (3).

## 1 THE PROTECTION OF LIFE IN THE LAW OF THE SEA

Assistance concerns the legal obligation of every actor at sea to render help when a vessel or person is found in danger or distress (1.1), while legal obligations of search and rescue are primarily directed at states (1.2). While assistance is formulated only in broad terms within the international law of the sea, the regime on the search and rescue obligations of states is regulated in detail in maritime safety conventions. This constitutes the 'rescue regime' in the strict sense. Together, the rules on assistance and the rules on search and rescue make up the 'rescue regime' in a broad sense.

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<sup>273</sup> Dearden, Last and Spencer (n 130) 57-9.

## 1.1 Obligations to assist

The obligation to assist persons in distress at sea constitutes a fundamental rule of the international law of the sea.<sup>274</sup> It is one of the main building blocks of the rescue regime broadly defined which consists of a body of rules that can be found in UNCLOS<sup>275</sup>, the SOLAS Convention<sup>276</sup>, the SAR Convention<sup>277</sup>, the Salvage Convention<sup>278</sup>, as well as in customary international law and a whole range of soft law instruments. The obligation to assist is laid out in Article 98 (1) UNCLOS:

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.<sup>279</sup>

We briefly discuss the international and domestic character (1.1.1), the geographical (1.1.2), and the material scope of this legal obligation (1.1.3). Anticipating a bit to the chapters to come on human rights, we finally tentatively compare the nature of the connection seemingly animating the obligation to assist under the law of the sea compared to relations of duty for human rights purposes (1.1.4).

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<sup>274</sup> D Guilfoyle, 'Article 98 – Duty to render assistance' in A Proells (ed), *United Nations Convention on the Law of the Sea. A Commentary* (C.H. Beck 2017) 725.

<sup>275</sup> *Supra* n 132.

<sup>276</sup> International Convention for the Safety of Life at Sea, as amended (1 November 1974; entry into force: 25 May 1980) (1980) 1184 *United Nations Treaty Series* 277, as amended as of 1 January 2020 ('SOLAS Convention').

<sup>277</sup> International Convention on Maritime Search and Rescue, as amended (27 April 1979; entry into force: 22 June 1985) (1985) 1405 *United Nations Treaty Series* 118, as amended as of 1 July 2006 ('SAR Convention').

<sup>278</sup> International Convention on Salvage (28 April 1989; entry into force: 14 July 1996) (2001) 1953 *United Nations Treaty Series* 165.

<sup>279</sup> UNCLOS (n 132) Article 98 (1).

### 1.1.1 *Obligation under international and domestic law*

Firstly, the legal obligation of a captain to render assistance at sea arises under domestic law, not under international law. One must indeed distinguish the legal obligation *of states* under UNCLOS and customary international law<sup>280</sup> and the legal obligation *of captains* at sea to render assistance pursuant to domestic legislation. Article 98 UNCLOS is addressed to states, not to captains of ships at sea. Article 98 contains a legal obligation under international law for flag states to impose via their respective domestic legislation a legal obligation on the captain of every vessel flying their flag to assist persons at sea under one of the three circumstances described in Article 98 (1).<sup>281</sup> Article 94 UNCLOS requires every state to ‘effectively exercise its jurisdiction and control’ under domestic law ‘in administrative, technical and social matters over ships flying its flag’.<sup>282</sup> Paragraph 3 of Article 94 obliges states to take measures for ships flying their flag to ensure safety at sea.<sup>283</sup> Pursuant to paragraph 4 of Article 94, this must include measures necessary to ensure ‘that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea’,<sup>284</sup> which include obligations of assistance arising under the SOLAS Convention and the Salvage Convention.<sup>285</sup> Maritime *safety* indeed concerns the ‘preventing or minimizing of the occurrence of accidents at sea’<sup>286</sup> or protection against ‘danger, risk, or injury’ of individuals and society in the context of maritime traffic<sup>287</sup>, while maritime *security* is related to military security and ‘protection against unlawful and

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<sup>280</sup> This obligation upon states is widely considered to be part of customary international law and therefore also binds states not party to the UNCLOS. On the customary nature of the obligation, see: ILC, ‘Report of the International Law Commission to the General Assembly on the Work of its Eighth Session (23 April – 4 July 1956)’ (1956) II *Yearbook of the International Law Commission* 281 (reporting that ‘in the opinion of the Commission, the article as worded above states the existing international law). See also: Guilfoyle (n 274) 726; A Chircop, ‘The Customary Law of Refuge for Ships in Distress’ in A Chircop and O Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff 2006) 163-229.

<sup>281</sup> Guilfoyle (n 274) 726; M Davies, ‘Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea’ (2003) 12 (1) *Pacific Rim Law & Policy Journal* 113.

<sup>282</sup> UNCLOS (n 132) Article 94 (1)-(2).

<sup>283</sup> UNCLOS (n 132) Article 94 (3).

<sup>284</sup> UNCLOS (n 132) Article 94 (4) (c).

<sup>285</sup> SOLAS Convention (n 276) Regulation 33 (‘Distress messages: obligations and procedures’); Salvage Convention (n 278) Article 10 (‘Duty to render assistance’).

<sup>286</sup> N Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 8.

<sup>287</sup> K Formela, T Neumann and A Weintrit, ‘Overview of Definitions of Maritime Safety, Safety at Sea, Navigational Safety and Safety in General’ (2019) 13 (2) *International Journal of Marine Navigation and Safety of Sea Transportation* 285.

deliberate acts'.<sup>288</sup> Reading together Articles 94 and 98, UNCLOS thus requires states to monitor whether the masters of vessels sailing under their flag comply with their obligations under domestic law deriving not only from UNCLOS but also from the SOLAS and Salvage Convention.<sup>289</sup> Ordinarily, then, each state with a fleet has domestic legislation describing the obligation to render assistance at sea, whether not doing so constitutes a criminal offence, and, often, excluding civil liability for the loss of or damage to goods if they result from the attempt to save lives at sea (so-called 'Good Samaritan' clause).<sup>290</sup> Efthymios Papastavridis explains that the legal obligation of states is not one of result (that is to guarantee that individuals in distress will be assisted) but one of due diligence. Papastavridis compares this due diligence obligation to monitor the conduct of vessels flying its flag with the one arising with regard to illegal, unreported and unregulated fishing as identified by the International Tribunal for the Law of the Sea (ITLOS): it, Papastavridis citing the ITLOS, 'involves an obligation not only to adopt appropriate national rules and measures but also to exercise "a certain level of vigilance in their enforcement", including exercising "administrative control" over relevant "public and private operators"'.<sup>291</sup>

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<sup>288</sup> Klein (n 286) 8.

<sup>289</sup> The Salvage Convention also requires States Parties to 'adopt all measures to enforce the duty to render assistance.' Salvage Convention (n 278) Article 10 (2). For a discussion of the *obligations of states*:

<sup>290</sup> See for example: Australia, *Navigation Act* (Act No. 128, 2012, as amended by Act No. 57, 2019), Sections 180-7 (moreover extending its legislation to foreign vessels on the condition that they are present in, or are entering or leaving an Australian port, or are in the internal or territorial waters of Australia); Belgium, *Belgisch Scheepvaartwetboek* (8 May 2019), Article 2.4.5.35 (obliging every captain to render assistance to those in peril at sea) and Article 2.6.2.6 (limiting liability for loss resulting from assisting persons or vessels at sea) and *Belgisch Strafwetboek* (8 June 1867), Article 422bis; Canada, *Shipping Act* (S.C 2001, c. 26, as amended on 22 June 2017), Sections 131-2 (the obligation to assist also applies to every foreign vessel within Canadian waters); China, *Maritime Code* (Law of 7 November 1992), Article 51 (7); France, *Code des Transports* (Ordonnance No. 2010-1307 of 28 October 2010) Article L5262-1 – L5262-7 (including for foreign vessels within French internal and territorial waters); Italy, *Codice della navigazione* (Decreto No. 327 of 30 March 1942, as amended by Decreto Legislativo No. 37 of 22 April 2020), Article 13 (stating this obligation is governed by the domestic law of the flag state), Article 489 (imposing to assist vessels in danger) and Article 490 (imposing an obligation to rescue the people on board if assisting the vessel does not suffice); Liberia, *Maritime Law* (Liberian Code of Laws of 1956 as amended on 19 June 2002, Title 21), Sections 204 and 296 (10); Marshall Islands, *Maritime Administration Act* (13 September 1990 as amended), Sections 154 and 811 (j); Malta, *Merchant Shipping Act* (Act of 6 April 1973 as amended), Articles 295 and 305; Panama, *Maritime Trade Law* (Law No. 55 of 6 August 2008) Article 219; Spain, *Ley de Navegación Marítima* (Law No. 14/2014 of 24 July 2014), Article 183; The Netherlands, *Wetboek van Koophandel* (10 April 1838 as amended on 15 November 2019), Articles 358a and 785 and *Wetboek van Strafrecht* (Law of 3 March 1991 as amended on 25 July 2020), Article 414; United States, *US Code – Title 46: Shipping* (26 August 1983, as amended on 6 October 2006), Sections 2303-4.

<sup>291</sup> E Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21(3) *German Law Journal* 430-1 (comparing due diligence obligation to monitor compliance with the obligation to assist of vessels flying their flag with the due diligence obligation with regard to illegal, unreported and unregulated fishing as identified in ITLOS, *Request for an*

### 1.1.2 Geographical scope of the obligation

Secondly, geographically the obligation to assist applies to every maritime area at sea; from the territorial sea of coastal states to the high seas. Because Article 98 was drafted under ‘Part VII. High Seas’ of UNCLOS, the obligation to assist pursuant to that provision strictly speaking only applies to the high seas and – to the extent one is established – a state’s Exclusive Economic Zone (‘EEZ’).<sup>292</sup> It is however widely recognised that the obligation to assist also applies to territorial waters of coastal states.<sup>293</sup> This indeed follows implicitly from Article 18 UNCLOS which provides that innocent passage (which normally requires continuous and expeditious movement) may be interrupted for the purpose of rendering assistance to persons in danger or distress.<sup>294</sup> The fact that this obligation stretches out to any actor and to any geographical area irrespective of jurisdictional claims upon those areas forebodes the specific nature of the connection propping the obligation to assist.<sup>295</sup>

### 1.1.3 Material scope of the obligation

Thirdly, as a matter of substance the obligation to assist is one of conduct and not one of result. The captain of the assisting vessel has to undertake action only in so far it *can* be done without serious danger to the ship, the crew or possible passengers on board the assisting vessel.<sup>296</sup> If not yet already entangled in the situation and informed of a situation of distress, the captain must proceed with all *possible* speed to the assistance of persons in distress.<sup>297</sup> If a ship receiving a distress alert is *unable* or considers it *unreasonable or unnecessary* to proceed to the distress scene, the captain must enter the reasons for it in his or her log-book and inform the relevant MRCC about it.<sup>298</sup> The vessel called upon to assist – either by a third party such as a rescue

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*Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion, 2 April 2015) *ITLOS Reports 2015* 4).

<sup>292</sup> UNCLOS (n 132) Articles 58 (2) *juncto* 86 (with Article 58 stipulating that Articles 88 to 115 apply to the EEZ in so far as they are not incompatible with ‘Part V. Exclusive Economic Zone’ of UNCLOS). Guilfoyle (n 274) 726.

<sup>293</sup> Oxman (n 143) 414-5.

<sup>294</sup> UNCLOS (n 132) Article 18 (2).

<sup>295</sup> See further *infra* section 1.1.4.

<sup>296</sup> UNCLOS (n 132) Article 98 (1), first sentence; Salvage Convention (n 278) Article 10 (1).

<sup>297</sup> *Ibid.* Article 98 (1) (b). Note, however, that the SOLAS Convention requires the master of the ship ‘to proceed *with all speed* to the assistance of persons in distress.’ SOLAS Convention (n 276) Regulation 33 (2).

<sup>298</sup> SOLAS Convention (n 276) Regulation 33 (1).

coordination centre or the vessel in distress itself<sup>299</sup> - is only formally released from its obligations once it is notified that the assistance is no longer necessary or another vessel or rescue unit of a state is taking care of the situation.<sup>300</sup>

Once at the scene (or if already at the scene because they found the vessel or collided with it) the actual obligation to *assist* kicks in. While it may be possible to have a common sense understanding of what that would entail, the law is not entirely clear on what assistance precisely amounts to and whether the material scope of the assistance varies depending on the gravity of the situation encountered. For example, UNCLOS at the same time speaks of ‘rendering assistance to any person found in danger of being lost’<sup>301</sup>, of ‘assistance to the ship, its crew and its passengers’<sup>302</sup>, but also of ‘proceeding ... to the rescue of persons in distress, if informed of their need of assistance’.<sup>303</sup> The SOLAS Convention speaks of ‘rendering assistance’ to ‘persons in distress’<sup>304</sup>, while the Salvage Convention speaks of ‘rendering assistance’ to ‘persons in danger of being lost at sea’.<sup>305</sup> We thus seem to deal with terminology that can be used interchangeably (‘assistance’ and ‘rescue’; ‘distress’ and ‘in danger of being lost’) and with two objects of assistance, namely ‘persons’ and ‘ships’. One may settle for a common sense understanding of ‘assistance’ and label our inquiry as rather academic, were it not that situations may arise where ships encounter small vessels at sea with migrants on board but limit themselves to repairing the engine of the migrant vessel or providing food and medical supplies to then subsequently leave the scene again. In our view, relying on the ordinary meaning of the words in UNCLOS and the other two conventions may thus not provide satisfactory legal answers. More precision is required.

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<sup>299</sup> SOLAS Convention (n 276) Regulation 33 (2) according to which the ship in distress or the search and rescue service concerned have the right to requisition one or more ships as they consider best able to render assistance.

<sup>300</sup> SOLAS Convention (n 276) Regulation 33 (3-4).

<sup>301</sup> UNCLOS (n 132) Article 98 (1) (a).

<sup>302</sup> UNCLOS (n 132) Article 98 (1) (c).

<sup>303</sup> UNCLOS (n 132) Article 98 (1) (b).

<sup>304</sup> SOLAS Convention (n 276) Regulation 33 (1).

<sup>305</sup> Salvage Convention (n 278) Article 10 (1).

Two different types of assistance may arguably be distinguished in the law: first, assisting the vessel and/or the people on it to remedy their situation on the spot (assistance in the strict sense), and second, taking the people off the boat and onto the assisting vessel (rescue or assistance in the broad sense). Depending on the circumstances of the case it may suffice to render assistance so that the assisted vessel may subsequently proceed on its course or to the closest port, while sometimes the law requires taking the people off the boat concerned. It is submitted that in almost all cases concerning so-called ‘migrant vessels’ that what is required is ‘assistance in the broad sense’.

Although UNCLOS itself does not define ‘distress’, the SAR Convention defines ‘distress phases’ as those situations ‘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’.<sup>306</sup> It is indeed often submitted that distress exists if a ‘skilful mariner would have a well-grounded apprehension of the persons losing their lives.’<sup>307</sup> This definition resonates with the notion of ‘distress’ as a circumstance precluding wrongfulness of the conduct of a state under the law of state responsibility, namely ‘if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care’.<sup>308</sup> The SAR Convention further elaborates that distress phases can also involve situations that in first instance were labelled as one of ‘alert’ but that unsuccessful attempts have been made to establish contact and that

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<sup>306</sup> SAR Convention (n 277) Section 1.3.13. Situations of ‘distress’ must be distinguished from situations of ‘uncertainty’ (uncertainty exist as to the safety of a person, a vessel or other craft) and ‘alert’ (apprehension exists as to the safety of a person, a vessel or other craft). Chapter 4 of the SAR Convention on Operating Procedures further details that uncertainty phases involve situations when a person has been reported as missing, or a vessel or other craft is overdue; or when a person, a vessel or other craft has failed to make an expected position or safety report. SAR Convention (n 277) Section 4.4.1. Alert phases exist when, following an uncertainty phase, attempts to establish contact with a person, a vessel or other craft have failed and enquiries addressed to other appropriate sources have been unsuccessful; or when information has been received that the operating efficiency of a vessel or other craft is impaired, but not to the extent that a distress situation is likely SAR Convention (n 277) Section 4.4.2. Under the search and rescue regime (discussed *infra* section 1.2), states must follow different procedures depending on the nature of the emergency.

<sup>307</sup> Guilfoyle (n 274) 728.

<sup>308</sup> International Law Commission, *Articles on State Responsibility for Internationally Wrongful Acts*, adopted in: United Nations General Assembly, *Resolution 56/83 of 12 December 2001*, UN Doc A/RES/56/83 (28 January 2002) (‘ARSIWA’), Article 24.

more widespread enquiries point to the probability that a distress situations exists. According to the SAR Convention, distress is also at hand when information is received which indicates that the operating efficiency of the vessel concerned is impaired to such an extent that a distress situation is likely.<sup>309</sup> European Union legislation has emulated the definition of distress employed by the SAR Convention<sup>310</sup> but moreover provides extra indicators that ‘shall be taken into account’ to distinguish distress situations from situations of uncertainty or alert. These include:

(i) the existence of a request for assistance, although such a request shall not be the sole factor for determining the existence of a distress situation; (ii) the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination; (iii) the number of persons on board in relation to the type and condition of the vessel; (iv) the availability of necessary supplies such as fuel, water and food to reach a shore; (v) the presence of qualified crew and command of the vessel; (vi) the availability and capability of safety, navigation and communication equipment; (vii) the presence of persons on board in urgent need of medical assistance; (viii) the presence of deceased persons on board; (ix) the presence of pregnant women or of children on board; (x) the weather and sea conditions, including weather and marine forecasts.

In these additional criteria we not only find criteria for defining distress, but also indicators of *the degree to which a vessel and the people on board may need assistance*. For example, assistance to a vessel may suffice and remedy the situation of distress if the vessel thereby will be able to reach its destination (indicator ii), the vessel is supplied with enough fuel, water and food to reach a shore (indicator iii), equipment is provided or repaired (indicator vi), or the providing of medical care is provided or those in need of it are taken to land with a view to providing such care (indicator vii). We can moreover find indications in the domestic laws of flag states that the degree of assistance may vary (from assistance to rescuing persons off the vessel) depending on the circumstances of each case. Thus, for instance, under the Italian *Codice della*

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<sup>309</sup> SAR Convention (n 277) Section 4.4.3

<sup>310</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ (27 June 2014) L 189/93, 104, Article 9 (e).

*navigazione* a distinction is made between an obligation to assist (*obbligo di assistenza*) and an obligation to rescue (*obbligo di salvataggio*). Thus Article 489 of the Italian code stipulates that ‘the *assistance* of a ship at sea which is in danger of being lost is compulsory<sup>311</sup>, while Article 490 determines that ‘when the ship in danger is *completely incapable of manoeuvring*, the commander of the assisting ship must’, under the circumstances and without serious risk to the assisting ship, its crew and its passengers, ‘attempt to *rescue the people on board*.<sup>312</sup>

Given the unseaworthy nature of vessels and the circumstances in which they are used (overcrowded, rough sea, etc.) migrant vessels are often considered as in distress by default.<sup>313</sup> Nonetheless, there may be situations where this is not necessarily the case. It is possible that a vessel’s situation could rather be qualified as one of uncertainty or alert. It is equally possible that neither of the three types of emergency characterises a situation if the vessel used is in good condition, is not overcrowded and is holding on its course without any problems. Thus a so-called ‘migrant vessel’ might be able to continue navigation after small repairs or might not experience any problems at all in order to reach its destination, for example, in Sicily.

A few remarks are in order here. Firstly, smugglers put people on increasingly smaller and unsafe vessels to lower the costs since law enforcement started destroying vessels at sea and it has become harder to recuperate vessels. Most ‘migrant vessels’ can then indeed be considered to be in distress by default, requiring not only assistance to the vessel (which would be pointless and ineffective in any case) but also the rescuing of the people and their embarkation onto the assisting vessel. In such circumstances, merely repairing an engine, supplying fuel and/or providing food supplies is legally inadequate and constitutes a violation of the obligation to assist. Secondly, there might be vessels whose condition is not that critical – for example a fishing vessel

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<sup>311</sup> *Codice della navigazione* (n 290) Article 489, paragraph 1 (‘l’*assistenza a nave* in mare è obbligatoria).

<sup>312</sup> *Ibid.* Article 490, paragraph 1 (‘a tentare il *salvataggio delle persone* che si trovano a bordo’).

<sup>313</sup> For a defence of a broad definition of distress in the case of migrant vessels, see: L-M Komp, ‘The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers on the High Seas?’ in V Moreno-Lax and E Papastavridis (eds), *‘Boat Refugees’ and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights* (Brill 206) 233-6.

smuggling a certain amount of people on board. This vessel might be violating all sorts of safety standards of the flag state, but it thereby is not necessarily in distress. In principle, then, there is no ‘obligation to assist’ which certain coastal states may wish to invoke to disrupt the movement of these vessels. That means that unless the vessel concerned flies the flag of the intercepting state or appears to be stateless, or unless an authorisation to stop and search the vessel is received from the flag state on reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants at sea<sup>314</sup>, no state has a legal pretext to interfere with that vessel’s navigation ‘to save lives’.<sup>315</sup> In sum, having a broad definition of distress and the obligation to assist can, depending on the circumstances, either serve the interests of migrants (when their survival is at stake) and the interests of states (seeking to intercept in the name of assistance). Thirdly and finally, the legal definition of assistance does not include a description of what must be done in case people need to be taken on board. In particular, the legal concept of assistance does not describe – if taken on board of the assisting vessel – where the assisted persons should be disembarked. In chapter 5 below on the issue of disembarkation, it is clarified how disembarkation is governed as an obligation of states under the sub-regime of maritime search and rescue; that is the search and rescue regime in the narrow sense. We will already address part of that regime in the next section below.<sup>316</sup> But before that, we have a look at the nature of the connections triggering the obligation to assist and tentatively compare it to the nature of connections triggering human rights obligations.

#### ***1.1.4 Justification of the obligation to assist***

An observation is due with regard to the normative justification of obligations to assist compared to obligations arising as a matter of human rights law. While both concern legal obligations and both obligations have the interests of individuals in

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<sup>314</sup> *Supra* chapter 3, section 1.2.

<sup>315</sup> *Supra* chapter 3, section 1.3.

<sup>316</sup> *Infra* section 1.2.

mind (their safety), the pedigree of the obligation to assist under the law of the sea can be contrasted to that of the obligation to protect the right to life under human rights law. While the former is based on an encounter and may remind us of pre-relational or pre-institutional ethics, the latter seems – as further explored in this thesis - based on relations of power and may remind us of relational justice. This observation adds to the idea that the phrasing ‘considerations of humanity’ to be found in the case law of ITLOS represents an umbrella term that includes but is not limited to human rights.

Firstly, assistance is owed to *any* person found in distress or in danger of being lost at sea. The law of the sea is clear that the identity of the person in distress shall play no role in whether that persons receives help: assistance must be provided ‘regardless of the nationality or status of such a person or the circumstances in which that person is found.’<sup>317</sup> This includes persons constructed as ‘unwanted migrants’ involved in ‘unauthorised sea crossings’.<sup>318</sup> Secondly, UNCLOS seeks to ensure that every captain at sea renders assistance whenever and wherever they happen to run into a distress scene (‘found’), when they are requested to proceed to such scene (‘if informed’), or when they are themselves entangled in the situation (‘after a collision’).<sup>319</sup> They must do so without however endangering themselves. Under the law of the sea, it is thus the encounter with the vulnerability of the other and the ability to help that is both the source of duty (‘you, who I encounter, ought to help me’).

What triggers the obligation to assist under the law of the sea, may remind us of certain ethical commands in encounters with other persons. One very old idea, for example, is the Christian obligation to love one’s neighbour as one would love oneself:<sup>320</sup> as a person, I commit myself to help the other because I recognise myself

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<sup>317</sup> SAR Convention (n 277) Section 2.1.10.

<sup>318</sup> IOM, *IOM Handbook on the Protection of Migrants at Sea* (Bangkok 2018) 91. See also *supra* chapter 2, section 1.

<sup>319</sup> *Supra* section 1.1.3.

<sup>320</sup> ‘Book of Leviticus’ in *Old Testament* 19:18; ‘Mattheus’ in *New Testament* 22/35-40; ‘Marcus’ in *New Testament* 12:28-34; ‘Lucas’ in *New Testament* 10:27; ‘Letter to the Romans’ in *New Testament* 13:8. For an account according to which

in the other's humanity and would like to be treated the same way. Thereby, the standard of whether and to the extent one jumps in depends on how one loves oneself.<sup>321</sup> For some, the obligation to assist someone would similarly ask me to put aside my own legitimate preoccupations, but to act in light of established social norms and not the norms I would hold based on my self-love.<sup>322</sup> For still others, the obligation to help would be arising before and irrespective of any social convention filtering or mediating how we encounter the other.<sup>323</sup> What these views on ethical commands have in common is that they are not based on a pre-existing power relation or a quality of the duty bearer but based on the encounter which in the situation asks for a response from the duty-bearer. In any context, anyone – whether a state agent of just a merchant fisher – can violate such a command.

When we contrast this to human rights, it is as well by virtue of each person's humanity that normativity arises: all humans are said to have certain fundamental rights by virtue of being human.<sup>324</sup> Yet where the captain's obligation under the law of the sea is itself rooted in the encounter with the humanity of the other, relations of duty for human rights purposes are *prima facie* rooted in relations of power. In that sense, a mere encounter – whether physically or through the mere knowledge of a situation – may not suffice to trigger relations of duty for human rights purposes absent a relation of power: not just anyone in any context can be said to be able to violate the human right to life, for current purposes, by not assisting a person. On

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this notion of love informs 'human rights jurisdiction', see G Noll, 'Theorizing Jurisdiction' in A Orford and F Hoffmann, *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 600-17.

<sup>321</sup> EE Constance Jones, 'Practical Dualism' (1917-8) 18 *Proceedings of the Aristotelian Society (New Series)* 324 (writing that 'in the [precept] "love your neighbour as yourself," it is implied that the love of self is logically prior to, and sets the standard for, love of our neighbour.').

<sup>322</sup> KE Logstrup, *The Ethical Demand* (University of Notre Dame Press 1977).

<sup>323</sup> Although his thought cannot easily be transposed into specific obligations or required actions, the work of Emmanuel Levinas and his concept of the 'face' is generally considered to establish a strong relation of duty toward the other. Thus, according to Levinas, we encounter the other in a face-to-face situation 'without mediations'. Cf. E Levinas, *Existence and Existents* (1947) 95. For a discussion, see: D Perpich, 'Levinas and the Face of the Other' in ML Morgan, *The Oxford Handbook of Levinas* (Oxford University Press 2019) 244-55; D Perpich, *The Ethics of Emmanuel Levinas* (Stanford University Press 2008). For an account of relations of duty for human rights purposes that seems to be inspired to a great extent by Levinas' concept of the face-to-face encounter with the other as the basis of rights and obligations, see: I Mann, *Humanity at Sea* (Cambridge University Press 2016).

<sup>324</sup> Human rights seek to protect essential interests in light of what it means to be human and play a justificatory role in the demand side of human rights, i.e. what human rights are and what kind of interests become identified as worthy of human rights protection. *Infra* chapter 6, section 1.1 on the 'demand side' of human rights'

the other hand, however, neither would an encounter be necessarily required for human rights purposes as long as there exists a relation of power between the state and the individual. As we will further explore in the chapters to come, human rights law seems to have been theorised to encompass obligations if and only if there is some form of power (priorly) established over the individual concerned; often in the form of ‘authority’ and/or ‘control’. If it is indeed *power relations* which justify the triggering of human rights obligations, the question arises what power relations amount to and whether they can approach the type of connection one sees doing justificatory work regarding the obligation to assist under the law of the sea. That is, not a power over a person, but a *power to* do something regarding a person.<sup>325</sup>

This brief comparative excursion into the justification of the obligation to assist may shed further light on the term ‘considerations of humanity’ as employed by the International Tribunal for the Law of the Sea.<sup>326</sup> In several cases, the International Tribunal has referred to ‘considerations of humanity’. In *M/V Saiga (No. 2)*, the Tribunal held that in considering the use of force during the arrest of a vessel it will take into account ‘the circumstances of the arrest in the context of the applicable rules of international law’ by virtue of Article 293 UNCLOS and that ‘considerations of humanity must apply in the law of the sea, as they do in other areas of international law.’<sup>327</sup> As Anna Petrig and Marta Bo have pointed out, there exists disagreement of what this term means: does it signify ‘that human rights norms must have a bearing’ on the interpretation or application of law of the sea norms or does it refer to ‘a general principle of international law’ or perhaps ‘merely a moral concept that has

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<sup>325</sup> *Infra* chapter 6, sections 2.2 and 2.3.

<sup>326</sup> Although first employed by the International Court of Justice in ICJ, *The Corfu Channel Case (Merits) (United Kingdom v Albania)* (Judgment, 9 April 1949) *ICJ Reports 1949* 22 (holding that ‘the obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity ...’).

<sup>327</sup> ITLOS *M/V Saiga (No. 2)* 62-3, §155. See also: ITLOS, *The “Juno Trader” Case (Saint Vincent and the Grenadines v Guinea-Bissau) (Prompt Release)* (Judgment, 18 December 2004) *ITLOS Reports 2004* 38-9, §77; ITLOS, *The M/V “Virginia G” Case (Panama v Guinea-Bissau)* (Judgment, 14 April 2014) *ITLOS Reports 2014* 101, §359; ITLOS, *The “Enrica Lexie” Incident (Italy v India)* (Order, 24 August 2015) *ITLOS Reports 2015* 204, §133.

not yet been translated into a legal rule?<sup>328</sup> Petrig and Bo argue that ‘considerations of humanity are to be considered a supra norm that, depending on the context in which it is used, can allow for reference to different legal norms’ and that ‘depending on the context in which it is used ... can trigger the application of different norms and principles that are expressions of the principle.’<sup>329</sup> Arguably, then, the factual context of each case determines which legal norms external to the law of the sea must inform the interpretation and application of the latter. In all the cases before the ITLOS in which it has referred to considerations of humanity, the context was one of state *power over* the vessels and the people on board through enforcement action. In those cases, considerations of humanity therefore appear to be able to bring in human rights norms – either as a source of systemic interpretation via Article 31 VCLT or via 293 UNCLOS, or as a source of autonomous application of human rights law by the Tribunal via Article 293 UNCLOS – because the factual context to the UNCLOS provisions involves state power and state power is what props human rights norms to apply to situations.<sup>330</sup>

It is important to stress, firstly, that where state power over persons is involved in enforcement under UNCLOS, that relation of power must meet the power threshold for the purposes of human rights law in order for the latter to become a relevant source of ‘systemic interpretation’ or to become ‘applicable law’ which the Tribunal can use under the header of ‘considerations of humanity’. This threshold test for the applicability of human rights norms arguably not only applies to bringing in human rights through the autonomous application of human rights as ‘applicable law’ but also when doing so through the ‘systemic interpretation’ of a law of the sea norm.

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<sup>328</sup> A Petrig and M Bo, ‘The International Tribunal for the Law of the Sea and Human Rights’ in: M Scheinin (ed), *Human Rights Norms in ‘Other’ International Courts* (CUP 2019) 353 and 403. Relying inter alia on A Peters, ‘Humanity as A and Ω of Sovereignty’ (2009) 20 (3) *European Journal of International Law* 513-44.

<sup>329</sup> Petrig and Bo (n 328) 404.

<sup>330</sup> Compare: the emergence of human rights norms is associated as a response to state power – both by the authors Petrig and Bo, as well as Judge Tullio Treves whom they cite: ‘He argues that these guarantees “show clear concern for what has been called *the human rights consequences of expanding the bases of jurisdiction*” (i.e., the strictures necessary to counter-balance the enforcement powers granted to coastal States ...’. Petrig and Bo (n 328) 362 (footnotes omitted), referring to ITLOS, *The “Juno Trader” Case* (*Saint Vincent and the Grenadines v Guinea-Bissau*) (*Prompt Release*) (Judgment, 18 December 2004) Separate Opinion of Judge Treves.

Just because a law of the sea norm applies to a situation does not automatically mean human rights norms can be used to guide its interpretation. For it to be able to play that role it must be shown that the underlying facts concerning the relation between state and individual justify a regime as specific as human rights to have a bearing on the situation. That does not mean that a judge cannot take into account the interests of humans beyond human rights. Considerations of humanity are indeed not exhausted by human rights law, just like there are many other regimes of international law whose goal is to consider the interests of humans, such as diplomatic protection and the law of armed conflict.<sup>331</sup> If we look at examples of underlying facts concerning the relation between state and individual, it is not only in the context of enforcement against illegal fisheries or bunkering that human rights can enter the frame. It can also in another example we already discussed: coastal state power over people trying to leave via its territorial sea.<sup>332</sup> For the sake of argument, suppose the litmus test of ‘power’ for relations of duty to arise under the human rights instrument by which the respondent state is bound consists of ‘physical, effective control over persons’. It will only be in cases before the Tribunal in which the underlying facts involve state enforcement amounting to effective control, that human rights would potentially have a role as tool of interpretation or as applicable law.

This conclusion, secondly, implies that *absent* a factual context of state power over persons at sea, human rights *prima facie* cannot enter the law of the sea frame – neither as tool of interpretation, nor as applicable law. This is arguably the case in the context of the obligation to assist persons in distress pursuant to Article 98 UNCLOS. As was shown, the obligation to assist is propped by an encounter absent any (pre-existing) relation of power. Human rights norms, then, have in principle no bearing on it, unless one demonstrates that in addition to the encounter also a relation of power characterises the circumstances of the distress case. This could for example be the case when a state vessel causes the distress by an enforcement action. Yet

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<sup>331</sup> Cf. R Teitel, *Humanity’s Law* (Oxford University Press 2011); A Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016).

<sup>332</sup> *Supra* chapter 3.

outside those rare circumstances, the obligation to assist – while clearly informed by consideration of humanity<sup>333</sup>, and clearly seeking to secure *interests* that human rights norms and the accompanying obligations of states *also* seek to secure<sup>334</sup> – does not bring human rights into issue. In this sense, it is not entirely accurate to create the impression that UNCLOS (or the SAR and SOLAS Conventions for that matter) ‘advance human rights’.<sup>335</sup> Concerning provisions such as Article 98 UNCLOS and the obligations of flag states in that regard, one will have to demonstrate that human rights law recognises the connection that exists between individual and flag state would justify a relation of duty for the purposes of human rights law, thus triggering its viability as a tool of ‘systemic interpretation’ or as autonomously ‘applicable law’. As we will see, this would arguably require a paradigm shift in the theory concerning the supply side of human rights, namely one from the exercise of *power over* a situation in the strict sense to causal *powers to* affect a situation.

For those who care about human rights protection, this may seem a restrictive view. Yet, from our brief discussion of the obligation to assist, one must not forget its strong normative nature and implications, which firstly does not require the existence of a power relation for a relation of duty to arise, and, secondly, once triggered literally asks us to drop everything to help as long as we thereby do not endanger ourselves. Counter-intuitively, it is human rights obligations of states which may offer weaker normative prospects: Firstly, they *prima facie* only arise in the context of power relations, and are, secondly, susceptible to the calibration of factors as positive obligations, for example, to protect the right to life may not impose an excessive burden on states. Scepticism over this restrictive view on the obligation to assist may of course be informed by a *different* problem rising in practice, namely that of a lack

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<sup>333</sup> See for example: International Maritime Organization, *Resolution 1/919(22) of 29 November 2001 on the acceptance and implementation of the International Convention on Maritime Search and Rescue, 1979, as amended*, A 22/Res.919 (22 January 2002) 1, consideration 4 (recognising the humanitarian purpose of the SAR and SOLAS Conventions).

<sup>334</sup> B Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (1998) 36 (1-2) *Columbia Journal of Transnational Law* 401; T Treves, ‘Human Rights and the Law of the Sea’ (2010) 28 (1) *Berkeley Journal of International Law* 3 (writing that ‘concerns for human beings, which lie at the core of human rights concerns, are present in the texture of [the UNCLOS] provisions’).

<sup>335</sup> Oxman (n 334) 401 (writing that the role of UNCLOS in advancing human rights is not negligible).

of compliance by captains at sea and the challenges this raises for affected individuals to hold those responsible accountable for their non-compliance. As we shall see, this is not evident under the law of the sea regime. In this sense, human rights law contains the promise of offering more a meaningful legal hook for remedies. Yet absent the triggering of their applicability, human rights law may not be able to rise to that occasion. What we will see is that, therefore, paradigms of duty for human rights purposes have been advocated for, seeking to extend the test for the applicability of human rights as a function of power relations to the broader logic of ethics of humanity as we see it embodied in the law of the sea obligation to assist; that is to extend the justification of relations of duty for human rights purposes to situations in which an actor merely encounters the individual or has an ability to affect his or her interests without there necessarily be a relation of power as predominantly understood.

## **1.2 Search and rescue obligations**

Another major element of the Search and Rescue (SAR) regime concerns the legal obligation of coastal states to develop and sustain search and rescue services pursuant to UNCLOS and the SAR Convention. Article 98 (2) UNCLOS provides:

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.<sup>336</sup>

Section 2.1.1 of the SAR Convention stipulates:

Parties shall, as they are able to do so individually or in co-operation with other States and, as appropriate, with the Organization, participate in the development of search and rescue services to ensure that assistance is rendered to any person in distress at sea.<sup>337</sup>

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<sup>336</sup> UNCLOS (n 132) Article 98 (2).

<sup>337</sup> SAR Convention (n 277) Section 2.1.1 (with 'Organization' referring to the International Maritime Organisation).

While the terms ‘assistance’ and ‘search and rescue’ (or simply ‘rescue’) are often used interchangeably and partly overlap in practice, they do refer to two distinct legal sub-regimes of the overall SAR regime: The obligation to assist addresses *any* actor at sea, while obligations of search and rescue are directed at states.<sup>338</sup>

This section discusses the basic architecture of the SAR regime (1.2.1) and the role of Maritime Search and Rescue Coordination Centres (MRCCs) in the coordination and cooperation with regard to assistance (1.2.2) and in the coordination and cooperation with regard to search and rescue operations (1.2.3).

### 1.2.1 The search and rescue regime

The international sub-regime on search and rescue by states is worked out in more detail in the SAR Convention. The aim of the SAR Convention is ‘to provide a worldwide system, so that wherever people sail ... SAR services will be available if needed.’<sup>339</sup> To this end the sea is divided into SAR Regions by agreement among the SAR Convention parties.<sup>340</sup> These agreements are to be sent to the International Maritime Organization (IMO) who then publishes them as circulars.<sup>341</sup>

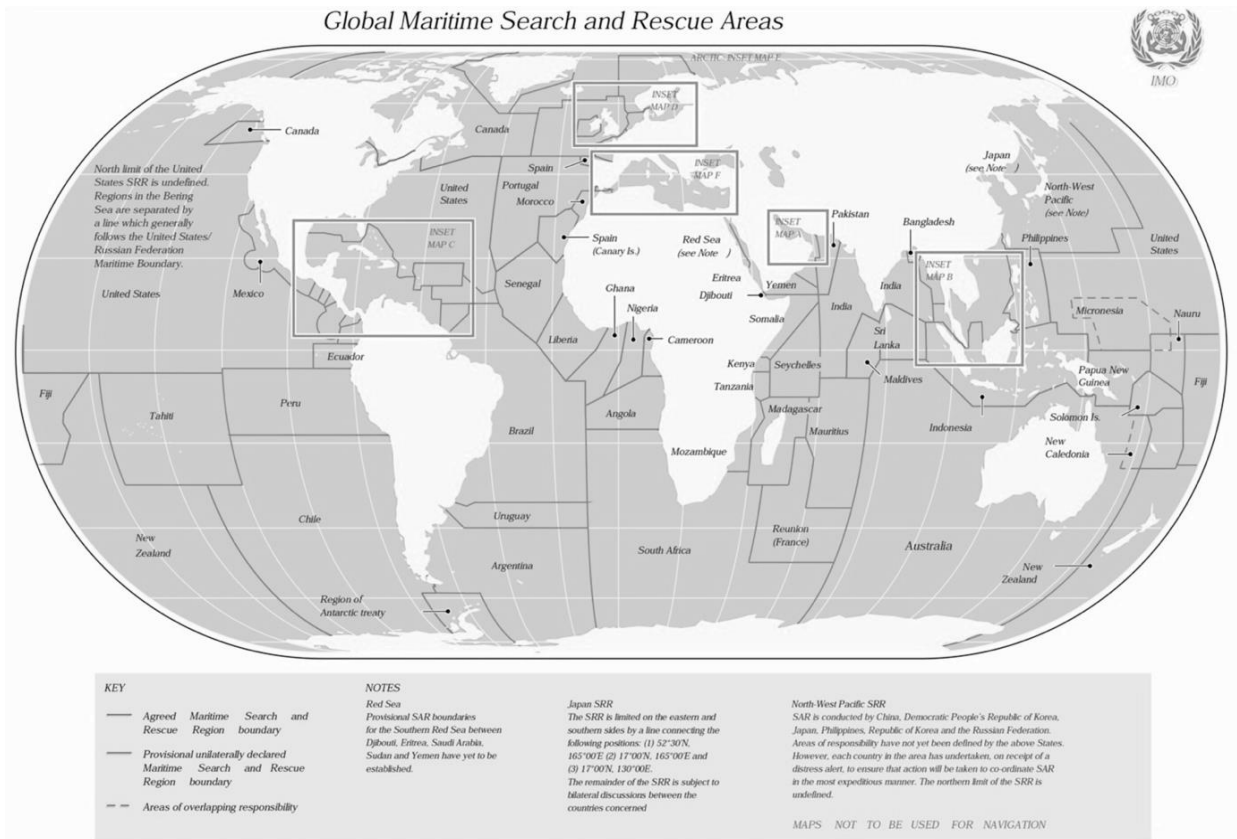
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<sup>338</sup> Note that while rescue always refers to the search and assistance of persons in distress, assistance may also pertain to the assistance of *vessels* where the persons on board are as such not at risk. cf. IMO Assembly, *Guidelines on Places of Refuge for Ship in Need of Assistance* (Resolution 1.949(23) of 5 December 2003 §§1.1 and 1.13. The latter kind of scenario can of course develop into a situation which involves the risk to life and thus the need for the assistance of persons.

<sup>339</sup> ICAO and IMO, *LAMSAR Manual: Volume I*, 1-4, section 1.6.1.

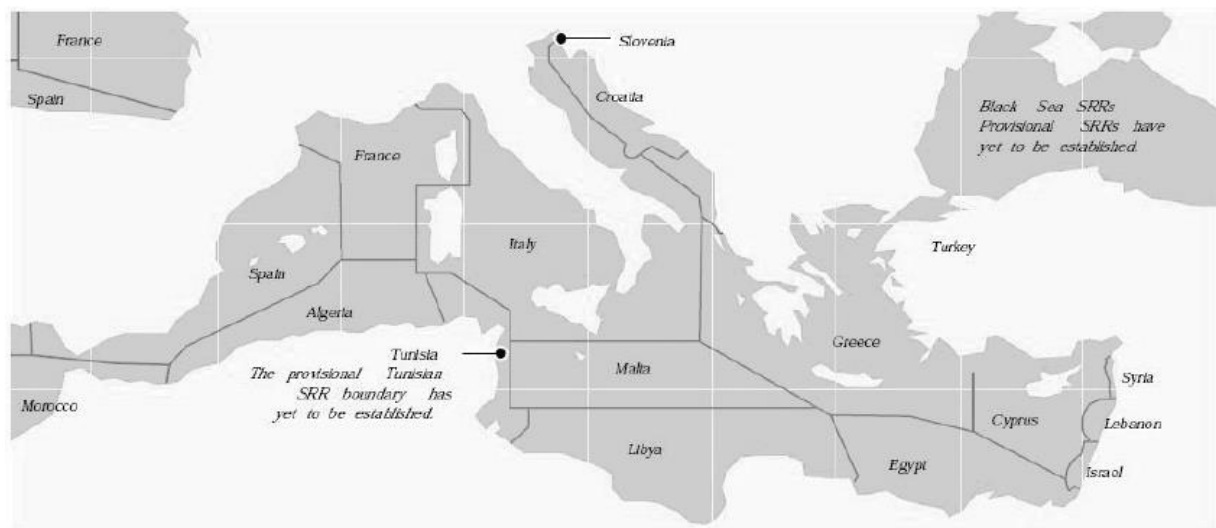
<sup>340</sup> SAR Convention (n 277) Section 2.1.5. The IMO has neither decision-making power, nor an active role in it but has a technical assistance programme to support states who wish to rely on its expertise.

<sup>341</sup> See e.g. IMO, *Notification by Australia and Papua New Guinea of an Agreement on Search and Rescue Regions and coordination of search and rescue services in accordance with paragraph 2.1.4 of the Annex to the SAR Convention*, SAR.6/Circ.17 (7 March 2001); IMO, *Notification by Australia and Indonesia of an Arrangement on Search and Rescue Regions and coordination of search and rescue services in accordance with paragraph 2.1.4 of the Annex to the SAR Convention*, SAR.6/Circ.22 (13 April 2004); IMO, *Notification by the Republic of Italy and the Republic of Albania of an agreement on Search and Rescue Regions and coordination of search and rescue services in accordance with paragraph 2.1.4 of the Annex to the SAR Convention*, SAR.6/Circ.43 (20 January 2010); IMO, *Notification by the Republic of Turkey on Search and Rescue Regions and coordination of search and rescue services in accordance with paragraph 2.1.4 of the Annex to the SAR Convention*, SAR.6/Circ.45 (5 May 2010); IMO, *Notification by the Republic of Cyprus and the State of Israel of an agreement on Aeronautical and Maritime Search and Rescue services in accordance with paragraph 2.1.4 of the Annex to the SAR Convention*, SAR.6/Circ.50 (6 March 2014); *Notification by Algeria and Italy of an agreement in accordance with paragraph 2.1.4 of the Annex to the SAR Convention*, SAR.6/Circ.51 (17 February 2017); IMO, *Notification by Cyprus and Greece of an Agreement in accordance with paragraph 2.1.4 of the Annex to the SAR Convention*, SAR.6/Circ.52 (27 March 2017); IMO, *Notification by New Zealand of an Arrangement in accordance with paragraph 2.1.4 of the Annex to the SAR Convention*, SAR.6/Circ.57 (2 May 2017).



Map 3. Global SAR Plan (IMO)

As for the Mediterranean region, the Global SAR Plan today looks as follows:



Map 4. Mediterranean SAR Plan (IMO)

Under the SAR Convention, each coastal state is responsible for establishing a SAR service within their respective SAR Region. Aside from basic elements like SAR vessels and equipment as well as communication facilities to receive distress calls and

coordinate SAR operations, a SAR service must have a legal framework which clarifies which authorities are responsible for search and rescue and which rules apply to their organisation and operations. The IMO has developed manuals, guidelines, and principles on search and rescue, the most important of which are the 2016 IAMSAR Manuals and the 2004 Guidelines on the Treatment of Persons Rescued at Sea. While these instruments are as such not legally binding, states have to, as far as practicable, follow these minimum standards and guidelines in their implementation of the SAR Convention.<sup>342</sup>

Central in the architecture of the inter-state organisation of SAR are the so-called *Maritime Rescue Coordination Centres* (the ‘MRCCs’ or ‘RCCs’). MRCCs are governmental authorities responsible for providing SAR services and coordinating SAR operations in a designated SAR area or region, which includes monitoring and relaying messages with regard to distress situations and conducting search and rescue operations when needed.<sup>343</sup> Important in every case of distress at sea is to determine which MRCC is responsible under the SAR regime. The starting point is that, in principle, the MRCC state in whose SAR Region an incident occurs is responsible for the coordination of assistance and, if necessary, for the coordination of search and rescue.<sup>344</sup> Sometimes, however, the MRCC receiving a distress call is a different one than the one in whose SAR Region the distress situation unfolds. In those situations, it is up to the so-called ‘first MRCC’ to take initial action – whether that is calling on vessels in the vicinity to assist or to initiate search and rescue. The principally responsible MRCC must then be notified without delay.<sup>345</sup> Until this MRCC takes over, the ‘first MRCC’ is required to coordinate the situation.<sup>346</sup>

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<sup>342</sup> K Gombeer and M Fink, ‘Non-Governmental Organisations and Search and Rescue at Sea’ (2018) 4 *Maritime Safety and Security Law Journal* 3-4.

<sup>343</sup> SAR Convention (n 277) Section 1.3.3; ICAO and IMO, *LAMSAR Manual: Volume I*, Section 1.4. The current research was pursued on the basis of the 2016 edition, but note that a new IAMSAR Manual appeared in 2022.

<sup>344</sup> SAR Convention (n 277) 2.1.9 and 4.2.1.

<sup>345</sup> SAR Convention (n 277) Section 4.3.

<sup>346</sup> ICAO and IMO, *LAMSAR Manual: Volume II*, Section 3.6.

The rationale behind this system is to ensure that there is always an actor in charge to ensure that assistance is rendered to any person in distress at sea. They can do so firstly by *relaying distress information to vessels in its SAR region with the aim of setting up speedy assistance* (1.2.2) and, secondly by *undertaking and coordinating of search and rescue operations* where necessary (1.2.3).

### **1.2.2 MRCC requests for assistance**

Each MRCC must ensure that it has ready access to information regarding the position of vessels within its designated SAR Region so that it can contact them to request their assistance for persons in distress.<sup>347</sup> An MRCC will rely on information of ship reporting systems which provide up-to-date information on the movements of vessels to call upon vessels.<sup>348</sup>

The legal nature of the ability of an MRCC to call upon a vessel to assist is disputed.<sup>349</sup> UNCLOS, the SAR Convention and the SOLAS Convention are silent on this. Soft law instruments provide no clear answers either. IMO Resolution 167(78) of 2004 containing guidelines on the treatment of persons rescued at sea stipulates that ship masters ‘should’ comply with the requirements of the relevant MRCC.<sup>350</sup> The IAMSAR Manual stipulates that states must enact legislation ‘aligned with international law’ which may serve to define ‘the jurisdiction and legal authority of the RCC in accordance with the relevant standards of ICAO and IMO’.<sup>351</sup> The question is, however, whether this refers to the state’s own internal jurisdictional organisation. The IAMSAR Manual further states that ‘the delimitation of SAR

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<sup>347</sup> SAR Convention (n 277) Section 4.1.2

<sup>348</sup> SAR Convention (n 277) Section 5.1.3.2. Note that flag states can sanction tampering with LRIT or AIS equipment. See e.g. Panama Maritime Authority, *Sanction to all those vessels of Panamanian Registry that deliberately deactivate the Long Range Identification and Tracking Equipment (LRIT) or the Automatic Identification System (AIS)*, Merchant Marine Notice No. 09/2020 (May 2020).

<sup>349</sup> A similar discussion arises regarding the role of aviation authorities in Flight Information Regions in areas beyond national jurisdiction. See: M Stewart, PhD thesis Leiden University (2021) 158-60.

<sup>350</sup> IMO, *Guidelines on the treatment of persons rescued at sea* (Resolution 167(78), 2004), §5.1.7.

<sup>351</sup> ICAO and IMO, *IAMSAR Manual: Volume I*, Section 1.3.6.

Regions is not related to and shall not prejudice the delimitation of any boundary between states.<sup>352</sup> What to make of all this?

Two options can be put forward regarding the nature of MRCC instructions directed at vessels at sea. One is to consider MRCC instructions as an exercise of authority over vessels at sea (1.2.2.1). The other is to consider MRCC instructions as either an exercise of authority or as requests for cooperation depending on the flag of the vessel at which the call is directed (1.2.2.2). In light of the general rules on jurisdiction under the law of the sea, the context of the SAR Convention, other relevant rules of international law, and absent clear state practice to the contrary, the second option arguable prevails as a matter of law.

#### *1.2.2.1 MRCC calls to assist as functionally limited jurisdiction and authority*

The first option is to consider MRCC calls to assist as a form of functionally limited jurisdiction of the MRCC state to assert authority over vessels within its SAR Region.<sup>353</sup> Jurisdiction and the authority that comes with it is functionally limited when it pertains only to authority over certain geographical area or with regard to a certain delimited area of human activities.<sup>354</sup> One such example is the functionally limited jurisdiction of coastal states over foreign vessels with regard to fisheries within their EEZ.<sup>355</sup> By analogy, MRCC instructions could be constructed as functionally limited jurisdiction over foreign vessels with regard to maritime safety within their SAR Region. According to Munari, this jurisdiction not only involves prescriptive but also enforcement jurisdiction over vessels not complying with instructions.<sup>356</sup> The problem with this account is that it is not textually provided for by international law. This is consequential for our question since absent an explicit

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<sup>352</sup> ICAO and IMO, *LAM SAR Manual: Volume I*, Section 2.3.15 (e).

<sup>353</sup> S Trevisanut, 'Is there a right to be rescued at sea? A constructive view' (2014) 4 *Questions of International Law* 12.

<sup>354</sup> For a discussion of the notion of functionally limited jurisdiction in the law of the sea, see: M Gavounelli, *Functional Jurisdiction in the Law of the Sea* (Brill 2007).

<sup>355</sup> Regime of EEZ pursuant to UNCLOS (n 132) Article 56.

<sup>356</sup> F Munari, 'Migrations by Sea in the Mediterranean: An Improvement of EU Law is Urgently Needed' (2018) 32 *Ocean Yearbook* 127.

norm providing for states to exercise authority over vessels on the high seas, the latter are subject to the exclusive jurisdiction of the flag state.<sup>357</sup>

Moreover, this interpretation does not seem to be consistently reflected in actual state practice. To the contrary, the domestic laws of MRCC states commonly limit the ability to give binding instructions to those cases where the international law of the sea provides states with jurisdiction as a coastal or flag state.<sup>358</sup>

#### *1.2.2.2 MRCC calls to assist as requests for cooperation*

A second, more restrictive view defines the role of MRCC states as part of an international law of cooperation between different states. It constructs the nature of MRCC calls to assist in light of this system of cooperation and by reference to the limits set by the general international law of the sea framework on state jurisdiction, including UNCLOS and customary international law.<sup>359</sup>

First of all, it is not uncommon to make a renvoi to the general law of the sea rules on jurisdiction. Recall from chapter 3, for instance, how UN Security Council resolutions and the Smuggling Protocol require State Parties to cooperate ‘in accordance with the international law of the sea’ and defer to the general rules on territorial sovereignty and flag state jurisdiction.<sup>360</sup> Moreover, Article II (1) of the SAR Convention stipulates that nothing in the Convention ‘shall prejudice ... 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.’<sup>361</sup> Also, as we just saw, the IAMSAR Manual asks states to enact legislation ‘aligned with international

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<sup>357</sup> Cf. UNCLOS (n 132) Article 92 (1).

<sup>358</sup> See further this section for examples of domestic legislation.

<sup>359</sup> For an initial defence of this view, see: Gombeer and Fink (n 342) 15-7. Compare also more recently the work from Valentin Schatz and Marco Fantinato who state that SAR Regions do not entail jurisdiction without however providing further references to that end: VJ Schatz and M Fantinato, ‘Post-Rescue Innocent Passage by Non-governmental Search and Rescue Vessels in the Mediterranean’ (2020) 35 *International Journal of Marine and Coastal Law* 744 (writing that ‘unlike maritime jurisdictional zones established in accordance with UNCLOS, SAR Regions do not involve any additional coastal State rights or jurisdiction vis-à-vis foreign vessels’).

<sup>360</sup> *Supra* chapter 3, section 1.2.2; Smuggling Protocol (n 39) Articles 7 and 8; United Nations Security Council, Resolution 2546/2020 adopted by the Security Council at its 8763<sup>rd</sup> meeting, on 2 October 2020, *UN Doc S/RES/2546 (2020)* §2.

<sup>361</sup> SAR Convention (n 277) Article II (1).

law'.<sup>362</sup> Framed this way, the interpretation of the legal nature of the MRCC calls to assist depends on the maritime area to which it pertains and on the nationality of the vessel at which the call is addressed. The reasoning goes that while an MRCC state has sovereignty over its internal and territorial waters and can thus in principle give binding instructions to any vessel within that area (*i.e.* irrespective of the flag they are flying), it cannot do so with regard to foreign vessels on the high seas and in the EEZ. Indeed, unless expressly provided otherwise all vessels on the high seas and the EEZ remain under the exclusive jurisdiction of their flag state pursuant to UNCLOS.<sup>363</sup> As we just saw, we cannot find any express provision formulating such an exception in treaty law when it comes to MRCC calls to assist.

Secondly, state practice tends to confirm the view that the nature of MRCC calls varies depending on the jurisdictional context, although there are a few states who seemingly wish to also assert their authority over foreign vessels on the high seas and the EEZ when it comes to SAR coordination. When looking at domestic legislation, coastal states have adopted three approaches.<sup>364</sup> Some coastal states' domestic legislation does not at all foresee the possibility for their competent authorities to issue SAR instructions or does so but without specifically clarifying their legally binding nature or geographical applicability. This is the case, for example, in relation to the Netherlands.<sup>365</sup> Other domestic legal systems provide for competences of MRCCs to give legally binding SAR instructions limited to their internal waters and territorial sea, both regarding their vessels flying their flag and regarding foreign vessels. Examples of such schemes include those in Australia, Spain, and Italy.<sup>366</sup> For instance, the Australian Navigation Act stipulates that the authorities may only give binding directions on foreign vessels and that the master of a foreign vessel does not

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<sup>362</sup> ICAO and IMO, *LAM SAR Manual: Volume I*, Section 1.3.6.

<sup>363</sup> UNCLOS (n 132) Articles 89 and 92 (1) regarding the high seas and Article 55 and following regarding the EEZ.

<sup>364</sup> This paragraph draws on the research done for and communicated in Gombeer and Fink (n 342) 16-7.

<sup>365</sup> The Netherlands, *SAR Decision* (Regeling inzake de SAR-dienst of 26 August 1994); *SAR operational plan* (Operationeel Plan voor Search and Rescue) 15 [www.kustwacht.nl/sites/default/files/2016-06-28%20OPPLAN%20SAR%20Versie%201.1.pdf](http://www.kustwacht.nl/sites/default/files/2016-06-28%20OPPLAN%20SAR%20Versie%201.1.pdf).

<sup>366</sup> Spain, *Ley de Navegación Marítima* (n 290), Article 367(1); Italy, *Italian SAR Decree* (Decreto del Presidente della Repubblica No. 622 of 28 September 1994), Article 5 juncto *Codice della navigazione* (n 290), Articles 69-70, 1113, and 1158.

commit an offence against the obligation to assist *unless* at the time of the act or omission the vessel is in an Australian port, enters or leaves an Australian port, or is in the internal or territorial waters of Australia.<sup>367</sup> Still other coastal states' legislation provides that their competent authorities *can* give binding SAR instructions to private vessels within their entire SRR, i.e. not only within their territorial sea but also in those parts of the high seas that are part of the SRR. Canada, Belgium, and France, for example, follow this approach.<sup>368</sup> A proper analysis would require a more extensive survey into the domestic legislation and practice of states with regard to MRCC calls for assistance. However, a brief overview already shows that there is no uniform practice to consider MRCC calls as a form of 'jurisdiction' or 'authority' over foreign vessels on the high seas or as 'binding instructions' unless enacted with regard to their own vessels or within their internal or territorial waters.

Thirdly, the nature of MRCC calls to assist should be assessed in light of the wider legal system of cooperation in which it is embedded. MRCC states responsible for a SAR Region are not the only states bearing legal responsibilities in situations of distress. On the one hand, there are the legal obligations to cooperate of the neighbouring MRCC states.<sup>369</sup> On the other hand, and particularly relevant here, are the legal obligations of flag states. Recall from the analysis above that the obligations of captains to assist are obligations arising under national law of the flag state.<sup>370</sup> These obligations remain unaffected by the SAR Convention.<sup>371</sup> To the contrary: The obligation of captains at sea kicks in upon receiving information about a distress situation, irrespective of the maritime area within which they are situated, and

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<sup>367</sup> Australia, *Navigation Act* (n 290), sections 246 and 183 respectively.

<sup>368</sup> Canada, *Shipping Act* (n 290) Articles 130(2)-(3) and 137(1); Belgium, *Flemish MRCC Decision* (Besluit van de Vlaamse Regering betreffende het Maritiem Reddings- en Coördinatiecentrum of 26 October 2007) Article 2 *juncto* *Flemish MRCC Act* (Decreet betreffende de begeleiding van scheepvaart op de maritieme toegangswegen en de organisatie van het Maritiem Reddings- en Coördinatiecentrum of 16 June 2006) Article 42; *Flemish MRCC Decision*, Article 11; *Flemish MRCC Act*, Articles 45 and 53, which do not make an explicit distinction between Belgian and foreign vessels; France, *Internal Security Code* (Code de la sécurité intérieure of 12 March 2012) Article L742-5; France, *SAR Decree* (Décret n°88-531 portant organisation du secours, de la recherche et du sauvetage des personnes en détroit de mer of 2 May 1988) arts 1 and 7(2).

<sup>369</sup> *Infra* section 1.2.3.

<sup>370</sup> *Supra* section 1.1.1.

<sup>371</sup> Cf. SAR Convention (n 277) Article II (2) (stipulating that '[no] provision of the Convention shall be construed as prejudicing obligations or rights of vessels provided for in other international instruments.').

irrespective the source of that information.<sup>372</sup> MRCC calls are such a source of information. MRCC calls, then, are legally relevant facts which activate obligations under the national law of the flag state. The authority over the vessel that is requested to assist rests therefore with the flag state pursuant to its domestic legislation, not with the MRCC state. As a consequence, for example, an MRCC still ‘may inform the flag state of a non-cooperative foreign vessel, but it may not itself enforce its instructions on the high seas’ even if within its designated SAR Region.<sup>373</sup>

In sum, when MRCC states and flag states each properly fulfil their respective obligations under the international law of the sea (respectively: the obligation to relay distress information to vessels at sea; the obligation to regulate and enforce the obligation to assist for vessels flying their flag), the SAR regime forms a seamless system of cooperation. A few observations are apposite here: Firstly, MRCC state authority over vessels is not necessary under this system as the system clearly defines who has which legal responsibilities and where they stem from. Internally, of course, a state must designate who has ‘jurisdiction’ or ‘authority’ to issue calls for assistance. Secondly, this system reflects the reality that distress incidents in a complex multi-actor environment require the cooperation and sharing of responsibilities among states. Thirdly, one may – perhaps cynically – ask whether it is desirable to put the full onus of responsibility on MRCC states given that such a move would weaken the incentive for flag states to exercise effective authority and control over vessels flying their flag when it comes to maritime safety. It may also disincentivise coastal states to engage themselves as MRCC coordinators. Aside from this last observation which does not strictly guide legal reasoning, it submitted that the legal view should prevail that MRCC calls for assistance can only be qualified as *requests for cooperation reminding foreign vessels to comply with their obligations under the domestic law of the flag state to assist vessels in distress*.

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<sup>372</sup> *Supra* sections 1.1.2 and 1.1.3.

<sup>373</sup> Gombeer and Fink (n 342) 17.

The desire to read more power into the nature of the tasks of MRCC states is understandable if one seeks to enhance the protection of persons at sea from a human rights angle. The discussion on the nature of the instructions by MRCCs is indeed not only relevant to asserting their binding character as such, but also plays a role in assessing the applicability of human rights law. It is not submitted that each legal regime should be treated in isolation of each other. However, one should remain consistent when it comes to the terms and particularities of each. The SAR regime tries to find a practicable solution while achieving a careful balance in terms of capabilities and responsibilities. Human rights law, on the other hand, has an evolving understanding of responsibilities and ways of dealing with practical limits of its own. The chapters below show that the cooperative nature of the SAR system and the nature of the legal obligations arising under it do not need to stand in the way of effective human protection.

### *1.2.3 MRCC coordination of search and rescue*

The second way to ensure persons in distress at sea are assisted is by setting up search and rescue (SAR) operations. Search and rescue are regulated in great detail in the SAR Convention and worked out to the smallest technicalities in three volumes of the IAMSAR Manual.<sup>374</sup> ‘Rescue’ strictly speaking differs from ‘assistance’ in that it concerns a highly regulated and professionalised field of governmental practice, while assistance refers to basic conduct expected from any seafarer.<sup>375</sup> Under the SAR regime, a *search* is ‘an operation normally coordinated by a rescue coordination centre using available personnel and facilities to locate persons in distress’.<sup>376</sup> A *rescue* is ‘an operation to retrieve persons in distress, provide for the initial medical or other

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<sup>374</sup> Volume I of the IAMSAR Manual discusses the global SAR regime concept, establishment of national and regional SAR systems and cooperation with neighbouring states to provide effective and economical SAR services; Volume II assists personnel who plan and coordinate SAR operations and exercises; and Volume III is to be carried aboard ships, aircraft and rescue units to help with performance of search, rescue or on-scene coordinator functions. Each volume is written with state obligations under the SAR regime in mind (IMO, ‘Guidelines on the Treatment of Persons Rescued at Sea’ (2004) *Resolution MSC.167(78)* (20 May 2004) Section 4).

<sup>375</sup> *Supra* section 1.1.

<sup>376</sup> SAR Convention (n 277) Section 1.3.1.

needs, and deliver them a place of safety.<sup>377</sup> Rescue is thus only terminated once persons are safely disembarked.<sup>378</sup> Three points require attention.

Firstly, the primary obligation of SAR authorities is to cooperate with neighbouring states during SAR operations.<sup>379</sup> The SAR Convention obliges states ‘whenever necessary, to coordinate search and rescue operations with those of neighbouring states.’<sup>380</sup> The IAMSAR Manual stresses the importance that ‘all involved in the overall multi-agency, multi-jurisdiction, multi-mission and possibly international response to major incidents must *clearly understand who is in charge*, the respective roles of all involved, and how to interact with each other.’<sup>381</sup> The obligation to cooperate first of all concerns ensuring that it is clear which MRCC is in charge: the MRCC in whose SAR Region the incident occurs (the principal MRCC) or the ‘first MRCC’ up until the principally responsible MRCC formally takes over. Taking the lead also means that the MRCC in charge designates the on-scene coordinator (OSC)<sup>382</sup>; this to ensure the most effective results.<sup>383</sup> The obligation of states to cooperate under the SAR regime not only pertains to clarifying who is in charge and who does what. It moreover entails that the MRCC in charge may request the assistance of another MRCC state, including of its assets.<sup>384</sup> It also entails that SAR assets of one MRCC state should be given access to the territorial sea of another MRCC state if necessary.<sup>385</sup> MRCC states ordinarily arrange this in detail in bilateral SAR Agreements.<sup>386</sup>

Secondly, private actors may be given a role in SAR operations. SAR operations are usually performed by the state’s SAR units (often abbreviated as SRUs), but an MRCC can also rely on private assets. Pursuant to the IAMSAR Manual nothing

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<sup>377</sup> SAR Convention (n 277) Section 1.3.2.

<sup>378</sup> See further *infra* chapter 5, section 1.1.

<sup>379</sup> ICAO and IMO, *LAMSAR Manual: Volume I*, Section 5.2.14.

<sup>380</sup> SAR Convention (n 277) Section 3.1.1.

<sup>381</sup> ICAO and IMO, *LAMSAR Manual: Volume II*, Section 6.15.6 (emphasis added).

<sup>382</sup> SAR Convention (n 277) Section 4.7; ICAO and IMO, *LAMSAR Manual: Volume III*, Section 3.

<sup>383</sup> SAR Convention (n 277) Section 4.7.

<sup>384</sup> SAR Convention (n 277) Section 3.1.6.1.

<sup>385</sup> SAR Convention (n 277) Sections 3.1.2 and 3.1.6.2-3.

<sup>386</sup> *Supra* (n 341) for examples.

stands in the way of integrating private SAR capacities into a state's operational SAR system:

States may wish to designate specific facilities as SRUs. These designated SRUs may be under the direct jurisdiction of the SAR service or other State authorities or may belong to non-Governmental or voluntary organisations. In the latter situation, agreements between the SAR service and these organizations should be developed. SRUs need not be dedicated solely to SAR operations but should have the training and equipment necessary for proficient operations.<sup>387</sup>

An MRCC can moreover designate a private actor as an on-scene coordinator (OSC). Sometimes NGOs present – who are increasingly professionalised - can be appointed as the OSC and left to undertake a rescue operation as would normally be executed by governmental SAR units (SRUs). The IAMSAR Manual clarifies that 'if no designated [state] vessels are available, a merchant ship should take the duties of OSC' as they 'may be the only means for an immediate rescue.'<sup>388</sup> Again, it is up to the MRCC in charge to determine how the SAR operation unfolds, including who functions as OSC, unless the coordination of the SAR operation is properly transferred to another MRCC.

Thirdly, the IAMSAR Manual clarifies that SAR Regions 'help to define who has the primary responsibility for coordinating responses to distress situations in every area of the world but that they are not intended to restrict anyone from assisting persons in distress.'<sup>389</sup> Arguably, one can state the issue in stronger terms: unless an MRCC calls a vessel in the vicinity not to proceed to the scene or unless it is notified by the vessel in distress that assistance is no longer necessary, the captain remains bound by its legal obligation to assist.<sup>390</sup>

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<sup>387</sup> ICAO and IMO, *IAMSAR Manual: Volume I*, Section 2.5.3.

<sup>388</sup> ICAO and IMO, *IAMSAR Manual: Volume II*, Section 6.8.3 (b).

<sup>389</sup> ICAO and IMO, *IAMSAR Manual: Volume III*, Section 1.

<sup>390</sup> *Supra* section 1.1.

### 1.3 Interim conclusion

The international law of the sea that we got to know in this chapter has a different take on protecting the interests of individuals compared to the law of the sea we analysed in the previous chapter. Whereas the law of the sea provides a wide basis for states to assert power over individuals trying to undertake unauthorised maritime departures with little safeguards for their interests, the regime analysed in this chapter showcases an extensive system to deal with migrants in distress at sea. It creates a worldwide system to ensure they receive help, either by receiving assistance by nearby ships or by being the object of search and rescue operations set up by coastal states. However, while the limits of the law of the sea in securing the interests of individuals trying to leave lies in its bias towards state power, the regime on assistance, search and rescue suffers from limitations of an entirely different nature: compliance. As the discussion on the right to life below shows, distress incidents can turn out badly despite the existence of such an elaborate normative framework. Distress signals can be ignored by MRCC states or by ships called upon to assist. The actors involved may negligently or malignly go about rendering assistance or pursuing rescue missions, putting the lives of migrants at risk. It may moreover occur that several distress incidents occur in one night, for example, thereby stretching the capacity of coastal states to provide rescue services. It is against this backdrop that human rights may play an important gap-filling role to enhance the protection of migrants at sea.

## 2 THE CONTRIBUTION OF HUMAN RIGHTS NORMS

As with the phase of departure, human rights have the potential to normatively contribute regarding the situation of migrants who have managed to leave by sea but find themselves at risk of drowning. The right to life is considered one of the most important human rights<sup>391</sup> and is protected in several human rights instruments.<sup>392</sup> In

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<sup>391</sup> HRCee, 'General Comment No. 36 – Article 6: right to life' *UN Doc. CCPR/C/GC/36* (3 September 2019) §2 (calling the right to life 'the supreme right from which no derogation is permitted').

<sup>392</sup> ICCPR (n 7), Article 6 (1); ECHR (n 8) Article 2 (1); ACHR (n 7) Article 4 (1); ACHPR (n 7) Article 4.

the context of assistance and the search and rescue of migrants at sea, the right to life is relevant in three ways: it prohibits unlawful killing (2.1); it creates a positive obligation to prevent the loss of life at sea (2.2); and it entails the procedural obligation to investigate the loss of life in the case of drownings (2.3).

## 2.1 Prohibition of unlawful killing

Often called the negative dimension of the right to life, every state has to refrain from intentionally depriving a person of life and from conduct which causes foreseeable and preventable life-terminating harm or injury.<sup>393</sup> The use of lethal force in self-defence is for instance not considered to be arbitrary.<sup>394</sup> For current purposes, the prohibition of unlawful killing is most relevant for the way state authorities go about assistance and search and rescue of migrants in distress at sea. As already explained, relaying assistance calls as well as coordinating and performing rescue operations are technical undertakings which require a high degree of professionalism and diligence. They are therefore the subject of detailed regulations and practical handbook guidance. Both assisting vessels – be it state vessels or private ones – as well as the coordinating MRCC and deployed SAR units on the ground may however conduct themselves in such a way as to put the lives of migrants at risk.

For example, an MRCC may – against professional standards – call upon a vessel in the vicinity *not* to proceed to the distress scene to render assistance. This happened for instance to NGO vessel *SOS Méditerranée* in November 2017. As such, an instruction not to move in the direction of an incident may have good reasons if there is another vessel nearby and in a better position to assist. But when this is not the case, as with the *SOS Méditerranée*, such conduct by an MRCC runs entirely against the object and purpose of the SAR regime. Saving lives indeed requires speedy arrival at a distress scene.<sup>395</sup> An MRCC may also appoint an incompetent on-scene

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<sup>393</sup> HRCee (n 391) §6.

<sup>394</sup> *Ibid.* §10.

<sup>395</sup> Gombeer and Fink (n 342) 17 (writing: ‘This is why UNCLOS requires captains to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance. This is why the SAR Convention obliges any search and rescue unit receiving information of a distress incident to take immediate action if in a position to assist.

coordinator. This too runs against the professional standards<sup>396</sup> and may foreseeably cause the loss of life. Even when not physically present, then, an MRCC's conduct can endanger the lives of migrants in distress.

SAR units – as counter-intuitive as this may sound – can on occasions endanger the lives of migrants on the scene. They can do so unintentionally if the deprivation of a migrant's life is the result of incompetence while handling a rescue incident. It has however also occurred that SAR units seem to have intentionally endangered the lives of migrants. In 2017, for example, the Libyan Coast Guard endangered the life of a migrant hanging on the side of the rescue vessel while accelerating.<sup>397</sup> In 2020, the New York Times brought the story of the Greek Coast Guard forcing rescued migrants onto rafts.<sup>398</sup> The conduct of rescue units can not only be problematic from a right to life perspective, but also in light of the prohibition of torture and inhuman treatment. Inappropriate conduct in general has been frequently reported with regard to the SAR operations performed by the Libyan Coast Guard<sup>399</sup> but has also come to the surface with regard to the European border guard agency also known as Frontex.<sup>400</sup>

In a first sense, then, a state's negative obligation accompanying the right to life can constitute an important benchmark to evaluate the conduct of states towards persons in distress at sea.<sup>401</sup> In *Xhavara*, the European Court of Human Rights came close to analysing the negative obligation involved in the right to life in the case of a collision

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And this is also why the IAMSAR Manual advises search and rescue units to be immediately dispatched to confirm the distress position.').

<sup>396</sup> SAR Convention (n 277) Section 4.7.2.

<sup>397</sup> Footage of the incident is available at [www.youtube.com/watch?v=phI-f\\_yFXQ](https://www.youtube.com/watch?v=phI-f_yFXQ).

<sup>398</sup> P Kingsly and K Shoumali, 'Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea' (New York Times, 14 August 2020) (available at: <https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html>).

<sup>399</sup> Forensic Oceanography, *Mare Clausum. Italy and the EU's undeclared operation to stem migration across the Mediterranean* (May 2018) 58-62.

<sup>400</sup> G Christides, K van Dijken, S Lüdke and M Popp, 'Scandals Plunge Europe's Border Agency into Turmoil' Der Spiegel (5 February 2021), available at: <https://www.spiegel.de/international/europe/missteps-and-mismanagement-at-frontex-scandals-plunge-europe-s-border-agency-into-turmoil-a-d11ae404-5fd4-41a7-b127-eca47a00753f>.

<sup>401</sup> Negligence can lead to criminal prosecution. See e.g. ECtHR, *Harald Ståle Botten v Norway* App. no. 16206/90 (Judgment, 19 February 1996) (this human rights case itself was not about the right to life as such, but concerned the right to a fair trial of Botten who was convicted for acting negligently while rescuing a fisherman who had gotten into trouble at sea).

of an Italian coast guard vessel with an Albanian ‘migrant boat’.<sup>402</sup> The case was however cut off at the stage of admissibility.<sup>403</sup>

## 2.2 Prevention of the loss of life

The right to life also produces positive obligations for states. As explained by the UN Human Rights Committee, protecting the right to life ‘also includes an obligation for states parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities.’<sup>404</sup> The European Court of Human Rights too has confirmed that the right to life ‘enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.’<sup>405</sup> This requires the state, given the circumstances of each case, to do everything it can to prevent a person’s life from being avoidably at risk.<sup>406</sup> The obligation to prevent the loss of life applies to a wide range of areas of human activity. From the use of force and detention by governmental authorities, to health care policy and the regulation of dangerous industrial activities. Of particular potential are the obligations emerging in the case law which require flag states to ensure safety ‘on board ships’ flying their flag<sup>407</sup> and the requirement that emergency services are provided when authorities are notified that someone’s life or health is at risk.<sup>408</sup>

The state also has an obligation to prevent the loss of life at the hands of private individuals. This not only means that a state has to put in place effective criminal law provisions to deter the commission of offences, but also that ‘in certain well-defined

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<sup>402</sup> ECtHR, *Xhavara* (n 253) [‘Griefs’] §1.

<sup>403</sup> *Ibid.* [‘En Droit’] §2.

<sup>404</sup> HRCee (n 391) §18.

<sup>405</sup> ECtHR, *Osman v the United Kingdom* (Judgment, 28 October 1998) §115; ECtHR, *LCB v the United Kingdom* App.no. 23413/94 (Judgment, 9 June 1998) §36.

<sup>406</sup> *LCB v the United Kingdom* §36.

<sup>407</sup> ECtHR, *Leray and Others v France* App. no. 44617/98 (Decision, 16 January 2001) [‘En Droit’] §1.

<sup>408</sup> ECtHR, *Milan Furdik v Slovakia* App. no. 42994/05 (Decision, 2 December 2008) [‘The Facts’] §A.1’ (the applicant’s daughter died as a result of injuries sustained while climbing in the High Tatras).

circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.<sup>409</sup> The assessment of whether a state has complied with its positive obligation needs to take into account difficulties involved in policing, the sometimes unpredictable character of human conduct and the limitation of resources a government may have at its disposal. The positive obligation to prevent may not ‘impose an impossible or disproportionate burden on the authorities’ and accordingly ‘not every claimed risk of life can entail for the authorities to take operational measures to prevent that risk from materialising.’<sup>410</sup> As a benchmark for operational measures, the European Court of Human Rights has held that ‘the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual ... from the criminal acts of a third party’ and that ‘they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.’<sup>411</sup> It suffices to show that the authorities ‘did not do all that could be reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.’<sup>412</sup> That a person puts him- or herself in a position of risk does not do away with the state’s obligation to prevent the loss of life<sup>413</sup>, although it can be taken into account when assessing the concrete measures the state took in the situation at hand.<sup>414</sup>

From this body of case law, the potential relevance of the right to life for the prevention migrant drownings at sea is evident.<sup>415</sup> Three aspects of it can be discerned, which relate to our analysis under the law the sea: the way MRCCs relay distress information to vessels at sea and how these vessels respond to those calls

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<sup>409</sup> *Osman v the United Kingdom* (n 405) §115.

<sup>410</sup> *Ibid.* §116.

<sup>411</sup> *Ibid.*

<sup>412</sup> *Ibid.*

<sup>413</sup> ECtHR, *Bone v France* App. no. 69869/01 (Decision, 1 March 2005).

<sup>414</sup> V Stoyanova, ‘The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling (2020) 21 (3) *German Law Journal* 452-3 (referring to the ECtHR’s case law which involved suicide and the choice to reside in a dangerous place leaving the obligation of the state to prevent intact).

<sup>415</sup> For general statements to that end, see: I Papanicolopulu (n 144) 189-90 (writing that ‘from a substantial point of view, the right to life requires the State to take measures to ensure that those at risk of losing their life are assisted, and to take all necessary measures to ensure their safety’).

(2.2.1), the way states conduct search and rescue operations (2.2.2), and, additionally, the way states aim to prevent the loss of life at the hands of smugglers (2.2.3).

### *2.2.1 Preventing the loss of life and assistance*

MRCC states can play an important role in preventing the loss of life by promptly calling upon vessels within the vicinity of a distress scene to assist. The way it goes about the relaying of information could therefore be subjected to human rights scrutiny. There is moreover the role of flag states: Running a little ahead of the chapter below on disembarkation, the fact that European states are reluctant to accept rescued migrants onto their territories makes that – as a side-effect – captains of merchant vessels are increasingly reluctant to aid migrants in distress. In that context, it has been argued that in order to satisfy the basic requirement under the right to life also comprehends a state's due diligence obligation to monitor and enforce the obligation of captains to assist migrants in distress – if necessary, under the threat of criminal punishment:

If a flag State learns of 'the existence of a serious risk' that persons in distress at sea will drown and even though they have the 'capacity to influence effectively the action of persons' in question, i.e. the masters of a vessel flying its flag in the vicinity of these persons, do nothing to prevent the loss of life at sea, it will be in violation of its due diligence obligation under the right to life.<sup>416</sup>

This of course corresponds with legal obligations already arising under the law of the sea, namely under Article 98 (1) UNCLOS.<sup>417</sup> Yet the added value of such legal obligations as a matter of human rights law is that they can be invoked by individuals against states. To be able to invoke the human rights obligations of MRCC states and flag states however requires confirmation that the relaying of SAR information and the proximity of a vessel to a distress incident respectively bring the persons in danger

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<sup>416</sup> E Papastavridis, 'Is there a right to be rescued? A skeptical view' (2014) 4 *Questions of International Law* 30-1.

<sup>417</sup> *Supra* section 1.1.

of being lost within the scope of application of the relevant human rights instruments by which the MRCC and flag states are bound.

### *2.2.2 Preventing the loss of life and search and rescue*

On the one hand, the prevention of the loss of life potentially requires the state to ensure that it has the necessary regulations and measures in place to avoid migrant drownings, including having emergency services available. These requirements can be satisfied by having SAR services in place and – when needed – operations conducted in line with the legal and professional standards as developed under the SAR regime.

This conclusion finds support in the *Leray* case, predating the development of the SAR regime as we know it today. In February 1979, a cargo vessel named the *François Vieljeux* sank about 80 kilometres west of Cape Fisterra, Spain. While today the incident would have resorted under the MRCC of Spain and the sub-MRCC of Finisterre<sup>418</sup>, the incident back then predated the SAR Convention of April 1979. At the time, the family members of *Leray* and other victims of the incident directed their complaint against France, arguing that the French authorities had not diligently executed the rescue mission they had engaged in. Their complaint was rejected by the French Conseil d'Etat<sup>419</sup> and subsequently brought before the European Court of Human Rights. The applicants pointed at

a series of serious mistakes committed by the French maritime and administrative authorities in the organisation of the operations aimed at safeguarding the lives of people in distress. They insist in particular on the delay in the implementation of this assistance, and on the erroneous assessment according to which the shipwreck area fell under the jurisdiction of the Spanish and not French authorities.<sup>420</sup>

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<sup>418</sup> IMO, 'Rescue Co-ordination Centre / Spain' in: *GISIS: Global SAR Plan*.

<sup>419</sup> ECtHR, *Leray and Others v France* App. no. 44617/98 (Judgment, 20 December 2001) §§13-5.

<sup>420</sup> ECtHR, *Leray and Others v France* App. no. 44617/98 Decision, 16 January 2001) ['Griefs'] §1 (translation from French: les requérants relèvent un ensemble de fautes lourdes commises par les autorités maritimes et administratives françaises dans l'organisation des opérations visant à sauvegarder la vie des personnes en détresse. Ils insistent

Referring to *LCB v the United Kingdom*, the Third Section of the Strasbourg Court recognised that the right to life entails an obligation to take adequate measures to prevent the loss of life of those under its jurisdiction. With regard to the *François Vieljeux* incident, however, it found no elements that would question the fact that the French authorities had made serious mistakes during the rescue operation.<sup>421</sup> It therefore declared the applicants' complaint regarding the right to life inadmissible, although it did allow the application to proceed with regard to the reasonable delay for the proceedings that had taken place within the French Court system.<sup>422</sup> Albeit a mere admissibility decision, *Leray* constitutes a first important precedent which shows that rescue operations are susceptible to be scrutinised from a right to life perspective. Moreover, it provides an intriguing precedent with regard to the question of the applicability of human rights law to distress scenarios at sea since the incident took place off the coast of Spain and France had as such no pre-established link to the unfolding distress situation.

Mountain ranges can be as inhospitable as the maritime environment and are therefore an interesting benchmark for comparison. The way search and rescue services are to be provided in the mountains and how they relate to the positive obligation to prevent the loss of life shed light on how one can assess the provision of SAR services at sea in light of the right to life.<sup>423</sup> In July 2005, a young woman lost her life as result of injuries sustained while climbing in the High Tatra mountains of Slovakia. Co-climbers had been able to support and hydrate her while trying to reach the emergency services by phone. Although the distress phone lines were initially busy, the accompanying climbers were able to reach the Slovak Mountain Rescue Service. Due to a combination of factors (the use of the designated helicopter for a rescue operation going on elsewhere, the need to refuel the helicopter, strong

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particulièrement sur le retard pris dans la mise en œuvre de ces secours, et sur l'appréciation erronée selon laquelle la zone de naufrage relevait du ressort des autorités espagnoles et non françaises').

<sup>421</sup> *Ibid.* ['En Droit'] §1.

<sup>422</sup> *Ibid.* ['En Droit'] §2.

<sup>423</sup> ECtHR, *Furdik* (n 408) ['The Law'] b), (i) alinea 5 (making the comparative relevance of the provision of air-mountain and air-sea rescue facilities).

turbulence, and the apparent need for special equipment) it took the rescue unit an hour and a half to reach the scene. By that time, the injured climber had lost her consciousness and had – according to the government – already reached the stage of clinical death.<sup>424</sup> One of the things the applicant took issue with was that another helicopter was said to be available which would have accelerated the provision of rescue. In its admissibility decision, the Fourth Section of the European Court of Human Rights established that a state’s obligation to prevent the loss of life ‘involves the setting up of an appropriate regulatory framework for rescuing persons in distress and ensuring the effective functioning of such framework’.<sup>425</sup> The choice of means to ensure the positive obligation falls within the state’s margin of appreciation. The Court ruled that Slovakia had the appropriate legislation in place to organise its mountain- and air rescue service and found no reason for doubting the adequacy of its mechanisms. The Court further held that

the positive obligations under Article 2 [do not] stretch as far as to require the incorporation in the relevant regulations of an obligation of result, that is a time-limit within which an aerial ambulance must reach a person needing urgent medical assistance (...). Various limiting factors inherent to the operation of airborne medical assistance, such as its dependence on weather conditions, accessibility of terrain and technical constraints would render such a general obligation difficult to fulfil and impose a disproportionate burden on the authorities (...).<sup>426</sup>

For a state’s maritime search and rescue services to comply with the obligation to prevent the loss of life, then, it must similarly have in place an appropriate legislative framework and practical mechanism in line with the standards developed under the SAR Convention and its Manuals. Given the vastness of some search and rescue regions and the limiting factors that are often at play at sea, states have a certain margin of appreciation on how to go about the rescue of migrants at sea.

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<sup>424</sup> ECtHR, *Furdik* (n 408) [‘The Facts’] A., 1.

<sup>425</sup> ECtHR, *Furdik* (n 408) [‘The Law’] b), (i) alinea 6.

<sup>426</sup> ECtHR, *Furdik* (n 408) [‘The Law’] b), (ii) alinea 10.

### *2.2.3 Preventing the loss of life at the hands of smugglers*

Finally, based on inter alia the *Osman* and *Rantsev* case law, the right to life would also require states to prevent the loss of life of migrants as a result of the methods employed by criminal smuggler networks. As Stoyanova explains, ‘in relation to migrants who lose their lives while trying to reach destination states via human smuggling, there is little doubt that the EU and the Member States are aware of the risks to life and, in this sense, the requirement for foreseeability of the risk is fulfilled.’<sup>427</sup> This obligation can be constructed in such a way that it takes into account the challenges of policing the sea, the limits and potential of prediction of the conduct of smugglers (especially on well-documented maritime routes, and the limits and capacities of government resources, including modern surveillance technologies. These statements too require, however, for each particular case of migrants in distress at sea, to assess whether the migrants affected found themselves within the scope of application of the human rights instrument to begin with.

## **2.3 Investigation of the loss of life**

A second positive obligation emanating from the right to life is of a procedural nature. It requires the state to investigate the loss of life and, where appropriate, to instigate criminal or other proceedings against the actors responsible – be they private or public.<sup>428</sup> It is an obligation of means, not of result. This means, for example, that the authorities ‘must have taken the reasonable steps available to them to secure the evidence concerning the incident’ and does not necessarily require an eventual prosecution or conviction.<sup>429</sup> Firstly, the positive obligation to investigate requires some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the state.<sup>430</sup> This may on certain

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<sup>427</sup> Stoyanova (n 414) 448.

<sup>428</sup> W Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 122.

<sup>429</sup> ECtHR, *Emars v Latvia* App. no. 22412/08 (18 November 2014) §§76 and 83.

<sup>430</sup> ECtHR, *McCann and Others v the United Kingdom* App. no. 18984/91 (Judgment, 27 September 1995) §161.

occasions occur in the case of migrant rescue.<sup>431</sup> More likely, however, are the scenarios in which there is a government's lack of action to prevent migrant drownings or in which migrants have lost their life at sea at the hands of migrant smugglers.<sup>432</sup> In the *Leray* case discussed above, the European Court of Human Rights not only found that the right to life entails preventing the loss of life through rescue operations, but also includes a procedural obligation to investigate when things go wrong during such operations.<sup>433</sup>

The obligation to investigate may be of particular relevance in case there are allegations that an MRCC state did not respond to a SAR incident or did not properly follow up on the situation once it had called upon vessels in the vicinity to assist migrants in distress. This was for instance the case with the notorious *Left to Die Boat* incident of March 2011.<sup>434</sup> Despite the knowledge or ability to know where the migrant boat was at sea, the migrants were left adrift at sea for fourteen days. Eventually the boat drifted back to the Libyan coast where it had departed. Only nine of the seventy-two migrants survived the incident. Not only did the MRCC state arguably handled the situation improperly, several state assets from differing states – from military vessels to surveillance aircraft of states patrolling in the area had at one or more points in time approached the migrant boat in distress without rendering any form of assistance. Investigations may thus not only be required under human rights norms by the MRCC state who sent out the distress information to vessels in the vicinity, but also to the flag states of vessels ignoring the MRCC's call or failing to act upon the information.

Finally, the procedural obligation to investigate does not only exist when a person is the victim of the use of force by state agents or their negligence, but also where the loss of life occurs in suspicious circumstance not imputable to state agents.<sup>435</sup>

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<sup>431</sup> *Supra* section 2.1.

<sup>432</sup> *Supra* section 2.2. Cf. Papanicolopulu (n 144) 190; Papastavridis (n 416) 25.

<sup>433</sup> ECtHR, *Leray* (n 420) ['En Droit'] §1.

<sup>434</sup> Heller and Pezzani (n 5).

<sup>435</sup> ECtHR, *Menson v United Kingdom* App. no. 47916/99 (Decision, 6 May 2003).

Governments must do so *ex officio*.<sup>436</sup> Precedent has in this regard been established with regard to victims of trafficking persons. In *Rantsev*, the European Court of Human Rights ruled that the official investigation into the death of a young woman who fell from a balcony necessarily had to look into the broader context of trafficking and how the death of the victim may have been linked to it. The state at hand had not done so satisfactorily, *inter alia* in light of the fact that it had been aware of the ‘serious problem in Cyprus since the 1970s involving young foreign women being forced to work in the sex industry’.<sup>437</sup> In the same vein, the Court has linked the death of an employee aboard ship to the broader context of his working conditions.<sup>438</sup> Similarly, then, the procedural obligation to investigate the loss of life of migrants at sea must be pursued in the broader context of smuggling. A critical perspective may also include the broader context of how migrants end up relying on smugglers because they are funnelled into unauthorised sea crossings in the first place.<sup>439</sup>

### 3 STATE POWER AND PROBLEMS OF DUTY

The standard that human rights law potentially sets with regard to assistance as well as search and rescue can be of tremendous importance to the further securing the saving the lives of migrants at sea where the law of the sea regime falters. For human rights to live up to that promise, however, they have to live up to another one first: that they are legally applicable to situations where the law of the sea hits its limits or where actors do not comply with the standards this body of law sets out for the maritime domain. As with the disruption of maritime departures, this raises several questions as to the applicability of human rights law to the conduct of flag states and coastal states alike.

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<sup>436</sup> ECtHR, *Ilhan v Turkey* App. no. 22277/93 (Judgment, 27 June 2000) §63.

<sup>437</sup> ECtHR, *Rantsev v Cyprus and Turkey* App no 25965/04 (Judgment, 7 January 2010) §§234-42 and §294.

<sup>438</sup> ECtHR, *Bakanova v Lithuania* App no 11167/12 (Judgment, 31 May 2016) §68.

<sup>439</sup> Cf. *Stoyanova* (n 414) 455-7.

### 3.1 MRCC States

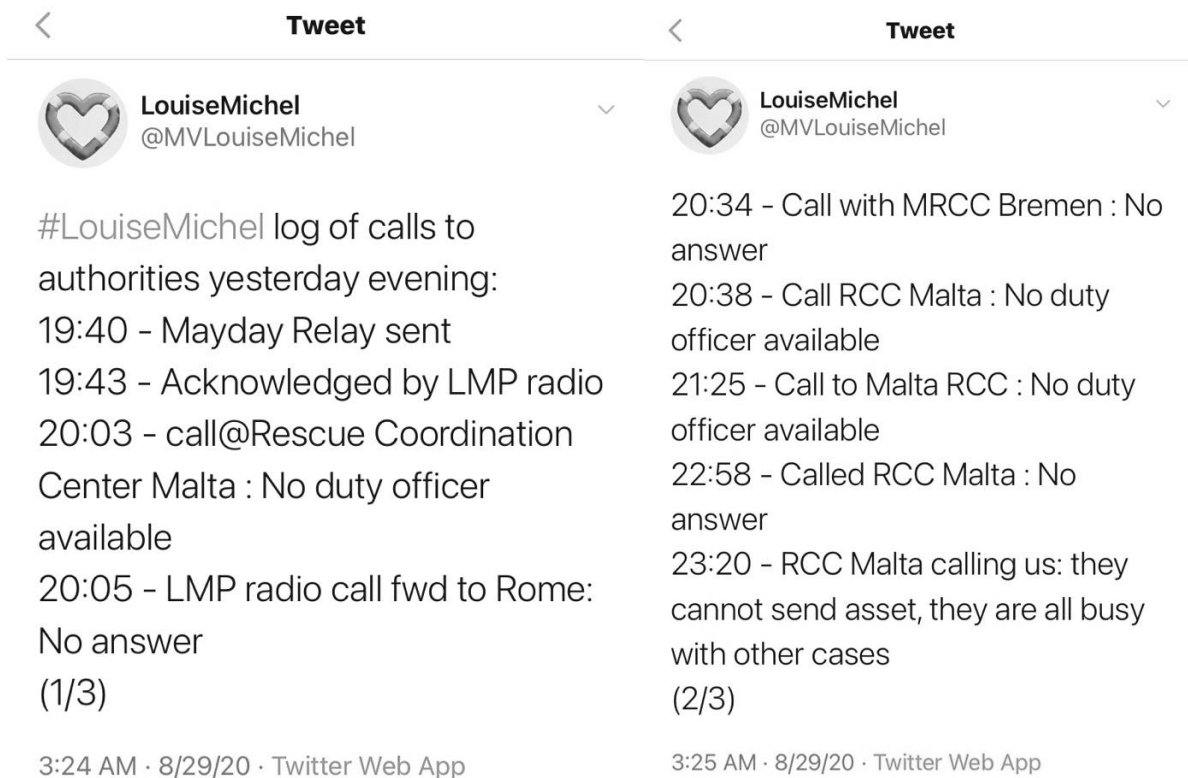
Starting with one of the capstones of the SAR regime, do human rights treaties apply to the relation between the state responsible for the coordination of assistance as well as search and rescue within a certain SAR Region (the MRCC state) and the migrant whose assistance and rescue may be at stake? Does, for example, the presence of a migrant vessel within the SAR Region of a coastal state bring those migrants within the scope of application of the human rights instruments by which that MRCC state is bound?

Take for instance the European Convention of Human Rights. This human rights instrument stipulates that it applies to ‘everyone within the jurisdiction’ of the state concerned.<sup>440</sup> This raises the question whether a SAR Region can be considered as an area ‘under the jurisdiction’ of the MRCC state, or, alternatively, whether performing SAR coordination – whether it pertains to calls for assistance or the setting up of search and rescue – constitutes an ‘exercise of jurisdiction’ over the migrants at risk of drowning. Equally important is the susceptibility of hand-overs of SAR responsibilities by ‘first MRCCs’ to the ones who are *de jure* responsible for an incident by virtue of its location. For instance, is the decision by Spain as a first MRCC authority to hand-over the coordination of a SAR incident to Senegal, Morocco or Algeria subject to human rights standards?<sup>441</sup> What if an MRCC refuses to take-over a SAR incident from a first MRCC? What if a first MRCC stops coordinating an incident even though the *de jure* responsible MRCC has not (yet) confirmed the take-over or refuses to do so? These questions are neither hypothetical nor without consequences for the chances of survival of migrants at sea.

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<sup>440</sup> ECHR (n 8) Article 1.

<sup>441</sup> Having a look at the SAR Global Plans above, one can think of several other examples: a hand-over by Malta or Italy to Tunisia or Libya, or by Greece or Cyprus to Turkey, Egypt or Syria. Outside the European context, one may for instance contemplate the same question for example with regard to a hand-over from Australia to Indonesia.



Firstly, an MRCC may not respond to a distress call, *i.e.* literally not pick up the phone or have no duty officer available.<sup>442</sup> Secondly, an MRCC may receive a distress call but limit itself to relaying a message to all vessels in the vicinity without further follow-up and without dispatching rescue units to the distress scene as was the case with the *Left to Die Boat* mentioned above.<sup>443</sup> Thirdly, an MRCC may acknowledge the need for dispatching a SAR unit but notify that it has no units available due to their deployment in other ongoing operations.<sup>444</sup> Fourthly, an MRCC may instruct a vessel not to proceed to a distress scene given that another vessel is already on its way. One such case involved the Italian MRCC instructing a nearby NGO not to proceed as a Libyan Coast Guard vessel was allegedly nearby.<sup>445</sup> Finally, a ‘first’ MRCC may hand-over the coordination of a SAR incident to another MRCC state with a bad human rights record with regard to the treatment of migrants.<sup>446</sup>

<sup>442</sup> E.g. online ‘Tweets’ of 29 August 2020 by the *M/V Louise Michel* (an NGO vessel funded by the stencil artist Banksy) concerning its attempt to contact MRCC Malta on the evening of 27 August 2020.

<sup>443</sup> Heller and Pezzani (n 5).

<sup>444</sup> *M/V Louise Michel* tweets (n 442).

<sup>445</sup> As with the *SOS Méditerranée* incident, *supra* section 2.1.

<sup>446</sup> As with the *Nivin* incident discussed further *infra* chapter 5, section 3.3.

While the first examples indicate different degrees of negligence towards the safety of migrants at sea, the last two more explicitly reflect the desire not only to avoid contact with migrants but moreover to ensure that they are returned to their point of departure once rescued: in other words, to instrumentalise SAR coordination as a tool for immigration control.<sup>447</sup>

According to Irimi Papanicolopulu, when an MRCC state fails to carry out its positive obligations regarding ‘operative measures for the implementation of search and rescue facilities’, that state ‘can be charged with having failed to comply with its obligations under human rights law.’<sup>448</sup> She however admits that difficulties may arise with regard to ‘the need to establish a valid jurisdictional link between the persons who risk their life at sea and the State that should act in order to protect that person’s right to life.’<sup>449</sup> Picking up this question, Efthymios Papastavridis has raised concerns about considering a state’s responsibility for a SAR Region as an instance of ‘jurisdiction over an area’. Against this he argues that ‘if such *de jure* control [sic] was accepted in principle, it would mean that every vessel or every person entering into an SAR zone – which sometimes is vast - , even without making distress calls, would automatically come under the jurisdiction of the coastal state concerned.’<sup>450</sup>

A few observations can be made which show how thorny the questions regarding the applicability of human rights law are. Firstly, note that both authors associate relations of duty with the notion of ‘jurisdiction’. Secondly, Papastravridis associates this ‘jurisdiction’ with ‘control’. This is something that needs a precise definition as well as an explanation as to why it matters for the notion of ‘jurisdiction’ used in human rights instruments. The same goes for the term ‘*de jure*’: does it mean that the law of the sea defines SAR responsibilities as an exercise of jurisdiction over an area?

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<sup>447</sup> *Supra* Chapter 3, section 1.3.

<sup>448</sup> Papanicolopulu (n 144) 192.

<sup>449</sup> *Ibid.* 192-3.

<sup>450</sup> Papastavridis (n 416) 27. A similar argument is made by Seline Trevisanut relying on paragraphs §§149-50 in the 2011 *Al-Skeini* case (n 907). S Trevisanut, ‘Search and Rescue Operations at Sea’ in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 438 (arguing that ‘control becomes *de jure* when the distress situation is located within the SAR zone of the recipient state’ and that ‘there is then an assumption of authority the coastal state exercises in its SAR zone’). The paragraphs referred to in *Al-Skeini* however neither explicitly nor implicitly support any conclusion in that direction.

Does it mean that the law of the sea creates a legal presumption that the MRCC state exercises jurisdiction, and, according to Papastavridis, control over persons in distress in the SAR area? Or does it mean that the exercise of jurisdiction is lawful vis-à-vis the rights of other sovereign states? As will explained in the chapters below, these definitional issues matter for justifying the establishment of relations of duty for human rights purposes. Thirdly, note that Papastavridis (implicitly) brings in considerations of *policy*: If the coordination of SAR zones constitutes an exercise of ‘jurisdiction’ over persons because of the principle that (let us pick one of the options just mentioned above) that the law of the sea creates a legal presumption of control over people, Papastavridis urges that this may impose an excessive amount of responsibility on the MRCC state. The purpose of our reflection here is not to put in doubt that it would put a significant burden on states. Rather, it is to point out that it is remarkable but therefore not indefensible that policy considerations would normatively matter for establishing relations of duty for human rights purposes: it would mean that, at least sometimes, *policy* considerations ought to prevail over *principles* when evaluating whether a human rights treaty applies to a certain situation.

It should be remarked that if one would confirm the applicability of a human rights treaty on the basis of a principle in this case, this would not necessarily entail the responsibility of the state for violations of the right to life. As we have seen already, the concept of ‘excessive burdens’ implied by positive obligations is something that Courts take into account *at the level of obligations*. If multiple accidents occur at the same time in a mountain range, the fact that a government may only have one or two rescue helicopters for a designated area should be taken into consideration when assessing whether the state complied with its positive obligation to prevent the loss of life. Would we however let this also cast doubt over whether that obligation would be activated in the first place? Would it have seeped into our assessment on whether a human rights treaty should apply to the situation of persons having climbing accidents in the mountains in the first place? The chapters below will point to the important distinction between establishing relations of duty on the one hand

(applicability of human rights) and the identification of the relevant obligations on the other hand (labelled as ‘dividing obligations’) once a relation of duty and the applicability of an instrument is triggered. The chapters will point to legal practice through which at the level of obligations, once they are established, Courts evaluate the scope of the obligations given the circumstances of each case (labelled ‘tailoring obligations’).

Papastavridis continues to consider alternatives for establishing the applicability of human rights instruments after having considered SAR zones as examples of ‘*de jure* control’, writing that:

[in] a similar vein, it cannot be supported that even if coastal States do not exercise *de jure* control, they may have *de facto* control over all vessels within their SAR zone. ... Such factual control would presuppose at least *awareness* of the location or of the situation of the vessels concerned; in the absence of such awareness, the presumption is that coastal States would not exercise any kind of control over them. This presumption of lack of control, however, may be rebutted ...<sup>451</sup>

Seline Trevisanut has taken a slightly stronger stance by arguing that distress calls ‘[create] a *factual* “*relation*” between the state which receives it and the persons who send it.’ She further elaborates:

The life of the persons in distress *depends on* the behaviour of the recipient state. The argument could go further and support the existence of an exclusive long distance *de facto* control that the state, which received the call, exercises on the lives of those people. Their lives are *submitted to the discretion* of that state.<sup>452</sup>

The passages of Papastavridis and Trevisanut again invite further questions. They shed another light on how one can contemplate the relation between state power and the establishment of duty for human rights purposes. Firstly, note that both authors consider ‘*de facto* control’ as normatively significant for the triggering of human rights law. The words ‘*de facto*’ and ‘*factual*’ are not defined but seem to point to a relation whose existence does not depend on rules of law. Observable facts (someone making

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<sup>451</sup> Papastavridis (n 416) 28 (emphases added).

<sup>452</sup> Trevisanut (n 450) 438 (emphases added). For a similar argument, see: VP Tzevelekos and E Katselli Proukaki, ‘Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?’ (2017) 86 *Nordic Journal of International Law* 463.

a phone call & someone receiving the phone call; someone communicating that they are in distress & someone understanding that they are in distress) are said to create a factual relation. Secondly, both authors argue that this factual relation is one of *control*. Both authors argue that knowledge is constitutive of control and thus for triggering a relation of duty for human rights purposes. This conception deviates from a notion of control which considers physical control on the ground as constitutive of control. While other differences may exist between the accounts of Papastravidis and Trevisanut<sup>453</sup>, the authors consider *knowledge as a necessary but insufficient* respectively *necessary and sufficient condition for the triggering of relations of duty*. While not made explicit, this conclusion seems to rest on the following reasoning: because of the knowledge of the entity receiving and understanding the message of the distress call, that entity has counter-factual causal weight in how the distress situation further unfolds (cf. language of ‘depends on behaviour’ and ‘submitted to the discretion of’). In reality, then, a concept of causation forms the justification in both author’s account for establishing duty. Not one of control.

In sum, MRCCs constitute another good illustration with regard to the promise of human rights and the problem of establishing duty. Do these accounts find any support in the law? Do they tell a coherent story about the concept of duty in human rights law? Should legally defined responsibilities under international law such as SAR responsibilities be considered as a matter of ‘jurisdiction’ or ‘control’? Do knowledge and causation play a role at the level of triggering relations of duty as the authors suggest? Or are knowledge and causation elements which only have a role to play at the level of obligations (cf. standard of ‘knew or ought to have known’) once those are already established by virtue of a relation of duty? None of this is to say that the accounts of the authors are ‘right’ or ‘wrong’, but that behind every stance regarding

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<sup>453</sup> For Papastavridis, control involves *at least* awareness of the precise location and/or situation of the vessel. This may point to a closer proximity on the situation than the mere knowledge threshold implied by Trevisanut. Furthermore, Papastavridis and Trevisanut seem to allocate the presumption of (a lack of) control on opposite ends. Note that Papastavridis in a later contribution dismisses a purely epistemic notion of control and requires visual contact and the presence of SAR units. E Papastavridis, ‘The European Convention of Human Rights and Migration at Sea: Reading the “Jurisdictional Threshold” of the Convention Under the Law of the Sea Paradigm’ (2020) 21 (3) *German Law Journal* 431 and 434.

the establishment of relations of duty, there lie assumptions which need descriptive and normative scrutiny. What are human rights about? What does this implicate for thinking about relations of duty? How do relations of duty relate to the obligations they entail? And do these suggested accounts have any footing in positive law?

### 3.2 Flag states

Equally intriguing questions arise regarding the application of human rights law to flag states. For the purposes of the law of the sea and already discussed above, flag states have legal obligations under international law concerning vessels flying their flag. The captains of those vessels have in turn legal obligations to assist under the domestic law of that flag state.<sup>454</sup> What happens when a captain does not act on the information furnished by it by an MRCC or another actor, or does not abide by its obligation to assist in an encounter with migrants at sea? For the purposes of the law of the sea the flag state

bears an obligation whose violation does not depend on the misconduct of the shipmaster. ... The misconduct of the shipmaster may constitute a factual situation, which generates the possible violation of the flag state's own obligation. But, as the obligation of the flag state is an obligation of conduct, the loss of life at sea does not necessarily trigger its international responsibility.<sup>455</sup>

The captain of the vessel would possibly face sanctions under the domestic law of the flag state. The question is, however, whether *human rights law* applies in the relation (if one can be said to exist) between a flag state and migrants in distress at sea by virtue of a vessel flying its flag.

We know from the analysis above that the flag state under international law has an obligation to effectively exercise their 'jurisdiction and control' with regard to the captain's obligation to assist persons in distress.<sup>456</sup> According to Papanicolopulu's analysis of the right to life, '[from] a procedural point of view, States having

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<sup>454</sup> *Supra* section 1.1.

<sup>455</sup> Trevisanut (n 450) 441.

<sup>456</sup> *Supra* section 1.1.1.

jurisdiction are required to investigate allegations that vessels flying their flag or contacted by them have not gone as requested to the rescue of people in distress.<sup>457</sup> But how is that so-called ‘jurisdiction’ for human rights purposes established in such situations? It is one thing to argue that the vessel itself is subjected to the ‘jurisdiction’ of a state for human rights purposes<sup>458</sup>, but thereby one has not yet argued how the people affected by the lack of assistance from that vessel can be brought ‘within the jurisdiction’ of the flag state concerned. The power that the flag state presumably assert in these situations pertains to the ship, not the persons in distress.

Papastavridis has suggested that if a private vessel would be acting upon the instructions of its flag state, it could be seen as a *de facto* state organ of that state.<sup>459</sup> Yet this carves out the rare situation in which the captain of a private vessel would act *as if* he or she would be a state agent. This however still leaves the question whether ignoring a distress situation of a *de facto* state organ (or actual state agents for that matter) would constitute conduct which brings the migrants in distress ‘within the jurisdiction’ of the state for human rights purposes. What if a vessel would simply avoid the encounter? What if no physical control or contact is established between the vessel and the people in distress?

Papastavridis eventually resorts to an argument that relies neither on the authority nor on the control of the state over persons in distress. Rather, ‘[if] a flag State learns of ‘the existence of a serious risk’ that persons in distress at sea will drown and even though they have the ‘capacity to influence effectively the action of persons’ in question, i.e. the masters of a vessel flying its flag in the vicinity of these persons, do nothing to prevent the loss of life at sea, it will be in violation of its due diligence obligation under the right to life.’<sup>460</sup> To reach this conclusion, Papastavridis draws on the International Court of Justice its understanding of due diligence obligations of

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<sup>457</sup> Papanicolopulu (n 144) 190.

<sup>458</sup> *Infra* chapter 5, section 3.2.

<sup>459</sup> Papastavridis (n 416) 29, relying on ARSIWA (n 308) Article 8.

<sup>460</sup> Papastavridis (n 416) 30-1.

states under the Genocide Convention<sup>461</sup> to argue that flag states may have an obligation to prevent the loss of life, including when vessels flying their flag are involved.<sup>462</sup>

There are two reasons why this analogy should be considered with the necessary caveats. Firstly, the International Court of Justice clearly stated that it did not ‘purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts’ and that it ‘still less [purported] to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of international law.’<sup>463</sup> Secondly, knowledge and capacity are elements that are normally taken into consideration to assess compliance with positive obligations of state once they already are at play; that is once a human rights instrument is applicable to a situation.<sup>464</sup> These concepts are normally not invoked to bring that human rights instrument into issue in the relation between state and individual in the first place.

In sum, to argue that the *ability* to regulate or control private entities under its jurisdiction so that their conduct does not affect the right to life of persons abroad is a novel argument that needs elaboration. Again, then, we see the concepts of knowledge and causation enter the frame for justifying relations of duty for human rights purposes.

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<sup>461</sup> Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948; entry into force: 12 January 1951) (1951) 78 *United Nations Treaty Series* 277.

<sup>462</sup> Papastavridis (n 416) 31.

<sup>463</sup> ICJ, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment, 26 February 2007) *ICJ Reports* 2007 181, §429.

<sup>464</sup> *Supra* section 2.2.

### 3.3 Other states

Contemplating the triggering of obligations to secure the right to life, one may ask whether human rights law can be made applicable in the relations between migrants at sea and states other than MRCC- and flag states. Three topics come to mind.

Firstly, *territorial waters* are considered part and parcel of a state's territory. What makes it so easy to accept that persons present in those maritime areas would be automatically covered under the scope of human rights instruments? While this question is perhaps one of the least controversial ones and unlikely to produce any stir before human rights courts, it is nonetheless an interesting case for theoretical purposes: *why* is it that territorial areas under the sovereignty of states are affiliated with relations of duty for human rights purposes to those present within it?

Secondly, one can inquire whether states (individually or collectively) by *putting under surveillance and/or patrolling specifically designated areas at sea* – be it for migration control purposes or security concerns such as embargo enforcements or naval blockades, thereby bring persons within those areas within the scope of application of human rights treaties. Indeed, since the turn of the century, European states have started to build up a system combining satellite imagery, radar detection, fixed and mobile sensors, drone footage, weather forecast and ocean current analyses, and aerial and maritime patrolling to create situational awareness on the southern maritime border of the EU.<sup>465</sup> These practices suggest that European states are well aware of the specific movements of migrant vessels. It has even been suggested that ‘because officials do not want to encourage additional migration by rescuing people outside the territorial waters of EU states, they often do not intervene until the boats reach shore or are very clearly in distress.’<sup>466</sup> In a report prepared for the Human Rights Sub-Committee of the European Parliament, for example, the following is noted by Violeta Moreno-Lax with regard to Frontex Joint Operation Triton/Themis:

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<sup>465</sup> The relevance of the surveillance and patrolling infrastructure of the EU and its Member States is further discussed in chapter 9.

<sup>466</sup> Jones (n 47) 24.

Awareness of a distress situation through whatever means — including satellite imagery or radar detection — triggers the obligation to assist ... . Hence, an approach such as that adopted by Frontex during Joint Operation Triton/Themis, according to which “instructions to move outside Triton operational area” to render assistance to migrant boats “will not be considered”, is in direct contravention of this obligation *and constitutes a serious violation of the right to life*.<sup>467</sup>

Without doubt, awareness of a (potential) distress incident requires captains of vessels at sea to proceed to the scene in order to provide assistance under the conditions set out by international law and in line with the IAMSAR manuals. It is less clear to which extent any other actor, aside from the MRCC state setting up a SAR operation, is required to assist. The IAMSAR Manual stipulates that for example air traffic services, radio coast stations and satellite earth stations are legally required *to relay information* to the SAR authorities<sup>468</sup>, while any other persons ‘are encouraged to report any abnormal occurrence that they have witnessed or heard about’ in order for RCCs to put the appropriate procedures into action.<sup>469</sup> They may even do so via social media regarding which RCCs are encouraged to develop efficient management procedures.<sup>470</sup> Yet except for perhaps the case of an unmanned aerial or naval system functioning as an extension of a vessel already at sea, international law does not require any other actor to also act further upon that information beyond sharing it with the competent SAR authorities.

In any case, instructing a vessel required and able to assist not to proceed to a distress scene is unlawful under the law of the sea. Important for our purposes in the quote above is the very end, where the rapporteur argues that such situations would amount to a serious violation of the right to life. Implied is that awareness of a situation

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<sup>467</sup> Moreno-Lax (n 264) 15 (emphases added).

<sup>468</sup> IAMSAR Manual, Volume I, Chapter 2, Section 2.2.3; Chapter 4, Section 4.5; and Volume II, Chapter 3, Section 3.4.5.

<sup>469</sup> IAMSAR Manual, Volume II, Chapter 3, Section 3.4.6.

<sup>470</sup> IAMSAR Manual, Volume I, Chapter 4, Section 4.9.

through whatever means suffices to establish a relation of duty for human rights purposes. Again, the question arises whether knowledge absent authority or physical control creates duty, as some authors' suggestions mentioned already indicate.

Also notable in the quote above is the distinction made by Frontex itself between operational and non-operational areas at sea. Could it be argued that these so-called 'operational areas' at sea can qualify as areas under the (effective) control of an actor such as Frontex? Can the applicability of human rights law perhaps be triggered with regard to distress situations within such areas but not to those outside it? Or, as argued by the commentators who have passed our *revue* by now, does the quality of control over a certain space not matter in light of knowledge of a certain situation?

Thirdly and finally, one may ask whether states otherwise affecting the stakes of migrants at sea may be considered as standing in a relation of duty for human rights purposes. This idea rests on looking beyond the overt power exercised by MRCCs, flag states, military surveillance actors and border guards to other forms of power that increase the risk of harm for migrants. To make things as tangible as possible, one can go back to what was earlier described as the phenomenon of 'the funnel', *i.e.* how policy decisions of European states limit legal pathways for migration and thereby funnel migrants into unauthorised maritime crossings.<sup>471</sup> It was explained that states neither exercise any authority or control over persons, nor intentionally force them to undertake dangerous sea crossings. It was also referred to that migrants have agency of their own. Does that mean that European states exercised no power over those migrants before and as they left by sea?

According to the vocabulary of modern international law, they would not. As will be clarified further in the next chapters, from a social science perspective such understanding of 'authority' and 'control' as power can be categorised as 'compulsory forms of power': they allow *direct power* exercised by *a specific agent* over the stakes of an individual. Yet, in the vocabulary of social science 'structural' forms of power –

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<sup>471</sup> *Supra* Chapter 2, section 3.

forms of power which are either exercised by specific states but indirectly, or work through social structures and processes rather than through the directed conduct of a specific state – can work in such a way that they equally enable and limit actions of migrants. These forms of power are however more diffuse and are often the result of the combined actions of multiple states – whether or not intentionally acting in concert. For example, one European country restricting visas for non-affluent citizens of refugee producing, sub-Saharan, or predominantly Muslim-populated country X or Y does not necessarily limit the stakes and options of individuals of those countries in a fundamental way. However, all European countries adopting such a policy arguably does, as we saw in chapter 2. But are these the kind of power that can establish relations of duty for human rights purposes? Can they be linked all the way back to specific distress incidents at sea? Can they be meaningfully captured by the vocabulary of international human rights lawyers?

Leanne Weber and Sharon Pickering have argued that ‘[the] role of border policies in creating conditions that lead to avoidable deaths remain wholly unacknowledged in purely individualised accounts. ... [Events] come to be apprehended from the moment of their occurrence, not as the outcome of a long chain of causation.’<sup>472</sup> They have suggested that responsibility can be attributed *where states play a part in creating the risks associated with unauthorised travel*, although they are not clear through which legal mechanism this should occur.<sup>473</sup> In the same vein, Thomas Spijkerboer has suggested that states should be held responsible for the foreseeable consequences of border control policies.<sup>474</sup>

One account which seems to link the effects of policies to human rights law has been developed by Vladislava Stoyanova. Her analysis however takes place at the level of

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<sup>472</sup> Weber and Pickering (n 32) 67.

<sup>473</sup> *Ibid.* 206.

<sup>474</sup> T Spijkerboer, ‘The Human Costs of Border Control’ (2007) 9 *European Journal of Migration and Law* 138.

determining the exigencies of obligations once they are already triggered. Not that of justifying the establishment of those obligations in the first place.<sup>475</sup> She writes:

Without generally challenging destination states' migration control entitlement, it can be argued that the particular modalities of the anti-smuggling measures undertaken by countries of destination make irregular travel even more dangerous. For example, criminalization arguably prompts smugglers to find techniques to avoid arrest by, for example, letting the migrants steer the boat themselves or offloading migrants before reaching the shore. Destruction of boats – another anti-smuggling measure – might discourage smugglers from investing in boats and instead push them to use boats that are of poor quality – like rubber dinghies – or just inadequately equipped. In addition, the increased surveillance of the departure coast might prompt smugglers to use more dangerous routes or choose to depart in bad weather conditions, which can also increase the risk to life. The withdrawal of search and rescue – or the obstruction of the activities of actors that perform search and rescue, which have been also framed as measures that prevent human smuggling – can also, arguably, increase the risk to life. ... Given the objective of establishing the responsibility of the EU and the MS for loss of life or risk to life, the complexity of the causation lines is further exacerbated. Even if the anti-smuggling measures increase the risk to life, the EU's and the MS's involvement in the performance of some of these measures is indirect—through the provision of equipment, intelligence, and financial support to third states.<sup>476</sup>

According to Stoyanova the right to life requires European states to consider alternative measures for immigration and border control that entail less risk to the life of migrants at sea. This includes inter alia an obligation 'to undertake studies and collect data that can contribute to better decision-making.'<sup>477</sup> Another response may require states to organise a sufficient amount of SAR operations at sea. Thus Dunja Mijatovic stated before the European Parliament's LIBE Committee that 'the right to life cannot be guaranteed if there are not enough SAR operations'.<sup>478</sup> Surely, every person has a fundamental interest in survival, but can also a rights claim be triggered

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<sup>475</sup> Stoyanova (n 414) 441 ('taking the application of the Charter to EU policy measures with extraterritorial effects as a point of departure').

<sup>476</sup> Stoyanova (n 414) 450-1.

<sup>477</sup> *Ibid.* 455.

<sup>478</sup> D Mijatovic, *Statement of the Council of Europe Commissioner for Human Rights before the LIBE Committee* (27 April 2020).

at sea in such a way as to identify states that bear a legal obligation to organise SAR at sea for the purposes of human rights law?

Stoyanova does not explicitly explore the link between policies on the one hand and specific distress incidents at sea on the other hand. What she does analyse is how the right to life may inform policy choices which do contribute to the way in which specific distress incidents arise. But this is an analysis which takes place at the level of obligations. This discussion can only take place once human rights obligations are triggered in the first place, i.e. when there exists a relation of duty making a human rights instrument applicable to a certain situation. Unless a migrant at sea finds herself, for example, 'within the jurisdiction of a state' for the purposes of Article 1 ECHR, the limits that the right to life poses on border policies simply will not be triggered. The question is whether the link between policies and their effects on the one hand, and specific distress incidents at sea on the other hand, provide any viable basis for establishing a relation of duty for human rights purposes.

Stoyanova signals that the ECHR might indeed not be applicable in the first place. With regard to the EU Charter of Fundamental Rights, however, she refers to the argument developed by Violeta Moreno-Lax and Cathryn Costello according to which the EU Charter tracks all activities of the EU and its Member States when they exercise power, given that the Charter is said not to contain any explicit threshold such as that of 'jurisdiction' under the ECHR.<sup>479</sup> Indeed, Moreno-Lax and Costello (and Moreno-Lax on separate occasions) argue(s) that because the EU Charter does not contain an explicit written provision which defines the scope of application of the Charter, there is no threshold but for EU law to apply to the particular circumstances, compared to thresholds as developed under other human rights instruments such as the ECHR and the ICCPR.<sup>480</sup> As a result, the argument

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<sup>479</sup> Stoyanova (n 171) 441.

<sup>480</sup> Moreno-Lax and Costello (n 13) 1660, §59.06 (arguing that 'there is no analogue of IHRL jurisdiction acting as a threshold criterion determining the applicability of the Charter'); Moreno-Lax (n 31) 290-4 and 472. See further below, chapter 9, section 2.1.3.

goes, anyone *affected* by the EU or its Member States policies comes within the scope of application of the Charter.

As with accounts encountered above, this is an argument that raises more questions: Firstly, is the silence of a human rights instrument necessarily an indication of it not containing any threshold for establishing relations of duty and thus their applicability to situations? As will be shown in chapters 6 and 7, the EU Charter is far from the only human rights instrument which does not contain ‘jurisdictional’ language. Yet the legal practice around those instruments displays the development of thresholds for relations of duty to arise. Secondly, the argument that ‘anyone affected’ by a state’s conduct falls within the scope of application of a human rights instrument arguably represents in and of itself a normative view of what it is that justifies the establishment of relations of duty for human rights purposes. Its normative justification and grounding in the sources of law must be elaborated. One would, among other things, have to show that such an ‘effects doctrine’ for triggering human rights instruments is indeed something that finds support in legal practice. And, finally, one would have to meaningfully delineate what constitutes a ‘cause’ and what constitutes an ‘effect’ in order for it to be normatively significant enough to entail human rights obligations for a state. We agree with Moreno-Lax and others when pointing to the relative ‘irrelevance of territory’ for establishing relations of duty, yet that may not necessarily imply that there is no threshold at all.

Finally, it should be noted that there are commentators who have pointed at the racial dimension of approaches to migrant rescue at sea<sup>481</sup>; an observation more recently echoed by the Black Lives Matter movement.<sup>482</sup> It is not a novel idea to point at the role of race in particular and the construction of cultural difference in general in the workings of international law. Anthony Anghie, for example, has argued how

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<sup>481</sup> R Robinson, ‘The Obligation to Rescue’ (1995) 62 (1) *Social Research* 7-12 (writing that ‘for many of us it was no accident that the Statue of Liberty sat in New York facing Europe and not in Miami facing Haiti’).

<sup>482</sup> L Tondo and M Stierl, ‘Banksy funds refugee rescue boat operating in the Mediterranean’ *The Guardian* (27 August 2020) available at: <https://www.theguardian.com/world/2020/aug/27/banksy-funds-refugee-rescue-boat-operating-in-mediterranean> The artist launched the vessel’s campaign with a video stating that ‘all black lives matter’ and that he undertook this campaign since ‘EU authorities deliberately ignore distress calls from non-Europeans’.

the construction of other states and their inhabitants as ‘uncivil’ has been used to legitimise assertions of power and how this is a recurring theme in the history of international law.<sup>483</sup> Differential treatment is indeed something that can be understood not only in tangible encounters, but also through more diffuse forms of institutional, structural and productive power – forms of power in which international law may have an accommodating role.



Cartoon 2.<sup>484</sup>

The challenge this critical view raises for human rights law is the following: can relations of power, such as those related to race, be meaningfully captured in workable legal concepts and can they be acted upon? At a more concrete level, such question goes back to the idea that relations of duty towards persons would vary on the basis of the identity of the potential beneficiary of such duty, in this case: the race or cultural status attributed to the rights holder. As we will see, such an idea is deeply

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<sup>483</sup> Anghie (n 22).

<sup>484</sup> T Royaards, ‘Rescue Guide for the Mediterranean’ (8 July 2019)(with the permission of Tsjerd Royaards).

at odds with human rights thinking.<sup>485</sup> Yet we will also see that it has nonetheless been present in the legal practice revolving around the applicability of human rights instruments; for instance, in the debate on and creation of so-called colonial clauses in human rights instruments.<sup>486</sup> While still in vigour under the European Convention on Human Rights<sup>487</sup>, for example, these are predominantly historic artefacts. Nonetheless we are challenged to think about differential treatment of persons based on their status beyond such examples and how it affects the issue of maritime migration and human rights. The reporting in this thesis cannot fully take up this task as many of its aspects go beyond the scope of the research pursued. Where encountered, these aspects of power will be signalled, and it will be indicated how they point at the limits of how we commonly think about the justification of relations of duty for human rights purposes.

#### 4 CONCLUSION

Unlike the case of unauthorised maritime departures, the law of the sea regime concerning assistance and rescue is clearly geared towards advancing the interests of individuals. When every actor does their part, whether as a captain, as a flag state, or as a coastal state responsible for SAR activities, the law of the sea provides a complementary system for coping with distress incidents. Nearby captains will assist, and flag states will ensure that. Nearby coastal states will coordinate such assistance and will dispatch assets of their own where necessary and possible. That does not mean that every person in distress can be helped (on time), as the sea remains an inhospitable environment and resources are limited. In this sense, the law of the sea is about coordinating collective efforts, not about creating rights – neither for states nor for those in distress. In this sense, the law of the sea is also about relations

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<sup>485</sup> *Infra* chapter 6, section 2.1.2.2 (on ‘identity’ as a lever of duty) and chapter 7, section 2.4 (on the ‘identity paradigm’ for establishing relations of duty).

<sup>486</sup> *Infra* chapter 7, section 2.4.2.1 (on ‘colonial status as a negative lever of duty’) and chapter 8, section 1.3 on the European Convention of Human Rights its ‘espace civilisatrice’).

<sup>487</sup> ECHR (n 8) Article 56.

between flag states and those using their flag and between flag states and coastal states cooperating and coordinating their moves. While the eventual object of this entire regime certainly is the saving of lives, the state obligations under public international law involved are in principle not geared towards creating subjective rights which private individuals may seek to enforce.

The limits of the law of the sea in this phase of the maritime journey have not so much to do with a biased design favouring state interests, but with the lack of compliance or proper implementation. Human rights norms and in particular the right to life potentially serves as a legal hook to check the behavior of states. Not only does it require states to refrain from causing death at sea through its own conduct but also to take positive action to prevent migrants from drowning. If human rights obligations, however, are only triggered in case a state already exercises power over persons at sea, a significant number of scenarios remain unaddressed by human rights law: not because states do not comply with their human rights obligations, but because they have no obligations in the first place. To avoid such gap, paradigms for establishing relations of duty would be needed that revolve around normatively significant causal connections.