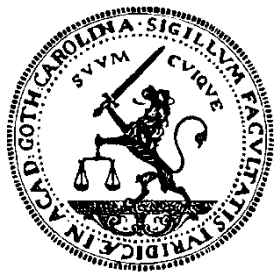

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Refugees at sea: state duties towards the disembarkation to a place of safety

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Contents

Summary

Maritime migration is a long-known phenomenon but has recently received increased attention in Europe due to the large number of people trying to reach the territory of the EU via the Mediterranean. With the abolishment of state-operated search and rescue services, human casualties in the Mediterranean reached a new alarming peak. Therefore, non-governmental organisations (NGOs) have become a crucial actor as they aim at compensating the lack of state-led search and rescue services by conducting rescue operations themselves. Coastal states significantly complicate the work of NGOs by refusing to provide a place of safety for the disembarkation of rescued refugees. This results in long stand-offs of rescue vessels which are usually not equipped to carry many vulnerable people for such long periods. The legal framework surrounding this closed port policy, especially which duties it establishes for states towards the disembarkation of rescued refugees, constitutes the focal point of this thesis. It provides an analysis of the international law of the sea governing the rescue of people in distress coming to the conclusion that this legal regime does not put forth an exclusive duty of a specific state to provide a safe port for disembarkation. Furthermore, human rights law is examined to identify respective state obligations. This analysis is informed by a study of the case *Y.A and others v. Italy* which is pending at the European Court of Human Rights. Considering the unacceptable conditions on board created by stand-offs and the vulnerable state of health of the rescued people, it is found in the thesis that the closure of ports amounts to inhuman treatment contrary to Art. 3 European Convention on Human Rights (ECHR) as well as it constitutes an act of *refoulement* which is prohibited under the same provision. Additionally, the rescued people are deprived of their liberty by this state practice since they are practically forced to remain on the rescue vessel resulting in a violation of Art. 5 para. 1 ECHR. Hence, the final conclusion is reached that coastal states do have an obligation to provide a place of safety for disembarkation which derives from a comprehensive and progressive interpretation of human rights law in the light of obligations under the law of the sea.

Preface

I am of the opinion that you do not let people drown at sea. I am of the opinion that this is not only an opinion but rather a basic rule of humanity. There is urgent need for change in the behaviour of states and there is legal ground for such change to happen.

Abbreviations

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEZ	Exclusive economic zone
EU	European Union
IAMSAR Manual	International Aeronautical and Maritime Search and Rescue Manual
ICAO	International Civil Aviation Organization
IMO	International Maritime Organization
IMO Guidelines	IMO Guidelines on the Treatment of Persons Rescued at Sea
IMO Principles	IMO Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea
IOM	International Organization of Migration
MOAS	Migrant Offshore Aid Station
NGO	Non-Governmental Organisation
nm	Nautical Miles
PMoU	Paris Memorandum of Understanding on Port State Control
RCC	Rescue Coordination Centre
SAR	Search and Rescue
SAR Convention	International Convention on Maritime Search and Rescue
SAR NGO	Non-Governmental Organisation carrying out SAR Services
SOLAS Convention	International Convention for the Safety of Life at Sea
SRR	Search and Rescue Region
UN	United Nations

UNCLOS	United Nations Convention on the Law of the Sea
UNHCR Guidelines	UNHCR Guidelines on the Treatment of Persons Rescued at Sea
UNHRC	United Nations Human Rights Committee
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

In 2012, the European Union (EU) received the Nobel Peace Prize for its achievements in the areas of 'peace, reconciliation, democracy and human rights in Europe'.[1] 2019, only seven years later, a submission was made by lawyers to the International Criminal Court calling for investigations against officials of the EU and its Member States. This call is based on the migration policy the EU exercises at its maritime border in the Central Mediterranean, which, according to the submission, amounts to crimes against humanity.[2] This legal action draws attention to the fact that the promotion and protection of human rights by the Nobel Peace Prize winner has its limits. One of them being the Mediterranean Sea, where between 2014 and 2021 an estimated number of 22.594 people have drowned trying to reach European territory.[3] This grants the EU another award: the one of the deadliest border worldwide.[4] The fact that human mobility is a significant cause for human deaths reveals severe injustice in the global migration order. While a person possessing an Italian passport can enter 114 countries without visa, a person from Afghanistan is only granted visa-free access to four states.[5] This affects the way and consequently the level of security in which people can move between different states. Of the currently about 84 million forcibly displaced people, the majority holds passports that are not equipped with the privilege of visa-free entry into their

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[1] Nobel Prize Outreach AB, 'European Union (EU) - Facts. Nobel Prize' (2022) <https://www.nobelprize.org/prizes/peace/2012/eu/facts/> accessed 13 April 2022.
[2] Omer Shatz and Juan Branco, 'Communication to the Office of the Prosecutor of the International Criminal Court, Pursuant to Art. 15 of the Rome Statute, EU Migration Policies in the Central Mediterranean and Libya (2014-2019)' <https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf> accessed 13 April 2022.
[3] Simona Varrella, 'Deaths of Migrants in the Mediterranean Sea 2021' (*Statista,* 2021) <https://www.statista.com/statistics/1082077/deaths-of-migrants-in-the-mediterranean-sea/> accessed 27 January 2022.
[4] Eugenio Cusumano and Matteo Villa, 'Over Troubled Waters: Maritme Rescue Operations in the Central Mediterranean Route' in Philippe Fargues and Marzia Rango (eds)*, Migration in West and North Africa and across the Mediterranean: Trends risks, development and governance.* (*IOM*, 2020) 200–212 <https://publications.iom.int/system/files/pdf/ch16-over-troubled-waters.pdf> accessed 28 April 2022.
[5] Passport Index, 'Global Passport Power Rank 2022: Passport Index 2022' (*Global Mobility Intelligence*, 2022) <https://www.passportindex.org/byRank.php> accessed 27 January 2022.

country of choice.[6] Therefore, people seeking refuge in Europe are forced onto dangerous routes of travel to realise their right to apply for asylum (e.g. Art. 18 Charter of Fundamental Rights of the EU[7]) while formal and save means of travel are blocked for them by EU-legislation.[8] This leaves people departing from Northern Africa without an alternative to crossing the Mediterranean in order to reach the EU despite its lethal risks.[9]

In response to this unacceptable situation, Italy launched the mission Mare Nostrum in 2014 aiming at saving lives of people in distress at sea. However, this humanitarian approach did not last long and was soon replaced by missions of the EU agency Frontex that no longer focused on rescuing people but rather on border protection and suppressing smuggling activities. This policy-shift created a gap in the Mediterranean regarding search and rescue (SAR) services. Instead of state actors taking an initiative, civil society took a stance. Starting in 2014, several non-governmental organisations (NGOs) have been conducting SAR missions rescuing around 120.000 people (until 2019) and bringing them to ports in the EU.[10] Lacking a fair system of burden sharing among EU Members States, the situation in Italy and Malta has become increasingly difficult which has led to an unwelcoming environment for NGOs delivering SAR services (SAR NGOs). Coastal states have since deployed several legal and political means to essentially complicate or completely block the operations of those NGOs. One of these measures is the closing of ports to vessels that carry rescued refugees[11] on board. This closed port

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[6] UNHCR, 'UNHCR - Refugee Statistics' (10 November 2021) <https://www.unhcr.org/refugee-statistics/> accessed 27 January 2022.
[7] Charter of Fundamental Rights of the European Union 2000 [OJ C 364/01].
[8] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 2001 [OJ L 187/45]. The directive requires member states to impose border control responsibilities and sanctions on carriers regarding the transportation of people without the necessary documents, especially entry-visa.
[9] EU territory can theoretically also be reached on the African continent in form of the Spanish enclaves Melilla and Ceuta, which, however, are strongly protected against entry: Emma Wallis, 'One dead as Spain extends closure of land border with Morocco' (*InfoMigrants*, 02 May 2022) <https://www.infomigrants.net/en/post/40238/one-dead-as-spain-extends-closure-of-land-border-with-morocco> accessed 18 May 2022.
[10] Eugenio Cusumano and Matteo Villa, 'From "Angels" to "Vice Smugglers": The Criminalization of Sea Rescue NGOs in Italy' (2021) 27 European Journal on Criminal Policy and Research 1.
[11] The term refugee is used in a broad sense in this sense, not only referring to people who actually fulfil the legal requirements of the refugee status under Art. 1 Refugee Convention but to all people seeking international protection.

policy has forced many NGO vessels to hold out on sea for several days despite being often overcrowded and carrying vulnerable people on board. These so-called stand-offs create conditions for the people on board which give rise to severe concerns regarding their human rights.[12] This situation addresses complex legal questions at the intersection of the international law of the sea, in particular the law on SAR, and human rights law which will be examined within this thesis. Of specific interest are the legal responsibilities states have towards private rescue vessels and the people on board within the interplay between the different legal regimes.

1.2 Relevance and research questions

The legal and political framework underlying the rescue of migrants and refugees at sea has been widely discussed within academic literature as well as it has been subject to debate within international and non-governmental organisations. This thesis, therefore, focuses on the specific problem of closed ports and resulting stand-offs of NGO rescue vessels carrying rescued refugees. As this policy is a fairly new development, there are still many controversies regarding the legal questions surrounding it. Of specific interest is the issue of disembarkation to a place of safety and which obligations states have in this regard under the international law of the sea and human rights law. The particular contribution of this thesis to this discussion is to take into consideration the human rights in the specific time period of the stand-off caused by closed ports and to assess whether this can give legal grounds for state obligations regarding the provisioning of a place of safety. This evaluation will be informed by the legal analysis of the case *Y.A. and others v. Italy* which is currently pending at the European Court of Human Rights (ECtHR).[13] Since the case was just communicated by the ECtHR on the 13th of September 2021, detailed academic writing on it does not yet exist which, however, is important as the Court's decision in this case will have important implications for the future of closed port policies.

Therefore, the thesis will examine the following questions:

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[12] Cusumano and Villa (n 10).
[13] *YA et autres contre l'Italie et 2 autres requêtes* [2021] ECtHR 5504/19, 5604/19, 20561/19.

1. Is there a state duty under the international law of the sea to provide a place of safety for disembarkation?
2. Are human rights violated by the closure of ports in the case *Y.A and others v. Italy* and in the context of stand-offs of NGO rescue vessels in general?
3. Is there a state duty under the European Convention for Human Rights (ECHR) to provide a place of safety for disembarkation?

1.3 Methodology and material

The thesis is based on a comprehensive review of primary sources of law, namely legislation and jurisprudence as well as a literature review of scholarly writing in the field of human rights of people in distress at sea and respective state duties. Primarily, doctrinal legal methodology will be deployed to reach the research goal of this thesis.[14] This approach will be complemented by public policy analysis which is crucial for providing an in-depth legal analysis due to the interconnectedness of law and policy.[15] In Chapter 2, statistics and state policies will be described, analysed and contextualised. The material used are publications by international organisations, especially the International Organization for Migration (IOM), the International Maritime Organization (IMO) and reports of NGOs as well as information published by respective state and EU agencies such as the EU Agency for Fundamental Rights. In the 3rd and 4th Chapter doctrinal legal method is used to explain and analyse the existing legal framework on rescue of people in distress at sea. Several instruments of different legal nature will be examined in this way, namely international treaty law, customary international law and international soft law instruments. The most important sources in this regard are the United Nations Convention on the Law of the Sea (UNCLOS), the Convention for the Safety of Life at Sea (SOLAS Convention), the Convention on Maritime Search and Rescue (SAR Convention) and the ECHR. Hereby, common methods of treaty interpretation as laid down in Arts. 31, 32 Vienna Convention on the Law of the Treaties (VCLT) will be applied with special emphasis on systemic integration (Art. 31 para. 3 (c) VCLT). The treaty law is *inter alia* complemented

[14] For comprehensive explanation of this method see: P Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford University Press 2020) 144–168.
[15] ibid 497–530.

by the following soft law instruments: the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual), the IMO Guidelines on the Treatment of Persons Rescued at Sea (IMO Guidelines), the IMO Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea (IMO Principles) and the UNHCR Guidelines on the Treatment of Persons Rescued at Sea (UNHCR Guidelines). As these instruments constitute an important component of the legal framework they will be included in the analysis. In the 5th Chapter, as it will evaluate a pending case, mainly *de lege ferenda* arguments will be built up based on a doctrinal analysis of case law of the ECtHR.

1.4 Limitations

Rescue operations in the Mediterranean Sea are influenced by several different legal regimes, namely international law, EU law and domestic law. In order to provide an in-depth analysis, this thesis will only consider international law of the sea and international human rights law in its regional form in Europe – the ECHR. There are two different dimensions of human rights violations that can be assessed in this context: the rights of the rescued people and the rights of the people rendering this assistance. While the latter can be an important contribution towards establishing state obligations,[16] this thesis can only focus on one dimension, which will be the rights of the rescued people.

Besides Europe there are other regions, such as the Andaman Sea or the Northern coast of Australia where maritime migration plays an important role. The treatment of these people by the respective governments is equally concerning as the one conducted by their European counterparts,[17] however, this thesis will focus on the situation in the Central Mediterranean.

Furthermore, the denial of access to ports is not only experienced by NGO vessels but also by private commercial vessels which, however, face different

[16] Itamar Mann, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 598.
[17] Violeta Moreno-Lax, Daniel Ghezelbash and Natalie Klein, 'Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia' (2019) 32 Leiden Journal of International Law 715.

consequences. As commercial vessels have a schedule to comply with, they cannot afford to hold out for days at sea in the search for a port to disembark rescued people as this leads to significant financial losses. This encourages these vessels to refrain from rendering assistance to people in distress or to change their routes to avoid areas where cases of distress are likely to occur.[18] Even though this is a significant problem based on the closed ports strategies of EU Member States, it would exceed the scope of this thesis to undertake an in-depth examination thereof.

1.5 Outline

The thesis is structured in the following way: first, the general development of the Mediterranean as migration route is presented which encompasses an examination of the relevant state actors and the role of SAR NGOs. Focus is put on the adverse impact of state action, especially the closure of ports, on NGO activities. Second, the legal framework governing cases of distress at sea and respective rescue missions are explained considering different levels of legal sources and their interconnection. Based on this, the main problem of closed ports and resulting stand-offs of rescue vessels is addressed from a legal perspective. The distribution of legal responsibilities under the regime of the international law of the sea for appointing and providing a place of safety are critically analysed. It is argued that the law of the sea does not precisely appoint a responsible actor and therefore does not establish an obligation for states to allow disembarkation on their territory. Subsequently, the case *Y.A and others v. Italy* is scrutinised regarding potential violations of human rights stemming from the ECHR. Coming to the result that such violations indeed occurred in the specific case as well as they do in the context of stand-offs in general, the argument is made that human rights law in its interconnection with the international law of the sea constitutes an obligation for states to provide a place of safety for disembarkation on their territory. Final summarising and concluding remarks will be provided in the last Chapter of the thesis.

[18] Åsne Kalland Aarstad, 'The Duty to Assist and Its Disincentives: The Shipping Industry and the Mediterranean Migration Crisis' (2015) 20 Mediterranean Politics 413; Kyriaki Noussia, 'The Rescue of Migrants and Refugees at Sea: Legal Rights and Obligations' (2017) 31 Ocean Yearbook 155.

2 Migration and search and rescue operations in the Mediterranean

2.1 Evolution of maritime migration

In Europe the numbers of irregular entries by sea were on a relatively steady low level up until 2014 when the numbers increased remarkably to over one million entries in 2015 which marked the peak until today.[19] Making up 69 percent of the overall irregular border crossings in 2020, entry via sea constitutes the most common migration route despite the severe risks it comes along with.[20] The choice of this dangerous route of travel is to some extent owed to the Schengen agreement[21] which entered into force in 1995 and is directed at abolishing border controls inside the Schengen Area realising the objective of free movement within the EU.[22] Decreased controls inside the area have consequently led to increased controls at the outer borders and even further to an externalisation of border controls to third countries. One crucial pillar of this externalisation policy was the implementation of carrier sanctions on the EU level in 2001 which penalize private transportation operators for transporting people without proper migration documents which often includes an entry visa.[23] As people seeking asylum usually do not possess such documents, official travel routes, especially by airplane, practically closed down for them.[24] Consequently, EU territory can for many of them only be reached by

[19] IOM, 'Four Decades of Cross-Mediterranean Undocumented Migration to Europe' (2017) 9 <https://publications.iom.int/books/four-decades-cross-mediterranean-undocumented-migration-europe-review-evidence> accessed 27 January 2022.
[20] European Commission, 'Statistics on Migration to Europe' (10 October 2021) <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#illegalbordercrossings> accessed 1 April 2022.
[21] The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [OJ L 239/43].
[22] Silja Klepp, *Europa zwischen Grenzkontrolle und Flüchtlingsschutz: eine Ethnographie der Seegrenze auf dem Mittelmeer* (transcript 2011) 32; Philippe Fargues and Marzia Rango (eds), *Migration in West and North Africa and across the Mediterranean* (*IOM,* 2020) 4 <https://publications.iom.int/system/files/pdf/migration-in-west-and-north-africa-and-across-the-mediterranean.pdf> accessed 28 April 2022.
[23] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (n 8).
[24] Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311, 316.

crossing the Mediterranean in unregistered boats which has proven to be an extremely dangerous journey.[25]

2.2 State action on search and rescue and border control

There used to be various routes on which refugees crossed the Mediterranean towards Europe, among which those between Morocco and Spain as well as Tunisia and Italy were the shortest and thus most convenient ones. However, with the EU entering into agreements with relevant countries of departure starting in the early 2000's, these routes became more difficult to travel leading to a concentration of migration on the Central and Eastern Mediterranean route.[26]

In 2013, after more than 600 people had drowned close to the shore of Lampedusa, Italy launched its humanitarian rescue mission Mare Nostrum within the framework of which the Italian navy provided a comprehensive SAR service.[27] However, this mission was replaced the following year by operation Triton led by the EU agency Frontex[28] due to Italy demanding a fairer burden sharing from the EU.[29] Operation Triton worked with significantly smaller capacities and had a fundamentally different approach with its predominant goal being border control instead of rescuing lives at sea.[30] Consequently, the number of deaths by drowning relative to the absolute amount of attempted crossings increased which required a reaction by the EU.[31] Besides the expansion of operation Triton, the EU introduced its Common Security and Defence Policy (CSDP) which entailed operation

[25] IOM (n 19); Martina Tazzioli, 'Border Displacements. Challenging the Politics of Rescue between Mare Nostrum and Triton' (2016) 4 Migration Studies 1, 5.
[26] Klepp (n 22) 33–34.
[27] Ministerio della Difesa, 'Mare Nostrum Operation - Marina Militare' (2018) <https://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx> accessed 1 April 2022; Tazzioli (n 25) 1–2; Eugenio Cusumano, 'Emptying the Sea with a Spoon? Non-Governmental Providers of Migrants Search and Rescue in the Mediterranean' (2017) 75 Marine Policy 91, 92.
[28] European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Regulation (EC) No 2007/2004 [OJ L 349/25.11.2004], renamed European Border and Coast Guard Agency and newly constituted by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 [OJ L 251, 16.09.2016] and reinforced and equipped with more competences by Regulation (EU) 019/1896 of 13 November 2019 [OJ L 295, 14.11.2019].
[29] Tazzioli (n 25) 2.
[30] Cusumano (n 27) 92.
[31] Simon McMahon and Nando Sigona, 'Boat Migration across the Central Mediterranean: Drivers, Experiences and Responses' (2016) 3 MEDMIG Research Brief 497, 1.

EUNAVFOR Med Sophia, and the Italian Navy implemented operation Mare Sicuro. Since 2018 Italy receives further support in controlling the sea border through the Frontex operation Themis.[32] These missions, however, have not led to a decline in human casualties because they were and are not primarily meant to provide SAR services but to protect the border, commercial activities and fight migrant smuggling.[33]

In order to control increasing migration flows in the Eastern Mediterranean, the Frontex operation Poseidon was set in place which was also primarily designed as border control mission.[34] It was accompanied by the adoption of a further major component of the EU's border externalisation strategy: the EU-Turkey Deal.[35] The exercise of this deal led to a significant decline of attempted crossings via the Aegean See and made the Central Mediterranean become the route with the highest migration traffic.[36] While numbers of irregular entries via that route had dropped significantly in spring 2020 due to the Covid-19 Pandemic, entries went up in the summer leading to an overall number of 35.700 in 2020 which constitutes an increase of 155% compared to 2019.[37]

This triggered an intensification of the cooperation between the EU and Libyan authorities, especially the Libyan Coast Guard[38] to reduce the number of refugees reaching European territory.[39] One basic pillar of this strategy is to build up and

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[32] Giorgia Bevilacqua, 'Italy Versus NGOS: The Controversial Interpretation and Implementation of Search and Rescue Obligations in the Context of Migration at Sea' (2019) 28 The Italian Yearbook of International Law Online 11, 15.
[33] Cusumano (n 27) 92.
[34] Eugenio Cusumano and James Pattison, 'The Non-Governmental Provision of Search and Rescue in the Mediterranean and the Abdication of State Responsibility' (2018) 31 Cambridge Review of International Affairs 53, 55; Cusumano (n 27) 92.
[35] European Council, 'EU-Turkey Statement, 18 March 2016' (18 March 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 31 January 2022.
[36] Cusumano (n 27) 92; IOM (n 19) 20.
[37]Frontex, 'Risk Analysis for 2021' (2021) 16 <https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Risk_Analysis_2021.pdf> accessed 3 February 2022.
[38] For reasons of simplicity, the term Libyan Coast Guard is used within this thesis. It must be acknowledged though that the Libyan Coast Guard cannot be considered a lawfully functioning Coast Guard institution and therefore the name is actually not suitable.
[39] Lorenzo Pezzani and Charles Heller, 'Mare Clausum Italy and the EU's Undeclared Operatio to Stem Migration across the Mediterranean' (*Forensic Oceanography,* 2018) 36 <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-

support SAR services conducted by the Libyan Coast Guard.[40] The mandate of the Operation EUNAVFOR Med Sophia does explicitly entail training of Libyan Coast Guard personnel.[41] These are just some examples of the general strategy of the EU towards the externalisation of its borders. In line with this, Italy and Libya agreed upon a Memorandum of Understanding in which Italy pledged to provide support for the Libyan Coast Guard and other military institutions.[42] The Italian military mission Naurus is part of the realisation of these agreements providing large scale equipment and human resources to the Libyan Coast Guard.[43] The latter has been accused of illegal pull backs, shootings at sea and unauthorised entering of rescue vessels.[44] Despite this being publicly known, Frontex provides the Libyan Coast Guard with information on locations of vessels in distress to facilitate pull backs.[45]

Overall, the missions launched by Italy and the EU since Mare Nostrum show a clear trend away from ambitions to proactively rescue lives at sea towards protecting the EU border by preventing immigration. State-led SAR service has become only an incidental side effect to border control missions.[46] This approach is complemented by intensified externalisation strategies which increase the obstacles for people to reach European territory to realize their right to apply for asylum. It also constitutes an obstacle in seeking judicial protection as the

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Clausum-full-EN.pdf> accessed 31 January 2022; Joint Communication to the European Parliament, the European Council and the Council, Migration on the Central Mediterranean route - Managing flows, saving lives JOIN (2017) 4 final 2017.

[40] For detailed account of cooperation between EU and Libya see: Pezzani and Heller (n 39) 37–50.

[41] European Union External Action Service, 'EUNAVFOR MED operation SOPHIA, About us - Mission' (2018) <https://www.operationsophia.eu/about-us/> accessed 14 April 2022.

[42] Italy-Libya Agreement: the Memorandum Text 2017 (02 February 2017) <http://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf> accessed 17 May 2022.

[43] Moreno-Lax, Ghezelbash and Klein (n 17) 723.

[44] ibid; Kiri Santer, 'Governing the Central Mediterranean through Indirect Rule: Tracing the Effects of the Recognition of Joint Rescue Coordination Centre Tripoli' (2019) 21 European Journal of Migration and Law 141.

[45] Sergio Carrera and Roberto Cortinovis, 'Search and Rescue, Disembarkation and Relocation Arrangements in the Mediterranean, Sailing Away from Responsibility?' (2019) 10 CEPS Paper in Liberty and Security in Europe 8 <http://aei.pitt.edu/100390/1/LSE2019%2D10_ReSoma_Sailing%2DAway%2Dfrom%2DResponsibility.pdf> accessed 28 April 2022.

[46] Daniel Ghezelbash et al, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) 67 International & Comparative Law Quarterly 315, 325.

outsourcing of border control activities creates jurisdictional challenges when trying to hold EU Member States responsible.

2.3 Search and rescue NGOs

The devastating situation off the shores of Europe and the limited action of the competent state actors led to strong reactions in civil society. In 2014, the first SAR NGO, the Migrant Offshore Aid Station (MOAS), was founded in Malta. The NGO bought a fishing boat which was rebuilt to serve as rescue vessel and together with a group of experts they started to provide life-saving services and medical assistance to people in distress at sea.[47] Soon other organisations followed the model of MOAS and launched SAR services.[48] Larger already existing organisations for example Médecins sans Frontières added SAR operations to their field of work. Additionally, several new associations were founded for the very purpose of saving lives in the Mediterranean such as Sea Watch, Sea-Eye or SOS Humanity (formerly called SOS Mediterranée).[49]

There are two main operational models among these NGOs. Some undertake complete rescue missions, meaning that they navigate in areas where distress situations of refugee boats are likely to occur. If they encounter a vessel in distress the people are taken onboard the rescue vessel which then navigates towards the coast and disembarks the people at a port. Another approach is to not take people on board but provide urgent support by, for instance, delivering drinking water or life vests and to then monitor the situation until a suitable rescue vessel arrives. The latter approach is among other reasons motivated by the aim of not releasing governments from their responsibilities regarding the provision of SAR services.[50]

The importance of these NGOs' activities in the Mediterranean is demonstrated by the number of lives they have saved. In the time between 2015 and 2018, 16 vessels

[47] MOAS, 'MOAS History' (2022) <https://www.moas.eu/moas-history/> accessed 1 April 2022; Bevilacqua (n 32) 15.
[48] Cusumano (n 27) 92.
[49] ibid 92–94.
[50] ibid.

operated by eleven different NGOs were deployed in the Mediterranean[51] with the peak of SAR activities being reached in 2016 with 13 active vessels.[52] In 2017 NGOs saved the lives of 46.601 people while the respective number for Frontex (Triton) was 14.976 and operation EUNAVFOR Med Sophia 10.663.[53] This imbalance reflects how rights and responsibilities are being shifted from public to private actors. Parallel to governments tending to privatise and externalise migration control tasks, which makes it harder for the individual to hold an actor accountable for human rights violations, the responsibility to protect human rights is also left to private actors while state actors try to find jurisdictional loopholes to escape their own obligations.[54]

2.3.1 Criticism, administrative and criminal measures against search and rescue NGOs

Despite these humanitarian achievements, the environment for SAR missions of NGOs has become increasingly difficult. One of the most common criticisms they face is that they would create a pull factor for refugees. Since people knew they would be rescued in case of distress, more people were encouraged to cross the sea under unsafe conditions.[55] This argument, however, is based on short-sighted assumptions about the decision-making of refugees which is not supported by empirical data.[56] There is no scientific proof of a correlation between SAR operations and the number of refugees crossing the Mediterranean.[57] Additionally, SAR NGOs are accused of facilitating smuggling of humans and even collaborating with smugglers.[58] This argument is equally unpersuasive as it lacks inherent logic. Due to the lack of any monetary or other financial benefits, SAR NGOs clearly act

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[51] European Union Agency for Fundamental Rights, 'Fundamental Rights Considerations: NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations' (2018) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-mediterranean_en.pdf> accessed 2 February 2022.
[52] Cusumano and Pattison (n 34) 56.
[53] Italian Coast Guard, 'Attivita' SAR Nel Mediterraneo Centrale' (2017) 14, 19 <https://www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2017/Rapporto_annuale_2017_ITA.pdf> accessed 2 February 2022.
[54] Costello and Mann (n 24) 331.
[55] Frontex, 'Risk Analysis for 2017' (2017) 32 <http://poznam.mnz.sigov.si/skmp/images/abook_file/annual_risk_analysis_2017.pdf> accessed 3 February 2022.
[56] Cusumano and Pattison (n 34) 64–65.
[57] Cusumano and Villa (n 4) 209.
[58] Frontex (n 55) 32.

out of humanitarian, not criminal, intentions and work to undo the adverse effects of smuggler activities which create situations where people cross the sea on overcrowded dinghies in the first place.[59]

The narrative of NGOs being collaborators of criminal smugglers materialised when the rescue vessel *Iuventa* operated by the NGO Jugend Rettet was seized at the port of Lampedusa and its crew members were confronted with criminal charges of facilitating irregular migration.[60] This case marked the starting point of a policy of criminalisation of SAR NGOs pursued by Italian authorities.[61] Representative for this policy shift, Interior Minister and Deputy Prime Minister Matteo Salvini declared the complete abolishment of arrivals of refugees to Italy by boat as his political goal.[62]

Following the *Iuventa* incident several other NGOs have had to face administrative and criminal measures taken against them by Italian authorities. One administrative tool the Italian authorities applied was the procedure of port state controls. This allows officials under special circumstances to undertake a review of the condition, equipment, crew and operation of the vessel regarding the compliance with international regulations.[63] In case of non-compliance the vessel can be detained in the port (3.4 Paris Memorandum of Understanding). Italian authorities instrumentalised this procedure by arbitrarily claiming deficiencies regarding rescue vessels which enabled them to detain the ships and prevent them from undertaking further rescue missions until the alleged problems were rectified.[64]

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[59] Cusumano and Pattison (n 34) 65–67.
[60] European Union Agency for Fundamental Rights, 'Fundamental Rights Considerations: NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations' (n 51).
[61] European Center for Constitutional and Human Rights, 'Sea Rescuers under Attack: Iuventa Crew Criminalized by Italian Government' <https://www.ecchr.eu/en/case/sea-rescuers-under-attack-iuventa-crew-criminalized-by-italian-government/> accessed 3 February 2022.
[62] 'Salvini Vows to End All Migrant Arrivals to Italy by Boat' (*The Local Italy*, 6 July 2018) <https://www.thelocal.it/20180706/matteo-salvini-migrant-arrivals-boat/> accessed 3 February 2022.
[63] Paris Memorandum of Understanding on Port State Control, 1982 <www.parismou.org> accessed 28 April 2022; Kai Trümpler, 'Art. 8: Internal Waters' in Alexander Proelss (ed), *United Nations Convention of the Law of the Sea: A Commentary* (CH Beck 2017) 92–94.
[64] Giansandro Merli, 'Behind Italy's "administrative Detention" of Refugee Rescue Vessels' (*Il manifesto global*, 27 April 2021) <https://global.ilmanifesto.it/how-italy-closed-its-ports-and-blocked-the-refugees/> accessed 28 April 2022.

Another strategy of complicating the work of SAR NGOs is the deregistration of their vessels by coastal states which makes it impossible for the NGO to operate until a new state is found that offers its flag for registration.[65] Additionally, criminal proceedings against NGOs and their crew members have led to the seizure of ships mainly in Italian harbours.[66] Between 2016 and 2021, 59 legal proceedings were launched against NGOs which made their operation temporarily practically impossible.[67] This resulted in a downsize of the number of operating NGO vessels to only five in August of 2018.[68]

An additional threat to the operation of SAR NGOs is imposed by the Libyan Coast Guard which has repeatedly harassed NGOs and interfered in life-threatening manners with their rescue operations.[69]

2.3.2 Closed port policies

Furthermore, the activities of SAR NGOs are impeded by coastal states in the Central Mediterranean, namely Italy and Malta, through the denial of access to their ports.[70] This is done by either completely ignoring distress alerts or responding with a prohibition of entry. These refusals to allow entry and disembarkation are not singular decisions but expression of a structural closed ports policy.[71] Under Deputy Prime Minister and Interior Minister Matteo Salvini, Italy had put a new decree into place imposing a fine on rescue ships entering Italian territorial waters without permission, thus making it even more difficult for NGOs to complete rescue operations by disembarking rescued people.[72] One of the most prominent examples in this context is a rescue operation undertaken by the *Sea Watch 3* in June 2019

[65] Jasper van Berckel Smit, 'Taking Onboard the Issue of Disembarkation: The Mediterranean Need for Responsibility-Sharing after the Malta Declaration' (2020) 22 European Journal of Migration & Law 492, 494.
[66] European Union Agency for Fundamental Rights, 'December 2021 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights' (2021) Table 1 <https://fra.europa.eu/de/publication/2021/december-2021-update-ngo-ships-sar-activities> accessed 14 February 2022.
[67] ibid Overview.
[68] Bevilacqua (n 32) 17.
[69] Pezzani and Heller (n 39) 58.
[70] Moreno-Lax, Ghezelbash and Klein (n 17) 723–724.
[71] Cusumano and Villa (n 10).
[72] Decreto-Legge 14 giugno 2019, n. 53, Disposizioni urgenti in materia di ordine e sicurezza pubblica (GU n.138 del 14-6-2019) In December this decree was abolished by Decree 173/2020.

navigated by its shipmaster Carola Rackete. After refusing to follow the instruction of the Libyan Rescue Coordination Centre (RCC) to disembark at the port of Tripoli, the crew contacted the RCCs of Italy, Malta, France, Spain and the Netherlands (the *Sea Watch 3* flew the Dutch flag). None of the states would provide a port for disembarkation which eventually forced the shipmaster to enter the port of Lampedusa after waiting at sea for two weeks. Since she proceeded without permission of Italian authorities, criminal procedures were launched against her.[73] This conduct of coastal states has become an established practice that forces rescue vessels to remain at sea for days or even weeks after having rescued people from distress at sea.[74] The number of incidents in which NGO rescue vessels experienced such stand-offs for more than a day has stayed on a constant high level with 28 in 2019[75], 22 in 2020[76] and 28 in 2021. For 2021, this translates to 8.293 people of whom at least 2.500 were children.[77] Bearing in mind the conditions on board a vessel carrying sometimes hundreds of people who often have already spent several days at sea in unseaworthy boats and undergone dangerous travels on land, the denial of disembarkation becomes particularly problematic from a human rights

[73] Human Rights Watch, 'Italy: End Curbs on Rescue at Sea' (26 June 2019) <https://www.hrw.org/news/2019/06/26/italy-end-curbs-rescue-sea> accessed 23 February 2022; Lorenzo Tondo, 'Migrant Rescue Ship Defies Salvini's Ban to Enter Italian Port' (*The Guardian*, 26 June 2019) <https://www.theguardian.com/world/2019/jun/26/ngo-boat-carrying-migrants-defies-matteo-salvini-veto-lampedusa-italy> accessed 23 February 2022; Valentin Schatz, 'Sea-Watch 3: Seenotrettung bei geschlossenen Häfen' (*Legal Tribune Online*, 2 July 2019) <https://www.lto.de/recht/hintergruende/h/sea-watch-seenot-rettung-rackete-haftrichter/> accessed 19 January 2022.

[74] SOS Mediterranee, 'Survivors on Rescue Ship Ocean Viking Urgently Need to Disembark in a Place of Safety' (18 February 2022) <https://en.sosmediterranee.org/press/survivors-on-rescue-ship-ocean-viking-urgently-need-to-disembark-in-a-place-of-safety/> accessed 23 February 2022; Sea Watch e.V.,'Situation on Board Sea-Watch 3 Deteriorates: Still No Port of Safety for over 400 Rescued People' (21 October 2021) <https://sea-watch.org/en/situation-on-board-sea-watch-3-deteriorates-still-no-port-of-safety-for-over-400-rescued-people/> accessed 23 February 2022; Sea-Eye e.V., 'Mission Lifeline Delivers Urgently Needed Aid to Sea-Eye 4' (6 November 2021) <https://sea-eye.org/en/mission-lifeline-delivers-urgently-needed-aid-to-sea-eye-4/> accessed 23 February 2022.

[75] European Union Agency for Fundamental Rights, 'Fundamental Rights Report 2019' 130–131 (2019) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-fundamental-rights-report-2019_en.pdf> accessed 10 May 2022.

[76] European Union Agency for Fundamental Rights, 'Fundamental Rights Report 2020' 114–115 (2020) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-report-2020_en.pdf> accessed 10 May 2022.

[77] European Union Agency for Fundamental Rights, 'Fundamental Rights Report 2021, Annex' (2021) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-frr-2021-annex-vessels_en.pdf> accessed 10 May 2022.

perspective.[78] For this reason, refugees rescued by the *Sea Watch 3* in a different mission in 2019 who were affected by Italy's closed port policy have filed a complaint with the ECtHR which will be examined in Chapter 5.

By refusing to provide a place of safety in due time, states are misusing SAR rules for the purpose of border and migration control.[79] Despite the strong moral concerns such conduct gives rise to, it must be acknowledged that there is an underlying issue that significantly fuels this behaviour which is the lack of a fair burden sharing mechanism within the EU. According to the Dublin III Regulation[80] the asylum application of a person generally has to be processed in the state where they first enters EU territory (Art. 13 para. 1 Dublin III Regulation). Therefore, Italy and Malta are generally responsible for the asylum procedures of refugees reaching their territory via the Mediterranean which creates a disincentive for allowing disembarkation.[81] This has also led to many ad hoc agreements, which were concluded between coastal states and other EU Member States providing for relocation of refugees after their disembarkation.[82] Even though this legal deficiency cannot be an excuse for causing human suffering, it is a crucial component for a holistic understanding of the problem and the development of solutions.[83]

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[78] Amnesty International, '121 People Including Babies and Children Stranded at Sea in Searing Heat Must Be Allowed to Dock' (8 August 2019) <https://www.amnesty.org/en/latest/news/2019/08/italy-malta-spain-121-people-including-babies-and-children-stranded-at-sea-in-searing-heat-must-be-allowed-to-dock-2/> accessed 23 February 2022.
[79] Ghezelbash and others (n 46) 323.
[80] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protecion lodged in one of the Member States by a third-country national or stateless person 2013 [OJ L 180/31].
[81] Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 International Journal of Refugee Law 174, 1–2.
[82] van Berckel Smit (n 65); Moreno-Lax (n 81) 25.
[83] van Berckel Smit (n 65) 492–497.

3 The legal framework of rescue at sea

3.1 Legal sources

Rescue of people in distress at sea is predominantly governed by an interplay of several international hard and soft law instruments. In this Chapter, these different sources of law will be analysed and discussed in the context of civil rescue of refugees in the Mediterranean. It will focus on provisions stemming from the international law of the sea while human rights law will be taken into closer consideration in Chapter 5. The corresponding domestic legislation will not be analysed as it is not relevant towards answering the research questions of this thesis.

3.2 International hard law

The international law of the sea is one of the oldest areas of international law which was long governed by unwritten traditions.[84] These traditions still form part of the legal regime of the seas as some are considered to be customary international law and many were codified in international treaties.[85] One of these customs is the duty to assist people in distress at sea which was first transformed into a treaty obligation within Art. 11 of the 1910 Brussels Convention.[86] This treaty was followed by a reviewed version, the 1989 Convention on Salvage,[87] which also contains a respective provision in Art. 10 para. 1.[88] It does however address mainly contractual rescue operations and is therefore not of high relevance for the context discussed here.

3.2.1 United Nations Convention on the Law of the Sea

One of the instruments in place to protect people in distress at sea is the UNCLOS[89] which was adopted in 1982 and since then is a basic pillar of the international law of the sea as it codifies its core standards and principles and establishes the

[84] Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley Journal of International Law 1, 1.
[85] Aphrodite Papachristodoulou, 'Mediterranean Maritime Migration: The Legal Framework of Saving Lives at Sea' (2020) 20 University College Dublin Law Review 87, 89–90.
[86] Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea 1910 [212 CTS 187].
[87] International Convention on Salvage 1989 [1953 UNTS 194].
[88] Bevilacqua (n 32) 24.
[89] United Nations Convention on the Law of the Sea 1982 [1834 UNTS 397].

International Tribunal for the Law of the Sea.[90] Before examining the duty to render assistance, it is necessary to briefly explain the system of maritime zones and the respective rights of states established by UNCLOS.

3.2.1.1 Maritime zones

The area with the closest ties with the territory of the state are the internal waters (Art. 8 UNCLOS). Usually, ports belong to these internal waters where the state can exercise complete sovereignty (Art. 11 UNCLOS). Within twelve nautical miles (nm) from the coastline which form the territorial waters, the state still enjoys sovereignty (Art. 2; Art. 3 UNCLOS). However, there is one important exception to this sovereignty which is the concept of 'innocent passage' laid down in Articles 17-23 UNCLOS. According to these provisions, coastal states must let vessels navigate through their territorial sea as long as this passage is conducted 'continuous and expeditious' (Art. 18 para. 2 UNCLOS). Innocence of the passage can only be assumed if it does not adversely affect the 'peace, good order and security of the coastal State' (Art. 19 para. 1 UNCLOS).[91] Whether or not navigation by SAR NGOs in the context of rescue operations fall within the ambit of Art. 19 para. 2 g) UNCLOS, which stipulates that passage is not innocent in case of the loading or unloading of persons contrary to immigration laws of the coastal states, is matter of debate.[92]

An additional area of twelve nm forms the contiguous zone where the coastal state no longer has complete sovereignty but is entitled to exercise state powers in exceptional cases if needed to protect its territorial sea, namely the right of visit (Art. 110 UNCLOS) and the right of hot pursuit (Art. 111 UNCLOS). Up until 200 nm from the territorial sea baseline the exclusive economic zone (EEZ) expands. In this area the coastal state is granted limited sovereign rights in relation to economic use of the sea such as exploitation of natural resources or the production of energy

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[90] Richard Barnes, 'Refugee Law at Sea' (2004) 53 The International and Comparative Law Quarterly 47, 48.
[91] ibid 55–57.
[92] Valentin Schatz and Marco Fantinato, 'Post-Rescue Innocent Passage by Non-Governmental Search and Rescue Vessels in the Mediterranean' (2020) 35 The International Journal of Marine and Coastal Law 740; Richard Barnes, 'Art. 18: Meaning of Passage' in Alexander Proelss (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 185; Moreno-Lax (n 81) 18–19.

from water and wind (Art. 56 UNCLOS). Beyond this area lay the high seas (Art. 86 UNCLOS) which are governed by the principle of the freedom of the high seas (Art. 87 UNCLOS). One core component of this principle is the freedom of navigation giving every state the right to sail ships in this area (Art. 90 UNCLOS). As the EEZ and the high seas are not subject to jurisdiction of a coastal state, flag state jurisdiction applies for vessels navigating in these areas. A ship needs to register with the state whose flag it intends to fly and thereby obtains the nationality of this state. The conditions of registration are governed by the domestic law of the flag state which then exercises exclusive jurisdiction over the vessel when navigating in the high seas (Art. 91, Art. 92 UNCLOS).[93] Flag state jurisdiction even applies in internal, territorial waters, and the EEZ however, not exclusively but concurrently with the coastal state's jurisdiction.[94]

3.2.1.2 Duty to render assistance

The duty to render assistance to people in distress at sea is enshrined in Art. 98 para. 1 UNCLOS which has also been acknowledged as rule of public international law.[95] A textual interpretation of the provision in line with the general logic of international law shows that it is a non-self-executing norm.[96] Thus, it does not directly address the master of a ship but the contracting states. The latter are obliged to enact legislation on the domestic level that imposes a legal duty to render assistance on masters of ships flying its flag. However, many contracting states are not (fully) complying with this obligation weakening the legal power of the duty to rescue especially with regard to enforcement.[97]

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[93] Moreno-Lax, Ghezelbash and Klein (n 17) 718.
[94] Richard Barnes, 'Flag States' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 310–313.
[95] UN, *Yearbook of the International Law Commission 1950 Vol. II* (UN Publications 1957) 40.
[96] Killian S O'Brien, 'Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem' (2011) 3 Goettingen Journal of International Law 715, 721; Lisa-Marie Komp, 'The Duty to Assist Persons in Distress' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill/Nijhoff 2017) 229.
[97] Barnes, 'Refugee Law at Sea' (n 90) 50.

Regarding the personal scope, the obligation is directed equally at shipmasters of governmental and private vessels.[98] On the side of the beneficiaries it applies to any person encountered in distress. No limitations can be drawn on the grounds of nationality or legal status which is of specific relevance in the case of refugee boats.[99] Furthermore, it does not matter whether the person in distress bears responsibility for the distress situation.[100]

Regarding the requirement of a distress situation the person must be in for the duty to apply the UNCLOS does not give clarifications, opening space for interpretation. Without discussing this issue further[101] it can be stated that there needs to be a state of urgency, which, however, does not necessarily entail immediate physical necessities.[102] Hence, distress is not only given in cases where the boat is just about to sink.[103] In line with this jurisprudence, it is apt to assume a general inherent danger in crossing the sea in a dinghy or a boat of similar condition, constituting *a priori* a distress situation from the time of embarkation.[104] Therefore, shipmasters of vessels operated by NGOs are legally obliged to render assistance in case they encounter refugees in such boats at sea.[105] Even though Art. 98 UNCLOS is embedded in the section on the high seas, it can be concluded from Art. 58 para. 2 and Art. 18 UNCLOS that it applies to all maritime zones.[106]

The material extent of the obligation is not clearly defined.[107] Art. 98 para. 1 UNCLOS only prescribes the obligation to render assistance without providing a definition of either of the terms. Therefore, it needs to be derived from treaty interpretation what rendering assistance entails. Of particular importance is the

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[98] Papachristodoulou (n 85) 91–92.
[99] Violeta Moreno-Lax, 'Access to Protection and International Responsibility-Sharing: Protection at Sea and the Denial of Asylum' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 490.
[100] ibid 491.
[101] For discussion of different interpretations see: Komp (n 96).
[102] *The Eleanor* [1809] English High Court of Admiralty 165 English Reports 1058 1068.
[103] *Kate A Hoff v The United Mexican States* [1929] General Claims Commission - United States and Mexico 331.
[104] Papachristodoulou (n 85) 95–97; Moreno-Lax (n 81) 22–23; Komp (n 96) 233–234.
[105] Papachristodoulou (n 85) 91–97.
[106] Satya Nandan, Shabtai Rosenne and Neal Grandy, *United Nations Convention on the Law of the Sea 1982: A Commentary Volume III* (Kluwer Law International 1995) 176–177.
[107] Barnes, 'Refugee Law at Sea' (n 90) 51–52.

question whether the disembarkation to a place of safety forms part of the obligation under Art. 98 para. 1 UNCLOS. Regarding the wording it is striking that instead of rescue the term assistance is used. This could be interpreted as implying that the duty is already fulfilled by providing immediate assistance at sea but does not expand to any further actions such as the disembarkation of the assisted persons.[108] Considering the regulatory context of the provision, this contestation cannot prevail. Reg. 1.3.2 Annex SAR Convention provides a definition of rescue. Accordingly, it is an 'operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety', which clearly points towards a broader understanding of the term assistance that encompasses the disembarkation to a place of safety. This is supported by a teleological interpretation of Art. 98 para. 1 UNCLOS. Framing the obligation as one to render assistance instead of one to rescue pays tribute to the fact that a rescue operation can be a risky undertaking that can be unsuccessful despite the good will of the shipmaster. It gives the captain discretion in deciding whether and how to perform the assistance according to the safety needs of all persons involved.[109] Hence, the use of the term assistance is not to be understood as limiting the material scope of the duty thus excluding disembarkation but rather as leaving sufficient flexibility for the shipmaster to respond to the factual circumstances without imposing a potentially impossible obligation on them. Concluding, the material scope of Art. 98 para. 1 UNCLOS establishes an obligation which includes the disembarkation to a place of safety.[110] It is not designed as an absolute obligation, but one that is limited by the own safety of the rescue vessel and its crew.[111]

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[108] O'Brien (n 96) 723–725.
[109] Sophie Cacciaguidi-Fahy, 'The Law of the Sea and Human Rights' 19 Sri Lanka Journal of International Law 85, 93–94.
[110] Seline Trevisanut, 'Is There a Right to Be Rescued at Sea? A Constructive View' (2014) 4 Questions of International Law 3, 6; Francesca De Vittor and Massimo Starita, 'Distributing Responsibility between Shipmasters and the Different States Involved in SAR Disasters' (2019) 28 The Italian Yearbook of International Law Online 77, 81.
[111] Moreno-Lax (n 99) 490; Douglas Guilfoyle, 'Art. 98: Duty to Render Assistance' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 727–728.

3.2.1.3 Search and rescue duties

In addition, Art. 98 para. 2 UNCLOS establishes the duty for coastal states to promote the establishment, operation, and maintenance of an SAR service. The three obligations contained are not further specified within UNCLOS. In order to find clarification, it is necessary to turn to the SAR Convention which provides more detailed guidance in this regard.[112]

3.2.2 International Convention on Maritime Search and Rescue

The SAR Convention contains more specific obligations regarding SAR and gives guidance on the interpretation of key terminology.[113] It aims to establish an international system for the co-ordination of SAR building on inter-state co-operation and harmonised procedures.[114] Before analysing the relevant provisions it is important to acknowledge that the drafting process of the SAR Convention was led by the IMO which is an UN agency primarily engaged with global standard-setting for the shipping industry.[115] Accordingly, the incentive was to securitise maritime traffic in the context of regular navigation mainly of merchant ships.[116] Representatives from the field of human and refugee rights were not involved which underlines the fact that the SAR Convention was not meant to function as legal answer to irregular maritime migration.[117] While this does not affect the Convention's applicability to this context, it does raise serious doubts about its suitability.[118]

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[112] Irini Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (2016) 98 International Review of the Red Cross 491, 498–499.
[113] Vittor and Starita (n 110) 81.
[114] International Convention on Maritime Search and Rescue 1979 [1405 UNTS 119] Preamble.
[115] IMO, 'Introduction to IMO' (2019) <https://www.imo.org/en/About/Pages/Default.aspx> accessed 17 May 2022.
[116] Ainhoa Campas Velasco, 'The International Convention on Maritime Search and Rescue: Legal Mechanisms of Responsibility-Sharing and Co-Operation in the Context of Sea Migration Symposium: Guest Editor Collective Responsibility for Migrants at Sea' (2015) 10 Irish Yearbook of International Law 57, 61, 64–66.
[117] ibid 58, 62–63; IMO, 'IMO Secretary-General Welcomes UN Security Council Resolution on Migrant Smuggling' <https://www.imo.org/en/MediaCentre/PressBriefings/Pages/45-UNSC-resolution-.aspx> accessed 22 February 2022.
[118] Campas Velasco (n 116) 68–69.

3.2.2.1 Duty to render assistance

As its basic pillar, the SAR Convention also contains a duty to render assistance to persons in distress at sea which is stipulated in Reg. 2.1.1 and 2.1.10 Annex SAR Convention. This obligation is legally similar to the corresponding UNCLOS provision insofar as it addresses the contracting state (not directly the shipmaster) and requires it to ensure that such assistance is provided. Within the SAR Convention, the universality of this duty on the side of the beneficiaries is given emphasis through the explicit provision on this matter in Reg. 2.1.10 Annex SAR Convention.[119] Read in conjunction with Reg. 3.1.9 Annex SAR Convention the duty to render assistance must be understood as including the disembarkation to a place of safety.[120]

3.2.2.2 Duty to co-ordinate and co-operate

One of the main obligations established by the SAR Convention are the duties to co-ordinate and co-operate (Reg. 2.1.1, 2.1.3 Annex SAR Convention).[121] In order to build up a co-operative SAR system, Reg. 2.1.3 Annex SAR Convention provides for the establishment of search and rescue regions (SRRs). It is important to emphasise that these SRRs generally do not establish jurisdiction of the coastal state in that area (Art. 2 para. 1, Reg. 2.1.7 Annex SAR Convention).[122] According to Reg. 1.3.4 and 1.3.5 Annex SAR Convention, each of these regions is to be connected to an RCC.[123] Within the SRR the respective state is responsible for the

> performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircraft, vessels and other craft and installations.[124]

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[119] ibid 63–64.
[120] Seline Trevisanut, 'Search and Rescue Operations at Sea' in André Nollkaemper et al (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 431.
[121] Papachristodoulou (n 85) 98–99.
[122] Trevisanut, 'Is There a Right to Be Rescued at Sea? A Constructive View' (n 110) 12.
[123] Interactive map indicating SRRs and their RCCs in the Mediterranean Sea region can be found here: <https://sarcontacts.info/srrs/tr_med/> accessed 04 April 2022.
[124] Reg. 1.3.3 Annex SAR Convention.

The most relevant states in the context of migration via the Central Mediterranean, Italy, Malta and Libya, have established an SRR and appointed an RCC.[125] Contrary to the recommendation in Reg 2.1.3 Annex SAR Convention, there are overlaps of these SRRs, for instance in the region south of Sicily where Malta and Italy have a shared zone.[126] This is not beneficial regarding the clear distribution of responsibilities. Moreover, the recognition of the Libyan SRR by the IMO in 2018 has given rise to critique because it increases the risk of refugees ending up under the control of the Libyan Coast Guard which does not perform its duties in line with international legal requirements.[127]

Building on the establishment of SRRs, the SAR Convention draws up a system of primary responsibility. This means that the RCC of the state in whose SRR a distress case occurs (SRR state), is supposed to take charge of the co-ordination of rescue operations.[128] Within the 2004 amendment of the SAR Convention an additional operational step to be undertaken by the RCC was inserted through Reg. 3.1.9. Annex SAR Convention.[129] Pursuant to this provision, the RCC managing the rescue operation is also in charge of co-ordinating the process of disembarkation and the delivery to a place of safety. Yet, it is not definitely prescribed where this disembarkation is to take place and what a place of safety is.[130] The problem resulting from this unclarity is subject to the analysis in Chapter 4.

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[125] IMO, 'GISIS: Global SAR Plan' (2022) <https://gisis.imo.org/Public/COMSAR/NationalAuthority.aspx> accessed 4 April 2022.
[126] Cusumano and Pattison (n 34) 58; US Coast Guard, 'IMO Maritime SAR Regions' <https://www.dco.uscg.mil/Portals/9/CG-5R/nsarc/IMO%20Maritime%20SAR%20Regions.pdf> accessed 4 April 2022.
[127] Santer (n 44); Ian Urbina and Joe Galvin, 'Is the U.N.'s Maritime Organization Facilitating Crimes at Sea?' (*The Outlaw Ocean Project*, 9 February 2022) <https://theoutlawocean.substack.com/p/is-the-uns-maritime-organization-95c> accessed 15 February 2022.
[128] van Berckel Smit (n 65) 501–502.
[129] Resolution MSC.155(78), Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended 2004 [MSC 78/26/Add.1 Annex 5].
[130] Jasmine Coppens and Eduard Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25 International Journal of Marine & Coastal Law 377, 378.

The existence of primary responsibility implies, that there are also secondary responsibilities (e.g. Immediate Action, Reg. 4.3 Annex SAR Convention). These are triggered in case the primary responsible state does not adequately respond to a distress situation. Therefore, the system can be referred to as one of responsibility-sharing.[131] Such inadequate fulfilment of responsibilities can be witnessed on side of the Maltese RCC which has continuously been ignoring distress alerts.[132] Moreover, responsibility can shift to neighbouring states if the SAR service provided by a state contravenes the principal goal of the Convention which is to save lives at sea. A prominent example in this regard is Libya, the SAR services of which entail illegal pull backs.[133] On the one hand, such a system of subordinate responsibilities contributes to the aim of creating a seamless net of SAR services. On the other hand, it diffuses responsibilities which can make it easier for states to escape their responsibilities by shifting them to other states.[134]

Generally, the system of the SAR Convention relies on the assumption that the contracting states are willing to co-operate and fulfil their responsibilities.[135] Consequently, there are no provisions governing cases where this willingness is not apparent, and states refuse to take charge of rescue operations. This reveals a disparity between the far-reaching duty to rescue and the small-scale design of the corresponding operational framework.[136] Moreover, it underlines the fact that the system of co-operation established by the SAR Convention was not designed for a context where maritime distress situations are heavily concentrated in certain areas as it is the case in the Central Mediterranean. This increases the difficulty for the states affected by this concentration to adequately fulfil their obligations within this system and creates reluctance in this regard.[137]

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[131] Campas Velasco (n 116).
[132] The Malta Independent Online, 'NGO Rescue Ship Seeks Port of Safety with over 400 Migrants' (18 May 2021) <https://www.independent.com.mt/articles/2021-05-18/local-news/NGO-rescue-ship-seeks-port-of-safety-with-over-400-migrants-6736233582> accessed 4 April 2022; Sea-Watch e.V., 'Crimes of Malta' <https://sea-watch.org/en/crimes-of-malta/> accessed 4 April 2022.
[133] Cusumano and Pattison (n 34) 59; Vittor and Starita (n 110) 91.
[134] Vittor and Starita (n 110) 87.
[135] Campas Velasco (n 116) 68–69.
[136] ibid 64.
[137] ibid 68–69.

3.2.3 International Convention for the Safety of Life at Sea

The main purpose of the SOLAS Convention[138] is to protect human lives at sea. Its substantive focus lays on setting forth safety standards for vessels regarding for example the machinery or technical equipment (Chapter II SOLAS Convention). Thereby, the SOLAS Convention pursues a more preventive approach as opposed to the SAR Convention which is focused on responsive measures in cases of distress.[139]

The SOLAS Convention also contains a legal duty to render assistance to people in distress at sea in Reg. V/33.1. Contrary to the respective provisions in UNCLOS and the SAR Convention, the wording of the SOLAS provision is directed at the shipmaster instead of the contracting states. Whether or not this is to be interpreted as establishing a direct legal obligation towards the masters of ships is matter of contention but does not need to be further discussed for the purpose of this thesis.[140] It also follows an explicit non-discriminatory approach regarding who the obligation is owed to.[141] Reg. V/33.6 SOLAS Convention expands the scope of the duty by requiring the master of the ship to treat the assisted persons with humanity to the extent possible in the given conditions.[142]

In Reg. V/7.1 SOLAS Convention the threefold duty of coastal states to ensure the establishment, operation and maintenance of an effective SAR service, already known from Art. 98 para. 2 UNCLOS is reiterated. The usage of rather flexible terms such as practicable and adequate leave wide discretion towards the coastal states in how they comply with this obligation.[143] Through the 2004 amendments of the SOLAS Convention, Reg. V/33.1-1 was inserted which establishes the duties of contracting states to co-ordinate and co-operate in rescue operations. In line with the SAR Convention, it provides for a system of primary and shared responsibility.[144]

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[138] International Convention for the Safety of Life at Sea 1974 [1184 UNTS 278].
[139] O'Brien (n 96) 720.
[140] Bevilacqua (n 32) 24–26.
[141] Papachristodoulou (n 85) 93–94.
[142] van Berckel Smit (n 65) 503.
[143] Papachristodoulou (n 85) 97–98.
[144] van Berckel Smit (n 65) 504–505.

In conclusion, the SOLAS Convention is a coherent component of the legal framework of rescue at sea since its provisions on SAR follow the same logic as the ones of the UNCLOS and the SAR Convention. These three treaties can be declared to be the core legal instruments for the subject of rescue at sea. In the following Chapters the term 'legal SAR regime' is used to refer to these treaties.

3.3 International soft law instruments

As pointed out in the previous section, the treaties leave some regulatory gaps and unclarities which is why several soft law[145] instruments have been developed to enhance legal certainty. In the following, the most relevant ones will be examined.

3.3.1 International Aeronautical and Maritime Search and Rescue Manual

The IAMSAR Manual published by the IMO and the International Civil Aviation Organization (ICAO) provides states with guidance on how to comply with their obligations under the Convention on International Civil Aviation, the SAR Convention and the SOLAS Convention. There are three volumes which cover the organisation and management of the SAR service within the global SAR system (Vol. I), mission coordination (Vol. II) and mobile facilities (Vol. III).[146]

Of particular importance regarding SAR responsibilities is para 3.6.1 Vol. II[147] which states that generally the RCC receiving the first distress alert will take on responsibility for the rescue operation. In case this first alerted RCC does not belong to the SRR state, it is required to notify the competent RCC of another state. If more than one RCC receive a distress alert it is stipulated that every RCC should assume its own responsibility until co-ordination between all RCCs involved in the case is clarified (para. 3.6.2 Vol. II) which contributes to the purpose of providing a gapless SAR service. This approach is underlined by para. 3.6.4 (b) Vol. II which regulates

[145] The term soft law is used here to refer to non-legally binding instruments. For an overview on the controversy about this term see: Hugh Thirlway, *The Sources of International Law* (2nd edn, Oxford University Press 2019) 186–194.
[146] IMO, *International Aeronautical and Maritime Search and Rescue Manual*, vol I (11th edn, IMO, ICAO 2019) Foreword.
[147] IMO, *International Aeronautical and Maritime Search and Rescue Manual*, vol II (11th edn, IOM, ICAO 2019).

cases in which a vessel navigates from one SRR to another. Here, the responsibility stays with the initial RCC until the new one accepts to be in charge. These provisions reflect the aim to avoid a lack of action by RCCs due to multiple potential bearers of responsibility. The Manual only regulates the problem of the involvement of too many actors but not the one of no RCC adequately responding to a distress case. This shows that it is built on the rather optimistic presumption that there is a general willingness among states to fulfil their SAR responsibilities.

3.3.2 IMO Guidelines on the Treatment of Persons Rescued at Sea

Another important soft law document are the IMO Guidelines. The purpose of these Guidelines is to balance the interests of the persons rescued at sea and the ones of the vessel rendering this assistance by giving governments and shipmasters guidance on how to comply with their obligations under international law (paras. 1.1, 1.2 Annex IMO Guidelines). To this end the Guidelines aim to increase the coherence and integrity of the SAR system set up by the SAR Convention and SOLAS Convention (para. 2.3 Annex IMO Guidelines). Reference is also made to the IAMSAR Manual (paras. 4, 6.2 Annex IMO Guidelines) demonstrating the strong interlinkage between all these legal instruments. The Guidelines make an important contribution to the legal framework regarding the division of responsibilities between RCCs. Hereby the Guidelines pursue a more practical approach as they do not only emphasise that the primary responsibility lays with the SRR state where assistance is required but also stress the secondary responsibilities of other states as long as the primary responsible RCC is not fulfilling its obligations (para. 6.3 Annex IMO Guidelines).

3.3.3 UNHCR Guidelines on the Treatment of Persons Rescued at Sea

The aforementioned soft law instruments that stem from a maritime law context are complemented by the UNHCR Guidelines[148] which add the refugee rights dimension to the framework. They serve as guideline for interpretation of treaty and

[148] The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees 2008 [UN Doc. A/AC.259/17].

customary law obligations. In paras. 13 and 21 of the Guidelines the duty to render assistance to persons in distress at sea is echoed. Notably, the role of private shipmasters is given special attention. It is stressed that the action of shipmasters in a rescue operation is to be supported by states as they perform an important humanitarian service (paras. 27-29 UNHCR Guidelines). Thereby the UNHCR expresses a supportive attitude towards private providers of SAR services and expects states to adopt this perception as well. The reality has developed into the contrary with states applying criminalisation strategies against SAR NGOs, impeding their rescue operations instead of supporting them (see Chapters 2.3.1; 2.3.2).

3.4 Conclusion

In summary, the international law of the sea governing rescue at sea is a complex interplay between many different instruments that cover different focal points but also overlap in several regulatory elements. The obligation to render assistance is a basic pillar of the hard law system and is clearly appointed to every ship encountering persons in distress at sea, including people on unseaworthy refugee boats. This clarity, however, cannot be found to the same extent regarding the further steps of a rescue operation and the distribution of responsibilities of SAR services as a whole. Against the background that such questions touch upon state sovereignty and territorial rights, it is not surprising that the legal agreements are not as compelling in this respect.[149] The soft law instruments provide more detailed guidance on how states should set up their SAR services and how co-operation should be organised. However, they still operate within the regulatory frame set forth by the UNCLOS, SOLAS and SAR Convention and can thus not abolish the uncertainties created by the system of primary and secondary responsibilities. Yet, they are a helpful guide for states to comply with their obligations stemming from the fragmented legal system on SAR and provide authoritative arguments regarding contested duties of states with respect to people rescued at sea.[150]

[149] Campas Velasco (n 116) 70.
[150] Martin Ratcovich, 'International Law and the Rescue of Refugees at Sea' (DLaw thesis, Stockholm University 2019) 254.

4 State duty to provide a place of safety under the international law of the sea

4.1 Background – the *Tampa* Case

The previous Chapter has shown that the legal framework governing rescue at sea, while being substantively coherent, is of complex and fragmented nature. Despite the density of this regulatory net, the provisions surrounding disembarkation and the place of safety are rather ambiguous as will be argued in this Chapter. Therefore, it remains a topic that receives major attention within academic literature without producing a consensus as to the specific obligations of states in this regard. This is particularly problematic against the background that states increasingly show reluctance to provide a place of safety within their territory.

Initially this problem was brought to public attention by the *Tampa* case which raised concerns about the functioning of the legal system. In 2001 the *MV Tampa*, a cargo vessel flying the Norwegian flag, was requested by the Australian RCC to render assistance to a wooden boat sinking in the Indian Ocean. Complying with this order the crew of the *MV Tampa* rescued 433 people and took them on board their ship. The Australian Coast Guard did not give any guidance on where to bring the rescued people thus the *MV Tampa* headed towards Indonesia but changed its course towards Christmas Island due to pressure exercised by the rescued people. Despite deteriorating conditions on board, the Australian authorities denied access to its territorial waters claiming Indonesia or Norway to be responsible. This order was eventually ignored by the shipmaster who entered Australian waters which provoked the seizure of the ship by Australian troops.[151] After a stand-off of seven days the rescued people were brought to Papua New Guinea and subsequently distributed according to the 'Pacific Solution'.[152] The case demonstrated that the legal provisions in place at that time were not suitable to respond to cases where large numbers of persons are rescued at sea and no state is willing to receive them

[151] *Victorian Council for Civil Liberties Incorporated and Eric Vadarlis v Minister for Immigration & Multicultural Affairs & Ors* [2001] Federal Court of Australia V899/2001, V900/2001, FCA 1297, paras 14–26.
[152] Barnes, 'Refugee Law at Sea' (n 90) 48.

on its territory.[153] This triggered an initiative by the IMO to reform the legal framework in order to integrate the needs stemming from irregular migration at sea.[154] Consequently, the SAR Convention and SOLAS Convention were amended in 2004[155] and the Guidelines on the Treatment of Persons Rescued at Sea were adopted.[156] Malta, however, has not ratified these amendments which is a major drawback regarding the important role the country plays for disembarkation in the Central Mediterranean.[157]

Unfortunately, the legal initiative did not put an end to incidents like the *Tampa* case. As described in Chapter 2.3.2., the current situation of closed ports in the Central Mediterranean dramatically displays that there are still deficiencies in the legal system regarding disembarkation. Building on the previous Chapter which explained the general legal framework, it will now be examined which concrete obligations states have towards disembarkation of rescued people under the international law of the sea. Particular attention will be paid to the question whether states have a duty to provide a place of safety on their territory.

4.2 The concept of a place of safety

Before identifying legal obligations towards the provisioning of a place of safety, it is crucial to clarify what a place of safety substantively is. Regrettably, neither the UNCLOS nor the SAR Convention or SOLAS Convention provide a definition of the place of safety. This makes apparent that the flexibility for states to react on a case-by-case basis to distress incidents was prioritised over clear legal determination.[158]

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[153] Cecilia Bailliet, 'The Tampa Case and Its Impact on Burden Sharing at Sea' (2003) 25 Human Rights Quarterly 741.
[154] Campas Velasco (n 116) 72–73; Papachristodoulou (n 85) 104–108.
[155] IMO Resolution MSC.155(78) and MSC 153 (78), 20.05.2004.
[156] Resolution MSC.167(78) Annex 34.
[157] IMO, 'Status of IMO Treaties, Comprehensive Information on the Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions' (2022) 40, 439 <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%20-%202022%20(2).pdf> accessed 27 April 2022.
[158] Campas Velasco (n 116) 74.

4.2.1 Legal requirements of a place of safety

The IMO Guidelines which serve as guidance towards the fulfilment of state SAR obligations contain several provisions that define and determine requirements for the place of safety. In interlinkage with the definition of rescue in Reg. 1.3.2 Annex SAR Convention which encompasses the delivery to a place of safety, para. 6.12 IMO Guidelines stipulates that a place of safety is a 'location where rescue operations are considered to terminate (...)'.

Implications for the geographical location of the place of safety can be drawn from Reg. 3.1.9 Annex SAR Convention which requires disembarkation to take place 'as soon as reasonably practicable'. In the same vein the SOLAS Convention stipulates that the shipmaster rendering assistance should be relieved from this obligation 'with minimum further deviation' (Reg. V/33.1-1). Para. 6.3 IMO Guidelines puts forth that the rescuing ship 'should not be subject to undue delay' after assisting persons in distress and that the 'coastal states should relieve the ship as soon as practicable'. Para. 6.8 IMO Guidelines considers the perspective of the rescued people and requires the time they have to stay on board the rescue vessel to be minimised. In consequence, the place of safety should be as close as possible to where the assistance has been performed.[159] However, it must be considered that weather conditions and other natural factors can make ports that are geographically further away to be reachable more quickly, thus, sometimes the geographically closest location does not necessarily make a port the most suitable place of safety.[160] Further, it needs to be acknowledged that a port within the territory of the SRR state can be significantly further away than a port of a neighbouring state.[161] These factors demonstrate a need for certain flexibility in an *a priori* legal determination of a place of safety.[162] Serving the aim of minimising the burden for the provider of the assistance it is considered a common maritime practice to realise disembarkation at the next port of call meaning the port that the rescue vessel was

[159] O'Brien (n 96) 722.
[160] Paolo Turrini, 'Between a "Go Back!" And a Hard (to Find) Place (of Safety): On the Rules and Standards of Disembarkation of People Rescued at Sea' (2019) 28 The Italian Yearbook of International Law Online 29, 38.
[161] ibid 42.
[162] Moreno-Lax (n 81) 25–26.

supposed to head to according to its initial navigation plan. Yet, this practice is not based on compelling legal grounds.[163] Furthermore, this approach is not suitable for the context of SAR NGO vessels which do not have a next port of call as they navigate for the very reason of rescuing people and bringing them to a safe place as fast as possible.[164]

While the aforementioned provisions concern the geographic dimension of determining a place of safety, there are further criteria focusing on the needs and rights of the rescued people. First, the shipmaster is required to realise disembarkation at a place where the safety of the rescued people is 'not further jeopardized' (para. 5.6 IMO Guidelines). Addressing states, para. 6.12 IMO Guidelines prescribes that it must be a place where their 'life is no longer threatened' and their 'basic human needs (such as food, shelter and medical needs)' can be met. This is explicitly emphasised for the context of refugees in para. 6.17 IMO Guidelines which stipulates that disembarkation is to be avoided in places where 'the lives and freedoms' of people asserting to be fleeing persecution would be at threat. Importantly in this regard, questions concerning the determination of their legal status should not affect the determination of a place of safety but taken care of after disembarkation (paras. 6.19, 6.20 IMO Guidelines). These provisions show the intention to avoid what is currently common practice in the Central Mediterranean, where the legal SAR regime is misused for border and migration control purposes (see Chapters 2, 3). Due to these substantive requirements the place of safety cannot simply be determined by geographical proximity.[165]

Indeed, these requirements open a door for adding human rights as a layer of scrutiny to the determination of a place of safety. Even though it is a different legal regime, it is apt to use human rights law to inform the interpretation of the SAR regime. Technically, this is enabled by the way of systemic integration as prescribed by Art. 31 para. 3 c) VCLT[166] meaning that all other rules of international law that

[163] Barnes, 'Refugee Law at Sea' (n 90) 51–52.
[164] van Berckel Smit (n 65) 505.
[165] Turrini (n 160) 35–36.
[166] Vienna Convention on the Law of Treaties 1969 [1155 UNTS 331].

are valid between the parties can serve as tool of interpretation. However, the VCLT entered into force in 1980 when the SAR Convention (1979) and SOLAS Convention (1974) had already been adopted and is, therefore, according to Art. 4 VCLT, not directly applicable. Yet, the provisions on the interpretation of treaties set forth by the VCLT are accepted to be rules of customary international law which predate the adoption of the aforementioned treaties. Consequently, the principle of systemic integration can still be applied, solely on a different legal basis.[167]

The notion of the absence of a threat to lives and freedoms of the rescued people corresponds primarily with the right to life (Art. 2 para. 1 ECHR), the principle of *non-refoulement* (Art. 3 ECHR) and the right to liberty and security (Art. 5 para. 1 ECHR). The prohibition of *refoulement* is also a principle under international refugee law prescribed in Art. 33 Convention relating to the Status of Refugees[168] (Refugee Convention) which, however, covers a smaller personal and material scope and thus does not add further requirements to the interpretation of the place of safety.[169] These human rights provisions limit RCCs when selecting and appointing a place of safety.[170] They also have indirect implications for the shipmaster whose actions are supposed to be guided by the aim to ensure the safety of lives (Reg. V/34.1 SOLAS Convention) and who is required to treat rescued people with humanity (Reg. V/33.6 SOLAS Convention).

4.2.2 Places of safety in the Central Mediterranean

These criteria are of high practical relevance in the context of the Central Mediterranean. Places of safety that are usually taken into consideration are located either on Italian, Maltese, or Libyan territory. While it is generally unquestioned that ports of Italy and Malta can serve as safe places for disembarkation[171] the same is not true for ports of Libya. It is well-documented that refugees and migrants in

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[167] *Fothergill v Monarch Airlines Ltd* [1980] House of Lords, England (Diplock) UKHL J0101-3, para 88; Ratcovich (n 150) 250.
[168] Convention relating to the Status of Refugees 1951 [189 UNTS 137].
[169] Ratcovich (n 150) 174.
[170] ibid 263–273, 282–283.
[171] It is worth noting that Italy declared itself to not be a place of safety for the duration of the Covid-19 pandemic by the Inter-ministerial Decree n.150 of 07.04.2020, <https://www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf> accessed 17 May 2022.

Libya face conditions that severely interfere with their human rights. Some of the most common crimes are arbitrary detention under inhuman conditions, torture and ill-treatment, sexual violence, forced work especially for militias and armed groups as well as forced disappearances directly after disembarkation. The detention centres used to detain migrants and refugees are of alarming conditions and deaths during detention therein is not uncommon.[172] It does not need close examination to subsume that these facts are contrary to the requirements for a place of safety presented above. Consequently, it has widely been acknowledged that Libyan ports are not suitable places for disembarkation of refugees.[173] This view is affirmed by the ECtHR in its judgement on *Hirsi and others v. Italy*[174] as well as the court of Naples which recently convicted the shipmaster of the Italian oil supply vessel *Asso Ventotto* for the abuse of office on the grounds that he brought rescued refugees back to the port of Tripoli.[175]

In summary, a place of safety must fulfil certain geographical and humanitarian criteria including the respect for human rights. Libyan territory does not fulfil these requirements, hence, disembarkation to Libyan ports cannot be instructed lawfully by an RCC and cannot be expected to be followed by NGOs. Consequently, the ports of Italy and Malta are the ones that are eligible as places of safety for disembarkation in the Central Mediterranean.

4.3 State duty to provide a place of safety

Having clarified to the extent possible, the concept of the place of safety, it is crucial to examine, if and which state has the duty to provide this place. Acknowledging the principle of *lex specialis derogat legi generali*, the analysis will start with the

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[172] Amnesty International, 'Between Life and Death - Refugees and Migrants Trapped in Libya's Cycle of Abuse' (2020) <https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE1930842020ENGLISH.pdf> accessed 1 March 2022.
[173] UNHCR, 'UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea' (2020) paras 33, 34 <https://www.refworld.org/pdfid/5f1edee24.pdf> accessed 1 March 2022; IOM, 'IOM and UNHCR Condemn the Return of Migrants and Refugees to Libya' <https://www.iom.int/news/iom-and-unhcr-condemn-return-migrants-and-refugees-libya> accessed 1 March 2022.
[174] *Hirsi Jamaa and others v Italy* [2012] ECtHR App no. 27765/09.
[175] Paolo Santalucia and Nicole Winfield, 'Italy Ship Captain Convicted after Sending Migrants to Libya' (*ABC News*, 14 October 2021) <https://abcnews.go.com/International/wireStory/italy-ship-captain-convicted-sending-migrants-libya-80583774> accessed 1 March 2022.

international law of the sea as most specific source of law for this question. In the subsequent Chapter, more general provisions stemming from human rights law will be considered.

4.3.1 United Nations Convention on the Law of the Sea and customary international law

The basic principle that sets the framework for the provision of a place of safety is state sovereignty. Since ports usually belong to internal waters, they are part of a states' territory where according to Art. 2 para. 1 UNCLOS the state has full sovereignty (see Chapter 3.2.1.1). This means that there is no general right of entry into ports but that this right is subject to regulation by the respective coastal state.[176] One important exception to this is the right to enter foreign territorial waters in case of distress. Both the principle and the exception are rules of customary international law.[177] Regarding the context of NGO rescue operations this exception can establish a legal right to enter the port of a foreign state in specific cases where the situation on board requires immediate action for instance if people are in urgent need of medical treatment. However, such a distress situation can also be resolved by providing assistance on board the rescue vessel or disembarking the most vulnerable persons. Subsequent to such ad hoc measures, the exceptional right to enter a port does no longer exist.[178] This conduct has become common among Italian and Maltese authorities which prefer to send (mostly) medical staff to a vessel and disembark singular people instead of allowing the rescue vessel to enter their ports and let all passengers disembark.[179] Therefore, a general duty to allow disembarkation cannot be derived from this rule. Art. 98 UNCLOS does not contain any specifications on the issue of disembarkation and the distribution of related responsibilities. As pointed out above, disembarkation is part of the duty to rescue,

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[176] Kiara Neri, 'The Missing Obligation to Disembark Persons Rescued at Sea' (2019) 28 The Italian Yearbook of International Law Online 47, 49; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgement* [1986] ICJ Reports 1986, p. 14, para 213.
[177] AV Lowe, 'The Right of Entry into Maritime Ports in International Law Law of the Sea IX' (1976) 14 San Diego Law Review 597, 608–609.
[178] Neri (n 176) 49–50.
[179] Sea-Watch e.V.,'Situation on Board Sea-Watch 3 Deteriorates: Still No Port of Safety for over 400 Rescued People ' (n 74); Sea-Eye e.V., '214 People Aboard Sea-Eye 4 Finally Get a Port of Safety in Pozzallo' (23 December 2021) <https://sea-eye.org/en/214-people-aboard-sea-eye-4-finally-get-a-port-of-safety-in-pozzallo/> accessed 2 March 2022.

however, it is a duty that must be fulfilled by the shipmaster which does not automatically give rise to a state duty to allow such disembarkation to happen on its territory.[180] Hence, neither customary international law nor the UNCLOS establish a state obligation to provide a place of safety.[181]

Coastal states, especially Italy, have been contending that the flag state bears responsibility for providing a port for disembarkation on its own territory. However, Art. 98 para. 2 UNCLOS clearly appoints the responsibility for the field of SAR services to coastal states. Hence, the assertion lacks legal grounds and can, therefore, not be considered as contribution in determining the legal responsibility for providing a place of safety.[182]

4.3.2 SAR Convention and SOLAS Convention

In contrast to the UNCLOS, the SAR Convention and the SOLAS Convention do address the question of responsibility for disembarkation. It was the specific intention of the 2004 amendments to bring legal clarity to this issue.[183]

According to Reg. 3.1.9 Annex SAR Convention and Reg. V/33.1-1 SOLAS Convention, the SRR state is primarily responsible for the co-ordination and co-operation towards the disembarkation of rescued people and their delivery to a place of safety. These provisions seem to establish legal certainty towards disembarkation on the territory of the SRR state. However, such a conclusion would be premature.

First, the scope of the clear obligations established by the provisions is limited to co-ordination and co-operation.[184] No explicit reference is made towards a duty to also providing the place that must be organised. Thus, it is only prescribed that the SRR state has the primary duty to appoint a place of safety without setting forth that this place is to be within its own territory.[185] It has, therefore, been argued that the provisions merely establish an obligation of conduct since they focus on co-

[180] Guilfoyle (n 111) 728–729.
[181] Neri (n 176) 50.
[182] Turrini (n 160) 40–41; Barnes, 'Refugee Law at Sea' (n 90) 63.
[183] Resolution MSC.155(78) Annex 5, 20.05.2004, Recitals 7, 8.
[184] Papachristodoulou (n 85) 98–99.
[185] Neri (n 176) 51.

operation and co-ordination.[186] This interpretation, however, does not take into account that the state is obliged to perform this co-operation and co-ordination to the end that rescued people are disembarked to a place of safety. Hence, it is well reasoned to assume Reg. 3.1.9 Annex SAR Convention and Reg. V/33 1-1 SOLAS Convention to establish a duty of result, not of conduct.[187] It has to be carefully identified though, which definite obligation arises from this for a specific state. The result that is owed is the performance of co-ordination and co-operation leading to the appointment of a place of safety and the disembarkation of the rescued people. The provisions do not go as far as obliging a specific actor to allow this disembarkation on its territory but in fact use a passive wording ('survivors assisted are disembarked' Reg. 3.1.9 Annex SAR Convention, Reg. V/33 1-1 SOLAS Convention) which implies that the duty of the co-ordinating state does not entail enabling disembarkation itself.[188] Under the legal SAR regime, the community of coastal states shares this responsibility to appoint and provide a place of safety instead of one specific state bearing the exclusive responsibility, which makes the seemingly clear obligation remain a 'grey area'.[189] This legal design of responsibilities may be coherent with the system of co-operation drawn up by the SAR Convention but hinders the establishment of a clear obligation towards one specific state.[190] The principle of primary responsibility is embedded in and dependent on this system of co-operation. It seems to contravene this system to assume a residual obligation of the SRR state to appoint a place of safety on its own territory if no other place can be found[191] in the given context that such practice of co-operation is not pursued by the relevant states.[192]

As discussed above, the SRR state is limited in its choice of the place of safety by the legal SAR regime and human rights law. These limitations can lead to reduced discretion in appointing a place of safety but do not necessarily allow the conclusion

[186] Stefan AG Talmon, 'Private Seenotrettung Und Das Völkerrecht (Maritime Rescue Operations by NGOs and International Law)' (2019) 74 JuristenZeitung 802, 807–808.
[187] Papachristodoulou (n 85) 107; Moreno-Lax (n 81) 23; Carrera and Cortinovis (n 45) 13.
[188] Guilfoyle (n 111) 729.
[189] Papachristodoulou (n 85) 107.
[190] Campas Velasco (n 116) 67; van Berckel Smit (n 65) 504.
[191] Trevisanut, 'Is There a Right to Be Rescued at Sea? A Constructive View' (n 110) 7.
[192] Campas Velasco (n 116) 68–69.

that the territory of the SRR state is the only lawful place for disembarkation. The requirements for a fast realisation of disembarkation (Reg. 3.1.9 Annex SAR Convention, Reg. V/33.1-1 SOLAS Convention) are codified with vague legal terms ('minimum further deviation', 'reasonably practicable') thus failing to set a fixed time frame which could give rise to a legal necessity to provide a place of safety on a certain territory.[193] Overall these factors lead to a wide discretion for the coastal state regarding the realisation of disembarkation.[194]

Within the Conventions reference is made to the IMO Guidelines for further clarification of the issue, therefore, these need to be consulted as well.

4.3.3 IMO Guidelines

The IMO Guidelines provide background explanations on the SAR Convention and the SOLAS Convention in Principle 2. It is stipulated that the SRR state is responsible to either provide or ensure the provisioning of a place of safety and is thereby more concise compared to the Conventions as it does not speak of a 'primary' responsibility. It has been argued that this would constitute a 'residual obligation' of the SRR state to provide a place of safety on its own territory in case no alternative can be found.[195] This needs to be contradicted since the Principle is not meant to establish new obligations but to explain the ones laid down in the Conventions. The latter cannot be overruled by non-binding Guidelines that exceed the limitations of interpretation set by the text of the Conventions which clearly do not establish an exclusive responsibility. This creates the appearance that the Guidelines wish to compensate for what, despite being suggested in the drafting processes, could not be agreed upon when adopting the Conventions. [196]

Para. 5.1.4 of the IMO Guidelines emphasises the secondary responsibility of other states if the primary responsible entity is not reachable. This supports the argument that there exists no strict obligation towards the primary responsible state to provide

[193] ibid 76.
[194] Ghezelbash et al (n 46) 322.
[195] Trevisanut, 'Search and Rescue Operations at Sea' (n 120) 432–433; Trevisanut, 'Is There a Right to Be Rescued at Sea? A Constructive View' (n 110) 7.
[196] van Berckel Smit (n 65) 505–506.

a place of safety within its territory. This view could be altered by para. 6.3 IMO Guidelines which requires coastal states to relieve ships as soon as practicable after assisting persons at sea so that they are not subject to undue delay. Considering that the SRR state is responsible for arranging a place of safety, this provision could be read as establishing a duty for the co-ordinating state to provide a place of safety itself if no other state can be found if that is necessary in order to protect the ship from undue delay. The double-use of the word should in the provision, however, contradicts the assumption of a compelling obligation. In line with this, the following provisions (especially paras. 6.7, 6.8, 6.9, 6.16 IMO Guidelines) underline the organisational responsibility of the SRR state and urge it to enable and facilitate disembarkation as soon as possible in co-operation with other contracting states. This responsibility, however, cannot be understood as one of result as the state authorities are only urged to 'make every effort' towards this goal. By requiring shipmasters to accept unavoidable delays resulting from co-ordination challenges, a rather wide range for interpretation is left open regarding the extent of delay that is deemed acceptable. It lowers the responsibility of the co-ordinating state and again contravenes the idea of an obligation to provide a place of safety in its own territory since delays are admissible under para. 6.9 IMO Guidelines in case they can be declared to be unavoidable.[197] In conclusion, the IMO Guidelines do set out clearer divisions of responsibility for the arrangement of disembarkation to a place of safety but they do not establish a state duty to allow disembarkation on its own territory.

4.3.4 IMO Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea

Taking into account the uncertainties on the issue of disembarkation, the IMO Facilitation Committee published a Circular[198] (IMO Principles) containing five principles that are meant to assist states in harmonising their procedures on disembarkation (para. 2 IMO Principles). These generally reiterate the concept of co-operation and primary responsibility of the SRR state. There is one important difference to be found in Principle 3 which requires the state responsible for

[197] Papachristodoulou (n 85) 105–106.
[198] IMO Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea 2009 [35th session IMO Doc. FAL.3/Circ.194].

arranging a place of safety to allow disembarkation to a place under its control within the limits of its immigration laws in case no other location can be found. This Principle could bring clarification, however, there are two important limitations to it. First, the Principles are set out in an IMO Circular in the character of recommendations and do, therefore, not establish legally binding obligations.[199] Second, the subsequent Principle 4 urges all parties involved in the process to assist the state that allows disembarkation on its territory with the administrative handling of the rescued people. It is submitted here that in case a lack of assistance is clearly predictable beforehand, the state addressed in Principle 3 cannot be expected to fulfil this requirement as it would impose a burden on it that is not intended by the IMO Principles. Concluding, the IMO Principles are a step towards a more comprehensive answer to the question of disembarkation but still do not create a legal duty to allow disembarkation on a certain territory.[200]

4.3.5 UNHCR Guidelines

Another source of clarification to be considered are the UNHCR Guidelines. These emphasise the role of the shipmaster in making a reasonable decision regarding the place for disembarkation (para. 28 UNHCR Guidelines) while stressing the state's role as assistant and facilitator in this regard (para. 29 UNHCR Guidelines). The section on disembarkation (paras. 32-35 UNHCR Guidelines) emphasises the responsibility of states as opposed to private actors for finding a place of safety in general rather than specifying which state should have a duty to do so. In line with the IMO Guidelines, para. 33 aims at avoiding SAR services to be unduly influenced by immigration control considerations. Overall, the UNHCR Guidelines do not give rise to the assumption that a certain state has a duty to provide a place of safety on its territory.

[199] Moreno-Lax (n 99) 493.
[200] Campas Velasco (n 116) 80–81.

4.4 Conclusion

Summarising, the international law of the sea itself falls short of establishing a state duty to provide a place of safety on its own territory.[201] The universal duty to render assistance is, therefore, not accompanied by a sufficient operational framework that safeguards the practical possibility of fulfilling this duty. Focal points are co-ordination and co-operation instead of a strict distribution of exclusive responsibilities. This is based on the assumption that states are actually willing to co-operate thus making it a reasonable choice to leave the concept of the place of safety flexible and to grant states wide discretion in the conduct of their SAR services. This is a clear reflection of the fact that the legal SAR regime was drafted in a different context of maritime casualties which were not connected to large maritime migration flows. Taking into consideration that the questions of disembarkation touch upon the fundaments of state sovereignty, it is not surprising that no agreement was found within the respective treaties that could establish a clear state obligation. Therefore, the final decisions in the search for a place of safety are not governed by law but left to political discretion.[202]

[201] Selection of affirming views: Moreno-Lax, Ghezelbash and Klein (n 17) 720; Coppens and Somers (n 130) 387; Moreno-Lax (n 99) 492–493; Ghezelbash and others (n 46) 342–343; O'Brien (n 96); Guilfoyle (n 111) 729–730; Campas Velasco (n 116); Neri (n 176).
[202] Campas Velasco (n 116) 81.

5 State duty to provide a place of safety under human rights law

5.1 Human rights as source for a legal obligation

So far, the analysis has shown that the law directly concerned with rescue at sea does not establish a legal obligation for states to allow disembarkation. However, this does not necessarily mean that there is no such duty at all. The factual circumstances of migration via the Central Mediterranean (see Chapter 2) give rise to severe human rights concerns. Therefore, it is crucial to consider human rights law as relevant source in the question of the existence of a state obligation to provide a place of safety. In case human rights were violated by the current practice of closing ports to rescue vessels, this would have strong implications for the obligations a state has towards these rescue units. Hence, the following Chapter will evaluate whether a legal obligation to allow disembarkation can be derived from human rights law. This assessment will focus on potential human rights violations during the time of stand-offs caused by the denial of coastal states to allow entry into their ports. Since the related case study concerns a case pending at the ECtHR, the analysis will be limited to human rights stemming from the ECHR.

5.2 The case of *Y.A and others v. Italy*

The question whether a state violates human rights by denying access to its ports, has recently been brought to the ECtHR by the applicants in the case *Y.A and others v. Italy*.[203] The outstanding judgement in this case has the potential to have major implications for closed port policies and is, therefore, of high relevance for this analysis and the current course of action in the Central Mediterranean.

On the 19th of January 2019 the 47 applicants, among who 15 were minors, were taken on board the vessel *Sea Watch 3* whose crew found them in conditions of peril in the Libyan SRR. The *Sea Watch 3* is operated by the German NGO Sea Watch and flew the Dutch flag at that time. Requests for the indication of a place of safety towards the Italian, Maltese and Libyan RCC were made by the shipmaster several

[203] *Y.A et autres contre l'Italie et 2 autres requêtes* (n 13).

times. The Italian RCC as well as the Maltese RCC rejected the requests and denied responsibility for the case. Italy declared the Netherlands as flag state to be competent to handle the disembarkation issue. Since the weather and the health conditions of the rescued people got concerningly worse, the shipmaster kept on repeating its requests for the appointment of a place of safety. On the 29th of September, following an order from the ECtHR under Art. 39 ECHR, Italian authorities delivered food, water and other goods of first necessity to the *Sea Watch 3*. The following day, twelve days after the first distress alert was sent, Italy gave permission for the disembarkation of all rescued people to the port of Catan.[204] The applicants claim that Italy violated their rights enshrined in Art. 3; Art. 5 paras. 1, 2, 4 and Art. 13 ECHR by not providing a port for disembarkation and thus causing a twelve days-long stand-off of the rescue vessel. In the following, these alleged violations will be scrutinised, first, in relation to the specific case. Second, it will be assessed whether the findings can be abstracted to the context of stand-offs in general and can give legal grounds for a state duty to provide a place for disembarkation. For reasons of substantive focus, the assessment will be limited to Art. 3 and Art. 5 para. 1 ECHR, leaving out their procedural safeguards enshrined in Art. 5 paras. 2, 4 and Art. 13 ECHR.

5.2.1 Jurisdiction

Before evaluating specific violations of human rights stemming from the ECHR it is crucial to assess whether the ECHR is applicable to this case and to cases of private rescue vessels in search for a port for disembarkation in general. The *Sea Watch 3* was located in international waters for the first five days of the stand-off before it entered Italian territorial waters accompanied by the Italian Coast Guard.[205] In order to provide a comprehensive legal analysis that is valid for all cases of stand-offs no matter where they take place, it will be assessed if jurisdiction can be affirmed if the rescue vessel is in international waters. If this is answered in the positive, jurisdiction for vessels in territorial waters can be assumed as well.

[204] ibid 2–21.
[205] ibid 9.

According to Art. 1 ECHR the rights enshrined in the Convention apply within the jurisdiction of the contracting states. Generally, a state has jurisdiction over its territory including its territorial waters. However, in exceptional cases jurisdiction can be established extraterritorially if a contracting state performs or produces effects outside its own territory. The exercise of effective control outside the own territory by military action has specifically acknowledged as field of extraterritorial jurisdiction.[206]

In the present case the *Sea Watch 3* was flying the Dutch flag which generally makes it subject to exclusive jurisdiction of the Netherlands when navigating in the high seas (see Chapter 3.2.1.1). Despite the general rule of flag state jurisdiction, another state can gain jurisdiction in case it exercises *de jure* or *de facto* control over the individuals on the vessel.[207] The ECtHR has approved the applicability of the ECHR to cases in international waters in several judgements.[208] Most recently, in *Hirsi and others v. Italy* the Court held that the fact that the event in question is a rescue operation on the high seas does not give rise to an alteration of the standing jurisdictional principles.[209] It was further emphasised that the exercise of state authority in the context of interception on the high seas with the purpose of preventing refugees from reaching the border of that state amounts to the exercise of jurisdiction.[210] The case at hand is placed in the same context of a rescue operation in international waters which makes it to a certain extent comparable to the case of *Hirsi and others v. Italy*. However, one major difference is that in the latter case military personnel of Italy itself handed refugees over to the Libyan Coast Guard thereby exercising effective control over them which established a jurisdictional link.[211] Such an authoritative act was not performed in the case *Y.A and others v. Italy*. The involvement of Italy took place in form of communication between the *Sea Watch 3* and the RCC Rome. The RCC Rome was contacted

[206] *Banković v Belgium* [2001] ECtHR App. no. 52207/99, paras 57–7; *Loizidou v Turkey (preliminary objections)* [1995] ECtHR App. no. 15318/89, para 62.
[207] *Hirsi Jamaa and others v Italy* (n 174) para 77.
[208] *Rigopoulos v Spain* [1999] ECtHR App. no. 37388/97; *Xhavara and others v Italy and Albania* [2001] ECtHR App. no. 39473/98; *Women on Waves v Portugal* [2009] ECtHR App. no. 31276/05; *Medvedyev and others v France* [2010] ECtHR App. no. 3394/03.
[209] *Hirsi Jamaa and others v. Italy* (n 174) para 79.
[210] ibid 180.
[211] ibid 81.

several times and rejected to co-ordinate the case. Furthermore, representatives of the Italian parliament as well as officials from the Italian health agency went on board the *Sea Watch 3* to get an impression of the living conditions of the applicants. The day before a place of safety was finally appointed, Italian authorities delivered nutrition, water and other goods of first necessity to the *Sea Watch 3*. This involvement does not seem to establish the same degree of control as in the *Hirsi* case regarding *de jure* control. However, regarding the *de facto* dimension of control, the prohibition to enter Italian territory directed at the *Sea Watch 3* has a compelling effect, keeping the affected persons from exercising and enjoying their human rights (see below). The people were subjected to authoritative decisions with the purpose to prevent them from reaching the Italian border which has been declared as sign of exercise of jurisdiction in the *Hirsi*-judgement. In the same vein, in *Women on Waves v. Portugal* the Court affirmed jurisdiction where the denial of access into Portuguese waters was enacted through the combination of a government notification sent to the shipmaster and the factual blocking of entry by a Portuguese warship without any physical contact between state officials and applicants.[212]

A similar case was recently decided by the United Nations Human Rights Committee (UNHRC) where Italy was requested to render assistance in a distress case but finally Malta co-ordinated the rescue operation. The procedures were prolonged due to reluctance to assist on side of the states to the effect that at least 200 people drowned. No public officials of either state were present at the rescue site at sea at any time.[213] In this case, the UNHRC submitted that Italy had exercised extraterritorial jurisdiction through several factual actions including the initial contact between the vessel in distress and the RCC Rome, the ongoing involvement in the rescue operation (that was co-ordinated by the RCC Malta) and legal obligations of Italy stemming from the SOLAS and SAR Convention.[214] The UNHRC argues that this involvement of Italy established a 'special relationship of

[212] *Women on Waves v. Portugal* (n 208).
[213] *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No 3042/2017* [2021] UNHRC CCPR/C/130/D/3042/2017.
[214] ibid 7.8.

dependency'[215] between the people on the vessel in distress and Italy. This interpretation of extraterritorial jurisdiction does go beyond the criteria that have so far been established by the ECtHR. However, the ECHR is a living instrument which has to evolve along with the factual developments.[216] In the context of migration control, EU Member States have extended their sovereignty beyond their territory by outsourcing border control mechanisms to third states.[217] Such an extensive use of state authority would lead to gaps in judicial protection if the jurisdictional principles would not adapt to this phenomenon.[218] The line of argumentation presented by the UNHRC to establish jurisdiction through several factual elements in combination with legal obligations pays tribute to the actual situation of dependency of the refugees. For the sake of their rights, it does not matter whether this dependency and exposure to state power is built up by the presence of officials at sea or by decisions taken on land that affect them at sea. State measures of border control have a 'territorial reference point'[219] which is why for the establishment of jurisdiction it should not make a difference that the border control takes effect at sea. This is supported by Moreno-Lax and Giuffré who argue in favour of recognising 'contactless control' as form of exercise of jurisdiction.[220] According to them, even if a contracting state exercises an indirect influence, that did not mean that it was not effective and can, thus, serve as basis to establish jurisdiction.[221] As it is the purpose of the Convention that the rights and freedoms of every individual shall be secured by the contracting parties (Art. 1 ECHR), jurisdiction must be understood in a way that does not allow states to circumvent their obligations by actively keeping rightsholders outside their territory.[222] It is,

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[215] ibid.
[216] *Tyrer v The United Kingdom* [1978] ECtHR App. no. 5856/72, para 31.
[217] Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Stavinder Singh Juss (ed), *Research handbook on international refugee law* (Edward Elgar Publishing 2019) 3–4.
[218] Nassim Madjidian, 'Mediterranean Responsibilities' (*Verfassungsblog*, 29 January 2021) <https://verfassungsblog.de/mediterranean-responsibilities/> accessed 20 January 2022; Carrera and Cortinovis (n 45).
[219] Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 International Journal of Refugee Law 256, 277.
[220] Moreno-Lax and Giuffré (n 217).
[221] ibid 24.
[222] Fischer-Lescano, Löhr and Tohidipur (n 219) 275–277.

therefore, apt to follow the principles on extraterritorial jurisdiction introduced by the UNHRC.

In the case discussed here, the Italian authorities similarly had not taken charge of the rescue operation but were still repeatedly involved in the situation. The inaction of Italian authorities is already questionable regarding Italy's legal obligations to co-operate with other states or co-ordinate itself under Reg. 3.1.1 and 3.1.9 Annex SAR Convention as well as Reg. V/33.1-1 SOLAS Convention. Considering the location of the *Sea Watch 3* which first was close to and later inside Italian territorial waters, the people on board were majorly dependent on the decisions of Italian authorities regarding the entry into its ports. Italy has, therefore, performed several authoritative acts which taken together create the typical unbalanced power structure of superiority and inferiority between the state and the individual. In the *Al-Skeini* case the Court acknowledged such asymmetry of powers as characteristic of jurisdiction.[223] Concluding from these arguments, based on the principles for extraterritorial jurisdiction established by the ECtHR and their further development by the UNHRC, it is apt to state that the people on board the rescue vessel were within the jurisdiction of Italy, making the ECHR applicable to the case.

It remains to be evaluated whether this finding can be applied to cases of civil rescue vessels unsuccessfully requesting a place of safety in general. Even though it is difficult to make general assertations as every case differs in its factual circumstances, the decisive factors in this group of cases are usually the same. They are characterised by a certain pattern of authoritative behaviour which has been identified above as the decisive factor for the determination of jurisdiction. Crews of rescue vessels always contact an RCC after saving people from distress at sea to receive instructions on where to disembark the people. The problem of stand-offs only occurs if the RCC does not appoint a place of safety or completely rejects to fulfil its obligations to co-ordinate and co-operate. Therefore, every stand-off case includes the interaction between the rescue crew and a state authority in a form

[223] *Al-Skeini and others v The United Kingdom* [2011] ECtHR App. no. 55721/07, paras 130–150; Itamar Mann, *Humanity at Sea, Maritime Migration and the Foundations of International Law* (Cambridge University Press 2016) 167.

where the fate of the people on board the vessel is dependent on the authoritative decisions. The latter always form part of border control mechanisms which are exercised indirectly through instructions or complete inaction of an RCC. Hence, the 'special relationship of dependency' is inherent in stand-off cases. In consequence, the jurisdictional link between the people on board a rescue vessel and the coastal state rejecting access to its ports can generally be established whereas naturally unusual cases that request a different evaluation can occur. [224]

5.2.2 Prohibition of torture, Art. 3 ECHR

The prohibition of torture, inhuman or degrading treatment as prescribed in Art. 3 ECHR constitutes an absolute right meaning that an interference with it cannot be justified and thus always amounts to a violation.[225] This absolute character is underlined by Art. 15 para. 2 ECHR which prohibits any derogations from Art. 3 ECHR. The legal interest protected by this right is the physical and psychological integrity of the person. In order for Art. 3 ECHR to be violated, the interference with this integrity must reach a minimum level of severity and express disrespect towards a person's humanity.[226] Torture is defined in Art. 1 UN Convention against Torture[227] which can be used as guidance for Art. 3 ECHR as well. It sets forth two main components: first, an act that causes severe physical or mental pain or suffering, second, that this act is inflicted for a certain purpose such as obtaining information or a confession. This purposive element together with the special severity of the inflicted pain or suffering are the decisive factors in distinguishing torture from inhuman treatment.[228] Whether or not the threshold of severity is met cannot be decided on the basis of general criteria but depends on the circumstances of the specific case, such as the duration of the treatment, the physical and mental

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[224] Contending such a view by asserting that a physical contact is necessary in order to establish jurisdiction: Efthymios 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 Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 417.
[225] Christoph Grabenwarter, *European Convention on Human Rights: Commentary* (Bloomsbury Academic 2013) 32, 38.
[226] ibid 32.
[227] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 [1465 UNTS 85].
[228] *Gäfgen v Germany* [2010] ECtHR App. no. 22978/05, para 90; *Selmouni v France* [1999] ECtHR App. no. 25803/94, para 100.

effects or the state of health of the affected person.[229] According to the Court, the suffering must 'go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment (...)'.[230] The lowest threshold of severity is to applied for the offence of degrading treatment or punishment the characteristic criterion of which is that it has the humiliation of the person as main objective.[231] Generally, Art. 3 ECHR is not limited to conventional forms of such ill-treatment but provides flexibility to be applicable to newly emerging practices.[232]

There are two distinct forms of violations of Art. 3 ECHR that have to be considered here. On the one hand, the denial of access to a port as push-back to an unsafe country. On the other hand, ill-treatment in form of inhuman conditions on board the rescue vessel caused by the stand-off.

5.2.2.1 Prohibition of *refoulement*

It has long been acknowledged by the Court that not only inhuman treatment caused by the state itself within its jurisdiction but also extradition, expulsion or deportation to a third state, not party to the Convention, where the person claims to be at a serious risk to be exposed to inhuman treatment, is covered by the scope of Art. 3 ECHR.[233] This is known as the prohibition of *refoulement*.[234] Even though it does not follow directly from the wording of the provision, actively removing a person from the jurisdictional sphere of the ECHR knowing that this will lead to their subjection to inhuman treatment under the control of a third party would be contrary to the spirit and intention of the Article as well as to the effectiveness of the Convention in general.[235] The fundamental importance of Art. 3 ECHR and the

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[229] *Gäfgen v. Germany* (n 228) para 108; *Jalloh v Germany* [2006] ECtHR App. no. 54810/00, para 67.
[230] *Jalloh v. Germany* (n 229) para 68.
[231] Peter Duffy, 'Article 3 of the European Convention on Human Rights' (1983) 32 The International and Comparative Law Quarterly 316, 320.
[232] *Selmouni v. France* (n 228) para 101.
[233] *Soering v The United Kingdom* [1989] ECtHR App. no. 1403/88, paras 81–111.
[234] Pieter van Dijk et al, *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 433; Seline Trevisanut, 'The Principle of Non-Refoulement at Sea' (2008) 12 Max Planck Yearbook of United Nations Law 205, 213.
[235] *Soering v. The United Kingdom* (n 233) paras 87, 90; Mark Janis, Richard Kay and Anthony Bradley, *European Human Rights Law, Text and Materials* (3rd edn, Oxford University Press 2008) 215.

irreparable risks the victim is expected to face makes it necessary to accept the claim even though the violation itself has not yet occurred.[236] Since the state plays an essential role in the causal chain leading to the exposure of the person to inhuman treatment, it bears a legal responsibility even if this is only of indirect nature.[237] This is also true in cases of chain deportations where the link towards the actual ill-treatment is even more indirect.[238] These principles do not only apply in cases where the person has already entered the territory of a contracting state but also when this entry is denied in the first place (non-rejection).[239] Even though neither a general right of entry nor a right to asylum can be derived from the Convention, the denial of entry can under certain circumstances constitute a violation of Art. 3 ECHR. [240] The Court has held that the principle of *non-refoulement* applies

> where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.[241]

This establishes two distinct thresholds: first, a substantiated real risk which goes beyond a general possibility of ill-treatment in the third state and second, a certain level of severity of the expected treatment. In evaluating the existence of a real risk and the sufficiency of proof thereof, the Court has moved from a very restrictive to a more liberal approach in the context of asylum seekers.[242] A strong indicator for such future real risk is that the applicant has experienced ill-treatment within the state they is supposed to be returned to in the past.[243] Regarding the severity of the ill-treatment it can be referred to the explanations above. A distinction between the different forms of ill-treatment is not necessary in the context of *refoulement*

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[236] *Soering v. The United Kingdom* (n 233) para 90.
[237] van Dijk et al (n 234) 429–430.
[238] ibid 430.
[239] Trevisanut, 'The Principle of Non-Refoulement at Sea' (n 234) 209, 220–222.
[240] van Dijk et al (n 234) 427; William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 194.
[241] *Vilvarajah and others v The United Kingdom* [1991] ECtHR App. no. 13163/87, para 103.
[242] van Dijk et al (n 234) 434–438.
[243] *JK and others v Sweden* [2016] ECtHR App. no. 59166/12, para 102.

cases.[244] It is important to acknowledge that the principle of *non-refoulement* under human rights law is of absolute character and not subject to limitations as its counterpart in the Refugee Convention.[245]

In the case at hand, the applicants wanted to reach Italian territory via the sea to seek asylum. They were first not permitted to enter Italian waters and then refused entry onto Italian land territory, hence, the rejection took effect at sea. Territorial water is not the same as state territory in the strict sense, however, there is no reason why the principle of *non-refoulement* should only apply to land borders.[246] Whether a border control is exercised at a water or land frontier does not make a difference in the effect that it has on the rejected person.[247] Consequently, coastal states are bound by the principle of *non-refoulement* with regard to access to territorial waters, access to a port and the choice of a place of safety.[248] Its applicability is not dependent upon the maritime zone the people are encountered in.[249] Therefore, Italy was bound by the prohibition of *refoulement* when it refused the *Sea Watch 3* access to an Italian port for disembarkation. It did so with the positive knowledge of the fact that the people on board were asylum seekers who had departed from Libya. As discussed above, there is a real risk for the applicants to be subjected to treatment contrary to Art. 3 ECHR in case of return. Even though the rescue vessel is pushed back to international waters and not directly to Libyan territory, there is no practicable alternative destination the vessel could navigate towards. The principle of *non-refoulement* needs to be interpreted in a way that effectively protects people from ill-treatment which is only possible if people have a realistic chance of access

[244] *Chahal v The United Kingdom* [1996] ECtHR App. no. 22414/93, para 107; Schabas (n 240) 195.
[245] Efthymios Papastavridis, 'The EU and the Obligation of Non-Refoulement at Sea' in Francesca Ippolito and Seline Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2015) 241.
[246] Barnes, 'Refugee Law at Sea' (n 90) 68–69; Moreno-Lax (n 81).
[247] Fischer-Lescano, Löhr and Tohidipur (n 219) 276–277.
[248] Trevisanut, 'The Principle of Non-Refoulement at Sea' (n 234) 239; Fischer-Lescano, Löhr and Tohidipur (n 219) 272–277.
[249] Barnes, 'Refugee Law at Sea' (n 90) 68–69.

to an asylum procedure.[250] In light of this, the rejection at the border becomes an illegal act according to the prohibition of *refoulement*.

Refugees travelling the Central Mediterranean route in general find themselves in a situation like the one described above regarding the threats towards their lives and freedoms in case of rejection at the EU sea border. Therefore, these findings can be applied to all cases where rescue vessels departing from unsafe countries are denied access to a port.

5.2.2.2 Conditions on board as inhuman treatment

Furthermore, the conditions on board need to be scrutinised in the light of Art. 3 ECHR. In the present case, 47 people who had departed from Libya were forced to stay on the rescue vessel for twelve days. As this rescue vessel was not equipped to keep this amount of people on board for such a long period of time, the conditions deteriorated severely. This was affirmed by representatives of the Italian parliament who visited the vessel. People on board lived crammed with only one chemical toilet available demonstrating the bad hygienic situation. Furthermore, they had no sufficient shelter on board the overcrowded ship so that they had to sleep exposed to wind, rain and sunlight even though a lot of them did not have appropriate clothing. As they had departed from Libya, where they were subjected to ill-treatment, many of the people suffered from post-traumatic psychological reactions. The physical and psychological health of the people was described as difficult.[251] These conditions have to be evaluated against the background that the people did not board the *Sea Watch 3* voluntarily in stable health conditions but were rescued from an unseaworthy boat on which they were caught after having left the Libyan coast. Libya was only a stopover for them after fleeing their home countries which were Sudan, Guinea, Senegal, Nigeria, the Central African Republic, Gambia, Mali and the Ivory Coast.[252] Each of the factors by itself may not seem severe enough to surpass the threshold, however, as the ECtHR has ruled, a case-specific evaluation

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[250] Mariagiulia Giuffré, 'Access to Asylum at Sea?' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migration at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill/Nijhoff 2017).
[251] *Y.A et autres contre l'Italie et 2 autres requêtes* (n 13) paras 8, 9, 12, 15.
[252] ibid Annex.

has to consider *inter alia* the duration of the treatment as well as the state of health of the person.[253] The stand-off period lasted twelve days, which is a substantial time period in the context of inhuman treatment, into which the people already entered in very vulnerable health conditions. Even though, the situation is not to be located on the same level as the suffering of people being tortured in the stricter sense for instance by the application of electric shocks[254] or the rape in custody by public officers,[255] it is apt to assume that the threshold of severity of inhuman treatment in the sense of Art. 3 ECHR is met.

Despite the fact that Italian authorities did not actively impose this harm on the applicants, it may still be attributable to them. The state does not only have a negative obligation to not actively interfere with the right but also a positive obligation to take measures to protect persons within its jurisdiction from violations.[256] In its case law the Court has held that this is not only true if harm is caused by a public or private actor but also if natural circumstances such as an illness lead to infringements of rights which is exacerbated by the state. The Court allows some flexibility regarding Art. 3 ECHR for this right of fundamental importance to be applicable also to unconventional cases. The threshold of severity is particularly high in such cases since the harm is not initiated by the state.[257] In *O'Keeffe v. Ireland* the Court affirmed this approach but broadened the scope of the positive obligations from only covering immediate risks to also applying to potential risks.[258]

In the case *Y.A. and others v. Italy* the applicants found themselves in a situation where no specific actor imposed direct harm on them but the natural development of the conditions on board, given the underlying health conditions, equipment and

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[253] *Selmouni v. France* (n 228) para 108.
[254] *Polonskiy v Russia* [2009] ECtHR App. no. 30033/05, para 124.
[255] *Aydin v Turkey* [1997] ECtHR 57/1996/676/866, para 86.
[256] *Moldovan and others v Romania (No 2)* [2005] ECtHR App. nos. 41138/98, 64320/01, para 98; Grabenwarter (n 225) 40.
[257] *Hristozov and others v Bulgaria* [2012] ECtHR App. nos. 47039/11, 358/12, para 111; *N v The United Kingdom* [2008] ECtHR App. no. 26565/05, para 29; *Pretty v The United Kingdom* [2002] ECtHR App. no. 2346/02, para 50; Schabas (n 240) 191.
[258] *O'Keeffe v Ireland* [2014] ECtHR App. no. 35810/09, para 162; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey, The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 214.

weather issues, led to a situation where their physical and psychological state of health was not in line with the guarantee of the Convention. These conditions were not initiated by the Italian state but exacerbated through its action. When applying the argumentation of the case law cited above, it is apt to assume responsibility of the Italian authorities to take measures to prevent these natural circumstances from infringing the rights of the rescued people. The measure that would have been necessary was to give the *Sea Watch 3* permission to disembark the people to an Italian port. As it is a matter of Italy's state sovereignty to regulate access to its ports (see Chapter 3.2.1.1), action on side of Italy was needed to avoid human rights violations on board the vessel. Italy, however, denied this access and thereby left the people exposed to the unavoidable natural development on board. It is, therefore, submitted here that Italy violated its positive obligation to take measures to prevent inhuman treatment.

Having assessed the violation of Art. 3 ECHR in the specific case at hand, it remains to be discussed what this finding contributes on a general level to a potential state obligation to allow disembarkation. On first sight, it seems impossible to generalise this legal result and make it applicable to all cases of stand-offs of rescue vessels since the conditions on board, the state of health of the people and the surrounding weather conditions are not always comparable. Despite this fact, it can indeed be generalised that if refugees are rescued from distress at sea and have to stay on the rescue vessel and are not granted access to a port, it is an inevitable consequence that at one point the conditions on board will become unacceptable. Hence, it is not the question if but only when the well-being of the rescued people will be at a stage that surpasses the threshold of severity of inhuman treatment contrary to Art. 3 ECHR. The violation of the right, therefore, seems to not necessarily be fulfilled at the time when a request for providing a place of safety is rejected but rather materialises in days or weeks. This perception makes it difficult to establish a general duty to provide a port for disembarkation. However, drawing an analogy to the Court's jurisprudence in expulsion and extradition cases could lead to a different evaluation. In these cases, it is sufficient for the applicant to prove that there is a real risk that they will face ill-treatment when being returned to an unsafe country. Thus, a violation of Art. 3 ECHR can already be assumed before the treatment or

conditions threatening the person's physical or psychological integrity have in fact materialised.[259] The high degree of probability that the person will face inhuman treatment by other actors in the future is deemed to be sufficient to oblige the state to refrain from expulsion or extradition.

Persons forced to remain on rescue vessels are in a comparable situation as they are exposed to dire living conditions – not in a third state but on board the vessel itself. These conditions are not state made, but by denying entry into a port the state knowingly puts the people in a situation where there is a real risk if not even certainty that their state of physical and mental health will deteriorate significantly. Consequently, it is apt to apply the logic of the Court's jurisprudence on extradition and expulsion cases to the evaluation of conditions on board the rescue vessel. This leads to the conclusion that a violation of Art. 3 ECHR can already be seen in the initial denial of access to ports since it is inevitable and hence, constitutes a real risk that the absence of a possibility to disembark rescued people will, with passing time, lead to conditions on board incompatible with Art. 3 ECHR. It is, therefore, concluded that by refusing to provide access to a port, a state violates the rights of the rescued people enshrined in Art. 3 ECHR.

5.2.3 Right to liberty and security, Art. 5 ECHR

The right to liberty and security enshrined in Art. 5 para. 1 ECHR protects the liberty to choose one's own physical location and to freely change it. Even though Art. 5 para. 1 ECHR names liberty and security separately they are to be understood as one composite right. The term security is meant to add a layer to the right which ensures legal certainty and the rule of law in cases of deprivation of liberty.[260] A violation of the right can only be found if the action in question does not merely restrict a person's liberty but deprives them of it. These different forms of interference are hard to distinguish and differ not in nature but in intensity.[261] A deprivation is defined by the Court as an act that confines a person to a certain

[259] Grabenwarter (n 225) 50; *Sufi and Elmi v The United Kingdom* [2011] ECtHR App. nos. 8319/07, 11449/07, paras 218, 219; *NA v The United Kingdom* [2008] ECtHR App. no. 25904/07, paras 108–117.
[260] Grabenwarter (n 225) 64.
[261] *Guzzardi v Italy* [1980] ECtHR App. no. 7367/76, para 93; van Dijk et al (n 234) 459.

restricted physical space for a not negligible length of time. In addition, as subjective requirement, this confinement must be pursued without the consent of the affected person.[262] This does not only cover cases of formal, *de jure*, detention but also those of *de facto* detention. The scope of Art. 5 para. 1 ECHR only covers the deprivation of liberty as such but not the conditions within this situation of detention.[263] Even though the protective sphere of the right can extend beyond the territory of a contracting state it does not oblige states to actively protect individuals from threats imposed by another state. In consequence, a right of entry cannot be derived from Art. 5 para. 1 ECHR if a person's liberty is at stake in its country of origin or residence.[264]

For the case *Y.A and others v. Italy,* this means that Art. 5 para. 1 ECHR cannot be invoked claiming a right to enter Italy due to threats to the applicants' liberty in their countries of origin or departure. However, the claim can be based on the fact that the prohibition to enter Italian territory practically forced the applicants to remain on the *Sea Watch 3* for twelve days, which can be considered a not negligible amount of time. It seems that by denying access to its territorial waters, Italy restricted the applicants' free choice of their physical location but did not deprive them of this liberty as such since they could theoretically still navigate towards other places such as Malta or Libya.

In the case *Amuur v. France* the same line of argumentation was used by the responding government. The case concerned Somalian citizens who were kept in the international transit zone of an airport in Paris for 20 days because they were denied access to French territory due to inadmissible travel documents.[265] The government alleged that this could not amount to a deprivation of liberty in the sense of Art. 5 para. 1 ECHR since the liberty of the applicants was only restricted regarding the entry into France but not in terms of outward movement especially

[262] *Storck v Germany* [2005] ECtHR App. no. 61603/00, para 74.
[263] *Winterwerp v The Netherlands* [1979] ECtHR App. no. 6301/73, para 51.
[264] Grabenwarter (n 225) 64–65.
[265] *Amuur v France* [1996] ECtHR App. no. 19776/92.

back to Syria where they had departed from.[266] This argument was rejected by the Court stating that the option of leaving the transit zone towards a different state

> becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country they are seeking asylum in is inclined or prepared to take them in.[267]

It was ruled that keeping the applicants in the airport's transit zone had the practical effect of a deprivation of liberty for them thus amounting to a violation of Art. 5 para. 1 ECHR.

This case is comparable to the situation in *Y.A and others v. Italy*, where the applicants are located outside the state's territory they wish to enter in order to apply for international protection. They are refused to enter which forces them to stay in the location they are in at that time which is the rescue vessel *Sea Watch 3*.

However, the Court came to a different conclusion in the similar case *Ilias and Ahmed v. Hungary* which concerned two Bangladeshi nationals who wanted to enter Hungary via the land border with Serbia and were detained in a transit zone until their asylum applications were decided.[268] Here, the Court ruled that keeping them in the transit zone did not amount to a deprivation of liberty since they had the option to go back to Serbia. This was held despite the fact that the applicants did not have a right to enter Serbia since, according to the Court, the *de facto* possibility of crossing the border was sufficient.[269] This option was not purely theoretical in nature because it was merely dependent upon the will of the applicants to walk over to Serbian territory. In contrast, in the *Amuur* case the applicants would have had to take a flight and were thus dependent on an airline to transport them and authorities to let them bord which made it a mere theoretic alternative.[270]

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[266] ibid 46.
[267] ibid 48.
[268] *Ilias and Ahmed v Hungary* [2019] ECtHR App. no. 47287/15.
[269] ibid 234–248.
[270] ibid 240.

Regarding the rescued people on the *Sea Watch 3* the situation differs from the one in the *Ilias and Ahmed* case in a similar way as the *Amuur* case does. They equally do not have the possibility to just walk over into another territory but are dependent on the master of the ship whose options are limited by international law. Their dependency can be asserted to be even stronger since they were on a vessel, they could not leave which was navigated under the control of a person they did not know. Ending this situation by navigating towards another state is equally only a theoretical option in this case. The other countries that would have been reachable in reasonable time were Libya or Malta. Since the latter did not respond to any distress alerts it can be assumed that it is not inclined to take them in. Regarding a return to Libya, the level of protection cannot be expected to be comparable to the one in Italy (see Chapter 4.2.2). Additionally, the shipmaster is required under SAR law to deliver rescued people to a place of safety (see Chapters 3, 4), hence, they would breach their legal obligations by bringing people back to Libya. Therefore, a return to Libya cannot be considered a way of avoiding the deprivation of liberty by the applicants, as it would require the violation of other international treaties by the shipmaster. Thus, the doctrine to be applied in this case remains the one established in the *Amuur* case even after the *Ilias and Ahmed* judgement. Following the principles established therein, the mere theoretical option the applicants had to escape their situation was not sufficient to frame the refusal of entry into the territory as only restricting their liberty. Since practically, the applicants did not have another place to turn to, the rejection of requests for disembarkation to an Italian port fulfils the objective element of deprivation of liberty in the sense of Art. 5 para. 1 ECHR.

Regarding the subjective element, it could be invoked that the people voluntarily boarded the boat in Libya to head towards Europe and agreed to being taken on board the *Sea Watch 3*. However, this assertation would be too superficial. First, the agreement to board the *Sea Watch 3* was made in a situation of peril where no other option to survive was at sight and was therefore not a free choice. Second, it cannot be assumed that at the time when the people took the decision to navigate to Europe on a small boat they had thereby consented to the possibility of them being confined on an NGO rescue vessel that would be prohibited to enter ports in Europe.

A consent by the affected people is, therefore, not existent and the subjective element of Art. 5 para. 1 ECHR is also fulfilled.

The interference with the right to liberty and security could be permissible under Art. 5 para. 1 f) ECHR which allows detention for the purpose of preventing illegal entry into a state's territory. However, this can only be invoked if and as long as formal proceedings for deportation or extradition are being pursued against the person.[271] No such proceedings were undertaken in the case at hand, thus, the justification clause is not applicable here.

This breach of Art. 5 para. 1 ECHR needs to be reviewed for its potential to bear implications for the general context of stand-offs. As concluded above, a deprivation of liberty can only be affirmed if the rejecting state would practically be the only possible place of safety for the rescued people. The cases studied in this thesis are characterised by this very scenario that practically the vessel does not have the option to resort to another state than Italy because Libya is no place of safety and Malta systematically refrains from even communicating with NGO vessels. Since the latter did not sign the 2004 amendments to the SAR and SOLAS Convention its legal ties are significantly looser than Italy's which makes it even more impractical to consider Malta as an actual alternative for disembarkation. It could be argued that the vessel could still navigate towards countries further away such as Spain or Greece. However, in consideration of the conditions on board identified above as inhuman conditions, this cannot reasonably be expected from the shipmaster and the persons on board. Concluding, under the status-quo in the Central Mediterranean, refusing a rescue vessel, which does not have a realistic alternative destination for disembarkation, entry into a port amounts to a violation of the right to liberty and security under Art. 5 para. 1 ECHR.

5.2.4 Conclusion

Summarising, the analysis has shown that in the case of *Y.A. and others v. Italy* the prohibition of *refoulement*, the prohibition of torture (Art. 3 ECHR) as well as the

[271] Schabas (n 240) 243.

right to liberty and security (Art. 5 para. 1 ECHR) were violated by the refusal of Italy to provide a place of safety for disembarkation. This finding is not only true for the specific case but can be abstracted to cases of stand-offs in general since they share the decisive characteristics that constitute these violations. Consequently, coastal states are legally obliged to take measures which end the violation of human rights under their jurisdiction. One means to this end could be to provide immediate assistance as it was done in the case of *Y.A. and others v. Italy* by delivering food and other goods of urgent necessity. However, this is not a reasonable solution since it would require an ongoing flow of aid on side of the coastal state without a foreseeable end. Hence, the only possibility to avoid or end the human rights violations is to allow disembarkation to a place of safety in the state's territory. No other conclusion can be drawn taking into account that the Court requests the Convention to be applied in a manner that practically and effectively safeguards human rights.[272]

The human rights obligations are not to be perceived isolated but need to be read in conjunction with the responsibilities under the legal SAR regime to co-ordinate and co-operate towards the delivery of rescued people to a place of safety. This strengthens the conclusion submitted here that the only coherent interpretation of all applicable legal norms is that the coastal state has a legal obligation to provide a port for disembarkation.[273] The Italian Supreme Court of Cassation supports this view through its judgement in which it acquitted Carola Rackete, captain of the *Sea Watch 3,* (see Chapter 2.3.2) from her criminal charges for entering Italian waters without permission. According to the Court she acted in a stage of urgent necessity and had the obligation under SAR law to deliver the rescued people to a place of safety which justified her unauthorised entry into Italian waters.[274] Hence, the existing legislation provides sufficient legal grounds for requesting a change in state practice towards rescue vessels if it is interpreted in a comprehensive way. The

[272] *Soering v. The United Kingdom* (n 233) para 87.
[273] Moreno-Lax (n 81).
[274] *Procuratore della Republica presso il Tribunale di Agrigento nel procedimento nei confronti di Rackte Carola* [2020] Corte di Cassazione penale, Sezione III Num. 6626.

effective enforcement of this law is therefore the crucial aspect when working towards ending human suffering at sea.

This result doubtlessly interferes with the principle of state sovereignty. However, this principle is not absolute but limited by other international obligations of the state and is to be balanced against competing interests. For the law of the sea this is explicitly prescribed in Art. 2 para. 3 and Art. 87 para. 1 UNCLOS. In the context of disembarkation, state sovereignty finds its limits in the human rights obligations towards the rescued people. Such sacrifices to territorial sovereignty are inevitable to acknowledge humanitarian necessities.[275]

[275] van Berckel Smit (n 65) 508–509.

6 Conclusion

The thesis has demonstrated how dramatic the situation is for refugees who are forced to flee via the Central Mediterranean to seek asylum in the EU. As the consistently high death rates show, the journey is marked by extreme dangers which are intensified by the absence of sufficient state-led SAR services. The private actors, namely SAR NGOs, who try to fill this humanitarian gap are criminalised by states for their efforts of saving lives instead of receiving appreciation and support. This hostile attitude towards SAR NGOs significantly impacts their work as it results in the seizure of ships and recently numerously in the denial of access to ports which forces rescue vessel into stand-offs lasting for several days. One reason for this can be found in the legal system governing SAR services. Even though there is a clear duty under the international law of the sea to render assistance which entails the delivery to a place of safety, there is no corresponding obligation for states to allow disembarkation which is crucial to complete a rescue operation. However, taking on a human rights perspective to the issue creates a different result. Closing ports to rescue vessels leads to conditions on board amounting to inhuman treatment contrary to Art. 3 ECHR and constitutes *refoulement* of asylum seekers which is prohibited under the same article. Moreover, it deprives the rescued people on board of their right to liberty and security enshrined in Art. 5 para. 1 ECHR since they practically do not have an alternative destination they can turn to. An integrated understanding of the obligations under the legal SAR regime and human rights law, leads to the conclusion that there is a legal duty of states to allow disembarkation to their ports.

Recalling the research questions of this thesis, the results have been reached that no state duty exists under the law of the sea to provide a place of safety (Question 1) but that human rights are indeed violated by the closure of ports to rescue vessels in the case of *Y.A. and others v. Italy* as well as in the context of stand-offs in general (Question 2). This has enabled the finding that the ECHR provides a basis for a state duty to allow disembarkation (Question 3).

An isolated look on the law of the sea first suggests that there are deficiencies in this legal regime that need reform to bring about change for the devastating situation for refugees fleeing via the Mediterranean. This is supported by the practice of coastal states who have been perceiving their obligations in a rather minimalistic way. However, an integrative and holistic interpretation of international law as suggested here enables a different understanding and shows that the existing law does require a different course of action by states. What is necessary to enforce the obligations identified above is respective jurisprudence by the ECtHR. Besides the case discussed here, the application of *S.S and Others v. Italy*[276] which concerns a similar situation is pending at the ECtHR and is likely to be decided within this or next year. The judgement can majorly influence the direction in which politics on border control on sea will head to. It is, therefore, upon the Court to acknowledge the expanded strategies of border control exercised by the EU and their effects on safeguarding human rights of refugees. In times when states act by proxy and shift locations of questionable action far away from their territory it is time for the Court to dismiss these strategies designed to strip people of their right to judicial protection and to respond in a manner that upholds the effective protection of human rights. While fighting the problem on the judicial level is of eminent importance, it has to be admitted that it is also a lengthy process. During this thesis's writing process several more incidents of stand-offs are reported. One refugee boat ended up under the control of the Libyan Coast Guard which led to a maritime accident where 90 people lost their lives.[277] For these people any judicial decision comes too late. It is, therefore, important to also keep on advocating for people's rights on a political level. Ad hoc relocation arrangements need to be replaced by fair burden sharing mechanisms to decrease the disincentives for coastal states to allow disembarkation. Furthermore, public attention must be drawn to the externalisation strategies of the EU to create control by publicity as long as the Court's decision on the issue has not been delivered. In the meantime, SAR NGOs

[276] *SS et autres contre l'Italie* ECtHR App. no. 21660/18.
[277] Sea-Eye e.V., 'Sea-Eye 4 Docks in Augusta with 106 Rescued People' (6 April 2022) <https://sea-eye.org/en/sea-eye-4-docks-in-augusta-with-106-rescued-people/> accessed 28 April 2022.

play a crucial role in reducing the effects of an EU border policy that creates a maritime graveyard on the doorstep to Europe.

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