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Navigating Legal Waters

A Study of Forcible Measures in Rescue Operations of Migrants
and Refugees on the High Seas

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Summary

The legal question of State's use of forcible measures to rescue people on international water has gained relevance in relation to the current migratory movements on the Mediterranean Sea. Multiple incidents have shown that there are strategic as well as pure survival motives for a migrant boat to refuse assistance. The aim of this thesis is to investigate to what extent States may use forcible measures to rescue 'boat migrants' on the high seas under international maritime rescue law, and to critically examine and discuss the effects of applicable law. The essay uses a legal dogmatic method to investigate and interpret the law, and a legal analytical method will be used to discuss its effects.

The result of the investigation shows that there are often legal grounds under UNCLOS for States to stop and board a vessel used by migrants on the high seas. To what extent States may exercise wider enforcement jurisdiction such as seizing the vessel or transporting it back to port is unclear. As the legal framework for search and rescue at sea cannot justify wider enforcement jurisdiction, the crucial legal question is that of whether a State may interdict a stateless vessel solely based on it being without nationality. To this question there is no certain answer since certain provisions of UNCLOS can be interpreted differently and there is no general state practice. Consequently, there is no clear conclusion as to what extent States can use forcible measures to rescue 'boat migrants' on the high seas under international maritime rescue law. However, there are significant differences in the practical effects of different interpretations of the law.

Sammanfattning

Den juridiska frågan om i vilken utsträckning stater får tvångsrädda människor på internationellt vatten, har fått ny betydelse i och med migrationsflödet över centrala Medelhavet. Flera incidenter har visat att det finns såväl strategiska som rent överlevnadsbaserade grunder till att migranter och flyktingar motsätter sig räddning av vissa statsfartyg på Medelhavet. Denna uppsats syftar till att utreda i vilken utsträckning stater får tillämpa tvångsåtgärder för att rädda flyktingar och migranter på öppet hav enligt den internationella sjöräddningsrätten, samt att därutöver kritiskt undersöka och resonera kring effekter av gällande rätt. I uppsatsen används därav en rättsdogamtisk metod för att utreda och tolka gällande rätt, samt en rättsanalytisk metod för att resonera kring dess effekter.

Uppsatsens resultat visar att det ofta finns rättslig grund för stater att stoppa samt gå ombord på ett fartyg som brukas av migranter på öppet hav. Detta gäller oavsett om dessa befinner sig i sjönöd eller inte. Det är dock oviss i vilken utsträckning stater får utöva mer ingripande exekutiv jurisdiktion, som att eskortera fartyget till hamn eller att beslagta fartyget. Ingripanden som, om de sker på öppet hav, onekligen även innebär tvångsförflyttningar av människor. Då den internationella regleringen kring sök- och räddningsoperationer inte kan anses ge upphov till en sådan rätt till exekutiv jurisdiktion, blir den avgörande frågan huruvida en stat får ta kommando över ett statslöst fartyg endast på grund av att ett sådant fartyg saknar nationalitet. Ingen tydlig slutsats om i vilken utsträckning stater får använda tvångsåtgärder för att rädda båtmigranter på öppet hav kan dras, men skillnaderna mellan de praktiska effekterna av olika tolkningar av gällande rätt är stora.

Abbreviations

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
COLREG	Convention on the International Regulations for Preventing Collisions at Sea
ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organization
IOM	International Organization for Migration
ITLOS	International Tribunal for the Law of the Sea
LCG	Libyan Coast Guard
MARPOL	International Convention for the Prevention of Pollution from Ships
NGO	Non-Governmental Organisation
PCIJ	Permanent Court of International Justice
RCC	Rescue Coordination Centres
SAR	Search and Rescue
SAR Convention	International Convention on Maritime Search and Rescue
SOLAS Convention	International Convention for the Safety of Life at Sea
SRR	Search and Rescue Region
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

Stubborn crewmembers or passengers that refuse to leave a sinking vessel out of panic, are examples of possible scenarios where a shipmaster would need to use forcible measures for a rescue operation to be successful.¹ A situation might make it necessary to board a non-compliant vessel, or sometimes even to forcibly relocate people from the vessel in distress to a rescue ship.² These scenarios raise the legal question of to what extent states can use forcible measures to rescue people, a question that has gained relevance in relation to the migratory flows on the Mediterranean Sea.³

Since 2014 more than 26, 600 migrants have been reported dead or missing on the Mediterranean Sea.⁴ The Central Mediterranean route is especially dangerous, and the first quarter of 2023 was the most fatal on record since 2017.⁵ The many tragedies might reflect restrictive European migration policies and the desperate measures migrants and refugees are willing to take to resettle in Europe.⁶ A crossing from the transit country Libya is often made in overcrowded and/or unseaworthy vessels such as wooden boats and rubber dinghies, leaving people exposed to the perils of the sea.⁷

¹ Ratcovich (2019), 99.

² Butler and Ratcovich (2016), 250.

³ E.g., the scenario is regulated in the EU see Regulation NO 656/2014 Article 9(2) h.

⁴ IOM, Missing Migrant Project, available at: <https://missingmigrants.iom.int/> [Accessed 2 May 2023].

⁵ IOM, Missing Migrant Project, ‘50 000 Lives Lost During Migration: Analysis of Missing Migrants Project Data 2014-2022’, 23 Nov 2022, 6, available for download at: [https://missingmigrants.iom.int/50k-deaths](https://missingmigrants.iom.int/50k-deaths;); IOM, ‘Deadliest Quarter for Migrants in the Central Mediterranean Since 2017’, 12 April 2023, available at: <https://www.iom.int/news/deadliest-quarter-migrants-central-mediterranean-2017> [Accessed 28 April 2023].

⁶ Office of the High Commissioner for Human Rights (OHCHR) ‘“Lethal Disregard” Search and rescue and the protection of migrants in the central Mediterranean Sea’, May 2021, Executive Summary, V, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf>.

⁷ Council of the European Union, ‘Migration flows on the Central Mediterranean route’, available at: <https://www.consilium.europa.eu/en/policies/eu-migration-policy/central-mediterranean-route/> [Accessed 15 April 2023].

Migrants and refugees are willing to gamble with their lives to reach Europe, and consequently there are strategic reasons to avoid being rescued if being rescued would jeopardize such an aim. An example is the *CS Caprice* incident, in which the migrants refused to be rescued, believing that the assisting vessel would not take them to their intended destination, Italy.⁸

Even if the framework for maritime rescues is of humanitarian character and distinct from the framework regulating interception of vessels being a part of migrant smuggling, this division is not upheld in practice.⁹ Many interdiction operations against vessels are characterised by the States undertaking them as search and rescue operations. Guilfoyle mentions that a ‘duty of compulsory rescue’ appears to be more relied upon as a legal ground for interdicting vessels than provisions in treaties such as the Migrant Smuggling Protocol.¹⁰

In SOS Humanity’s report from January 2023, the NGO stated that they witnessed the Libyan Coast Guard (LCG) intercept a boat in distress, claiming to rescue the people on board. However, LCG left six people behind in the water and the “rescued” migrants and refugees were returned to Libya.¹¹ It should be highlighted that Libya has been criticized for their grave human rights violations towards migrants and refugees.¹² Consequently, there can be both strategic as well as pure survival motives for migrants and refugees to refuse assistance.

⁸ Mohammed, Arshad and Grey, Stephen, ‘In Libya, a smuggler's paradise, migrants live in fear and desperation’, *Reuters*, September 21, 2015, available at: <https://www.reuters.com/article/us-europe-migrants-ship-specialreport-idUSKCN0RL0W320150921> > [Accessed 25 April 2023].

⁹ See Migrant Smuggling Protocol.; High Commissioner for Refugees (UNHCR), Background Paper: Refugees and Asylum-Seekers in Distress at Sea – how best to respond? Expert Meeting in Djibouti, 8-10 November 2011, Summary Conclusions, B.7.; Coppens (2017), 221.; Council of the European Union, ‘Migration flows on the Central Mediterranean route’, available at: <https://www.consilium.europa.eu/en/policies/eu-migration-policy/central-mediterranean-route/> [Accessed 15 April 2023].

¹⁰ Guilfoyle (2015), 217.

¹¹ SOS Humanity, ‘SOS Humanity Rescue Report No.3’, January 19, 2023, 5, available at: https://sos-humanity.org/wp-content/uploads/2023/01/20230119__SOS-Humanity_Rescue-Report-No-3.pdf [Accessed 8 May 2023].

¹² UN Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, fifty-second session, Distr.: General, 3 March 2023, A/HRC/52/83, Para 40 – 47.

1.2 Aim, Research Questions and Delimitations

This thesis aims to investigate to what extent States can use forcible measures to rescue migrants and refugees on the high seas under international maritime rescue law. Thus, the primary inquiry of this thesis is tied to the subject of extraterritorial enforcement jurisdiction. The thesis also aims to analyse and critically examine the effects of the law from an international perspective.

The text's research questions is:

1. To what extent can a State use forcible measures to rescue 'boat migrants' on the high seas under international maritime rescue law, and what are the practical effects of the applicable law?

The research question is the overarching question of this thesis. To answer it, two sub-questions have been formulated:

- 1.1 To what extent can a State interdict a stateless vessel on the high seas under the law of the sea?
- 1.2 What is the international legal framework for search and rescue operations at sea?

Rescue operations of migrants and refugees on the high seas are affected by many legal areas such as domestic law, human rights law, and refugee law. To provide an in-depth analysis of the issue of forcible rescue operations of migrants, this thesis will consider the law of the sea, with a special focus on the subsystem that could be referred to as international maritime rescue law. International maritime rescue law could be understood as a legal area which has the underlying significance or purpose to safeguard human lives from the dangers of the ocean. Accordingly, in addition to encompassing aspects from the law of the sea, it includes certain norms of humanitarian character such as the duty to render assistance.¹³

¹³ Ratcovich (2019), 66, 68.

Since this thesis aims to investigate to what extent States can use forcible measures under international maritime rescue law, the application of human rights law during interceptions will be excluded. Moreover, even if the law of state responsibility, and especially the plea of necessity,¹⁴ is of interest in relation to the topic of this thesis, it will be excluded due to the limited scope of a bachelor thesis.

1.3 Method and Material

This thesis uses a legal dogmatic method, which is a method that could be understood as aiming to describe the law using the established legal sources. This includes to interpret, determine, and systematize the law.¹⁵ Furthermore, as a compliment to the legal dogmatic method, a legal analytical method will be incorporated to provide reasonings on the practical effects of the law.¹⁶ As the legal analytical method aims to analyse applicable law, a critical approach is necessary and will be employed.¹⁷

This thesis is based on the legal sources as stipulated in Article 38 of the ICJ Statute which include international conventions, international customs, and the general principles of law. The Article also includes judicial decisions and the teachings of the most highly qualified scholars, which should be interpreted as subsidiary means for the determination of rules of law.¹⁸ The list provided in Article 38 of the ICJ Statute is commonly interpreted as a list of the classical legal sources of international law.¹⁹

This thesis will consider the law of the sea with a certain focus on maritime rescue law, which is predominantly treaty based. Consequently, the United Nations Convention on the Law of the Sea (UNCLOS), which establishes the basic legal framework and encompasses the duty to render assistance, is studied as a primary source. It should be noted that the majority of UNCLOS

¹⁴ See ARSIWA Article 25.

¹⁵ Sandgren (2021), 51f.; C.f. Kleineman (2018), 21 ff.

¹⁶ Sandgren (2021), 53–54.

¹⁷ Sandgren (2021), 54.

¹⁸ ICJ Statute Article 38.

¹⁹ Thirlway (2019), 6.

reflects customary international law.²⁰ Moreover, the International Convention on Maritime Search and Rescue (SAR Convention), provides details on search and rescue regulation. Considering that the main objective of the International Convention for the Safety of Life at Sea (SOLAS Convention) is to specify minimum standards for ships,²¹ the convention will be of limited use in this thesis. Common methods of treaty interpretation will be used as stipulated in the Vienna Convention on the Law of the Treaties (VCLT).²² In addition, rules of international customary law will be included.

Moreover, secondary sources will be used in this thesis as a compliment to understand how the instruments should be interpreted and applied. A few court judgements, and works of various prominent scholars such as Churchill, Lowe, and Sander,²³ and Papastavridis,²⁴ will be incorporated to help determine applicable law by providing different views and legal reasonings on the provisions. It should be noted that the legal analytical method allows for a wider range of legal literature and overall material than the legal dogmatic method.²⁵

1.4 Previous Research

Previous research that focuses on forcible rescue operations of migrants and refugees is limited. Butler and Ratcovich raise the question of legality of forcible rescue operations in their article,²⁶ and the issue is further discussed in Ratcovich's doctoral thesis.²⁷ Moreover, the question of the use of force

²⁰ Churchill, Lowe and Sander (2022), 35f.

²¹ IMO, 'International Convention for the Safety of Life at Sea (SOLAS), 1974', available at: [https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\),-1974.aspx#:~:text=The%20main%20objective%20of%20the,ships%2C%20compatible%20with%20their%20safety](https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx#:~:text=The%20main%20objective%20of%20the,ships%2C%20compatible%20with%20their%20safety) [Accessed 2 May 2023].

²² VCLT Article 31 and 32.

²³ Churchill, Lowe, Sander (2022).

²⁴ Papastavridis (2010).

²⁵ Sandgren (2021), 54.

²⁶ Butler and Ratcovich (2016).

²⁷ Ratcovich (2019).

within rescue operations has also been touched upon by Attard in her monograph.²⁸

1.5 Outline

The second and following chapter treats the first sub-question and is divided into two sections. The first section focuses on the basic legal framework for vessels on the high seas, and the subsequent section investigates the regulation of enforcement jurisdiction over stateless vessels on the high seas. The third chapter treats the second sub-question and investigates the legal norms regulating search and rescue at sea. The fourth and final chapter contains a critical discussion around the findings in the previous sections as well as a presentation of the conclusion.

1.6 Terminology

Interdiction includes both the action of boarding, inspecting, and searching a ship, as well as the action of taking measures such as arresting the vessel, arresting persons aboard or seizing cargo.²⁹ *Interception* will be used synonymously.

Migrants is used to refer to individuals who move to a new nation for reasons that are not temporary, thus the term also cover refugees and asylum seekers. In contrast *refugee* is used in its specific meaning under international refugee law.³⁰ *Migrants and refugees* is used to highlight the importance of refugee rights.

The term ‘*boat migrants*’ refers to *migrants* migrating by small and/or overcrowded boats, i.e., boats that could be understood as unseaworthy.

²⁸ Attard (2020).

²⁹ Guilfoyle (2009), 4f.; Gallagher and David (2014), 405.

³⁰ See Convention relating to the Status of Refugees Article 1A(2).; Protocol relating to the Status of Refugees Article 1.2.

Irregular migration refers to “movement of persons to a new place of residence or transit that takes place outside the regulatory norms of the sending, transit and receiving countries.”³¹

³¹ IOM, ‘International Migration Law No. 34 – Glossary on Migration’, 18 Jun 2019, 116, available for download at: <https://publications.iom.int/books/international-migration-law-ndeg34-glossary-migration> [Accessed 15 May 2023].

2 Legal Status of the High Seas

2.1 Vessels on the High Seas

2.1.1 'Ship' and 'Vessel'

As mentioned in the introduction, boats used for irregular migration are often relatively small. Therefore, the signification of the terms 'ship' and 'vessel' used in UNCLOS, should briefly be touched upon.

There is no generally accepted definition of neither 'ship' nor 'vessel' in customary law or in UNCLOS,³² and the terms are used interchangeably in UNCLOS.³³ Historically, there has been a proposal to establish a definition and difference between the terms, although it did not gain necessary support.³⁴ Without discussing this complex issue further, it should be mentioned that the terms are given quite broad and inclusive definitions under different IMO Conventions.³⁵ For example, the definition of 'vessel' under the Convention on the International Regulations for Preventing Collisions at Sea (COLREG), encompasses every description of water craft that is used or being capable of being used as a means of transportation on water.³⁶ These definitions cannot be incorporated into UNCLOS, however they might provide some guidance when interpreting the terms.³⁷

Within this thesis the terms 'ship' and 'vessel' will be considered as legally identical, although preference will be given to 'ship' when the circumstances permit.³⁸

³² Yang (2006), 7.

³³ Yang (2006) 10f.

³⁴ Third United Nations Conference on the Law of the Sea, 'Report of the Chairman of the Third Committee', A/CONF.62. L.92, Official Records of the Third United Nations Conference on the Law of the Sea, Volume XVI, 209f.; Yang (2006), 11.

³⁵ E.g. MARPOL 73/78 Art. 2(4).; COLREG 1972 Rule 3(a).

³⁶ COLREG 1972 Rule 3(a).

³⁷ C.f. VCLT 31.3(c).

³⁸ Yang (2006), 13.

2.1.2 The High Seas

Under UNCLOS seas are divided into different maritime zones, in which the rights and duties of States vary. The high seas are defined in Article 86 of UNCLOS as all parts of sea that are not included in the exclusive economic zone, the territorial sea, internal waters, or archipelagic waters. The high seas shall be reserved for peaceful purposes,³⁹ and no State can validly claim sovereignty over the high seas.⁴⁰

Despite this, the high seas should not be interpreted as an area that lacks regulation. States enjoy multiple freedoms on the high seas.⁴¹ These freedoms are regulated to safeguard their exercise, which is in the interest of the entire international community.⁴² In addition, every State has the right of navigation which means that every state has the right to sail ships that are flying its flag,⁴³ correlating to this right is a duty for a State to effectively exercise its jurisdiction and control over ships flying its flag.⁴⁴

2.1.3 Nationality of Ships

For long, the common view has been that the absence of any authority of ships on the high seas would lead to chaos. Public order has therefore been pursued through the regulation of nationality of ships and the status of ships.⁴⁵

A State has the right to grant a ship its nationality which results in that State's exclusive jurisdiction over the ship.⁴⁶ This right is subject to few exceptions, such as the right of visit in Article 110 of UNCLOS which is to be understood as a tool for the suppression of uses of the ocean that are believed to be conflicting with the collective interests of States, such as piracy and slave trade.⁴⁷

³⁹ UNCLOS Article 88.

⁴⁰ UNCLOS Article 89.

⁴¹ UNCLOS Article 87.

⁴² ILC, Report of the International Law Commission to the General Assembly, UN Doc A/3159, Report of the International Law Commission covering the work of its eight session 23 April – 4 July 1956, [1956] II *Yearbook of the International Law Commission* 253, 278.

⁴³ UNCLOS Article 90.

⁴⁴ UNCLOS Article 94.

⁴⁵ ILC, Report of the International Law Commission to the General Assembly, 279.

⁴⁶ UNCLOS Article 91 and 92.

⁴⁷ Guilfoyle (2015), 219.

Moreover, States are required to fix the conditions for the grant of nationality, for the registration of ships in its territory, and for the right to fly its flag. Regarding those ships to which it has granted nationality, it must issue and provide documents to that effect.⁴⁸ Clearly, States have complete liberty in the case of vessels owned by it or ships that are property of a nationalized company.⁴⁹

The above mentioned should not be understood as meaning that UNCLOS prescribes a requirement for vessels to have documents or to be registered to enjoy nationality.⁵⁰ Numerous States' domestic laws allow smaller vessels to fly their flag if the boat is owned by a national, and only require vessels of a certain size to be registered.⁵¹

Finally, Article 91 of UNCLOS set outs that there must be a 'genuine link' between the vessel and the State. The meaning of 'genuine link' and the consequences of not attaining it, are not clear.⁵² However, without delving into this matter much further, it should be noted that ITLOS held, in *M/V Saiga* (No. 2), that there was nothing in UNCLOS that allowed for a State not to recognise the nationality of a ship when there was no genuine link between that ship and its flag state.⁵³ Even if ITLOS's interpretation leaves the requirement of a 'genuine link' quite toothless, it would be to go too far to regard such a ship as stateless.⁵⁴

2.1.4 Stateless Vessels

Stateless vessels are those that lack a claim to nationality under UNCLOS, and a vessel can become stateless in two ways. Firstly, a vessel cannot enjoy dual nationality as this would compromise the duties of the flag State.⁵⁵ A ship can therefore not change flag during a voyage if it is not a real transfer

⁴⁸ UNCLOS Article 91.2.

⁴⁹ ILC, Report of the International Law Commission to the General Assembly, 278.

⁵⁰ Churchill, Lowe and Sander (2022), 403.

⁵¹ Ibid.; Guilfoyle (2009), 16.

⁵² E.g., ILC, Report of the International Law Commission to the General Assembly, 279.; Churchill, Lowe and Sander (2022), 463–471.

⁵³ *M/V Saiga* (No.2), para. 82.

⁵⁴ Churchill, Lowe and Sander (2022), 471.

⁵⁵ UNCLOS Article 92 and 94.

of ownership or change of registry.⁵⁶ A ship that sails under the flags of two or more States and is using them out of convenience cannot claim either nationality and it may be assimilated to a ship without nationality.⁵⁷ ILC stated in 1956 that due to the “serious disadvantages in this ‘statelessness’ for a ship, this sanction will do much to prevent ships from sailing under two flags.”⁵⁸ Secondly, a vessel may become stateless if the presumptive flag state refuses the claim of nationality made by the ship. Article 91 of UNCLOS stipulates that ships have the nationality of the State whose flag they are entitled to fly. Furthermore, it should be noted that if the ship then attempted to claim a different nationality, it would fall within the scope of the first rule.⁵⁹

Boats used for irregular migration generally do not carry documentation or fly a flag.⁶⁰ However this does not inevitably make their vessel stateless. Guilfoyle states that it is certainly not enough for a vessel to be treated as stateless on the grounds that it does not fly a flag or carry documentation.⁶¹ As aforementioned, there is no universal requirement for small vessels to be registered, which means that it can be difficult to determine if a small vessel is legally stateless or not. However, in practice, it’s unlikely that a state accepts a claim of nationality made by migrants, refugees and/or smugglers. It should be mentioned that multiple scholars have concluded that boats involved in irregular migration are typically to be considered as stateless.⁶²

⁵⁶ UNCLOS Article 92.1.

⁵⁷ UNCLOS Article 92.2.

⁵⁸ ILC, Report of the International Law Commission to the General Assembly, 280.

⁵⁹ Guilfoyle (2015), 217.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Attard (2020), 47.; Moreno-Lax, Ghezelbash and Klein (2019), 718.

2.2 Enforcement Jurisdiction over Stateless Vessels

2.2.1 An Introduction to Enforcement Jurisdiction

Enforcement jurisdiction in international law refers to the authority of a state to ensure compliance with its laws.⁶³ PCIJ made a statement in the *S.S Lotus* case regarding what in today's literature is understood as enforcement jurisdiction.⁶⁴ PCIJ stated that:

Now the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention.⁶⁵

A contrary understanding would fracture the principle of equality of sovereignty among nations.⁶⁶

2.2.2 Different Views in the Legal Literature

If a governmental ship, i.e., a duly authorized ship, clearly marked and identifiable as being on government service,⁶⁷ on reasonable grounds suspects that another ship on the high seas is without nationality it has a right of visit. The right of visit, set out in Article 110 of UNCLOS, gives the governmental ship a right to stop and board the vessel. If suspicion of statelessness remains, the governmental ship also has a right of further examination which must be conducted with all possible consideration.⁶⁸ However, UNCLOS does not clarify

⁶³ Kamminga, Menno T, 'Extraterritoriality' (last updated September 2020) in A Peters and R Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008-) available at: www.mpepil.com [Accessed 2 May 2023].

⁶⁴ *SS Lotus*, 18-19.; Rothwell and Stephens (2016), 159. Ryngaert (2015), 31.

⁶⁵ *SS Lotus*, 18-19.

⁶⁶ Ryngaert (2015), 31.

⁶⁷ See UNCLOS Article 110.5.

⁶⁸ UNCLOS Article 110.

which actions, if any, that may be taken after boarding and examining a stateless vessel,⁶⁹ and boarding and seizure involve different exercises of enforcement jurisdiction.⁷⁰ This uncertainty has led to the development of two positions in the literature regarding a state's authority to take control of a stateless vessel on the high seas, solely on the basis of it being without nationality.

A view that is endorsed by multiple scholars, is that for interdiction of stateless vessels on the high seas, to be in accordance with the law of the sea it requires some further jurisdictional nexus or permissive rule.⁷¹ Moreno-Lax underlines that the fact that visit and enforcement powers have been regulated separately in the UNCLOS, suggests that a right of visit does not imply wider enforcement rights.⁷² Article 110 of UNCLOS provides a right to board a ship that is suspected to be stateless, but nowhere does UNCLOS provide for other powers regarding these vessels.⁷³ Churchill, Lowe and Sander emphasize that such nexus exists in relation to piracy in Article 105 of UNCLOS, and in relation to unauthorized broadcasting in Article 109 of UNCLOS.⁷⁴ Article 105 of UNCLOS stipulates that on the high seas, or in any other place outside the jurisdiction of any State, *every State may seize a pirate ship*.⁷⁵

The contrary view, that a state has legal authority under UNCLOS to take control of a stateless vessel on the high seas, is favoured by, among others, Gallagher and David. They hold that a substantive argument lies in the essence and underlying principles of international law, that nationality is a precondition for enjoyment of protection of the law. The consequence of this is that a ship without nationality will fall within the jurisdictional power of the state boarding the vessel.⁷⁶ In other words, the vessel may be arrested by any state because it enjoys the protection of none.⁷⁷ This view is shared by the

⁶⁹ C.f. UNCLOS Article 110, Article 105, and Article 109.

⁷⁰ Guilfoyle (2009), 9.

⁷¹ E.g., Churchill, Lowe, and Sander (2022), 405.; Moreno-Lax (2011), 186f.; Markard (2016), 600.

⁷² Moreno-Lax (2011), 186.

⁷³ Moreno-Lax (2011), 187.

⁷⁴ Churchill, Lowe and Sander (2022), 405.

⁷⁵ UNCLOS Article 105. Emphasis added.

⁷⁶ Gallagher and David (2014), 423.

⁷⁷ Guilfoyle (2015), 218.

United States, and the requirement of a nexus has been strongly rejected under US law.⁷⁸ However there is little non-US jurisprudence or general State practice on the matter.⁷⁹

Furthermore, Papastavridis highlights that, the *ratio juris* of Article 110 (1)(d) of UNCLOS lies in the idea of the legal order of the high seas that is based upon the principle of nationality of vessels navigating. Thus, it is dangerous to have ships on the high seas that are not subject to the jurisdiction of any state. They are being a law unto themselves, and consequently not needing to comply with any generally accepted international regulations.⁸⁰

However, the fact that the vessel is stateless does not mean that other States' rights and interests are not affected.⁸¹ Churchill, Lowe, and Sander stress that the view of stateless vessels as 'international pariahs' ignores the possibility that the persons on board enjoy diplomatic protection.⁸² The people on board the vessel is however not the only factor that links it to the interests and rights of other States. Butler and Ratcovich also raise other factors, such as the person who owns the ship or property on board it.⁸³ Papastavridis differentiates between jurisdiction *in rem* – against the vessel and/or cargo, and jurisdiction *in personam* – to arrest, prosecute and try foreign persons. He further holds that it is mainly in relation to *in personam* jurisdiction that States would have to rely on a nexus to exercise wider enforcement jurisdiction.⁸⁴

A practical flaw of the aforementioned view that a jurisdictional nexus is needed is indeed that the lack of nationality of the vessel means that it is improbable that any state will protest such assertion of jurisdiction.⁸⁵ In actuality, it is also unlikely that diplomatic protection would be granted to migrant

⁷⁸ E.g., *US v. Marino-Garcia*; *US v. Pinto-Mejia*; The Stockton Center for International Law in coordination with U.S. Navy, U.S. Marine Corps and U.S. Coast Guard, 'The Commander's Handbook on the Law of Naval Operations', March 2022, Norfolk. ch 3-10, para 3.11.2.

⁷⁹ Barnes (2010), 132.; *Molvan v. A. G. for Palestine*, para 28.

⁸⁰ Papastavridis (2010), 584.

⁸¹ Yang (2006), 17.; Butler and Ratcovich (2016), 247.

⁸² Churchill, Lowe, and Sander (2022), 404.; C.f. ILC Draft Articles of Diplomatic Protection Article 18.

⁸³ Butler and Ratcovich (2016), 247f.

⁸⁴ Papastavridis (2010), 584f.

⁸⁵ Churchill and Lowe (1999), 214.

smugglers, migrants and refugees by States.⁸⁶ Even if the State would be willing to exercise diplomatic protection, that protection would likely include repatriation of its nationals, which is highly undesirable especially in the scenario of the persons on board being refugees.⁸⁷

⁸⁶ Fremeaux and Attard (2023), 372.

⁸⁷ Barnes (2010), 132.

3 Search and Rescue at Sea

3.1 Duty to Render Assistance

The duty to render assistance at sea could be described as the heart of international maritime rescue law.⁸⁸ It is to be understood as the legal mirroring of the prominent moral tradition to help others at sea. Therefore, not surprisingly, it is widely considered as a principle of customary status.⁸⁹ The most important current instruments that provide for the duty is UNCLOS,⁹⁰ the SAR Convention,⁹¹ and the SOLAS Convention.⁹²

Article 98 of UNCLOS states that every state shall require the master of a ship flying its flag to render assistance. Yet, it is disputed if the article should be interpreted as directly binding upon the shipmaster,⁹³ and to what extent States are obligated to enact domestic legislation that requires and ensures that the shipmaster renders assistance.⁹⁴ What is undisputed is that the duty covers both the scenario that the shipmaster was informed of the people's need of assistance, and the scenario that the people are found by the shipmaster in danger of being lost.⁹⁵

Moreover, it should be noted that the Article does not differentiate between shipmasters of governmental vessels and of private ones. The duty is consequently applicable to a governmental vessel, even if its original purpose was to interdict the boat that was later found in distress.⁹⁶ It should be emphasized that the norm constitutes a positive obligation on flag States to help to the extent it can be done without danger to the ship, the crew, or the passengers.⁹⁷

⁸⁸ Ratcovich (2019), 66.

⁸⁹ See e.g., ILC, Report of the International Law Commission to the General Assembly, 281.; Gallagher and David (2014), 446; Attard (2020) 1, 92.; Papanicolopulu (2016), 494.

⁹⁰ UNCLOS Article 98.

⁹¹ SAR Convention Reg. 2.1.1 and 2.1.10 Annex.

⁹² SOLAS Convention Annex ch V reg 33. Para 1.

⁹³ Komp (2017), 229.; Gallagher and David (2014), 448; Papanicolopulu (2018), 85.

⁹⁴ Komp (2017), 229.; Gallagher and David (2014), 448.

⁹⁵ UNCLOS Article 98.1(a) and 98.1(b).

⁹⁶ Komp (2017), 231.

⁹⁷ UNCLOS Article 98.

Regarding the geographical scope, the duty to render assistance exists throughout the entire ocean (i.e., irrespective of where a ship encounters a vessel in distress).⁹⁸ As for the personal scope, the duty applies to ‘any person’ in distress.⁹⁹ States are prohibited from discriminating between different categories of people based on nationality, the circumstances under which a person was found, or their legal status.¹⁰⁰ This includes the scenario that the people found in distress, were engaged in an unlawful activity or induced the dangerous situation themselves by challenging the perils of the sea.¹⁰¹ Consequently, the personal scope of the duty encompasses refugees and migrants even if they consented to heading out to sea in an unseaworthy vessel.¹⁰²

Regarding the requirement of distress, it should primarily be mentioned that the wording of the concept of distress is slightly different under different instruments.¹⁰³ However, this possible difference seems mainly theoretical since many Parties to UNCLOS are also Parties to the SOLAS Convention and/or the SAR Convention, and because of the customary status of the duty to render assistance.¹⁰⁴

There is no definition of distress under UNCLOS. Nevertheless, ‘distress phase’ is defined in the SAR Convention as a situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance.¹⁰⁵ Yet, this definition is ambiguous and could be interpreted either as requiring a situation to be of

⁹⁸ UNCLOS Article 58.2 and Article 18.2.; Attard (2020), 42f.

⁹⁹ UNCLOS Article 98.; SAR Convention Annex para 2.1.10.

¹⁰⁰ UNCLOS Article 98(1); SOLAS Convention Annex ch V reg 33(1); SAR Convention Annex para 2.1.10.

¹⁰¹ Komp (2017), 245; Gallagher and David (2014), 450.

¹⁰² Ratcovich (2019), 77-78.

¹⁰³ UNCLOS Art. 98(1); SOLAS Convention Annex ch V reg 33; SAR Convention Annex para 2.1.1 and 2.1.10.

¹⁰⁴ IMO, Status of Multilateral Conventions, ‘Status Book – Comprehensive information on the status of multilateral conventions and instruments’, 16-19 and 437-439, available for download at: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>. [Accessed 24 April 2023].; UN Treaty Collection, Chapter XXI, Law of the Sea, United Nations Convention on the Law of the Sea, status at 17-05-2023, available at: treaties.un.org/ [Accessed 17 May 2023].

¹⁰⁵ SAR Convention Annex para. 1.3.11.

immediate danger or of imminent danger.¹⁰⁶ If a narrow understanding of distress is applied, States are not obligated to render assistance to migrants and refugees who travel in a rubber dinghy, badly equipped and/or overcrowded boat up until the point in which they are in immediate danger.¹⁰⁷

Some scholars argue that the humanitarian character of the norm should permit an extensive interpretation of the material scope.¹⁰⁸ Moreover, it is possible that a contrary interpretation would risk the effectiveness of the duty.¹⁰⁹ Additionally, ILC stated that, given that a treaty has two understandings, one of which enables the treaty to have appropriate effects while the other does not, good faith and the objects and purposes of the treaty should demand the former interpretation to be adopted.¹¹⁰

Moreover, it should be noted that international law abstains from defining the exact extent of assistance needed to render assistance in accordance with international law.¹¹¹ It should, however, be considered clear that the duty is not inevitably to rescue, except in cases where rescue is both necessary and possible.¹¹² The shipmasters discretion in deciding their response has been asserted as necessary to fulfil their safety obligations towards their own crew as well as the needs of the special circumstances.¹¹³ The shipmasters expert opinion and discretion has been emphasized in the 2004 Amendments to the SOLAS Convention. It stresses that the interests of the shipowner, the company operating the ship or any other person, should not impact the shipmaster's decision.¹¹⁴

Lastly, the SAR Convention stipulates that search and rescue operations shall continue, when practicable, until all reasonable hope of rescuing survivors

¹⁰⁶ E.g., Komp (2017), 232f.

¹⁰⁷ Komp (2017), 233.

¹⁰⁸ Komp (2017), 232-234; Markard (2016), 609.

¹⁰⁹ C.f. Article 31.1 VCLT.

¹¹⁰ ILC, Report of the Commission to the General Assembly, 219.; C.f. VCLT Article 31.1.

¹¹¹ See the wording of UNCLOS Article 98.

¹¹² Gallagher and David (2014), 449.

¹¹³ Ibid.; Attard (2020), 47f.

¹¹⁴ 2004 Amendments to the SOLAS Convention Annex ch V reg 34-1.

has passed.¹¹⁵ Moreover, under the SAR Convention, ‘rescue’ is defined as an operation to *retrieve* persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.¹¹⁶

3.2 Search and Rescue Regions

Article 98 of UNCLOS stipulates that every coastal state shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service. It should be accentuated that the article stipulates an obligation to *promote* which does not imply an obligation to *provide*. Parties to the SOLAS Convention and the SAR Convention are nevertheless under special obligations regarding how to cooperate and establish regions in which they shall coordinate search and rescue operations.¹¹⁷

The so-called search and rescue regions (SRRs) are established within each sea in accordance with the SAR Convention, and the regions should, as far as practicable, not overlap.¹¹⁸ It should be emphasized that the construction of an SRR does not establish jurisdiction for that state, because an SRR is not related to and shall not prejudice the delimitation of any boundary between States.¹¹⁹ Nevertheless, the delineation is invariably uncontroversial. States are responsible for their delimited SRRs, within which search and rescue services should be provided.¹²⁰ Following the 2004 Amendments to the SAR Convention and the SOLAS Convention,¹²¹ a stricter obligation falls on States. A state is primarily responsible for ensuring that coordination and cooperation occurs so that survivors can be disembarked and delivered to a place of safety.¹²²

¹¹⁵ SAR Convention Annex para 4.8.1.

¹¹⁶ SAR Convention Annex para 1.3.2. Emphasis added.

¹¹⁷ SOLAS Convention Annex ch V reg 7(1).; SAR Convention Annex ch 2.

¹¹⁸ SAR Convention Annex para 2.1.3.

¹¹⁹ SAR Convention Annex para 2.1.7.; SAR Convention Article II para 1.

¹²⁰ SAR Convention Annex para 2.1.3 and 2.1.9.

¹²¹ IMO Resolution MSC.153(78) (2004 Amendments to the SOLAS Convention).; IMO Resolution MSC.155(78) (2004 Amendments to the SAR Convention).

¹²² 2004 Amendments 1979 SAR Convention Annex para 3.1.9.; 2004 Amendments 1974 SOLAS Convention ch V reg 33 para 1-1.

3.3 Forcible Rescue

As mentioned in the introduction, multiple scenarios that actualize the question of forcible rescues are possible. As neither the SOLAS Convention nor the SAR Convention includes provisions on the use of forcible means within rescue operations, Butler and Ratcovich hold that the general framework under the law of the sea regarding jurisdiction seems applicable.¹²³

However, Attard's writings could perhaps be interpreted as her being of a different view than Butler and Ratcovich, regarding whether the duty to render assistance prescribes a right for States to use enforcement jurisdiction or not. She states that:

It would appear that the shipmaster may not be bound to render assistance if the rescuees refuse [...] Yet it is possible that in certain cases the shipmaster must use his discretion to determine whether the rescuees are in danger, as they may not be fully aware of the circumstances in which they find themselves. [...] It is also open to debate whether in such cases it would be acceptable for the shipmaster and his crew to exercise a reasonable and necessary level of force to protect life at sea. In these circumstances, where every other effort has proven to be unsuccessful, a reasonable amount of force by the shipmaster or crew may be justifiable.¹²⁴

However, it should be mentioned that it is likely that Attard discusses private and not governmental vessels.¹²⁵

It should briefly be mentioned that, in any case, the exercise of enforcement jurisdiction must be in accordance with the requirements of general international law concerning the use of force and police powers.¹²⁶ ITLOS stated in the *M/V Saiga Case (No.2)* that the use of force should be understood as a measure of last resort under international law, it should be avoided as far as

¹²³ Butler and Ratcovich (2016), 250.; C.f. Ratcovich (2019), 100.

¹²⁴ Attard (2020), 48-49.

¹²⁵ Ibid.

¹²⁶ Coppens (2017), 216.

possible while boarding a vessel.¹²⁷ Still, in the scenario where force is unavoidable, any force used must be ‘reasonable and necessary in the circumstances.’¹²⁸ ITLOS confirmed this interpretation of applicable law in the *M/V Virginia G* Case.¹²⁹

¹²⁷ *M/V Saiga (No.2)*, 62, para 155 and 156.

¹²⁸ *M/V Saiga (No.2)*, 62, para 155.

¹²⁹ *M/V Virginia G*, 101ff.

4 Discussion and Conclusion

The investigation shows that the legality of forcible measures in rescue operations of ‘boat migrants’ on the high seas, is dependent on a variety of factors. A first inquiry is that of the vessel used by migrants and refugees. It could be questioned, given the lack of definitions, if some of the boats used for sea-borne irregular migration, such as small rubber dinghies, could be considered as ‘vessels’ and/or ‘ships’ under UNCLOS. It should be emphasized that only vessels and ships may enjoy navigational rights under UNCLOS. However, if a boat used for maritime irregular migration is to be understood as a vessel, it is likely that it would be considered as stateless. Since a claim of nationality is likely to be refused by a presumptive flag state. Moreover, the right of visit stipulates that it is enough for States to suspect, on reasonable grounds, that a vessel is stateless, for the governmental vessel to stop and board it.

This study shows that it is ambiguous if the law of the sea prescribes wider enforcement jurisdiction for States than a right for governmental vessels to stop, board, and examine a stateless vessel. It should be emphasized that the practical outcomes of these views are almost completely opposite. Firstly, if one favours the view that any state may assert jurisdiction, States have full authority to seize the vessel irrespective of the refugees and migrants’ consent and of it being a distress situation or not. Secondly, if one favours the view that a further jurisdictional link is needed to assert jurisdiction, States would be prevented from exercising wider enforcement jurisdiction than explicitly stipulated in the right of visit unless they can establish a nexus with that vessel. If one favours this view, it should be discussed if the legal framework for maritime rescues could be understood as establishing such a nexus.

The legal framework for search and rescue at sea, creates legal obligations for States to coordinate and cooperate with rescue operations by establishing SRRs. However, it should be emphasized that the creation of an SRR does not establish jurisdiction for a state, and the fact that the rescue takes place in that State’s SRR can therefore not *per se* justify forcible measures.

One might argue that the duty to render assistance could be interpreted as a nexus that enables States to use enforcement jurisdiction when carrying out rescue operations. In favour of this interpretation is the purpose of the norm to protect human lives from the threats of the sea.

However, such an interpretation is not unquestionable in relation to the wordings of relevant conventions providing for the norm. In addition, for such an interpretation to be in accordance with the duty to render assistance's prominent non-discriminatory character, the duty would likely also need to authorise enforcement jurisdiction for States in relation to vessels of nationality. This is unlikely, considering the prominent legal tradition of flag States exclusive jurisdiction and that other exceptions from that rule are explicit. Such an interpretation is likely not in accordance with the cautious assertion of enforcement jurisdiction under international law. Therefore, based on the results from this study, it is unlikely that the duty to render assistance can be interpreted as providing governmental vessels with the authority to use forcible measures when conducting rescue operations.

A consequence of the previously stated is that the question of if States may use forcible measures, under international maritime rescue law, when conducting rescue operations of 'boat migrants', is dependent on one's interpretation of to which extent States may exercise enforcement jurisdiction over stateless vessels on the high seas. As mentioned earlier, the applicable law can be interpreted differently. However, based on the results from this study, it is likely that States have legal grounds for exercising such jurisdiction because of the essence and underlying principles of international law. Nevertheless, Papastavridis understanding of the need to differentiate between jurisdiction *in rem* and jurisdiction *in personam* is of importance. It is worth noting that the practical effects of this understanding of applicable law, would be that States may use forcible measures when rescuing people that travel on stateless vessels, but not in relation to vessels of nationality. It is also likely fraught with challenges for a shipmaster of a governmental vessel to decide whether a vessel is stateless or not whilst it is in distress. The practical outcome of this understanding of the law is not unquestionable in relation to the

prominent non-discriminatory character that is an aspect of the very essence of the duty to render assistance.

It is important to note that this does not pertain to or provide insights into other international legal areas and instruments. As previously discussed, other perspectives are needed to give an encompassing answer to the topic of forcible rescues of migrants and refugees on the high seas. Moreover, as mentioned, States must in all cases observe the rules of customary international law regarding the use of force when conducting rescue operations. Any force used must be reasonable and necessary in the circumstances.

To conclude, there are often legal grounds under UNCLOS for States to stop, board and examine a vessel used by migrants on the high seas. States solely need to suspect, on reasonable grounds, that the vessel is stateless for a governmental vessel to stop and board it. Moreover, it is safe to say that it is unlikely that a vessel used for irregular migration has successfully acquired a nationality, and it is consequently likely that many vessels used can be assimilated to a status of statelessness. However, to what extent States may use forcible measures such as seizing the vessel is dependent on the question of wider enforcement jurisdiction over stateless vessels, and in this regard the law is uncertain. Consequently, there is no clear conclusion as to when States can use forcible measures to rescue ‘boat migrants’ on the high seas under international maritime rescue law. However, the differences in the interpretations of applicable law can have significant practical implications, and variations can lead to divergent outcomes and consequences in real-world scenarios.

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