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Non-Governmental Organisations and Search and Rescue at Sea

*Kristof GOMBEER and Melanie FINK**

Abstract

Non-governmental organisations (NGOs) have become increasingly involved in search and rescue in the Mediterranean Sea in order to fill a gap in humanitarian protection. This article examines the legal framework of their search and rescue activities. The international law of the sea sets out an obligation to render assistance to persons in distress at sea. However, recent developments reveal that the relationship between NGO vessels rendering assistance and the affected coastal states is highly uncertain. This article addresses two particular questions: First, can NGOs navigate anywhere in order to render assistance at sea or can (coastal) states limit the rights of navigation of NGOs? Second, can coastal states give NGOs binding instructions concerning whether and how to conduct search and rescue and where to disembark the persons rescued? The article concludes that within their territorial sea, coastal states enjoy the power to determine, in a legally binding manner, how search and rescue operations are carried out, but that they may not deny NGOs access to distress scenes. Beyond their territorial sea, coastal states are neither entitled to issue binding instructions to foreign vessels nor limit their navigational freedom. In any case, all instructions have to comply with the substantive restrictions set out within the Search and Rescue regime and international human rights law.

Keywords: NGOs, search and rescue, UNCLOS, SAR Convention, human rights, boat migrants

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1. Introduction

Over the last two decades, the death toll of migrants attempting to reach Europe via the Mediterranean Sea has increased consistently.[1] In response, NGOs started to carry out privately funded search and rescue operations.[2] The first one of these was launched in the summer of 2014 by the *Migrant Offshore Aid Station* (MOAS), followed in 2015 by *Sea-Watch* and *Médecins Sans Frontières* (MSF). Whilst more NGOs became active in 2016, there was a substantial decline in 2017 due to pressure by and confrontations with public authorities.[3] Some NGOs conduct fully-fledged search and rescue

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1 For continuously updated numbers see in particular the 'Missing Migrants Project', launched by IOM <http://missingmigrants.iom.int/> accessed 27 January 2018.

2 Daniela Irrera, 'Migrants, the EU and NGOs: The 'Practice' of Non-Governmental SAR Operations' (2016) 16(3) Romanian Journal of European Affairs 20, 28-30.

3 Forensic Oceanography, 'Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean' (May 2018) 58-62.

operations: they patrol areas likely to be the origin of distress calls in order to spot vessels in distress early on. They take the persons in distress on board, provide first aid, and disembark the rescued individuals at a place of safety. Other NGOs focus on first response to emergencies by providing life vests, drinking water, and urgent medical treatment. Often, these smaller NGO vessels do not take migrants on board but wait for larger ships to transport them to dry land.[4] According to data of the Italian Coast Guard, in 2016 NGOs rescued 46,795 migrants out of the total of 178,415 persons rescued under the coordination of the Italian Maritime Rescue Coordination Center (MRCC).[5]

The relationship between NGO vessels rendering assistance and the relevant coastal states is highly uncertain. Two questions in particular have given rise to controversy: First, it is unclear whether NGOs are free to navigate the seas, including the territorial sea of coastal states, in order to search for and rescue migrant vessels in distress. Coastal states seem to assume a possibility on their part to pose certain limits on NGOs in this respect. The Libyan Coast Guard, for example, on 26 September 2017, attempted – on the high seas – to push back the NGO vessel *Lifeline*, flying the Dutch flag, further away from the Libyan coast and transfer the migrants rescued by the *Lifeline* to a Coast Guard vessel.[6] In a similar vein, the Code of Conduct for NGOs that carry out search and rescue operations in the Mediterranean drawn up by Italy in summer 2017 requires NGOs to refrain from entering Libyan territorial waters, except in situations of grave and imminent danger.[7] Second, it is uncertain whether NGOs have to follow instructions from coastal states on whether and how to conduct search and rescue operations and where to disembark the persons rescued. On several occasions, NGOs were at or near to a distress scene, but given instructions by MRCC Rome to leave their position or to refrain from assisting due to the expected arrival of the Libyan Coast Guard. This occurred, for example, on 23 and 24 November 2017 to a vessel of *SOS Méditerranée*, the *Aquarius*.[8] Many coastal states seem to assume that private vessels have to abide by instructions of the relevant coastal authorities and have adopted legislation explicitly setting out such obligations.[9] Also the Italian Code of Conduct for

4 Eugenio Cusumano, 'Emptying the sea with a spoon? Non-governmental providers of migrants search and rescue in the Mediterranean' (2017) 75 Marine Policy 91, 92-94.

5 Italian Coast Guard, 'Search and Rescue (SAR) activity in the central Mediterranean Sea from January 1st to December 31st 2016' <www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2016/ANNUALE%20ENG.pdf> accessed 27 January 2018.

6 Steve Scherer, 'Rescue ship says Libyan coast guard shot at and boarded it, seeking migrants' *Reuters* (Rome, 26 September 2017) <www.reuters.com/article/us-europe-migrants-libya-ngo/rescue-ship-says-libyan-coast-guard-shot-at-and-boarded-it-seeking-migrants-idUSKCN1C12I4> accessed 27 January 2018.

7 On the Code of Conduct, see Section 2.2.1 below.

8 SOS-Méditerranée, 'Woman Found Dead at Bottom of Rubber Boat After Rescue Operation in Central Mediterranean' (24 November 2017) <http://sosmediterranee.org/woman-found-dead-at-bottom-of-rubber-boat-after-rescue-operation-in-central-mediterranean/?lang=en> accessed 27 January 2018; SOS-Méditerranée, 'Dramatic Week in the Mediterranean: More Than 800 People Rescued by SOS Mediterranée, Whilst Crew Witnesses Interceptions at Sea by the Libyan Coast Guard' (26 November 2017) <http://sosmediterranee.org/dramatic-week-in-the-mediterranean-more-than-800-people-rescued-by-sos-mediterranee-whilst-crew-witnesses-interceptions-at-sea-by-the-libyan-coast-guard/?lang=en> accessed 27 January 2018.

9 See Section 4.1 below.

NGOs stipulates that they have to follow instructions of the competent national authority.[10]

Against this background, this article analyses two specific legal questions: The first concerns navigation under the law of the sea: Can NGOs navigate anywhere in order to render assistance at sea or can (coastal) states limit navigation? This is addressed in Section 3. The second question concerns the relationship between NGO vessels and the state responsible for the coordination of a maritime Search and Rescue Region (SRR): Can a competent national authority give binding instructions to NGOs when it comes to operational aspects and the venue for disembarkation? This is discussed in Section 4. Before addressing these two questions, Section 2 maps the basic legal regime concerning search and rescue (in the following 'SAR regime') in the Mediterranean (Section 2.1) and the practices of Italy and Libya (Section 2.2).

2. The SAR regime in the Mediterranean

2.1 The legal framework for search and rescue at sea

Two prescriptions constitute the building blocks of the legal framework on search and rescue at sea. First, Article 98(1) of the United Nations Convention on the Law of the Sea (UNCLOS) obliges states to require the master of every ship that flies their flag to render assistance to any person found at sea in danger of being lost.[11] The duty to assist is widely considered to reflect customary international law and therefore also binds states that have not ratified the treaties in question.[12]

Second, Article 98(2) UNCLOS obliges coastal states to organise search and rescue services and capacities (in the following 'SAR services') and to enter into regional arrangements where necessary. In this context, more precise legal obligations are set out in the 1979 International Convention on Maritime Search and Rescue (SAR Convention). The aim of the SAR Convention is to have every maritime space covered by search and rescue services. To this end the oceans and seas are divided into SRRs by agreement among the SAR Convention parties. These agreements are to be sent to the International Maritime Organization (IMO) which then publishes them as SAR.6 Circulars.

Under the SAR Convention, each coastal state is responsible for establishing a SAR service with-

10 On the Code of Conduct, see Section 2.2.1 below.

11 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 98(1); similarly see International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 118 (SAR Convention) as amended in 1998 and 2004, section 2.1.1; International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 277 (SOLAS Convention) Chapter V, regulation 33; International Convention On Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165, art 10.

12 ILC, 'Report of the International Law Commission on the Work of its Eighth Session' (23 April – 4 July 1956) UN Doc. A/3159, 281; see also Aldo Chircop, 'The Customary Law of Refuge for Ships in Distress' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff 2006) 163-229; Guy Goodwin-Gill and Jane McAdam, *The refugee in international law* (OUP 2007) 278; Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 134.

in their SRR. Aside from basic elements like search and rescue resources (e.g. rescue vessels and equipment) and communication facilities in order to receive distress calls and coordinate search and rescue operations, a SAR service must have a legal framework which clarifies which authorities are responsible for search and rescue and which rules apply to their organisation and operations.[13] The IMO has developed manuals, guidelines, and principles on search and rescue, the most important of which are the 2016 IAMSAR Manuals and the 2004 Guidelines on the Treatment of Persons Rescued at Sea.[14] While these instruments are as such not legally binding, states have to, as far as practicable, follow these minimum standards and guidelines in their implementation of the SAR Convention.[15]

2.2 State practice

2.2.1 Italy

Italy is party to both UNCLOS and the SAR Convention.[16] It has established a SAR zone and an MRCC.[17] Against the background of the increased presence of NGOs in the Mediterranean and the legal questions associated with it, Italy proposed drafting a Code of Conduct with the explicit aim to ensure that NGO vessels 'operate within, and abide by, a set of clear rules'. With the backing of the EU Commission, a 'Code of Conduct for NGOs undertaking activities in migrants' rescue operations at sea' was adopted in summer 2017.[18]

The Code of Conduct envisages that NGOs undertake a number of commitments, which are presented in Table 1 (below), based on two categorisations. On the one hand, the commitments are categorised according to the types of commitments they contain (Table 1, horizontal axis). They include: (1) commitments to abstain from certain conduct, (2) commitments to actively cooperate with state, sub-state, or other public authorities, and (3) information duties. On the other hand, the commitments are categorised according to the types of concern they may give rise to (Table 1, vertical axis).

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13 SAR Convention, section 2.1.

14 The International Aeronautical and Maritime Search and Rescue Manual (IAMSAR) is developed by the ICAO and the IMO and addresses the organisation, management and operation of the SAR system; IMO Resolution MSC.167(78) Guidelines on the Treatment of Persons Rescued at Sea (20 May 2004) MSC 78/26/add.2.

15 SAR Convention, section 2.1.2 *in fine*.

16 Italy ratified UNCLOS on 13 January 1995 (entered into force for Italy on 12 February 1995) and acceded to the SAR Convention on 2 June 1989 (entered into force for Italy on 2 July 1989).

17 IMO Global SAR Plan, see <https://gisis.imo.org> accessed 27 January 2018; Italian SAR Decree (*Decreto del Presidente della Repubblica del 28 settembre 1994, n. 622*).

18 Code of Conduct for NGOs undertaking activities in migrants' rescue operations at sea (no author, undated); for the European Commission's endorsement see Commission, 'Action Plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity' (Brussels 4 July 2017) SEC (2017) 339. Neither the draft nor final Code of Conduct was ever officially published by EU or Italian authorities. Different versions, all of them undated, were made public by news outlets and NGOs. The Draft Code of Conduct leaked after the JHA Ministers Meeting in Tallinn was made public *inter alia* by Human Rights Watch, see <www.humanrightsatsea.org/wp-content/uploads/2017/07/2017070516-EU-Code-of-Conduct.pdf> accessed 27 January 2018; a later (probably final) version was published on 3 August 2017 by *Euronews*, see <www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue> accessed 27 January 2018. In the following, 'Code of Conduct' refers to the latter version.

One group of commitments raises questions of compatibility with international law, in particular international law of the sea or human rights law. A second group of commitments risks limiting the effectiveness of search and rescue, thus jeopardising the protection of human lives at sea. A third group of commitments may compromise the independence of NGOs from states, a fundamental principle they are based on.[19] Finally, a fourth group of commitments *prima facie* does not raise any specific concerns. Importantly, some commitments may appear more than once within Table 1, if they give rise to more than one concern.

19 See also Eugenio Cusumano, 'Straightjacketing migrant rescuers? The code of conduct on maritime NGOs' [2017] Mediterranean Politics; Eugenio Cusumano, 'The Sea as a Humanitarian Space. Non-governmental Search and Rescue dilemmas on the Central Mediterranean migratory route' [2017] Mediterranean Politics.

Table 1: Overview of Commitments in the Code of Conduct

	Commitment to abstain	Commitment to cooperate	Commitment to inform
Compatibility with Public International Law	▪ No entering Libyan territorial waters ▪ No obstructing SAR by Libyan Coast Guard (in Libyan territorial waters?) ▪ No transfers of rescued to other vessels unless authorised by MRCC	▪ Follow instructions of competent MRCC ▪ Allow police officers on board to conduct investigations ▪ Collect vessels and engines used by traffickers/smugglers	▪ Report SAR events occurring outside SRR zones to flag state and MRCC competent for nearest SRR ▪ Keep (foreign) flag state informed on all activities
Effectiveness of SAR	▪ No entering Libyan territorial waters ▪ No transfers of rescued to other vessels unless authorised by MRCC	▪ Follow instructions of competent MRCC ▪ Collect vessels and engines used by traffickers/smugglers	N/A
NGO independence	▪ No transfers of rescued to other vessels unless authorised by MRCC	▪ Follow instructions of competent MRCC ▪ Allow police officers on board to conduct investigations ▪ Collect vessels and engines used by traffickers/smugglers	▪ Transmit information relevant for investigation purposes to state of disembarkation
***Prima facie* no concern**	▪ No turning off vessel tracking systems ▪ No (pre-SAR) communication facilitating departure of migrant vessels	N/A	▪ Communicate SAR suitability of vessel, equipment, and staff to MRCC ▪ Constantly update competent MRCC on ongoing SAR events ▪ Declare SAR financing to NGO's state of registration and (upon request) Italy ▪ Notify Frontex Operation Triton [now Themis] after rescue

For present purposes, two commitments are of specific relevance. The first is the commitment not to enter Libyan territorial waters. The second is the commitment to follow instructions of the competent MRCC. The extent to which international law permits states to restrict the rights of navigation of NGOs and to oblige them to follow state instructions, will be analysed in Sections 3 and 4 respectively.

It is important to note that, in any case, there is no certainty as to the legal nature and thus the consequences of non-compliance with the Code of Conduct. Its legal nature depends on a number of factors, including, first, the amount and type of parties (unilateral/bilateral/multilateral; private/public signatories) and, second, the legal order under which it was adopted (national/international). Neither of these aspects is addressed within the Code of Conduct itself, or otherwise made clear, which renders its legal status highly uncertain.

The Code of Conduct was drawn up by the Italian Ministry of the Interior and presented to the relevant NGOs for signature in the end of July 2017. It is not a (quasi-)legislative act adopted by Italy because that would not require signature by those potentially bound by the document in question. It also does not seem to be an agreement between Italy and the signatory NGOs, since it is signed only by NGOs but not by Italy or specific Italian authorities and contains only commitments by NGOs who are themselves not beneficiaries of reciprocal commitments entered into on the part of Italy (or any other public authority). In this light, the Code of Conduct is most likely a unilateral declaration made by each NGO that signs it.

This raises the question whether a unilateral declaration is capable of producing legal effects. In particular, are NGOs legally bound by their unilaterally made commitments? The Code of Conduct itself largely leaves this matter open. It merely sets out that both a failure to subscribe to the Code and a failure to comply with the commitments therein may result in the adoption of 'measures addressed to the relevant vessels' by Italian authorities. These 'measures', however, seem to be unrelated to the legal consequences the signature of the Code of Conduct possibly triggers, since they may also be taken against NGOs that do not sign at all. Whilst the concept that unilateral behaviour may create legally binding obligations is familiar under public international law, NGOs are not commonly considered to have legal personality on the international plane, and may thus also not create obligations binding on them as a matter of public international law.[20] Thus, the Code of Conduct is not binding under international law. However, it is conceivable that it creates legally binding obligations under Italian national law for those NGOs that sign it. This ultimately depends on the existence of the legal concept

20 See in particular *Nuclear Tests Case (Australia v France, New Zealand v France)* (Judgment) [1974] ICJ Rep 253; ILC, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations' in 'Report of the International Law Commission on the Work of its Fifty-eighth Session (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, Ch IX, 160–177; for more detail on the contentious question of NGOs' international legal personality see Ingrid Rossi, *Legal Status of Non-Governmental Organizations in International Law* (Intersentia 2010) 48-65.

of unilateral declarations under Italian law and the conditions under which Italian law affords them legally binding character.

2.2.2 Libya

Libya is not party to UNCLOS, but did accede to the SAR Convention in 2005.[21] Whilst no Libyan SRR or MRCC officially exist yet, Libya is in the process of establishing them. In August 2017, the Libyan authorities declared their SRR and submitted the necessary documents to IMO. However, the declaration was withdrawn in December 2017 only to submit a new one a few days later. It is unclear when the Libyan SRR may be expected to be fully functional.

Neighbouring coastal states usually enter into bilateral agreements regarding cooperation and coordination with regard to search and rescue. These agreements are then published in the IMO database. They are important to ensure that there is clarity of who is responsible for the coordination of search and rescue incidents and that the transfer of such coordination from one authority to another runs smoothly. The absence of an agreement creates the risk of gaps in the provision of search and rescue (see for example Section 4.2.1). No such formal agreement exists between Italy and Libya. Instead, Italy and Libya have substituted this standard cooperation within the IMO framework with a rather unorthodox cooperative framework.

The national authority in charge of search and rescue in Libyan waters is the Libyan Coast Guard. It officially functions under the authority of the Government of National Accord and operates – given the fragmentation of power in Libya – only in the Western sector of the Libyan coast. On the basis of Memoranda of Understanding, the Libyan Coast Guard has received vessels, financial support, and training from Italy and the European Union since 2016.[22] In addition to this support, Italy has dispatched some of its own war ships to Libyan territorial waters in order to support the Libyan Coast Guard.[23] Italy has, moreover, used its MRCC in Rome to relay information concerning distress incidents occurring within the yet to be established Libyan SRR.

Whilst officially conducting search and rescue, the operations of the Libyan Coast Guard have practically had the effect of preventing migrants from leaving Libyan waters. Estimates suggest that in 2017 the Libyan Coast Guard retrieved over 80,000 persons off its coast and returned them to Libyan territory.[24] In addition, its activities were reported to have frequently limited the ability of NGOs to provide effective SAR services off the Libyan coast.

3. The rights of navigation under the law of the sea

This section analyses NGOs' rights of navigation when conducting search and rescue operations.

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21 Libya acceded on 28 April 2005 (entry into force for Libya on 28 May 2005), see IMO, SAR/Circ. 77 (17 May 2005) Ref. A1/W/2.03.

22 For more detail, see Forensic Oceanography (n 3) 40-46.

23 ibid 48-49.

24 Safa Alharathy, 'Libyan and Italian officials discuss joint cooperation to combat illegal immigration' *The Libya Observer* (Tripoli, 9 December 2017) <www.libyaobserver.ly/news/libyan-and-italian-officials-discuss-joint-cooperation-combat-illegal-immigration> accessed 27 January 2018. Forensic Oceanography speaks of 20,335 people (n 3) 57.

The central question is whether NGOs are free to navigate anywhere, including the territorial sea of a coastal state, in order to provide assistance at sea. To what extent may Italy or Libya restrict NGO vessels' access to distress scenes in the Libyan territorial waters or on the high seas?

Two rights, recognised in the law of the sea, are of particular relevance in this respect. The first is the right of innocent passage that allows foreign vessels to pass through the territorial sea of coastal states. Thus, Section 3.1 discusses the right of NGO vessels to access the Libyan territorial sea and the extent to which Libya may restrict it whilst complying with the regime for innocent passage. The second is the right for vessels flying any flag to freely navigate on the high seas. In this light, Section 3.2 analyses the extent to which Libya or Italy may limit the freedom of navigation of NGO vessels on the high seas.

It should be noted that a right to enter the territorial waters of a coastal state may also exist outside the regime of innocent passage. In particular, the SAR Convention stipulates that coastal states should authorise immediate entry into their territorial sea of rescue units of other states if their sole purpose is search and rescue.[25] Neighbouring coastal states often insert an admission clause in their bilateral search and rescue agreements to that end. Some of these admission clauses require prior authorisation,[26] others allow immediate entry.[27] Private foreign vessels – such as search and rescue vessels of NGOs – are, however, not covered by these bilateral agreements. Therefore, in the absence of a specific rule, the rights of navigation of NGOs in the territorial sea of a third state are governed by the regime of innocent passage under UNCLOS.

3.1 Access to the territorial sea: the right of innocent passage

Coastal states have a right to establish a territorial sea up to a limit of 12 nautical miles from their coast, of which both Italy and Libya took advantage.[28] The territorial sea, as the name suggests, forms part of the territory of a state within which a coastal state enjoys full sovereignty.[29] Thus, in principle,

25 SAR Convention, section 3.1.2.

26 See e.g. IMO, 'Agreement concluded between Italy and Slovenia on Search and Rescue Regions and coordination of search and rescue services in accordance with paragraph 2.1.4. of the Annex to the SAR Convention, 1979, as amended' (25 January 2010) SAR.6/Circ.44, art 7; IMO, 'Agreement concluded between Bulgaria and Turkey on Search and Rescue Regions and coordination of search and rescue services in accordance with paragraph 2.1.4. of the Annex to the SAR Convention, 1979, as amended' (25 April 2005) SAR.6/Circ.24, art 5.

27 See e.g. IMO, 'Arrangement for Cooperation between the New Zealand Civil Aviation Authority and the United States Coast Guard concerning Search and Rescue' (April 2017) SAR.6/Circ.57, art 3.6.

28 UNCLOS, arts 3 and 4; Article 2 of Italian Law No. 359 of 24 August 1974 *Gazzetta Ufficiale. Anno 115° - Numero 218*, 5542; Libyan Act No. 2 of 18 February 1959 concerning the delimitation of Libyan territorial waters. UN Doc, Legislative Series, ST/LEG/SER.B/16, 14.

29 UNCLOS, art 2(1); Richard Barnes, 'Article 25: Rights of protection of the coastal State' in Alexander Proelss (ed), *The United Nations Convention on the Law of the Sea. A Commentary* (C.H. Beck – Hart – Nomos 2017) 223. Pre-World War II, the sovereignty of the state over its territorial sea was contested. Since the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 UNCLOS, this is, however, explicitly accepted. Louis B Sohn and others, *Law of the Sea* (2nd edn, West 2010) 209.

coastal states may determine who enters their territorial sea.[30]

However, the sovereignty of coastal states within their territorial sea is limited by the right of innocent passage, governed by Articles 17 to 32 UNCLOS. Under the regime of innocent passage, foreign vessels, including NGO vessels flying a foreign state's flag, have a right to access to the territorial sea of a coastal state, as long as they merely 'pass', as opposed to stay, and do so 'innocently'.

In this light, there are two ways in which coastal states may limit an NGO vessel's right to navigate to, from, and through the territorial sea. The first is to argue that vessels are not 'passing' through the territorial sea in the first place. It has indeed been pointed out that the very purpose of defining passage separately from its innocence is precisely 'to confirm the authority of coastal states to expel vessels that are not engaged in passage, innocent or otherwise'.[31] A ship is considered to be 'passing' when it traverses the territorial sea in a continuous and expeditious manner.[32] That includes entering the territorial sea at one point and leaving at another without calling at a port ('lateral passage') as well as crossing the territorial sea in order to enter ('entry passage') or exit a coastal state's port ('exit passage').[33] A vessel may stop as long as this is part of ordinary navigation or rendered necessary, most importantly, for the purpose of rendering assistance to persons or ships in danger or distress.[34]

A coastal state may argue that the entry or presence of an NGO vessel in its territorial sea does not qualify as passage because it is not the crew's *intention* to get from point A to point B, but to rescue migrants or anticipate their rescue. This argument presupposes that in order to determine whether the entry to or presence in the territorial sea constitutes 'passage' involves assessing the intention or purpose behind passing. However, the latter is assessed when determining the innocent character of the passage. Accordingly, the objectively observable navigational behaviour is the only criterion relevant to the determination of navigational movement as 'passage'. Thus, whilst NGO vessels circling around and hovering would clearly not be 'passing', NGO vessels entering or traversing the territorial sea for the purpose of rescuing migrants are.

The second way of limiting foreign vessels' right of entry to or presence in its territorial sea is to argue that their passage does not qualify as 'innocent'. Passage is 'innocent' as long as 'it is not prejudicial to the peace, good order or security of the coastal State'.[35] Article 19(2) UNCLOS provides a list of activities by foreign vessels considered to be not innocent.[36] With respect to NGO vessels that

30 International law recognises the right of every state to control entry into its territory, subject, however, to its treaty obligations. See, *inter alia*, *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) para 41; *Gül v Switzerland* App no 23218/94 (ECtHR, 19 February 1996) para 38.

31 Richard Barnes, 'Article 18: Meaning of Passage' in Proelss (n 29) 182 [referring to Daniel P O'Connell, *The International Law of the Sea. Volume I* (OUP 1982)].

32 UNCLOS, art 18(2).

33 UNCLOS, art 18(2).

34 UNCLOS, art 18(2).

35 UNCLOS, art 19(1).

36 UNCLOS, art 19(2); The majority view is that Article 19(2) is non-exhaustive, see Richard Barnes, 'Article 19: Meaning of innocent passage' in Proelss (n 29) 191-92 and references there.

render search and rescue services at sea, a coastal state may seek to rely on two provisions.

One is Article 19(2)(g) UNCLOS. According to that provision, passage is presumed not to be innocent when it involves the loading of persons contrary to the coastal state's immigration laws. *Loading* of persons – within the meaning of Article 19(2)(g) – is, however, not equivalent to *rescuing* persons. Whilst a rescue typically involves taking persons on board, this is necessary to save lives, but does not constitute a deliberate act to circumvent immigration laws. Thus, interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty – as required by the general rule of treaty interpretation – coastal states may not rely on Article 19(2)(g) to deny foreign vessels that conduct search and rescue operations access to the territorial sea.[37] In any case, Article 19(2)(g) only covers immigration laws, not emigration laws and may therefore only be relied on to address the loading of people trying to *enter* the coastal state, but not those trying to *leave*. Emigration laws were indeed explicitly excluded during the preparation and negotiation of the predecessors to Article 19(2)(g) UNCLOS because the view was that including the aspect of emigration in addition to immigration would raise serious human rights concerns (see also the analysis below in this section).[38]

The other relevant provision is Article 19(2)(l) UNCLOS, which enables coastal states to qualify any other activity not having a direct bearing on passage as non-innocent and deny passage through its territorial sea on that basis. Two possible grounds are of specific interest in the present context. First, parallel to Article 19(2)(g) UNCLOS, a coastal state may argue that a vessels' passage is not innocent, when it loads persons contrary to the coastal state's *emigration*, as opposed to *immigration* laws (i.e. laws regulating the *exit from*, as opposed to *entry to*, their territory). Second, coastal states party to the 2000 Protocol against the Smuggling of Migrants are under an obligation to prevent and suppress the smuggling of migrants by sea as a place of departure.[39] Based on that obligation, a coastal state may seek to argue that they are allowed to prevent persons from irregularly leaving their shores and to prohibit vessels from picking these persons up from their territorial sea.

At the outset, it should be noted that rescue activities by NGOs are unlikely to qualify as the smuggling of migrants or the facilitation thereof pursuant to the Smuggling Protocol.[40] Importantly, how-

37 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(1).

38 ILC, 'Summary records of the fifth session' (1 June – 14 August 1953) *Yearbook of the International Law Commission 1953 (Vol. I)* 165 and 167; ILC, 'Documents of the fifth session including the report of the Commission to the General Assembly' *Yearbook of the International Law Commission (Vol. II)* 45; ILC, 'Summary records of the eighth session' (23 April – 4 July 1956) *Yearbook of the International Law Commission 1956 (Vol. I)* 73-78. See also Daniel-Erasmus Khan, 'Article 33: Contiguous zone' in Proelss (n 29) 267-68.

39 Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime of 15 November 2000 (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (Smuggling Protocol) arts 7 and 11(1).

40 cf Smuggling Protocol, arts 3(a) and 6(1). There have been recent instances in which Italian and Greek authorities have pursued criminal investigations against NGOs for allegedly smuggling migrants. It goes beyond the scope of this article to delve into Italian and Greek criminal law, but prima facie these acts of prosecution arguably find no support in the Smuggling Protocol and run counter search and rescue obligations under the law of the sea. See *inter alia* Jasmine Coppens, 'Interception of Migrant Boats at Sea' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill 2016) 203; Sergio Carrera and others, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants* (2016) Study for the European Parliament; Daniel Ghezelbash and others, 'Securitization of Search and Rescue at Sea' (2018) 67 ICLQ 315, 347-49.

ever, there are two reasons why enforcing these grounds against NGOs conducting search and rescue would in any case contravene international law.

First, it would not be in line with the object and purpose of UNCLOS. While not the central objective of UNCLOS, humanitarian considerations are 'present in the texture of its provisions.'[41] Arguably, the provisions on innocent passage, interpreted and applied in good faith and in light of the humanitarian objectives of UNCLOS, in particular Article 98 UNCLOS, require the primacy of saving lives over enforcing domestic laws of the coastal state.[42]

Second, it would conflict with international human rights law. Article 31(3)(c) VCLT requires to take into account 'any relevant rules of international law applicable in the relations between the parties' for the interpretation of a treaty. Also called the principle or method of systemic integration, Article 31(3)(c) is said to allow bringing into consideration obligations even when flowing from other treaties, when they relate to the subject matter.[43] Moreover, Article 293 UNCLOS itself stipulates that a court or tribunal having jurisdiction to adjudicate shall also apply 'other rules of international law not incompatible with [the] Convention.'[44] Therefore, the UNCLOS Articles on innocent passage should be interpreted and applied in light of international human rights law.[45]

Concerns might be raised when using Article 31(3)(c) VCLT or Article 293 UNCLOS to read rules into the Convention which go well beyond matters governed by UNCLOS.[46] International human rights law may however – in addition to constituting a means of interpreting UNCLOS – apply *autonomously* and limit the possibilities of coastal states to deny foreign vessels entry to their territorial sea. This was held for example by the European Court of Human Rights in *Women on Waves v Portugal*.[47] The case concerned an NGO vessel, the *Borndiep*, that intended to enter Portuguese territorial

41 Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28(1) Berkeley Journal of International Law 1, 3; Bernard Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1998) 36 Columbia Journal of Transnational Law 399, 401-02.

42 cf Treves, ibid 6, who argues that the activity that entails less risk of human life should prevail when it is impossible to have simultaneously due regard to activities that are equally legal or pose issues of norm conflict.

43 Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 299; ILC, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission' (prepared by Martti Koskenniemi, 13 April 2006) UN Docs. A/CN.4/L.682, 209, para 416.

44 This was confirmed on several occasions by the International Tribunal for the Law of the Sea (ITLOS), see e.g. *M/V 'Saiga' (No. 2) Case (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999, 10, 61-62, [155]; /M/V/ '*Juno Trader' Case (Saint Vincent and the Grenadines v Guinea)* (Judgment of 18 December 2004) ITLOS Reports 2004, 19, 38-39, [77].

45 For more detail see: Irini Papanicolopulu, 'International Judges and the Protection of Human Rights at Sea' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law* (Springer 2013) 535, 542; Seline Trevisanut, 'Is there a right to be rescued? A constructive view' (2004) 4 Questions of International Law 3, 9-11; Efthymios D Papastavridis, 'Is there a right to be rescued? A skeptical view' (2004) 4 Questions of International Law 17, 23-24.

46 cf Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 International and Comparative Law Quarterly 791, 802-04; Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, OUP 2007) 243; Gardiner (n 43) 320-23.

47 *Women On Waves v Portugal* App no 31276/05 (ECtHR, 3 February 2009).

waters in order to moor at the port of Figueira da Foz where it would organise activities related to the promotion of reproductive health on board the *Borndiep*. Portugal denied the *Borndiep* entry, arguing that the intended activities would render the *Borndiep*'s passage non-innocent. In particular, Portugal found them to fall under Article 19(2)(g) UNCLOS, according to which the loading or unloading of merchandise and persons contrary to the sanitation laws and regulations of a coastal state may preclude the innocence of a passing vessel.[48] The Portuguese authorities notified the captain of the *Borndiep* of the decision not to grant entry and positioned a naval vessel next to the *Borndiep* to effectively prevent entry. Even though under UNCLOS a danger to public health may be a reason to consider passage non-innocent, the Court found that by denying the vessel entry, Portugal had violated Article 10 ECHR, which guarantees the freedom of expression.[49] In a nutshell, relying on emigration or anti-smuggling laws to preclude the innocence of a foreign vessels' passage has to be assessed in light of human rights norms (whether via systematic interpretation of UNCLOS or the autonomous application of human rights law). This has a number of implications for the case at hand.

On the one hand, prohibiting persons from exiting a state, is – with the exception of a few limited permissible restrictions – contrary to international human rights law, according to which everyone is in principle free to leave any country, including their own.[50] On the other hand, the right to life imposes positive obligations on the coastal state to take adequate measures to prevent the deaths of those within its jurisdiction.[51] This equally applies in the context of search and rescue.[52] Respecting and ensuring the right to life of migrants to be rescued would – depending on the circumstances

48 ibid para 8.

49 ibid para 44. See also Barnes (n 36) 192.

50 Restrictions have to be provided by law and have to be necessary and proportional. Legitimate restrictions include securing a pending trial, protecting state secrets, recovering a large amount of unpaid taxes, or giving effect to UN Security Council sanctions. Universal Declaration of Human Rights, UNGA Res 217 A (III) (10 December 1948) art 1(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12(2); Protocol No. 4 to the European Convention on Human Rights (adopted 16 September 1963, entered into force 2 May 1968) 046 ETS, art 2(2). See also Colin Harvey and Robert P Barnidge, 'Right to Leave in International Law' (2007) 19(1) International Journal of Refugee Law 1, 14; Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12(1) Melbourne Journal of International Law 27, 54-55; Dimitry Kochenov, 'The Right to Leave Any Country Including Your Own in International Law' (2012) 28(1) Connecticut Journal of International Law 43, 64-68; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 246-49; Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27(3) European Journal of International Law 591, 609; Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017) 341-48.

51 See e.g. *LCB v UK* App no 23413/94 (ECtHR, 9 June 1998) para 36; *Osman v UK* App no 23452/94 (ECtHR, 28 October 1998) paras 115-16; *Berü v Turkey* App no 47304/07 (ECtHR, 11 January 2011); *Choreftakis and Choreftaki v Greece* App no 46846/08 (ECtHR, 17 January 2012) para 47; *Kemaloğlu v Turkey* App no 19986/06 (ECtHR, 10 April 2012); William Schabas, *The European Convention on Human Rights – A Commentary* (OUP 2015) 126-27.

52 See also *Leray v France* App no 44617/98 (ECtHR, 16 January 2001) where the ECtHR confirmed that the way in which maritime rescue operations are conducted are susceptible for judicial review in light of the right to life. See also Paul Tavernier, 'La Cour Européenne des Droits de l'Homme et la Mer' in Daniel-Heywood Anderson and others (eds), *La Mer et Son Droit* (Pedone 2003) 575, 586; Lisa-Marie Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill 2016) 236-38.

of the distress situation and the proximity of vessels able to render assistance – entail an obligation not to prevent passage of NGO vessels in territorial waters when they are able to contribute to the prevention of the loss of life.

In sum, a coastal state has no legal basis to impede NGOs from conducting search and rescue of migrants in its territorial sea. This is because entry to and presence in the territorial sea for the purpose of search and rescue does not render a vessel's passage as non-innocent. Not only do NGOs have a right to navigate territorial waters to save lives, but denying access would infringe fundamental provisions of UNCLOS and international human rights law. Even though Libya is not a party to UNCLOS, the main tenets of the right to innocent passage as codified in UNCLOS are considered to reflect customary international law, which Libya is bound to comply with. [53] Moreover, it should be noted that the law of the sea does not guarantee coastal states any powers to restrict foreign vessels' navigational rights in *other coastal states*' territorial sea. Thus, any attempt in that regard by Italy, e.g. by committing NGOs in the Italian Code of Conduct not to enter Libyan territorial waters (see above Section 2.2.1), has no basis in international law.

3.2 Outside the territorial sea: the freedom of navigation

Adjacent to the territorial sea are the high seas and – if declared – the Contiguous Zone and the Exclusive Economic Zone (EEZ).[54] Importantly, beyond the territorial sea, vessels of any state enjoy freedom of navigation.[55] Thus, in principle, NGO vessels outside the territorial sea are exclusively subject to the jurisdiction of their flag state and no other state may limit NGO vessels' rights to navigate within the EEZ or on the high seas.[56]

There are three particular exceptions to this rule. First, there are a number of specific grounds for jurisdiction that states other than the flag state can exercise on the high seas. These are exhaustively listed in UNCLOS and include the exercise of jurisdiction or a 'right of visit' in cases of, for example, slave trade, piracy, illicit trafficking in drugs, or unauthorised broadcasting.[57] However, none of these provide a legal basis to limit the rights of navigation of NGO vessels that conduct search and rescue operations.

The second exception concerns the so-called right of hot pursuit. This allows a coastal state to pursue a foreign vessel from within its territorial waters into the high seas when it has good reason to believe that that vessel has violated its laws.[58] However, Article 111(1) UNCLOS specifies that hot

53 *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports 14 [214]. Note that these observations on access to the territorial sea for search and rescue purposes would apply *mutatis mutandis* for NGOs wanting to access e.g. Turkish territorial waters.

54 UNCLOS, arts 55 and 86.

55 UNCLOS, arts 87 and 58.

56 Note that a coastal state can establish a contiguous zone in which it may exercise the control necessary to prevent and punish the infringement of its immigration laws pursuant to Article 33 UNCLOS. Libya has not declared a contiguous zone.

57 UNCLOS, arts 99, 105, 108, and 109.

58 UNCLOS, art 111.

pursuit must always commence within the internal waters, territorial sea, or contiguous zone of the pursuing state.[59] Thus, it cannot be exercised against NGO vessels that were on the high seas whilst engaging in the allegedly illegal activity without ever entering territorial waters.

The third exception concerns the power to intercept foreign vessels on the high seas suspected of smuggling migrants on the basis of Article 8 Smuggling Protocol. However, search and rescue normally does not qualify as smuggling or the facilitation thereof.[60] In addition, the intercepting state would need prior authorization from the flag state of the NGO before it could take measures pursuant to Article 8 (2) Smuggling Protocol.[61]

In conclusion, there are typically no circumstances under which coastal states have a right to stop, board, or search NGO vessels conducting search and rescue operations beyond the territorial sea or arrest their crew. Thus, when for instance the Libyan Coast Guard intercepted the NGO vessel *Lifeline* on 26 September 2017 outside its territorial waters, it had no legal basis in international law to do so.

4. The power of coastal states to give instructions under the law of the sea

This section analyses the power of coastal states to give instructions to NGOs in the context of search and rescue operations (in the following 'SAR instructions'). It focusses on two central questions with respect to such instructions. First, are NGOs legally bound to follow them? This essentially depends on the legal nature of the instructions, which is analysed in Section 4.1. Second, to the extent coastal states may issue SAR instructions to foreign vessels, are there limits on the content of these? This is analysed in Section 4.2, taking into account in particular the SAR Convention and human rights law.

4.1 The legal nature of SAR instructions

In order to comply with their obligations under the SAR Convention, coastal states are required to put into place facilities allowing for the efficient coordination of distress events that occur within their SRRs.[62] For that purpose, coastal states typically afford coordination competences to the competent state authorities, in particular the MRCCs. An overview of some coastal states' legislation in that respect reveals that approaches vary considerably. According to the extent of instruction powers af-

59 UNCLOS, art 111(1).

60 See above Section 3.1. It has, moreover, been noted that 'the act of carrying migrants on the high seas is not an international crime as such.' Efthymios Papastavridis, *Interceptions of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Bloomsbury 2014) 266.

61 See also Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 185.

62 See Section 2.1.

forded to the competent authorities in domestic legislation, three approaches may be distinguished.[63]

Firstly, some coastal states' domestic legislation does not at all foresee the possibility for their competent authorities to issue SAR instructions, or does, but without specifically clarifying their legally binding nature or geographical applicability. This is the case, for example, in relation to the Netherlands.[64] Secondly, some domestic legal systems of coastal states provide for competences of MRCCs to give legally binding SAR instructions within the territorial sea of that state. Examples of such schemes include those in Australia, Spain, and Italy.[65] Thirdly, some coastal states' domestic legislation provides that their competent authorities can give SAR instructions to private vessels within their entire SRR, i.e. not only within their territorial sea but also in those parts of the high seas that are part of the SRR. Canada, Belgium, and France, for example, follow this approach.[66]

Whilst there are no specific rules under international law regarding the power of coastal states to issue binding SAR instructions, the law of the sea does provide some guidance. Within the territorial sea, states can exercise full sovereignty including over foreign vessels.[67] Thus, the first two approaches, i.e. domestic legislation that either does not at all provide for the possibility of legally binding SAR instructions or does so but limited to the territorial sea, do not raise any specific questions of compatibility with international law. However, no state may claim sovereignty over the high seas. All vessels on the high seas thus remain under the *exclusive* jurisdiction of their flag state.[68] The SAR regime itself only creates responsibilities but does not affect state boundaries, territorial control, or rights over navigation and, most importantly, therefore confers no new rights or grounds of jurisdiction to coastal states.[69] The third approach, i.e. domestic legislation that envisages SAR instructions to be legally binding beyond the territorial sea, interferes with exclusive flag state jurisdiction and is consequently not in compliance with the international law of the sea.

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63 The sample is based on the familiarity with and linguistic accessibility of the legislation to the researchers. The sample is in no way meant to be representative for all coastal states, but serves as a *prima facie* way of looking into the kind of legislation coastal states may adopt when it comes to SAR instructions and their application *ratione loci* and *ratione personae*. Where possible, interviews via e-mail or telephone were conducted with state authorities in order to obtain the pertinent legal instruments and the interpretation thereof.

64 Dutch SAR Decision (*Regeling inzake de SAR-dienst van 26 augustus 1994*); Dutch SAR operational plan (*Operationeel Plan voor Search and Rescue*) 15 <www.kustwacht.nl/sites/default/files/2016-06-28%20OPPLAN%20SAR%20Versie%201.1.pdf> accessed 27 January 2018.

65 Australian Navigation Act, sections 246 and 183; Spanish Maritime Navigation Law (*Ley 14/2014 de Navegación Marítima*) art 367(1); Italian SAR Decree, art 5; and Italian Navigation Code (*Codice della navigazione*) arts 69-70, 1113, and 1158.

66 Canadian Shipping Act, arts 130(2)-(3) and 137(1); Flemish MRCC Decision (*Besluit van 26 Oktober 2007 van de Vlaamse Regering betreffende het Maritiem Reddings- en Coördinatiecentrum*) art 2 *juncto* Flemish MRCC Act (*Decreet van 16 Juni 2006 betreffende de begeleiding van scheepvaart op de maritieme toegangswegen en de organisatie van het Maritiem Reddings- en Coördinatiecentrum*) art 42; Flemish MRCC Decision, art 11; Flemish MRCC Act, arts 45 and 53, which does not make an explicit distinction between Belgian and foreign vessels; French Internal Security Code (*Code de la sécurité intérieure du 12 mars 2012*) art L742-5; French SAR Decree (*Décret n°88-531 du 2 mai 1988 portant organisation du secours, de la recherché et du sauvetage des personnes en détresse en mer*) arts 1 and 7(2).

67 UNCLOS, art 2(1); see also Section 3.1 above.

68 UNCLOS, arts 89 and 92(1).

69 See also IAMSAR Manual (n 14) Vol I, section 2.3.15(e).

In this vein, under international law, SAR instructions issued by national authorities to foreign private vessels beyond the territorial sea can only be considered as 'requests for cooperation', reminding foreign vessels to comply with their obligations under the domestic law of the flag state concerning the duty to assist. An MRCC may inform the flag state of a non-cooperative foreign vessel, but it may not itself enforce its instructions on the high seas. As such, the commitment in the Italian Code of Conduct to follow instructions of the competent MRCC (see above Section 2.2.1) can only be understood as applying to the territorial sea. Beyond that, the instructions are non-binding requests for cooperation.

4.2 The legality of SAR instructions

International law, in particular the SAR regime and human rights law, place legal limits on the permissible content of SAR instructions. The following sections analyse two types of SAR instructions that have in the past led to tensions between coastal states and NGOs: instructions concerning on-scene rescue (Section 4.2.1) and instructions concerning transfers and disembarkation of rescued persons (Section 4.2.2).

4.2.1 Instructions concerning on-scene rescue

Instructions concerning on-scene rescue generally consist of requests to proceed to a distress scene and assist the persons in danger. These raise no particular questions of compliance with international law, since all captains are indeed typically themselves under an obligation to assist persons in distress under the laws of their vessel's flag state. However, NGOs have in the recent past reportedly received more problematic instructions, when national authorities instructed them *not* to proceed to a distress scene, or to *refrain* from assisting, even though they were near or already present at a distress scene. As noted in Section 1, this occurred, for example, on 23 and 24 November 2017 to a vessel of *SOS Méditerranée*.

The entire body of rules and guidelines of the SAR regime is designed to ensure efficient and effective search and rescue. Preventing loss of life requires speedy arrival at a distress scene.[70] This is why UNCLOS obliges captains to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance.[71] This is why the SAR Convention obliges any search and rescue unit receiving information of a distress incident to take immediate action if in a position to assist.[72] And this is also why the IAMSAR Manual advises search and rescue units to be immediately dispatched to confirm the distress position.[73] There may be good reasons for an authority to ask a vessel to stand-by, for instance when another vessel is in a better position to provide assistance. However, it

70 IAMSAR Manual (n 14) Vol II, sections 1.6.1 and 3.1.

71 UNCLOS, art 98(1)(b).

72 SAR Convention, section 4.3.

73 IAMSAR Manual (n 14) Vol II, section 3.8.5. See also IMO Guidelines (n 14) section 3.1.

is clear that where an NGO vessel is at or near a distress scene and able to provide prompt assistance, a coastal state's instruction *not* to proceed violates the letter and spirit of the SAR regime.[74]

Further, preventing loss of life requires on-scene coordination to be effective. This is, in particular, the case when multiple actors are present at a distress scene. Questions may arise, in these instances, as to who is in charge and how to go about the on-scene rescue. For example, on 6 November 2017, the NGO *Sea Watch* arrived at a distress scene in response to a call from MRCC Rome and took on the on-scene coordination of all assets present (an Italian and a French warship, an Italian helicopter) in mutual agreement. However, when the Libyan Coast Guard arrived, it interrupted the on-scene rescue coordination and execution by the NGO. In the ensuing chaos a number of persons drowned.[75]

To ensure effectiveness, the SAR Convention requires there to be a clearly designated on-scene coordinator.[76] The IAMSAR Manual advises that the person in charge of the first search and rescue resource to arrive at the scene assumes this function.[77] Due to their position in the vicinity of likely distress scenes, NGO vessels are frequently the first ones to arrive and therefore they are often most suited to assume on-scene coordination. When multiple assets are at a distress scene, the role of the on-scene coordinator must be assigned to the most capable person.[78] NGO crews typically have the operational expertise and capabilities to take on on-scene coordination responsibilities. In contrast, reports suggest that the Libyan Coast Guard does not possess the proper capabilities, expertise, and professionalism to take on on-scene coordination.[79] When the captain of an NGO vessel is appointed on-scene coordinator for multiple search and rescue providers present, instructing or otherwise obstructing its coordination or execution is in breach of the SAR regime.

In addition, instructions to stand-by or instructions undermining effective on-scene coordination may violate the right to life of those in distress. As noted above in Section 3.1, the right to life imposes positive obligations on states to take adequate measures to prevent deaths. In the present context, this means that a coastal state that should be aware of a danger to persons' lives (e.g. after a distress call), but gives instructions that are clearly detrimental to the chances of success of a rescue operation, would violate human rights law. However, there is a caveat. States are only required to guarantee the human rights of those within their jurisdiction. Whilst distress scenes within the territory (including the territorial sea) of a coastal state *prima facie* occur within the jurisdiction of that state, distress scenes on the high seas require assessing the extraterritorial applicability of human rights law.

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74 Note that the instruction not to proceed to a distress scene arguably does not contravene the SAR regime when *another* vessel is already closer to the distress scene and is sufficiently able to assist. This way, for instance, one avoids having all NGO vessels rushing towards one incident.

75 Comprehensive video footage of the incident is available at <www.youtube.com/watch?v=_phI-f_yFXQ> accessed 27 January 2018; for a detailed account of the incident see Forensic Oceanography (n 3).

76 SAR Convention, section 4.7.

77 IAMSAR Manual (n 14) Vol I, section 2.6.1. and Vol II, section 1.2.4. This guideline was enshrined in section 5.7.3 of the original 1979 SAR Convention but was removed on the occasion of the 1998 amendment.

78 SAR Convention, section 4.7.2.

79 Forensic Oceanography (n 3) 57-81.

A detailed analysis in this regard is outside the scope of this article. Suffice it to say, there is overall agreement that human rights obligations can be triggered on the high seas when a state exercises 'authority and control over persons'.[80] A state that takes people on board its ship[81] or manoeuvres around a vessel striking it and/or causing it to capsize,[82] thereby exercises 'authority and control' over the persons on the vessel and thus 'jurisdiction' for human rights purposes. Thus, if a coastal state engages in such practices at a distress scene, this would arguably bring those to be rescued within its jurisdiction. It has indeed been reported, that there were incidents in which the Libyan Coast Guard exercised coercion on NGO vessels in order to force their departure from a distress scene or to hand over rescued migrants. This occurred for example on 26 September 2017 to a vessel of *Mission Lifeline*, when the Libyan Coast Guard fired shots into the water and air close to the NGO vessel which had previously rescued a group of migrants and set course for Italy. Similarly amounting to an exercise of effective control may be the use of intimidation tactics, such as the positioning of a large naval vessel next to an NGO vessel.[83]

Establishing human rights jurisdiction is more complicated when a coastal state's agents are not physically present at the distress scene on the high seas. What if all the MRCC does is using a phone call to instruct the NGO not to proceed or assist? What if the instruction or request comes from a coast guard vessel within sight but still a few miles away from the scene? Some have argued that nearby physical presence – even without using force – can constitute effective control.[84] Others have argued that being both aware of a situation and in a position to save lives activates due diligence obligations, even when the traditional legal bases for jurisdiction are missing.[85] These arguments,

80 For a general discussion, see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties – Law, Principles, and Policy* (OUP 2011) 160-63, 168-69 and 193; Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) Leiden Journal of International Law 857, 874-76. For a discussion of extraterritoriality specifically related to asylum, see *inter alia* den Heijer (n 50) 15-56 and 240-54, Moreno-Lax (n 50) Ch 8; Mariagiulia Giuffré, 'Access to Asylum at Sea? Non-Refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations' in Moreno-Lax and Papastavridis (eds) (n 52) 248-75; Papastavridis (n 60) 302-08.

81 *Rigopoulos v Spain* App no 37388/97 (ECtHR, 12 January 1999); *Medvedyev v France* App no 3394/03 (ECtHR, 29 March 2010) paras 66-67; *Hirsi Jamaa v Italy* App no 27765/09 (ECtHR, 23 February 2012).

82 *Xhavara v Italy and Albania* App no 39473/98 (ECtHR, 11 January 2001).

83 This scenario would resemble the *Women on Waves* case in which naval presence in the combination of threatening with prosecution was used to keep the NGO vessel away from Portuguese territorial waters. See *Women on Waves v Portugal* (n 47) para 9. At no point did Portugal contest that it had exercised jurisdiction.

84 Paolo Biondi, 'Italy Strikes Back Again: A Push-Back's Firsthand Account' (*Border Criminologies*, 15 December 2017) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/12/italy-strikes > accessed 27 January 2018. Compare: Papastavridis (n 45) 28. See also Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar forthcoming).

85 Vassilis P Tzevelekos and Elena Katselli Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) 86 Nordic Journal of International Law 427, 455 and 463.

however, have not yet been confirmed in human rights law adjudication.[86]

4.2.2 Instructions concerning transfers and disembarkation

The SAR Convention requires that persons retrieved from the water are disembarked to a place of safety.[87] This, legally speaking, terminates a rescue operation. The MRCC in whose SRR the distress situation is dealt with, is primarily responsible to ensure that coordination and cooperation occurs with a view to finding a place for disembarkation.[88] However, it is unclear how much discretion coastal states enjoy in determining, first, *who* carries out the disembarkation and, second, *where*.

Smaller NGO vessels, for lack of physical space, focus on first response to emergencies by providing life vests, drinking water, and urgent medical treatment. Often, they do not take migrants on board but wait for larger and faster ships to transport them to dry land.[89] This allows them to conduct further rescue operations in the area. However, the Italian Code of Conduct, for example, envisages that NGOs do not transfer rescued persons to other vessels unless authorised by the competent MRCC (see above Section 2.2.1). Thus, the question arises whether coastal states may prohibit these transfers and instead oblige a vessel to complete a rescue operation by disembarking the persons in distress on land.

It should be noted that there exists no legal provision entitling coastal states to prohibit transfers of rescued persons. To the contrary, the SAR regime urges coastal states to release assisting vessels from their obligations as soon as possible.[90] Moreover, in some situations, prohibiting transfers risks endangering the safety of a vessel, its crew, or its passengers. This is the case, for instance, where the number of persons rescued exceeds the capacity of a vessel. Similarly, speedy disembarkation may be essential to safeguard the well-being of rescued persons, in particular where the latter need urgent medical attention. In these situations, prohibiting transfers to larger and/or faster vessels runs counter the SAR regime.[91]

The second ambiguity concerns the question of discretion of the coastal state in determining *where* disembarkation should take place. Can a coastal state oblige an NGO vessel to disembark persons at a place the NGO considers unsafe, for example because of human rights violations occurring within that territory? In the present context, it is noteworthy that an earlier draft of the Italian Code of Con-

86 An interesting test case in this regard is the recent application against Italy at the ECtHR of seventeen survivors of the above mentioned 6 November 2017 incident with the NGO *Sea Watch*. GLAN, 'Legal action against Italy over its coordination of Libyan Coast Guard pull-backs resulting in migrant deaths and abuse' (8 May 2018) <www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse> accessed 10 May 2018.

87 SAR Convention, section 1.3.2.

88 SAR Convention, section 3.1.9.

89 See also Section 1 above.

90 See for example SAR Convention, section 3.1.9; IMO Guidelines (n 14) section 3.1.

91 See for example UNCLOS, art 98(1), which sets out that a duty to assist exists only if and to the extent it does not endanger the safety of the vessel, the crew, or the passengers; See also IMO Guidelines (n 14) para 6.11.

duct set out that a failure to comply with the commitments set out therein 'may result in the refusal by the Italian State to authorize the access to national ports, subject to compliance with the existing international conventions'.[92] However, this was later modified, the final version merely setting out that failures to subscribe to or comply with the commitments in the Code of Conduct may result in the adoption of 'measures addressed to the relevant vessels' by Italian authorities.[93]

The Guidelines on the Treatment of Persons Rescued at Sea specify that a 'place of safety' is a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.[94] In addition, human rights law creates limits on the choice of the place of disembarkation.[95] Whilst these do not apply to NGOs, they do bind states, provided they exercise jurisdiction over the rescued persons (see also above Section 4.2.1). If human rights law is applicable in a specific case, firstly, the principle of *non-refoulement* prohibits disembarking persons at a place where they may face torture or inhuman or degrading treatment or punishment.[96] Secondly, the prohibition of collective expulsion requires there to be an assessment of the individual circumstances of the persons rescued before disembarkation.[97] As a result, coastal states may not oblige NGO vessels within their jurisdiction to disembark the rescued persons in contravention of either of these prohibitions.

5. Conclusion

This article examined the legal framework of the search and rescue activities of NGOs in the Mediterranean. It set out to analyse two questions: First, are NGOs free to navigate anywhere in order to render assistance to migrants? The analysis showed that a coastal state has no legal basis to impede NGOs from conducting search and rescue of migrants in its territorial sea. Even less are states entitled to restrict NGOs' access to the high seas or the territorial sea of another state.

Essentially, NGO vessels that render assistance to migrants in distress at sea have a right of innocent passage through the territorial sea of coastal states. In line with the regime on innocent passage, a coastal state can only limit foreign vessels' entry to or presence in its territorial sea when the foreign vessels do not pass in a continuous and expeditious manner or do so in a way prejudicial to peace, good order, or security of the coastal state. Entry into territorial waters in order to assist vessels in distress constitutes neither of those two. Most importantly, the regime of innocent passage has to be

92 For the draft version, see above n 18.

93 Section 2.2.1.

94 IMO Guidelines (n 14) para 6.12; See also Jasmine Coppens and Eduard Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?'(2010) 25 International Journal of Marine and Coastal Law 377, 378-79.

95 It should be noted that the IMO Guidelines (n 14) para 6.17 mentions human rights for asylum-seekers and refugees merely as a consideration. For a discussion on the effects of human rights law on options for the disembarkation of rescued migrants, see Kristof Gombeer, 'Human Rights Adrift? Enabling the Disembarkation of Migrants to a Place of Safety in the Mediterranean' (2015) 10 Irish Yearbook of International Law 31-40.

96 See in particular Article 3 ECHR and the case law of the ECtHR on this question, most notably *Hirsi Jamaa v Italy* (n 81). Note that *refoulement* of those risking persecution is also prohibited under the 1951 Refugee Convention.

97 *Hirsi Jamaa v Italy* (n 81) para 166. For the requirement of individual assessment, see also *Khlaifia v Italy* App no 16483/12 (ECtHR, 15 December 2016) paras 237-40; *ND and NT v Spain* App nos 8675/15 and 8675/15 (ECtHR, 3 October 2017) paras 98-99 [referred to the Grand Chamber on 29 January 2018].

interpreted in light of the object and purpose of UNCLOS, including its humanitarian objectives, and in line with international human rights law, in particular the right to leave and the right to life. It is predominantly for that reason that the grounds on which coastal states may rely on to restrict foreign vessels' passage through their territorial sea cannot be invoked against NGO vessels conducting search and rescue operations. Unsurprisingly, if coastal states have no legal basis to prohibit NGOs from rendering assistance to migrants in distress within their territorial sea, there is also no legal basis to do so on the high seas, where vessels of any state enjoy freedom of navigation. Moreover, a coastal state may not prohibit access to the territorial sea of a third state, where the latter alone enjoys sovereignty. This means, on the one hand, that recent practices by the Libyan Coast Guard to impede NGO vessels from rendering assistance on the high seas are not in conformity with the law of the sea. In a similar vein, attempts by Italy to restrict NGO vessels' access to the Libyan territorial sea through the respective commitment in the Italian Code of Conduct have no basis in international law.

The second question analysed in this article was whether coastal states can give NGOs binding instructions concerning, on the one hand, whether and how to conduct search and rescue and, on the other, where to disembark the persons rescued. The analysis showed that national legislation that renders a coastal state authority's instructions legally binding within its territorial sea raises no particular challenges under international law, essentially because coastal states can exercise full sovereignty within that area. However, this is different outside the territorial sea. No state may claim sovereignty over the high seas, a rule which remains unaffected by the SAR regime. Since all vessels within that area thus remain under the exclusive jurisdiction of their flag state, instructions by a state assuming search and rescue responsibility are not binding under international law and can only be conceived as requests for cooperation. In this vein, regardless of the legal nature of the Italian Code of Conduct as such, the commitment requiring NGOs to abide by the instructions of the competent MRCC without stipulating a geographical limitation cannot be understood to create a legally binding obligation to follow these instructions outside the territorial sea.

The analysis also showed that international law, more specifically the SAR regime as well as international human rights law, place restrictions on the content of instructions. In other words, some instructions violate international law. This concerns in particular two types of instruction. First, NGOs have in the recent past reportedly been instructed *not* to proceed to a distress scene, or to *refrain* from assisting when already there. Both instructions are typically not in compliance with the SAR regime. This is because they run counter the body of rules designed to prevent loss of life, in particular provisions ensuring speedy arrival at a distress scene and effective on-scene coordination. Moreover, an instruction *not* to assist may additionally violate the right to life of those in distress, provided they find themselves within the territorial sea or otherwise within the jurisdiction of the instructing state.

Second, states have attempted to determine *who* carries out the disembarkation and *where*. It was found that prohibiting transfers from smaller NGO vessels to larger and/or faster vessels (as, for instance, the Italian Code of Conduct does) will often run counter the SAR regime, in particular where transfers would ensure the safety of the vessel's crew and passengers or guarantee speedy disembarkation. In contrast, coastal states have more discretion in determining the place of disembarkation, as long as this does not contravene their human rights obligations, in particular the principle of *non-refoulement* and the prohibition of collective expulsion.

Appendix: Code Of Conduct For NGOs Undertaking Activities In Migrants' Rescue Operations At Sea

Migration pressure on Italy does not seem to diminish and indeed is even more impressive than last year, as recognized by the Institutions of the European Union and its Member States.

In this context, the main objective of the Italian Authorities in rescuing migrants is the protection of human life and the rights of the people, in full respect of international conventions. Nevertheless, the rescuing activity cannot be separated from a reception path, sustainable and shared with other Member States, in accordance with the principle of solidarity referred to in Article 80 of the TFEU.

On the occasion of the Informal meeting of the Justice and Home Affairs Ministers, held on 6th July in Tallinn under the Estonian Presidency, the EU's Interior Ministers welcomed the initiative of the Italian authorities to ensure that NGO's vessels involved in Search and Rescue (SAR) activities operate within, and abide by, a set of clear rules, in the form of a code of conduct to be urgently finalised by the Italian authorities, in consultation with the Commission and in cooperation with the relevant stakeholders, including the NGOs themselves. The Italian initiative was also included in the "Action Plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity" submitted by the European Commission on 4thJuly.

The Italian Authorities and the signatory NGOs carrying out SAR activities thus share the need to provide for specific arrangements to address the complexity of rescue operations in the Mediterranean Sea, in compliance with this Code of Conduct, also safeguard the security of migrants and operators.

The NGOs that subscribe to this Code of Conduct undertake the following commitments:

- **in accordance with relevant international law, commitment not to enter Libyan territorial waters, except in situations of grave and imminent danger requiring immediate assistance and not to obstruct Search & Rescue by the Libyan Coast Guard:** *with a view not to hinder the possibility for the competent National Authorities to intervene in their territorial waters, in compliance with international obligations;*
- **commitment to respect the obligation not to turn off or delaying the regular transmission times of AIS (Automatic Identification System) and LRIT (Long Range Identification and Tracking) signals, whenever on board (Chap. V SOLAS):** *in order to ensure safety of navigation and security of vessels, including those not involved in the search and rescue event but navigating in proximity of the area, where the event itself takes place;*
- **commitment not to make communications or send light signals** to facilitate the departure and embarkation of vessels carrying migrants, without prejudice to the communications that are necessary in the course of SAR events to preserve the safety of life at sea: *with the intention not to facilitate contacts with migrant smugglers and/or traffickers;*

- **commitment to communicate to the competent MRCC the technical suitability (regarding the vessel, its equipment and the crew's training) for rescuing activities, without prejudice to the applicable domestic and international provisions regarding seaworthiness of vessels and other technical conditions necessary to operate ships:** *NGOs are requested to be equipped with instruments and resort to personnel whose technical suitability and capabilities in mass rescue operations under all conditions are ascertained. This is required in order to guarantee their professional know-how in rescuing activities. Such a commitment concerns, inter alia, the need for providing the ship's master with proper information on stability, on- board reception capacity, individual and collective safety equipment, crew's specific training and relevant capability certification, security aspects, on board hygienic and habitability conditions, preservation capacity of possible corpses. All of the above is without prejudice to the provisions of Article IV (force majeure cases) and Article V (people transportation in emergency situations) of SOLAS;*

- **commitment to ensure that when SAR cases occur where no official SRR is established, the ship's master immediately notifies the competent Authorities of the flag States for security purposes and the MRCC competent for the nearest SRR as "better able to assist", except in case the latter expressly refuses or doesn't respond:** *information to the flag State qualifies more as a commitment, while notification to the competent MRCC recalls an existing obligation of international law;*

- **commitment to respect the obligation under international law to keep constantly updated the competent MRCC or the OSC (On Scene Coordinator) appointed by the latter as to the ongoing scenario and the developments of rescuing operations,** as well as all the information regarding SAR or navigation security;

- **commitment not to transfer those rescued on other vessels,** except in case of a request of the competent MRCC and under its coordination also based on the information provided by the ship's master: *after the embarkation of survivors, NGO vessels should as a rule complete the operation by disembarking survivors in a safe port under the coordination of the responsible MRCC, except in situations recalled above;*

- **commitment to ensure that the competent Authorities of the flag State are constantly kept updated** on the activities undertaken by the vessel and immediately notified of any relevant event concerning "maritime security", in compliance with the principle of flag State jurisdiction under UNCLOS and other applicable rules of international law;

- **commitment to cooperate with the competent MRCC, executing its instructions and informing** it in advance of any initiative undertaken independently because it is deemed necessary and urgent;

- **commitment to receive on board, possibly and for a period which is strictly necessary, upon request by the competent National Authorities, judicial police officers for information and evidence gathering with a view to conducting investigations related to migrant smuggling and/or trafficking in human beings, without prejudice of the ongoing humanitarian activity.** The above is withoutprejudice to the exclusive jurisdiction of the flag State on the vessel under UNCLOS and other applicable rules of international law, to the competences of the shipmaster and to the different mandates and competences of the legal entities involved as provided under national and international law, with which police officers do not, and shall not, interfere: *allowing access on board of their naval assets, upon request by the competent National Authorities, of police personnel who will conduct preliminary inquiries and investigations, also following specific indications by the competent Judicial Authority;*

- **commitment to declare, in conformity with legislation of the flag State, to the competent authorities of the State where NGO is registered, all sources of financing** for their rescuing activity at sea and to communicate, upon request, such information to the Italian authorities, in accordance with the principles of transparency;

- **commitment to loyal cooperation with the Public Security Authority of the migrants' intended place of disembarkation,** including by transmitting relevant information of interest for investigation purposes to the Italian Police Authorities, within the respect of international refugee and data protection law and of the different mandates and competences of the legal entities involved as provided under national and international law: *such an obligation will result, by way of example and not limited to, in a commitment to provide - at least two hours before the arrival at the port - the documents that should be completed during the phases of rescue and journey to the port, after the primary assistance activities - i.e. the "maritime incident report" (summary document of the event) and the "sanitary incident report" (summary document of health situation on board);*

- **commitment to collect, during the activities, once migrants are rescued and if possible, the makeshift boats and the outboard engines used by migrants' traffickers/smugglers and commitment to immediately notify the ICC (International Coordination Centre) of the Triton Operation; the coordinating MRCC shall anyway be informed on the aspects relating to navigation security and pollution risks:** *such a commitment is an important way of cooperating with the EU Triton Operation and the competent national Authorities against traffickers and smugglers, as well as with the MRCC for information on navigation security and pollution risks.*

Failure to subscribe to this Code of Conduct or to comply with the commitments set out therein may result in the adoption by the Italian Authorities of measures addressed to the relevant vessels, in compliance with applicable domestic and international law and as required in the public interest of saving human lives while guaranteeing shared and sustainable reception of migration flows.

Any failure to comply with the commitments set out in this Code of Conduct will be communicated by the Italian Authorities to the flag State and to the State where the NGO is registered.

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Migration in the Mediterranean: Exposing the Limits of Vulnerability at the European Court of Human Rights

*Ben HUDSON**

Abstract

In recent years, the European Court of Human Rights (ECtHR) has been increasingly called upon to settle disputes pertaining to migration in the Mediterranean. This article examines the developments in the ECtHR's pertinent case law through the lens of vulnerability, a concept that offers much potential for developing the Convention on Human Rights in response to new challenges, such as those posed by the so-called 'migration crisis'. By drawing upon literature from law, legal theory and (bio)ethics, this article will show that while the ECtHR is amenable to the recognition of vulnerability in its inherent, situational and pathogenic forms, the Court's actual application of the concept both belies this sophistication and squanders its potential. Indeed, despite widespread condemnation of the traditional, categorical conceptualisation of vulnerability, the ECtHR continues to rely on this simplistic and arguably invidious approach. As such, while the ECtHR may have extended vulnerability's reach within its case law, it has nevertheless failed to recognise and effectively respond to the lived vulnerability of all who undertake hazardous journeys across the Mediterranean Sea, irrespective of the reason or reasons for their migration.

Keywords: vulnerability, migration, Mediterranean, European Court of Human Rights, ECtHR, asylum, *Khlaifia v Italy*

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1. Introduction

Vulnerability is a ubiquitous yet highly contested concept. It has been characterised in literature as both universal and categorical, as enduring yet situational, as variable, occurrent, dispositional, pathogenic, layered, and more. In recent years, the European Court of Human Rights (ECtHR or Court) has drawn upon the complex concept of vulnerability with greater frequency.[1] Simultaneous to this, the ECtHR has been called upon to adjudicate an increasing number of disputes within the Mediterranean migration context. It was with the Grand Chamber's landmark judgment in *M.S.S. v Belgium and Greece*[2] that the two collided. In *M.S.S.*, the Court for the first time accepted that

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1 Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Fineman and Anna Grear (eds), Vulnerability: Reflections on a New Ethical Foundation for Law and Politics (Routledge 2014) 111.

2 *M.S.S. v Belgium and Greece* [GC] App no 30696/09 (ECtHR, 21 January 2011).

asylum-seekers are 'particularly vulnerable'[3] by virtue of 'the vulnerability inherent in [their] situation',[4] and therefore deserving of 'special protection' under the European Convention on Human Rights (ECHR).[5] Yet, while *M.S.S.* may have further extended vulnerability's reach into the arena of cross-border migration, the Grand Chamber's late-2016 judgment in *Khlaifia and Others v Italy*[6] brought this extension to an abrupt halt. In *Khlaifia*, the Grand Chamber declined to recognise as vulnerable all those undertaking hazardous journeys across the Mediterranean, irrespective of the reasons for their migration, even though the Chamber took this position in its judgment in the case 15 months prior.[7] For the Grand Chamber, the journey, taken alone, was simply insufficient to establish particular vulnerability under the ECHR.

While regrettable, this outcome does not come as much of a surprise. As this article will show, the outcome is the natural, if flawed, result of the Grand Chamber continuing to latch onto a simplistic, outdated, and arguably prejudicial, understanding of vulnerability, one which views individual vulnerability as contingent upon membership of an accepted vulnerable sub-population group. The consequence of the Grand Chamber's refusal to fully embrace and apply a dynamic, more situational conceptualisation of vulnerability is two-fold. While this approach has reaffirmed the particular vulnerability of asylum-seekers, it has done so at the expense of the recognition of the lived vulnerability that is nonetheless experienced by those migrants who, having crossed the Mediterranean by precarious means, do not then go on to claim asylum in Europe. This leaves non-asylum-seeking migrants particularly exposed, as it maintains their position at the very fringes of international human rights law,[8] despite weighty humanitarian grounds for recognising the situational vulnerability that they experience on account of the journey.[9]

This article will begin by surveying the literature on vulnerability (Section 2), drawing upon the apparent 'paradox' of vulnerability as both categorical and universal,[10] and examining analytical approaches that seek to more closely identify, understand and classify types and sources of vulnerability. Second, attention will turn to the ECtHR's understanding and use of the vulnerability concept both in general and in the context of the ongoing so-called 'migration crisis' (Section 3). The discussion will draw on the emergence in *M.S.S.* of a two-pronged test of vulnerability tailored to the migration context (Section 3.2). This nascent test will be considered in the light of insights drawn from

3 ibid para 232.

4 ibid para 233.

5 ibid para 251.

6 *Khlaifia and Others v Italy* [GC] App no 16483/12 (ECtHR, 15 December 2016).

7 *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 1 September 2015) para 135.

8 Sylvie Da Lomba, 'Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights' (2014) 21(4) European Journal of Health Law 339, 342.

9 Amnesty International, *Hotspot Italy: How EU's Flagship Approach leads to Violations of Refugee and Migrant Rights* (Amnesty International 2016) 32.

10 Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) International Journal of Constitutional Law 1056, 1058.

literature, and its application by the Court in the *Khlaifia* judgments will then be explored (Section 3.3). Examining and contrasting the differing conceptualisations of vulnerability advanced by the Chamber and the Grand Chamber, will elucidate and problematise the ECtHR's approach(es) to and application of migrant vulnerability. The discussion will conclude (Section 4) with reflections on the repercussions for the human rights protection of both asylum-seeking and non-asylum-seeking migrants, and thoughts on what this means for the ECtHR's capacity to respond effectively to the 'new challenge[s]'[11] posed by increased migratory flows arriving at the borders of Europe by sea.

The work of Beduschi, Da Lomba, Flegar, Peroni and Timmer will be drawn upon throughout, as each has successfully linked the concept of vulnerability with human rights practice by means of exploring the jurisprudence of the ECtHR. However, insights will also be drawn from farther afield, specifically from (bio)ethics, as scholars in this and connected disciplines have been grappling with these very issues for some time, and as will be shown, such insights can prove particularly fruitful for the study of vulnerability and the law.[12]

2. Approaching vulnerability as a concept

References to vulnerability are found in popular discourse, law, policy and scholarship on a broad range of subject matters. Yet, as a concept, it enjoys little in the way of consensus, instead being characterised by ambiguity and multiplicity.[13] While much of the literature either explicitly or implicitly speaks of vulnerability as a universal characteristic of the human condition, within legal and policy frameworks vulnerability is often employed as a label,[14] most commonly attributed to an individual pursuant to their 'membership' of a distinct sub-population group that is categorised as 'vulnerable'.[15] As defined by Nickel, a vulnerable population is 'a group of persons who, in virtue of some feature they share… are deserving of special protections'.[16] Such features may include, *inter alia*, a susceptibility to exploitation or harm, an inability to protect or safeguard one's own interests, unequal op-

11 *Khlaifia* [GC] (n 6) para 241.

12 Indeed, Kenneth Kipnis, a leading vulnerability and ethics scholar, has expressly stated that work such as his, which is strictly concerned with the vulnerability of research subjects and not with what he terms 'everyday vulnerabilities', 'surely has an importance extending beyond the boundaries of research ethics'. See Kenneth Kipnis, 'Seven Vulnerabilities in the Pediatric Research Subject' (2003) 24(2) Theoretical Medicine and Bioethics; and Kenneth Kipnis, 'Vulnerability in Research Subjects: A Bioethical Taxonomy', in National Bioethics Advisory Commission, *Ethical and Policy Issues in Research Involving Human Participants* (National Bioethics Advisory Commission, 2001).

13 Sana Loue and Bebe Loff, 'Is there a Universal Understanding of Vulnerability? Experiences with Russian and Romanian Trainees in Research Ethics' (2013) 8(5) Journal of Empirical on Human Research Ethics 17, 17.

14 Florenica Luna, 'Elucidating the Concept of Vulnerability: Layers not Labels' (2009) 2(1) International Journal of Feminist Approaches to Bioethics 121, 123.

15 Florencia Luna and Sheryl Vanderpoel, 'Not the Usual Suspects: Addressing Layers of Vulnerability' (2013) 27(6) Bioethics 325, 326.

16 Philip Nickel, 'Vulnerable Populations in Research' (2006) 27(3) Theoretical Medicine and Bioethics 245, 245.

portunity, or a lack of basic rights.[17] This traditional, categorical approach can be seen, for instance, in the 2013 European Union (EU) Reception Conditions Directive,[18] Article 21 of which provides a non-exhaustive list of categories of persons who are considered vulnerable. These include, *inter alia*, (unaccompanied) minors, persons with disabilities, pregnant women, victims of human trafficking, and persons who have been subjected to serious forms of violence.[19]

A similar reliance on the listing of vulnerable groups has been characterised by Bracken-Roche and others as 'rampant' within research ethics policies and guidelines, especially those in the health sciences.[20] A case in point are the 2002 Council for International Organizations of Medical Sciences (CIOMS) International Ethical Guidelines for Biomedical Research Involving Human Subjects.[21] The 2002 CIOMS Guidelines refer frequently to vulnerable groups or 'classes'.[22] Particular attention is given to what Luna has termed 'a list of usual suspects',[23] which includes children,[24] persons with mental or behavioural disorders,[25] prisoners, homeless persons and refugees.[26] As expressed in Nickel's definition, designation as 'vulnerable' is important in a research setting because it affords such groups special protections and services not commonly available to the general population.[27] Indeed, in the words of Ruof, 'vulnerability is an abstract concept that has concrete effects both for those labelled vulnerable and for those not'.[28] The same is true in law. Recognition as a vulnerable person for the purpose of the EU Reception Conditions Directive is critical for anyone seeking to rely on its provisions because '[o]nly vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with [the] Directive'.[29]

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17 Angela Martin, Nicolas Tavaglione and Samia Hurst, 'Resolving the Conflict: Clarifying 'Vulnerability' in Health Care Ethics' (2014) 24(1) Kennedy Institute of Ethics Journal 51, 52.

18 Directive 2013/33/EU of 26 June 2013 laying down the standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (Reception Conditions Directive).

19 ibid art 21.

20 Dearbhail Bracken-Roche, Emily Bell, Mary Ellen Macdonald and Eric Racine, 'The Concept of 'Vulnerability' in Research Ethics' (2017) 15(8) Health Research Policy and Systems 8, 15.

21 CIOMS, *International Ethical Guidelines for Biomedical Research Involving Human Subjects* (3rd edn, CIOMS 2002). The Guidelines are prepared by CIOMS in collaboration with the World Health Organization (WHO).

22 ibid 64-66. Guideline 13: Research involving vulnerable persons (commentary).

23 Florencia Luna and Sheryl Vanderpoel, 'Not the Usual Suspects: Addressing Layers of Vulnerability' (2013) 27(6) Bioethics 325, 325.

24 CIOMS (n 21) 66-69. Guideline 14: Research involving children (commentary).

25 ibid 70-72. Guideline 15: Research involving individuals who by reason of mental or behavioural disorders are not capable of giving adequately informed consent (commentary).

26 ibid 64-66. Guideline 13: Research involving vulnerable persons (commentary).

27 Mary Ruof, 'Vulnerability, Vulnerable Populations, and Policy' (2004) 14(4) Kennedy Institute of Ethics Journal 411, 411.

28 ibid 412.

29 Reception Conditions Directive (n 18) art 22(3).

For many scholars, categorical attributions of vulnerability are fundamentally flawed. Critics denounce the approach for its exclusivity,[30] its rigidity,[31] its superficiality,[32] its ambiguity,[33] and for its reliance on a conceptual understanding of vulnerability that is both simplistic[34] and vague.[35] Levine and others put forward a particularly powerful critique of the flaws of the categorical vulnerability approach, and, more broadly, of the utility of the term 'vulnerable' itself.[36] They raise three basic problems. First, the traditional understanding of vulnerability as categorical is too broad, as 'so many categories of people are now considered vulnerable that virtually all potential human subjects are included'.[37] Second, it is simultaneously too narrow, as exclusively emphasising group characteristics diverts attention away from contextual features.[38] Third, it stereotypes, thereby essentialising entire groups through its failure to take into consideration pertinent differences that do exist between individuals within a particular group.[39] As Aultman and others warn, to assign individuals to a particular group in this way can itself lead to exploitation and harm,[40] as those who are labelled as vulnerable risk being stigmatised[41] and becoming subject to 'paternalistic protections' that are 'premised on the assumption that the vulnerable are incapable of protecting themselves'.[42] Moreover, the failure of the categorical approach to see the individual not only stereotypes and essentialises within recognised vulnerable groups,[43] but also has the effect of obscuring and denying protection for those who experience harm on account of other, unrecognised, vulnerabilities, such as poverty.[44] This therefore calls into question the reliability of the categorical approach in identifying vulnerability and in protecting vulnerable individuals from harm.[45]

Yet, perhaps the most incising criticism comes from legal theory. The criticism advanced is that vulnerability cannot be viewed as categorical for it is universal. In contrast to the categorical approach of seeing pockets of vulnerability amongst an otherwise invulnerable general human population,

30 Da Lomba (n 8) 344.

31 Luna and Vanderpoel (n 23) 326.

32 Bracken-Roche and others (n 20) 15-16.

33 Kipnis (n 12) G1.

34 Luna and Vanderpoel (n 23) 326.

35 Debra DeBruin, 'Looking Beyond the Limitations of "Vulnerability": Reforming Safeguards in Research' (2004) 4(3) The American Journal of Bioethics 76, 76.

36 Carol Levine, Ruth Faden, Christine Grady, Dale Hammerschmidt, Lisa Eckenwiler and Jeremy Sugarman, 'The Limitations of "Vulnerability" as a Protection for Human Research Participants' (2004) 4(3) The American Journal of Bioethics 44.

37 ibid 46.

38 ibid.

39 ibid 47.

40 Julie Aultman, 'Vulnerability: Its Meaning and Value in the Context of Contemporary Bioethics' (2014) 14(12) The American Journal of Bioethics 15, 16.

41 Florencia Luna, 'Vulnerability, an Interesting Concept for Public Health: The Case of Older Persons' (2014) 7(2) Public Health Ethics 180, 182.

42 DeBruin (n 35) 77.

43 Da Lomba (n 8) 343.

44 Aultman (n 40) 16.

45 Levine and others (n 36) 44.

for Fineman and for many others, vulnerability is 'a universal, inevitable, enduring aspect of the human condition'.[46] To be human is to be vulnerable, and to be vulnerable is to be in 'a state of constant possibility of harm'.[47] Vulnerability cannot therefore be seen as something associated with only certain population groups;[48] indeed, the very idea of human invulnerability is exposed as a fallacy.[49] Yet Fineman's thesis, while emphasising universality, also recognises vulnerability's particularity.[50] Specifically, an individual's experience of vulnerability is unique for it is influenced simultaneously by both one's distinctive position 'within a web of economic and institutional relationships' and one's access to and possession of resources.[51]

Still, the universal approach itself is not immune to criticism. While the categorical approach has been branded as exclusive, the universal approach has been criticised for being over-inclusive. In the most stinging critique, Levine and others assert that '[i]f everyone is vulnerable then the concept becomes too nebulous to be meaningful'.[52] For Luna, the universal 'existential approach' is as dangerous as the categorical 'essentialist approach' because both risk 'naturalising' vulnerability, in other words, 'if everyone is equally and essentially vulnerable, no one is *specifically* vulnerable'.[53] The universal approach has therefore been denounced for neither 'acknowledg[ing] the special perils faced by some'[54] nor providing an adequate explanation for why special protection is in practice not afforded to all.[55] In this connection, Hurst argues simply that '[a] definition that includes humanity itself… cannot provide reason for *special* protection'.[56]

While it has been argued that there is 'no inherent impediment' to reconciling the categorical and universal approaches at a conceptual level,[57] at the practical level this has proven far less straightforward.[58] Within the (bio)ethics literature, scholars including Luna, and Rogers, Mackenzie and Dodds, have turned to analytical approaches in an effort to bring greater nuance to the theory of vulnerability,[59] and to thereby operationalise it as a 'conceptual tool'.[60] Such analyses seek to focus more precisely on identifying characteristics that can render individuals vulnerable, in other words,

46 Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law & Feminism 1, 8.

47 ibid 11.

48 Timmer (n 1) 112.

49 Martha Albertson Fineman and Anna Grear, 'Introduction: Vulnerability as Heuristic – An Invitation to Future Exploration' in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2014) 11.

50 Fineman (n 46) 10.

51 ibid.

52 Levine and others (n 36) 46.

53 Luna (n 41) 182 (emphasis in original).

54 DeBruin (n 35) 76.

55 Martin and others (n 17) 52.

56 Samia Hurst, 'Vulnerability in Research and Health Care; Describing the Elephant in the Room?' (2008) 22(4) Bioethics 191, 192 (emphasis in original).

57 Peroni and Timmer (n 10) 1060; Da Lomba (n 8) 349.

58 Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Introduction' (2012) 5(2) International Journal of Feminist Approaches to Bioethics 1, 2.

59 Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5(2) International Journal of Feminist Approaches to Bioethics 11, 26.

60 Luna (n 14) 123.

its sources,[61] and assessing their impact.[62] Such characteristics, or 'vulnerability markers',[63] include not only personal characteristics of the individual, but also the nature of one's social, legal, political and economic environment,[64] which together help emphasise both vulnerability's relationality[65] and mutability.[66]

Of particular utility in the migration at sea context is the vulnerability taxonomy proposed by Rogers, Mackenzie and Dodds.[67] Their approach seeks to identify and classify sources of vulnerability and associated duties that exist towards those recognised as vulnerable.[68] The taxonomy is formed of three overlapping kinds of vulnerability. These are inherent, situational, and pathogenic vulnerability,[69] all of which are present in the migration at sea context.

The first, inherent vulnerability, echoes Fineman's thesis. It is concerned with vulnerabilities that 'arise from our corporeality, our neediness, our dependence on others, and our affective and social natures', in other words, vulnerabilities inherent in the human condition.[70] The second, situational sources, are context-specific. They are 'caused or exacerbated by the personal, social, political, economic, or environmental situation of a person or social group'.[71] Such sources may exist either in the short or long term and may occur either once or on multiple occasions.[72] The third, pathogenic sources, emanate from 'dysfunctional social or personal relationships',[73] in other words from relationships characterised by, *inter alia*, prejudice, abuse, persecution or injustice.[74] Pathogenic vulnerabilities may also occur when well-intended protection policies either exacerbate existing vulnerabilities[75] or generate new vulnerabilities.[76] Rogers, Mackenzie and Dodds then take their taxonomy one stage further by arguing that these three sources of vulnerability can be experienced in one of

61 Margaret Meek Lange, Wendy Rogers and Susan Dodds, 'Vulnerability in Research Ethics: A Way Forward' (2013) 27(6) Bioethics 333, 335.

62 Rogers and others, 'Why Bioethics Needs a Concept of Vulnerability' (n 59) 16; DeBruin (n 35) 77.

63 Meek Lange and others (n 61) 334.

64 Franck Duvell, Anna Triandafyllidou and Bastian Vollmer, 'Ethical Issues in Irregular Migration Research in Europe' (2010) 16(1) Population, Space and Place 227, 232.

65 Luna (n 14) 129; Meek Lange and others (n 61) 335.

66 DeBruin (n 35) 77.

67 Rogers and others, 'Why Bioethics Needs a Concept of Vulnerability' (n 59) 24.

68 Meek Lange and others (n 61) 336 and 340.

69 Rogers and others, 'Why Bioethics Needs a Concept of Vulnerability' (n 59) 24.

70 ibid.

71 ibid.

72 ibid.

73 Meek Lange and others (n 61) 336.

74 ibid.

75 Rogers and others, 'Why Bioethics Needs a Concept of Vulnerability' (n 59) 25.

76 Meek Lange and others (n 61) 336.

two states – either dispositionally or occurrently.[77] To take being at sea as an example.[78] All human beings are dispositionally vulnerable at sea, yet most of us will never find ourselves in a situation in which we are occurrently vulnerable at sea. Even when at sea, the vast majority of us will benefit from the safety provided by being on an appropriate seagoing craft. This is in stark contrast to those who find themselves in ill-equipped, overcrowded crafts unsuited to making long journeys across large expanses of water.

In sum, analytical approaches to vulnerability are useful as they not only assist in better integrating the universal and context-specific interpretations of vulnerability,[79] but also provide a way to better direct attention towards what Rogers, Mackenzie and Dodds have called 'more than ordinary vulnerability'.[80] However, it must be borne in mind that although taxonomies may help to provide more 'concrete' guidance, such guidance can only ever be seen as 'general'.[81] While the taxonomy can be utilised as a framework through which to view vulnerability in its many manifestations, the theory does not, and cannot, provide all of the answers, especially when it comes to determining where the threshold lies between 'ordinary' and 'more than ordinary' vulnerability. The decision as to where this threshold lies, and therefore the decision as to who should be owed 'special protection' on account of their vulnerability, rests with the decision-makers. Turning therefore to now look specifically at the ECtHR, the vulnerability taxonomy of Rogers, Mackenzie and Dodds will be used to examine the manner in which the concept of vulnerability has been employed by the Court as a tool to determine who should be owed 'special protection' under the ECHR generally, and in respect to migration specifically.

3. Examining migrant vulnerability at the ECtHR

3.1 Unpacking the ECtHR's general approach to vulnerability

While the term 'vulnerable' has been a feature of the ECtHR's lexicon for decades,[82] the Court has been engaging far more frequently with the concept in recent years.[83] Signalling perhaps an at least implicit appreciation of the universality of human vulnerability,[84] the Court has often used a range

77 Margaret Meek Lange, 'Vulnerability as a Concept for Health Systems Research' (2014) 14(2) Ethical Review of Health Services Research 41, 42.

78 Rogers and others (n 59) give the example of hunger. On page 24, they explain that while all '[a]ll human beings are dispositionally vulnerable to hunger… most of those of us who live in affluent countries are not occurrently vulnerable to life-threatening hunger on a daily basis, unlike a significant proportion of the world's population who lack the resources to supply their daily nutritional needs'.

79 Rogers and others, 'Introduction' (n 58) 3-4.

80 Rogers and others (n 59) 24.

81 Meek Lange and others (n 61) 337.

82 See multiple references to vulnerability in *Dudgeon v UK* App no 7525/76 (ECtHR, 22 October 1981).

83 Veronika Flegar, 'Vulnerability and the Principle of *Non-Refoulement* in the European Court of Human Rights' (2016) 8(2) Contemporary Readings in Law and Social Justice 148, 153.

84 On this point, Peroni and Timmer report that a Strasbourg judge confirmed as much, stating that 'All applicants are vulnerable, but some are more vulnerable than others'. See Peroni and Timmer (n 10) 1060.

of preceding qualifying terms directly prior to the term 'vulnerable'. These have included 'specially',[85] 'highly',[86] 'extremely'[87] and 'particularly',[88] with the latter being especially common.[89] It nevertheless remains somewhat unclear as to when and why an applicant will be deemed 'particularly vulnerable' in the eyes of the Court,[90] the Court having provided neither a precise definition nor a coherent set of vulnerability 'criteria'.[91] Scholarly analyses have though given some insight into how the concept is understood by the Court.

Analysing Timmer's thematisation of the Court's use of the term vulnerable[92] through the lens of the vulnerability taxonomy of Rogers, Mackenzie and Dodds reveals that the Court recognises inherent vulnerabilities, in particular, of children and persons with mental disabilities, as well as situational sources of vulnerability, for instance, being in detention or in a domestic violence setting.[93] Moreover, Timmer identifies in the Court's jurisprudence what she calls 'compounded vulnerability'.[94] On such occasions, the Court recognises an applicant as being vulnerable on multiple grounds, or to use the language of Luna, presenting with multiple layers, which may be both inherent and situational. For example, in *V.C. v Italy*,[95] in finding that the applicant was in a situation of 'particular vulnerability',[96] the Court considered both the applicant's inherent vulnerability as a 15-year-old minor[97] and 'the particular situation of vulnerability, both moral and physical' in which she found herself.[98] Timmer further observes that in some such cases 'compounded vulnerability' may result in a seemingly more pronounced vulnerability, which has been termed by the Court as 'extreme', 'double' or 'great'.[99] This was notably the case in the Court's judgment in *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*.[100] In *Mubilanzila Mayeka*, the Court found that a five-year-old, unaccompanied, irregular migrant was 'in an extremely vulnerable situation',[101] and that there had been a consequent violation of Article 3 on account of her detention for two months in an adult detention facility.[102]

85 *Dudgeon* (n 82) para 62.

86 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC] App no 47848/08 (ECtHR, 17 July 2014) para 104.

87 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) para 55.

88 *Yordanova and Others v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012) para 130.

89 It is, however, important to note that, while in the vast majority of cases the Court has used a preceding qualifying term such as 'particular', its use of such terms is not entirely consistent. For example, in *Kiyutin* (n 112), while the Court unequivocally asserts in paragraph 74 that the applicant, as a person with HIV, 'belonged to a particularly vulnerable group', earlier, in paragraph 64, the Court simply refers to persons living with HIV as 'a vulnerable group'.

90 Flegar (n 83) 157.

91 Da Lomba (n 8) 343.

92 Timmer (n 1) 112.

93 ibid 114-118.

94 ibid 118.

95 App no 54227/14 (ECtHR, 1 February 2018).

96 ibid para 110.

97 ibid para 89.

98 ibid para 110.

99 Timmer (n 1) 118.

100 *Mubilanzila Mayeka* (n 87).

101 ibid paras 55 and 103.

102 ibid paras 50 and 59.

However, although in judgments such as *V.C.* the Court has approached the question of vulnerability in the light of the specific circumstances of the applicant, Timmer, both individually and in her work with Peroni, has emphasised the Court's particular reliance upon 'vulnerable groups',[103] or in other words, the categorical approach, in its vulnerability reasoning. This is especially the case in judgments concerning minority rights and discrimination. In its landmark judgment in *Chapman v UK*,[104] the Court, despite finding no violations of any of the Convention articles raised,[105] explicitly accepted 'the vulnerable position of Gypsies as a minority'.[106] Since *Chapman*, the ECtHR has recognised the vulnerability of other sub-population groups, including, as already mentioned, children[107] and persons with mental disabilities,[108] as well as, in *Kiyutin v Russia*,[109] persons living with HIV.[110] In *Kiyutin*, the ECtHR gave some indication as to the rationale behind its vulnerable groups approach, explaining that 'such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion'.[111] Similarly, in *Alajos Kiss v Hungary*,[112] the Court stated that 'particularly vulnerable group[s] in society… have suffered considerable discrimination in the past'.[113]

While these statements are insightful, they cannot be taken as ultimately determinative of which groups will or will not be considered vulnerable by the ECtHR because not all groups whose vulnerability has been recognised by the Court fit within this particular reasoning, for instance children. Indeed, in respect to children, Timmer pinpoints the Court's references to dependency on others and an inability to complain about abuse as both being sources of their 'inherent and constant' vulnerability.[114]

Identification by the ECtHR as vulnerable is highly important because such recognition can have substantial implications in respect to the level of protection afforded by the Convention. As Beduschi observes, although the ECtHR does not create new obligations *per se*, it does utilise vulnerability 'as a magnifying glass, exposing a greater duty to protect and care imposed upon States'.[115] For example, in *Alajos Kiss*, the Court stated that 'if a restriction on fundamental rights applies to a particularly vulnerable group in society… then the State's margin of appreciation is substantially narrower and

103 Timmer (n 1) 111; Peroni and Timmer (n 10) 1056.

104 [GC] App no 27238/95 (ECtHR, 18 January 2001).

105 ibid paras 116, 120, 125 and 130.

106 ibid para 96.

107 *Okkali v Turkey* App no 52067/99 (ECtHR, 17 October 2006) para 70.

108 *Renolde v France* App no 5608/05 (ECtHR, 16 October 2008) para 84.

109 App no 2700/10 (ECtHR, 10 March 2011).

110 ibid para 64.

111 ibid para 63.

112 App no 38832/06 (ECtHR, 20 May 2010).

113 ibid para 42.

114 Timmer (n 1) 114.

115 Ana Beduschi, 'Vulnerability on Trial: Protection of Migrant Children's Rights in the Jurisprudence of International Human Rights Courts' (2018) 36(1) Boston University International Law Journal 55, 85.

it must have very weighty reasons for the restrictions in question'.[116] In *Chapman*, the Court found there to be a positive obligation on contracting states 'to facilitate the Gypsy way of life',[117] and in *Valiulienė v Lithuania*,[118] the Court stated that 'given the particular vulnerability of women affected by domestic violence, a heightened degree of vigilance was required by the State'.[119]

It is clear therefore that recognition as vulnerable under the Convention has important consequences for the level of protection afforded to certain applicants and for the obligations incumbent upon contracting states. It is also apparent that the Court has, in extending the vulnerability concept to a broader range of applicants relied heavily, albeit not exclusively, on a categorical approach that attaches vulnerability to certain groups.[120] In the light of these general findings, this discussion now turns to examine precisely how the concept of vulnerability has been deployed by the ECtHR in respect to the Mediterranean migration context, chiefly with discussion of the Court's judgments in *M.S.S.* and *Khlaifia*.

3.2 M.S.S. – a nascent test of vulnerability in the Mediterranean migration context

It was in *M.S.S.* that the ECtHR for the first time identified asylum-seekers as 'a particularly underprivileged and vulnerable population group in need of special protection'.[121] *M.S.S.* concerned the treatment of an Afghan male national who, having first entered the EU via Greece, travelled to Belgium, only to then be transferred back to Greece upon attempting to seek asylum in Belgium.[122] The applicant claimed, *inter alia*, that his detention at Athens International Airport and his subsequent living conditions in Greece amounted to inhuman and degrading treatment.[123] In respect to his living conditions, the applicant alleged that he had for months been residing in a 'state of extreme poverty'.[124] In its judgment, the Court attached 'considerable importance' to the fact that the applicant had sought asylum.[125] Specifically, in coming to its finding of a violation of Article 3, the Grand Chamber stated that 'the applicant's distress was accentuated by *the vulnerability inherent in his situation as an asylum-seeker*'.[126]

The *M.S.S.* judgment has been well-received in many quarters.[127] Peroni finds 'the line of reasoning put forward by the majority… opens up the idea of vulnerability to other circumstances and oth-

116 *Alajos Kiss* (n 112) para 42.

117 *Chapman* (n 104) para 96.

118 App no 33234/07 (ECtHR, 26 March 2013).

119 ibid para 51.

120 Timmer (n 1) 114.

121 *M.S.S.* (n 2) para 251.

122 ibid paras 11-12 and 33.

123 ibid paras 205-206 and 235.

124 ibid paras 235-239.

125 ibid para 251.

126 ibid para 233 (emphasis added). Note that the Court here uses the term 'inherent' in respect to all that is inherent in the *status* of an asylum-seeker as opposed to all that is inherent in the human condition, per Rogers and others (n 59).

127 For a thoughtful appraisal, see Marie-Bénédicte Dembour, *When Humans Become Migrants* (OUP 2015) 402-441.

er groups'.[128] Never before had the ECtHR so emphatically supported the rights of asylum-seekers in general, and '[n]ever before… had living conditions of extreme poverty been found to give rise to state responsibility under Article 3'.[129] In order to achieve these advances, the Court relied substantially upon a bespoke test of vulnerability tailored to the forced migration context. The Court identified two sources, or prongs, of the applicant's vulnerability as an asylum-seeker. The first was 'everything he had been through during his migration' (migratory experience), and the second was 'the traumatic experiences he was likely to have endured previously' (prior trauma).[130] The Court left undefined what it meant precisely by 'everything he had been through during his migration' and 'traumatic experiences', however, these are surely open to broad interpretation in the light of the blanket manner with which the Court attributed these to all asylum-seekers. '[E]verything' that an asylum-seeker has 'been through during [their] migration' may surely encompass not only reception conditions and characteristics of the receiving state's asylum system, but also all that was experienced during the actual journey itself. For instance, the cramped and unsanitary conditions experienced on an overcrowded seagoing craft, a lack of privacy and basic supplies, the sense of precarity and uncertainty associated with a long and dangerous journey by sea, and acute exposure to the elements, especially at night. Such an approach can in fact be seen in the UNHCR's 2016 Vulnerability Screening Tool, which explicitly recognises vulnerabilities arising either in the home country, during the journey, upon arrival, or through the legal and administrative processes in the arrival country.[131]

Viewing these two sources through the lens of the vulnerability taxonomy of Rogers, Mackenzie and Dodds, it becomes apparent that this is a heavily situational test. Both sources primarily stem not from the inherent nature of the applicant but from the situation in which the applicant found himself. The test is open to temporary forms of vulnerability and is flexible enough to recognise pathogenic sources as a sub-type of this situational vulnerability. Such pathogenic sources could here include the prejudice, injustice and persecution that the applicant likely experienced, as well as the exacerbation of his situational vulnerability on account of the Greek authorities' failure to act. However, while the sources of vulnerability here are strongly situational, and while the Court in *M.S.S.* did, on the whole, conduct an individualised assessment of the applicant's situation, it is nevertheless clear that the manner in which the Court applied vulnerability to the applicant was unmistakeably categorical. This was as a consequence of the Court affiliating the two-pronged test with the 'status' of the applicant as an asylum-seeker.[132] Moreover, by recognising vulnerability as 'inherent in his

128 Lourdes Peroni, 'M.S.S. v. Belgium and Greece: When is a Group Vulnerable?' (*Strasbourg Observers*, 11 February 2011) <strasbourgobservers.com/2011/02/10/m-s-s-v-belgium-and-greece-when-is-a-group-vulnerable> accessed 15 May 2018.

129 Flegar (n 83) 157.

130 *M.S.S.* (n 2) para 232.

131 UNHCR, *Vulnerability Screening Tool* (UNHCR and IDC 2016) 2. This position is though in contrast to Brandl and Czech who do more narrowly construe this statement as referring to only 'the specific problems asylum-seekers face in their struggle to make a living while awaiting the decision on their request for international protection'. See Ulrike Brandl and Philip Czech, 'General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to their Needs?' in Francesco Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 250.

132 *M.S.S.* (n 2) para 251.

situation as an asylum-seeker',[133] the Court sweepingly attributed particular vulnerability to all asylum-seekers 'as though it were an inherent attribute of the entire class'.[134] This thus brings to the fore the concerns advanced in the literature in respect to essentialism, paternalism and stigmatisation, and also raises questions about the reliability of the test in recognising vulnerability, more on which will be discussed below.

It is indeed clear that the *M.S.S.* judgment has been highly influential. It is also apparent that this nascent vulnerability test has gained significant traction. The Court has on numerous occasions since reaffirmed its position that asylum-seekers constitute a 'particularly… vulnerable population group in need of special protection', this being on account of the two grounds listed in *M.S.S.*[135] In fact, in *Mahamed Jama v Malta*,[136] the Court clarified this further by announcing that the particular vulnerability of asylum-seekers is 'a state of vulnerability which exists irrespective of other health concerns or age factors'.[137] However, the precise form and reach of the test has remained somewhat undefined. Indeed, while in many of the subsequent cases the applicants have, at the material time, been seeking asylum and awaiting a decision on their claim, this was not the case in *Khlaifia*.

3.3 *Khlaifia* – vulnerability on account of the journey (alone)?

3.3.1 Conflicting judgments

In *Khlaifia*, the Court was called upon to adjudicate on the receiving and holding (to be read as 'detaining') of three Tunisian non-asylum-seeking migrants (the applicants) by Italian authorities, first, at the Early Reception and Aid Centre (CSPA) at Contrada Imbriacola on the island of Lampedusa,[138] and second, on ships moored in Palermo harbour, Sicily,[139] as well as the subsequent return (to be read as 'expulsion') of the applicants to Tunisia in accordance with 'simplified procedures' bilaterally entered into by the two states.[140] The applicants, all males aged in their twenties, had each been travelling on board rudimentary vessels across the Mediterranean when they were intercepted by the Italian coastguard.[141] After spending a few days on Lampedusa, the applicants were flown to Palermo.[142] They remained in Palermo, again for only a few days,[143] before being returned to Tunis.[144]

133 ibid para 233.

134 Peroni and Timmer (n 10) 1068.

135 For example, *S.H.H. v UK* App no 60367/10 (ECtHR, 29 January 2013) para 76; and *A.S. v Switzerland* App no 39350/13 (ECtHR, 30 June 2015) para 29.

136 App no 10290/13 (ECtHR, 26 November 2015).

137 ibid para 100.

138 *Khlaifia* [GC] (n 6) para 12.

139 ibid para 15.

140 ibid paras 36-40.

141 ibid paras 10-11.

142 ibid paras 11-15.

143 ibid para 17.

144 ibid para 21.

In both of the judgments in the case, that is, in the judgment of the Chamber and in the judgment of the Grand Chamber, vulnerability performed a brief but crucial role.[145] As in *M.S.S.*, in *Khlaifia*, the question of vulnerability was raised in relation to an alleged violation of Article 3,[146] specifically the detention conditions at the CSPA.[147] The applicants complained of overcrowding, poor sleeping arrangements, and unacceptable conditions of hygiene and sanitation.[148] For the Chamber, the evidence before it revealed standards that had fallen short of the requirements prescribed by Article 3.[149] However, before either the Chamber or the Grand Chamber came to a finding as to whether or not there had been a violation of Article 3, both considered the duration of the applicants' detention. It was indeed uncontested that the applicants had been held at the CSPA for a short period of two to three days.[150] Both the Chamber and the Grand Chamber accepted that the short duration of the applicants' detention meant that 'their limited contact with the outside world could not therefore have had serious consequences for their personal situations'.[151] The Grand Chamber also distinguished the case from those previous cases in which it had found violations of Article 3 'in spite of the short duration of the deprivation of liberty in question',[152] doing so on the grounds that, in those cases, the conditions of detention had been particularly poor, even 'atrocious'.[153] The applicants nevertheless stressed the following:

> that at the material time they had just survived a dangerous crossing of the Mediterranean by night in a rubber dinghy, and that this had weakened them physically and psychologically. They had thus been in a situation of vulnerability, accentuated by the fact that their deprivation of liberty had no legal basis, and their mental distress had increased as a result.[154]

The applicants were here drawing on both situational and pathogenic sources of vulnerability, remarking in particular on how the actions of the Italian authorities had exacerbated, rather than alleviated, their 'situation of vulnerability'. The Chamber agreed. The applicants were vulnerable. Moreover, in the Chamber's view, there had been a violation of Article 3.[155] For the Chamber it was a 'fact that the applicants… were in a situation of vulnerability'.[156] In line with the argument put forward by the applicants, the Chamber found that this 'situation of vulnerability' was on account of their

145 ibid para 194; *Khlaifia* (n 7) para 135.

146 In total, the applicants alleged nine separate violations of four substantive rights – arts 3, 5, 13 and art 4 of protocol no. 4.

147 *Khlaifia* [GC] (n 6) para 136.

148 ibid paras 142-144.

149 *Khlaifia* (n 7) para 134.

150 *Khlaifia* [GC] (n 6) para 14.

151 ibid para 195; *Khlaifia* (n 7) para 135.

152 *Khlaifia* [GC] (n 6) para 196.

153 ibid.

154 *Khlaifia* [GC] (n 6) para 143.

155 *Khlaifia* (n 7) paras 135-136. By five votes to two.

156 ibid para 135.

having 'just undergone a dangerous journey on the high seas'.[157] Having accepted that the applicants had been in a vulnerable situation, the Chamber then conducted what was essentially a balancing exercise between the short duration on one side and the applicants' vulnerability on the other.[158] It found that the short duration of the applicants' stay in the CSPA was outweighed by their vulnerability. As such, '[t]heir confinement in conditions which impaired their human dignity thus constituted degrading treatment in breach of Article 3'.[159] For the Grand Chamber, however, no such balancing exercise was required. The applicants were not vulnerable and there was no violation of Article 3.[160] While the Grand Chamber recognised that 'the applicants were weakened physically and psychologically because they had just made a dangerous crossing of the Mediterranean',[161] it nevertheless qualified this by emphasising that the applicants had not sought asylum during the 'not insignificant period' they had been in Italy.[162] As the applicants were not asylum-seekers, they consequently 'did not have the specific vulnerability inherent in that status'.[163] The Grand Chamber thereby concluded that neither the treatment of the detainees nor the conditions of their detention at the CSPA violated Article 3.[164]

3.3.2 Conflicting conceptualisations

It is clear from both *Khlaifia* judgments that the journey is relevant, per the first prong of the *M.S.S.* test (migratory experience). Both the Chamber and the Grand Chamber appreciated that the applicants had undergone, and had been detrimentally affected by, a 'dangerous' migratory journey. The difference between the two judgments, however, lies in whether the journey *alone* is sufficient to establish vulnerability under the ECHR. For the Chamber, the applicants' vulnerability had a single source, the journey, the danger of which was enough to render them vulnerable and to provide sufficient weight to in effect lower the minimum threshold needed to find a violation of Article 3. Moreover, timing is crucial, as it cannot be assumed that such vulnerability is permanent. In the Chamber's view the applicants were vulnerable at the material time, meaning that their detention, which was effective almost immediately upon their arrival on Lampedusa, occurred at a time when they were 'Convention vulnerable'.

The conceptualisation of vulnerability proffered by the Chamber was, without doubt, progressive, at least within the ECtHR's jurisprudence. For the majority, neither the legal status nor the political identity of the applicants was of issue when it came to the question of vulnerability. By taking this approach, the Chamber was able to release the *M.S.S.* two-pronged test from any restrictions that had been placed upon it as a consequence of it having been attached to the status of an asylum-seeker. Yet,

157 ibid.

158 ibid.

159 ibid.

160 *Khlaifia* [GC] (n 6) paras 199-200.

161 ibid para 194.

162 ibid para 249.

163 ibid para 194.

164 ibid paras 199-200. Unanimous.

the Grand Chamber, and indeed the minority in the Chamber,[165] elected to stick resolutely to a purely categorical application of the test. That the applicants failed to fall within any of the sub-population groups previously identified as vulnerable under the ECHR was fatal to their claim. Not only were the applicants not asylum-seekers,[166] they also 'belonged neither to the category of elderly persons nor to that of minors… did not claim to be suffering from any particular medical condition. Nor did they complain of any lack of medical care'.[167] In the words of Judge Raimondi, the applicants, who were aged in their mid-twenties,[168] were of 'young age and good health'.[169] The Grand Chamber thereby reverted to its most traditional, categorical approach, thus belying the nuance and conceptual sophistication that underpins the two-pronged *M.S.S.* test. While the Grand Chamber may have again reaffirmed the inherent and particular vulnerability of asylum-seekers, it has done so in a manner that unequivocally excludes non-asylum-seeking migrants from the Convention's 'special protection'.

At least for now, the Grand Chamber has squandered the opportunity to move towards a more nuanced, mutable conceptualisation of vulnerability that better responds to the lived experience of those making the hazardous journey across the Mediterranean, whatever the reason or reasons for their journey. Yet in addition to this, the Grand Chamber's *Khlaifia* judgment has also had an important impact on the scope of the *M.S.S.* test, an impact that seemingly narrows and thereby restricts the test in two particular, overlapping ways.

First, it appears to amend the second prong (prior trauma). As mentioned, both prongs of the *M.S.S.* test were left open to broad interpretation. Yet, while the express wording in *M.S.S.* was 'because of… the traumatic experiences he was likely to have endured *previously*',[170] in *Khlaifia*, the Court made explicit reference to the fact that the applicants 'did not claim to have endured traumatic experiences *in their country of origin*'.[171] While it can be argued that this requirement that the trauma be endured in the 'country of origin' was always implicit in the test, this being because the test was detailed in the express light of an asylum-seeking migrant, it is nevertheless the case that this qualification did not explicitly feature in the initial test. The effect of this 'clarification' is to narrow the possible interpretation of the second prong, framing it more unequivocally as a test that applies only to those seeking asylum.

Second, it hints towards an imbalance in the test. On the face of it, the Grand Chamber's *Khlaifia* judgment appears to lend further support to the *M.S.S.* vulnerability test as a two-pronged test. Both prongs were explicitly considered in the judgment, and while it was acknowledged that the applicants had undertaken a 'dangerous journey', the fact that they had 'not claim[ed] to have endured traumatic experiences'[172] was fatal to their claim. As such, and in accordance with the test being two-pronged,

165 *Khlaifia* (n 7) partly dissenting opinion of Judges Sajó and Vučinić, paras 53-58.

166 *Khlaifia* [GC] (n 6) para 194.

167 ibid.

168 ibid.

169 ibid, concurring opinion of Judge Raimondi, para 5. The words of Judge Raimondi are indeed most interesting given that he was on the side of the majority judgment in the Chamber.

170 *M.S.S.* (n 2) para 232.

171 *Khlaifia* [GC] (n 6) para 194.

172 ibid.

non-fulfilment of the second prong (prior trauma) meant that the test had not been met and the applicants were not 'particularly vulnerable' under the ECHR. However, what the *Khlaifia* Grand Chamber judgment also helps reveal is an apparent prioritisation of the second *M.S.S.* prong (prior trauma) over the first (migratory experience). As mentioned, in *M.S.S.*, the Grand Chamber tied the two-prong test to what it pronounced as the 'inherent' vulnerability of asylum-seekers. The Grand Chamber therefore effectively declared that all asylum-seekers automatically satisfy the two prongs, and that therefore all asylum-seekers are vulnerable as a result of the journey *and* as a result of prior traumatic experiences. Yet, to take each prong in turn, while the second (prior trauma) is indeed likely to be typical, albeit not unique, to the situation of asylum-seekers, the first (migratory experience) is by no means exclusive to those seeking asylum, as is made apparent by the facts in *Khlaifia*. Additionally, by no means can it automatically be assumed that an individual who is seeking asylum has undergone a 'dangerous' journey in order to seek asylum – indeed, this does not form a pre-requisite for the recognition of refugee status. As such, although the applicant in *M.S.S.* did satisfy both prongs of the test, it seems perfectly plausible that a situation may arise in which an asylum-seeker may not necessarily meet the first prong of the test, that is vulnerability on account of the journey, but would nevertheless be recognised as vulnerable under the ECHR due to the Grand Chamber's position that all asylum-seekers are to be 'unconditionally'[173] recognised as such. Yet, conversely, as shown by *Khlaifia*, meeting the first prong (migratory journey) but not the second (prior trauma) fails to establish particular vulnerability.

It could of course be argued that the first prong is simply so open-ended, per the use of the word 'everything', that it would always be met by all asylum-seekers regardless of the precise nature of their journey, remembering of course that the journey is only one aspect to be taken into consideration in this respect. Yet, even if this is the case, an imbalance would still occur because while the first prong (migratory journey) would be open to a broad interpretation, the second (prior trauma) would be so narrowly interpreted as to in effect restrict it to asylum-seekers only. This imbalance, along with the clarification of the first prong, provides further evidence of the Court retaining a traditional understanding of vulnerability. Despite the Grand Chamber itself having identified vulnerability in the Mediterranean migration context as two-pronged, the second, prior traumatic experience, now specifically in the country of origin, appears to be prioritised over the first, everything that is experienced during migration, including the journey.

In sum, the Grand Chamber's approach to vulnerability in the Mediterranean migration context is categorical par excellence. While the ECtHR may to some degree appreciate the universality of human vulnerability, while it does typically engage in an individualised assessment of an applicant's claims, and while it may, at least impliedly, recognise a diverse range of vulnerability's sources, including in its situational and pathogenic forms, the way in which the concept is applied by the Court in this particular context nevertheless relies on the attribution of vulnerability to an individual based

173 To use the word employed by Judge Sajó in his partly concurring and partly dissenting opinion to the Grand Chamber's judgment in *M.S.S.* See (n 2) 101.

upon their membership of a recognised vulnerable sub-population group. The consequence for the ECtHR is an unduly rigid, essentialising conceptualisation of vulnerability that is ill-equipped to respond effectively to the reality of increased mixed-migratory flows arriving at the borders of Europe by sea. The consequence for non-asylum-seeking migrants who have crossed the Mediterranean into Europe is that while the physical and psychological toll of their journey is to be noted by the Court, their resulting vulnerability remains unrecognised.

Yet, there is one final and somewhat curious aspect to the Grand Chamber's unwillingness to recognise the vulnerability of non-asylum-seeking migrants crossing the Mediterranean. It is clear from surveying the Court's judgments post-*M.S.S.* that just because asylum-seekers are now recognised as particularly vulnerable by the Court does not mean that a violation of the Convention will automatically follow. This aligns with the position pre-*M.S.S* in respect to some other vulnerable groups, for instance, as in *Chapman* mentioned above.[174] In *Mahamed Jama*, although the applicant was seeking asylum in Malta, and so therefore automatically met the two-pronged *M.S.S.* test of 'particular vulnerability',[175] the Court found no violation of Article 3.[176] This was because, in its view, even having taken into consideration the applicant's particular vulnerability as an asylum-seeker, 'the cumulative effect of the conditions complained of… did not amount to degrading treatment'.[177] Moreover, and perhaps most intriguingly, the Court then went on to say that it '[did] not lose sight of the fact that the applicant… was not more vulnerable than any other adult asylum-seeker detained at the time'.[178] While the Court offered no further clarification at this point, more is revealed by looking to the subsequent case of *Abdullahi Elmi and Aweys Abubakar v Malta*.[179] As in *Mahamed Jama*, *Abdullahi Elmi* concerned irregular entry into Malta by boat.[180]

Although there are numerous similarities between the two cases, there is one crucial difference. While the applicant in *Mahamed Jama* was an adult,[181] the applicants in *Abdullah Elmi* were minors, aged sixteen and seventeen.[182] In *Abdullahi Elmi*, the Court reiterated the particular vulnerability of the applicants as asylum-seekers,[183] exactly as it had done in *Mahamed Jama*, but then went on to emphasise that the applicants were indeed minors. In the view of the Court, the applicants 'were even more vulnerable than any other adult asylum-seeker detained at the time because of their age'.[184] It

174 *Chapman* (n 104).

175 *Mahamed Jama* (n 136) para 100.

176 ibid para 102.

177 ibid para 100.

178 ibid.

179 *Abdullahi Elmi and Aweys Abubakar v Malta* Apps nos 25794/13 and 28151/13 (ECtHR, 22 November 2016).

180 ibid paras 6 and 11.

181 The applicant in *Mahamed Jama* had in fact falsely claimed to be a minor during her stay in Malta. See (n 136) paras 11, 13 and 99.

182 ibid para 113.

183 *Abdullahi Elmi* (n 179) para 113.

184 ibid.

was at this point that *Mahamed Jama* was cited, *a contrario*.[185] This is most interesting given that it was actually in its judgment in *Mahamed Jama* that the Court stated that the particular vulnerability of asylum-seekers 'exists irrespective of… age factors'.[186] While it may indeed be the case that age does not impact the Court's recognition of asylum-seekers' particular vulnerability, it nonetheless appears that age was here pivotal to whether a violation was found.[187] The same also seems to have been the case in *Tarakhel v Switzerland*.[188] Although in this case the six minors, aged between 2 and 15,[189] were accompanied by their parents (the applicants), the Grand Chamber nevertheless affirmed their 'extreme vulnerability' as asylum-seeking children,[190] before then reaching the conclusion that there would be a related violation of Article 3 should the family be returned to Italy without the necessary guarantees in place.[191]

It appears therefore that something more is needed to find a violation. Being one asylum-seeker amongst many is simply not enough. An applicant needs that certain something that, when combined with their 'inherent' and 'particular' vulnerability,[192] means they stand out from the 'asylum-seeking crowd'. Based on the post-*M.S.S.* case law, this certain something may very well be age, especially being a minor, although particularly poor living conditions may also suffice. Indeed, looking to *M.S.S.* itself, it was crucial that the applicant, who was not a minor, was residing in a state of the 'most extreme poverty'.[193] This is of course an exceedingly high bar to meet. It was to some degree nevertheless affirmed in *Tarakhel*, where although the ECtHR had 'serious doubts' about the capacity of the asylum reception system in Italy, it did not find the arrangements in Italy sufficiently deficient to 'act as a bar to all removals of asylum seekers to that country'.[194] What was though absolutely pivotal in *Tarakhel* was that the applicants had six children. It would therefore be reasonable to speculate that even if the applicants in *Khlaifia* had been asylum-seekers, they would likely still not have been successful in their claim under Article 3, on account of their age, the short duration of their detention, and the Grand Chamber's view that their detention conditions could be distinguished from the more severe conditions found in earlier cases.

With the work of Beduschi and Timmer in mind, it seems therefore that for the ECtHR to find a violation in such cases requires some form of compounded vulnerability. Moreover, it appears that the compound must include the presence of at least one recognised vulnerable sub-population group, meaning that the Court is once again relying on a heavily traditional conceptualisation of vulnerability as categorical. While being an asylum-seeker would suffice for this purpose, when it comes to

185 *Mahamed Jama* (n 136) para 113.

186 ibid para 100.

187 ibid paras 113-115.

188 *Tarakhel v Switzerland* [GC] App no 29217/12 (ECtHR, 4 November 2015).

189 ibid para 1.

190 ibid para 119.

191 ibid para 122.

192 *M.S.S.* (n 2) paras 233 and 251 respectively.

193 ibid para 254.

194 *Tarakhel* (n 188) para 115.

non-asylum-seeking migrants, specifically irregular migrants, it seems that only in situations of the most 'extreme' vulnerability involving children would the vulnerability of the applicant act as 'the decisive factor… tak[ing] precedence over considerations relating to… status as an illegal immigrant'.[195]

This finding that the recognition of particular vulnerability does not lead to an automatic violation of the Convention raises the broader question of why the Court has been so reluctant to accept the seemingly self-evident vulnerability of non-asylum-seeking migrants arriving at Europe's southern shores. To provide a satisfactory answer to this question would likely require further empirical exploration, but what is clear is that for the Court to approach the question of vulnerability through the lens of the now asylum-seeker-specific *M.S.S.* test would be to present non-asylum-seeking migrants with a *fait accompli*. The Court would not, as Peroni had hoped, be opening up the concept of vulnerability to embrace 'other circumstances and other groups,'[196] but would instead be utilising the vulnerability concept as a tool for exclusion.

4. Conclusion – Behind the times or a sign of the times?

The ECtHR's judgments in the cases of *M.S.S.* and *Khlaifia* have proven to be of immense significance not only for the rights protections of asylum-seeking and non-asylum-seeking migrants risking their lives to cross the Mediterranean, but also for the development, or lack thereof, of the Court's understanding and use of the concept of vulnerability. While through these judgments the Court has engaged with differing conceptualisations of vulnerability, and for a brief period appeared to be moving towards a more nuanced and dynamic form of situational vulnerability, the ECtHR has ultimately stuck steadfastly to the much-maligned traditional approach of attributing individual vulnerability on the basis of vulnerable sub-population group membership. For those migrants who have made the perilous journey across the Mediterranean, but 'who fall within the groups of undocumented migrants or rejected asylum-seekers rather than within the vulnerable group of asylum-seekers', the Court has now made clear its position that they are not to be considered vulnerable as a group.[197] It appears that only in the most extreme examples of compounded vulnerability will irregular migrants be recognised as vulnerable under the ECHR, and the likelihood is that those recognised as such will be minors. As has here been shown, such a position is lamentable. Rather than utilising the concept of vulnerability as a means by which to move towards a human rights law that is 'more inclusive… [and] more responsive to the needs of vulnerable people',[198] whatever their legal or political status, the concept has instead been used to further exclude those who are already some of the most marginalised by society and the law.

195 *Mubilanzila Mayeka* (n 87) para 55; *Rahimi v Greece* App no 8687/08 (ECtHR, 5 April 2011) para 86.

196 Peroni (n 128).

197 In response here to Flegar who posed this very question in 2016. See (n 83) 157.

198 Timmer (n 1) 122.

Looking to other fields, it seems that change is being embraced. Within the medical sciences, the latest edition of the CIOMS Guidelines, published in 2016,[199] exhibit a demonstrable semantic shift away from the traditional language of group-based vulnerability towards explicit recognition of individual vulnerability.[200] Although the Guidelines do not reflect a complete conceptual split from the traditional approach,[201] they do nonetheless emphasise 'the importance of avoiding classification of entire groups as inherently vulnerable'.[202] The UNHCR Vulnerability Screening Tool[203] also takes a strikingly similar approach. While the Tool does mention many of those groups commonly considered to be vulnerable, it also recognises the vulnerability of those who do not fit within the established categories, stating that 'their individual circumstances and context are the main determinates of vulnerability'.[204] This is indeed in stark contrast to the 'mere affiliation' approach that characterises categorical conceptualisations of vulnerability.[205] Moreover, the Tool warns against 'a rigid or exhaustive measurement of vulnerability',[206] advocating instead for 'a person-centred and holistic approach'.[207] Such change is, however, yet to be seen in the ECtHR, and the Grand Chamber's judgment in *Khlaifia* does very little to take any such steps towards this necessary conceptual shift.

It would, of course, be unhelpful to downplay the challenges that southern European states face as a result of ongoing influxes of migrants at their borders. The Grand Chamber indeed recognised as much in its *Khlaifia* judgment when it stated that 'the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time'.[208] But for the Convention to be able to respond effectively to new challenges, it must adapt and evolve in line with the changing global socio-political climate. Moreover, the Court must remain vigilant and must continue to re-assert, perhaps now more than ever, that the responsibility for protecting the most vulnerable, whomever they may be, rests with the contracting states.

199 CIOMS, *International Ethical Guidelines for Health-related Research Involving Humans* (4th edn, CIOMS 2016).

200 ibid 57-58.

201 ibid. Reference is still made in the Guidelines to 'members of groups that have traditionally been considered vulnerable'.

202 ibid 59.

203 UNHCR (n 131).

204 ibid 2.

205 Brandl and Czech (n 131) 250.

206 UNHCR (n 131) 3.

207 ibid.

208 *Khlaifia* [GC] (n 6) para 185. This position was then soon after relied upon in the Court's judgment in the case of *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 2017) para 83. *Ilias* also concerned the entry of asylum-seekers into Europe, albeit via the Western Balkan route.

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The Effect of Unmanned Vessels on Canadian Law: Some Basic Legal Concepts

*Marel KATSIVELA**

Abstract

For the first time the possibility exists for ships to navigate the world with no person on board. Unmanned vessels promise safer and less costly navigation at sea. However, arguments have been made that electronically operated devices may malfunction or be defective and that the cost-savings they operate may be offset by the cost of acquiring new sensors and operating systems. Automation in shipping will inevitably bring change in the rules governing shipping. At present, the International Maritime Organisation has added automation in shipping on its agenda for deliberation. The present study examines key Canadian legal concepts and provisions - likely to be present in the laws of other maritime states - that will be affected by the presence of unmanned vessels. Domestic regulatory definitions of the terms 'vessel', 'master', 'pilotage', 'seaworthiness' ('crew', 'seafarer', 'manning'), are examined in an effort to explore whether or to what extent applicable domestic rules need to be revisited. The author suggests that precisions and/or modifications should be made to the meaning of the above-mentioned terms in order to address the new unmanned vessel reality.

Keywords: unmanned, vessels, autonomous, ships, Canada, robotics, automation

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1. Introduction

From its origins in the Code of Hammurabi in Mesopotamia and Rhodian law in Ancient Greece to the present day, maritime law has been a specialised area of law.[1] Technological innovation has led the way to bigger, safer, more advanced ships promising faster, more efficient and cost-effective transportation of goods and people.[2] Regulatory, legal and psychological impediments have been overcome on this premise.[3] In recent years states, including Canada, have embraced the same trend

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1 Doyle Slifer, 'The Classical Legacy of Admiralty: The Pre-Roman World (Part One of a Two-Part Series)' [2017] Illinois Business Law Journal <https://publish.illinois.edu/illinoisblj/2007/02/15/the-classical-legacy-of-admiralty-the-pre-roman-world-part-one-of-a-two-part-series/> accessed 24 July 2018. For the Rhodian law in ancient Greece, see Aliki Kiantou-Pampouki, *Nautiko Dikaio*, vol 1 (Sakkoulas 2003) 9.

2 ibid (Slifer).

3 Thanasis Karlis, 'Maritime law issues related to the operation of unmanned autonomous cargo ships' (2018) 17 WMU Journal of Maritime Affairs 119, 127.

of innovation leading the way to faster and more cost-effective ways of maritime transportation with regulatory reforms consequent upon technological changes.[4]

The trend continues today. For the first time the possibility exists for ships to navigate the globe with no one at the helm.[5] Unmanned ships are being configured to operate via remote control, autonomous means, or a combination of the two methods.[6] Technology has reached a point where self-navigating seagoing vessels is entirely feasible.[7] The British firm Rolls-Royce has demonstrated the world's first remotely operated commercial (tug) vessel[8] while the first unmanned vessel used for subsea positioning, surveying and environmental monitoring has already been registered in the United Kingdom (UK).[9] In 2018, the United States Navy acquired an unmanned vessel.[10] There are ongoing projects worldwide for the construction of (commercial) autonomous vessels.[11] Unmanned ships have a variety of potential uses: they may be used for the transport of goods and passengers

4 For example, Canadian and international laws had to adapt to the introduction of containers in shipping cargo in the 1950s: W David Angus, 'Legal Implications of "The Container Revolution" in the International Carriage of Goods' (1968) 14(3) McGill Law Journal 395, 395-96; Trevor D Heaver, 'Shipping Industry', (*Canadian Encyclopedia,* 4 March 2015) <www.thecanadianencyclopedia.ca/en/article/shipping-industry/> accessed 24 July 2018. It has been noted that regulation should follow technology rather than lead it: Henry H Perritt Jr, 'Who Pays when Drones Crash?' (2017) 21 UCLA Journal of Law & Technology 1, 66; in general, see also Aldo Chircop, 'Testing International Legal Regimes: The Advent of Automated Commercial Vessels' (2018) (in press with the German yearbook of International Law) 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130453> accessed 24 July 2018. In the present study, the terms 'maritime' and 'shipping' will be used interchangeably. The same applies to the terms 'ship' and 'vessel'.

5 Paul W Pritchett, 'Ghost Ships: Why the Law Should Embrace Unmanned Vessel Technology' (2015) 40 Tulane Maritime Law Journal 197, 199. As per Chircop, ibid 5, there is good reason why unmanned and autonomous ships will not be technologies of passing interest. Today, there is a declining interest towards seafaring careers and a consequent shortage of seafarers.

6 ibid (Pritchett). See Lloyd's Register, 'LR defines "autonomy levels" for ship design and operation' (8 July 2016) <www.lr.org/en/latest-news/lr-defines-autonomy-levels-for-ship-design-and-operation/> accessed 24 July 2018, for a definition of different levels of automation.

7 Perritt (n 4) 12.

8 Rolls Royce, 'Rolls-Royce demonstrates world's first remotely operated commercial vessel' (2017) <www.rolls-royce.com/media/our-stories/press-releases/2017/20-06-2017-rr-demonstrates-worlds-first-remotely-operated-commercial-vessel.aspx> accessed 24 July 2018.

9 'First Unmanned Vessel Joins UK Ship Register' (*World Maritime News,* 14 November 2017) <https://worldmaritimenews.com/archives/235207/first-unmanned-vessel-joins-uk-ship-register/> accessed 24 July 2018.

10 Amanda Macias, 'The first drone warship just joined the Navy and now nearly every element of it is classified' (CNBC, 25 April 2018) <www.cnbc.com/2018/04/25/first-drone-warship-joins-us-navy-nearly-every-element-classified.html> accessed 24 July 2018.

11 The Norwegian project YARA Birkeland is envisioned to become the world's first electrically powered unmanned container ship. Canadian Shipper, 'How autonomous cargo boats could disrupt the massive shipping industry' (Canadian Shipper, 6 October 2017) <www.canadianshipper.com/transportation-and-logistics/autonomous-cargo-boats-disrupt-massive-shipping-industry/1003374961/> accessed 24 July 2018. Japanese shipping firms Mitsui OSK Lines and Nippon Yusen are working with shipbuilders including Japan Marine United to develop self-piloting cargo ships; 'Japan to launch self-navigating cargo ships "by 2025"' (BBC, 9 June 2017) <www.bbc.com/news/technology-40219682> accessed 24 July 2018. See also 'World's 1st Autonomous Shipping Company in the Making' (World Maritime News, 3 April 2018) <https://worldmaritimenews.com/archives/248731/worlds-1st-autonomous-shipping-company-in-the-making/> accessed 24 July 2018. The European Union is spending millions of dollars on funding regarding unmanned navigation. Isaac Arnsdorf, 'Rolls-Royce Drone Ships Challenge $375 Billion Industry: Freight' (Bloomberg, 25 February 2014) <www.bloomberg.com/news/articles/2014-02-25/rolls-royce-drone-ships-challenge-375-billion-industry-freight> accessed 24 July 2018.

(merchant shipping), hydrography, scientific marine research, the maintenance and repair of oil platforms, pipelines, ships and ports, laying submarine cables, surveillance, espionage, border surveillance, detection of smuggling and of narcotics.[12]

There are several advantages resulting from the introduction of robotics into shipping. Safety in maritime transport has always been of critical importance. Human error accounts for 75% or more of all marine casualties;[13] by eliminating human presence on board, autonomous vessels may also remove, or at least substantially reduce, human error. Further, the elimination of manned vessels may result in considerable cost savings in wages and accommodations for the crew leading, at the same time, to vessels that weigh less, have more space for transport and consume less fuel.[14] Unmanned vessel operation presents certain risks: human error may persist; electronically operated devices may malfunction or be defective; cost saving resulting from automation may be offset by costs of new sensors and operating systems.[15] Nonetheless significant improvement in overall safety can be achieved under the proposed systems.[16]

Regulation needs to address the legal issues presented by technological advances.[17] In a regulatory context, autonomy levels of unmanned ships may be summarized as follows:[18] *M: Manual navigation with automated processes and decision support* where the master and crew are on board and if, at times, the bridge is unmanned, an officer is on standby and ready to take control; *R: Remote-con-*

12 These are some of the uses noted. For these and more see Eric Van Hooydonk, 'The law of unmanned merchant shipping – an exploration' (2014) 20 Journal of International Maritime Law 403, 404.

13 According to Anita M Rothblum cited by Paul W. Pritchett, Pritchett (n 5) 201-02, 'fatigue, inadequate communication … and inadequate technical knowledge are the three largest factors contributing to human error'. See 'The Relation between Human Error and Marine Industry' (*Marine Insight News Network*, 21 July 2016) <www.marineinsight.com/marine-safety/the-relation-between-human-error-and-marine-industry/> accessed 24 July 2018, Maritime Unmanned Navigation through Intelligence in Networks (MUNIN) 'Research in maritime autonomous systems project results and technology potentials' (*MUNIN*, 2016) <www.unmanned-ship.org/munin/wp-content/uploads/2016/02/MUNIN-final-brochure.pdf> accessed 27 July 2018.

14 Pritchett (n 5) 201; MUNIN, ibid; Luci Carey, 'All Hands Off Deck? The Legal Barriers to Autonomous Ships' (2017) NUS Centre for Maritime Law Working Paper 17/06, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025882> accessed 1 September 2018. Cost effectiveness may not be the same for all types of vessels. Apart from cost, automation and digitalization will create shore-based jobs in shipping which will appeal equally to men and women. 'In Depth: Shore-Based Jobs Big Opportunity for Women to Join Maritime' (*World Maritime News*, 12 March 2018) <https://worldmaritimenews.com/archives/246969/interview-shore-based-jobs-big-opportunity-for-women-to-join-maritime/> accessed 24 July 2018. However, labor unions doubt unmanned ships could be safe and cost-effective any time soon. Arnsdorf (n 11).

15 Also, in the absence of persons on board, the shore-based operator will be unable to react with the same intuitive feel for the situation (or at the very least a good deal less) and will depend on the satisfactory operation of all the onboard sensors and the transmission systems which gives rise to new kinds of dangers if such are i.e. defective. Van Hooydonk (n 12) 406. For a general discussion see Pritchett (n 5) 202.

16 Pritchett (n 5) 202 and MUNIN (n 13).

17 According to Perritt, at this stage, the barriers to actual commercial deployment lie also in the regulatory regimes rather than in the engineering one (Perritt (n 4) 12).

18 Danish Maritime Authority Report (DMAR), 'Analysis of Regulatory Barriers to the Use of Autonomous Ships' (December 2017) 6 <www.dma.dk/Vaekst/autonomeskibe/Pages/Foranalyse-af-autonome-skibe.aspx> accessed 1 September 2018, for what follows in the paragraph. See also Lloyd's Register (n 6).

trolled vessel with crew on board where the vessel is controlled remotely but a trained person is on board on standby and ready to take control in which case the level of autonomy shifts to *M; RU: Remote-controlled vessel without crew on board* where the vessel is controlled remotely without a crew on board. In this case, onboard electronic sensors feed information to a human operator not located on the vessel who then evaluates the relayed information and sends commands back to the vessel which will be carried out by the vessel's electronic systems;[19] *A: Autonomous vessel* where the vessel's operating system assesses risks present and reacts accordingly. If the system fails or requires human intervention the crew will intervene in which case the level of autonomy will shift to *R: Remote-controlled vessel with crew on board* or *RU: Remote-controlled vessel without crew on board* depending on whether or not there is a crew on board.[20]

Based on the above-mentioned classification, it is evident that the term 'unmanned ships' does not always refer to ships without a crew on board. Only the classifications *RU: Remote-controlled vessels without crew on board* and *A: Autonomous vessels* refer to vessels without crew on board. With regards to those vessels and existing regulation many questions may arise: is an unmanned vessel a vessel following the above-mentioned levels of automation? Do the regulatory references made to the master and crew or to the obligation that the vessel be manned have a *raison d'être* when there is no personnel on board? How is seaworthiness defined? To date, questions of this nature remain unanswered at the Canadian and international levels. The legal implications of automation in shipping as well as the extent of the initiatives undertaken in this area around the world have led the International Maritime Organization (IMO) to add unmanned vessels to its agenda for deliberation.[21] The regulatory approach to autonomous shipping should be considered carefully to prevent regulation negatively impacting technological developments and the commercial use of autonomous technol-

19 Pritchett (n 5) 199.

20 According to Karlis (n 3) 121, 'the concept of the autonomous system is based on four interdependent systems. The first regards a system of an array of sensors that provide situation awareness data of external (waves, swell, objects at sea etc.) and internal (machinery, systems, and cargo conditions) conditions. The second system regards the algorithms and software that interpret the sensors data and makes and/or suggests appropriate actions. The third system regards the manned shore control centre which confirms or realigns the decisions suggested by the automated system. The shore control centre assumes full control during port access or in the case of a systems failure. Finally, the fourth system is the ship herself and its specialised design that includes new construction materials and redundancy mechanical systems that kick in when the primary systems fail'. As Perritt ((n 4) 12) notes, whatever the mode of transportation (land, air or sea) robotic systems and automation strategies in general require 'good sensors and smart autopilots. All modes depend on radio control and are thus vulnerable to phenomena that impede radio waves. All depend on an appropriate human/machine interface. … Understanding what can go wrong requires understanding the underlying technologies.'

21 According to IMO deliberations, the organisation should take a proactive and leading role given the rapid technological developments relating to the introduction of commercially operated ships in autonomous/unmanned mode. The scoping exercise could include identifying: IMO regulations which, as currently drafted, preclude autonomous/unmanned operations; IMO regulations that would have no application to autonomous/unmanned operations (as they relate purely to a human presence on board); and IMO regulations which do not preclude unmanned operations but may need to be amended in order to ensure that the construction and operation of MASS ['maritime autonomous surface ships'] are carried out safely, securely, and in an environmentally sound manner. IMO Maritime Safety Committee (98th session) Scoping exercise on autonomous vessels put on agenda (16 June 2017) <www.imo.org/en/MediaCentre/MeetingSummaries/MSC/Pages/MSC-98th-session.aspx> accessed 24 July 2018.

ogies in shipping.[22] While awaiting international regulation, several national bodies have elaborated proposals regarding unmanned ships.[23]

Canada is among the states that will be affected by the introduction of automation in merchant shipping. Canada's coastline borders three oceans: the Atlantic, the Pacific and the Arctic.[24] It is a shipping nation and a major exporter of iron, coal and grain.[25] It is ranked among the first thirty ship-owning countries in the world[26] and has major ports along its east and west coasts.[27] As an IMO member state,[28] Canada will follow the IMO lead regarding regulation of unmanned ships.

The present study examines several key Canadian legal provisions regarding merchant shipping that will be affected by the presence of unmanned ships. Regulatory definitions of 'master', 'crew', 'seafarer', 'seaworthiness' (focusing on manning requirements), 'pilot' will be examined in an effort to explore whether or not, or to what extent, the applicable domestic rules need to be revisited and possibly amended in order to adapt to the reality of unmanned vessels. The levels of automation focused on are *RU: Remote-controlled vessel without crew on board* and *A: Autonomous Vessels* since these presuppose the absence of a crew on board – if a vessel is partially manned the effect on the regula-

22 DMAR (n 18) para 3.2.1. According to the report, considering the complexity of current shipping regulation the focus of the IMO should be on incorporating autonomous ships into the existing regulatory frame. New regulation of autonomous ships should only cover areas unique to autonomous ships that existing regulation does not take account of. Others opine that specific legal instruments should govern unmanned vessels instead of undertaking the extraordinary task of revising existing law. Pritchett (n 5) 223. Chircop (n 4) 30, suggests that amendment of a rule might be preferable to waiting for an interpretation from an authoritative body. In the present study, we will refer to revising or revisiting present rules without excluding the possibility of a separate instrument specifically applicable to unmanned vessels.

23 See, for example, Maritime UK, 'Being a Responsible Industry-A Voluntary Code' (*Digital Ship*, 20 November 2017) <https://thedigitalship.com/news/item/5231-autonomous-vessel-code-of-practice-launched> accessed 24 July 2018 (UK Code) and DMAR (n 18).

24 Canadian Wildlife Federation, 'The Challenge' (*Canadian Wildlife Federation*, 2018) <http://cwf-fcf.org/en/explore-our-work/coasts-oceans/?src=menu> accessed 24 July 2018. In the present study, arctic navigation will not be subject to detailed commentary.

25 United Nations Conference on Trade and Development, 'Review of Maritime Transport' (UNCTAD/RMT/2017) 11.

26 ibid 28. For the importance of the maritime sector in Canada historically see: Aldo Chircop, A William Moreira, Hugh M Kindred and Edgar Gold, *Canadian Maritime Law* (2nd ed, Irwin Law Inc 2016) 15-18 (CML).

27 'List of Canada Port Authorities' (*Transport Canada*, 23 January 2018) <www.tc.gc.ca/en/services/marine/ports-harbours/list-canada-port-authorities.html> accessed 24 July 2018. When considering that 38.3% of Canada's international trade moves by ship, the maritime sector is still extremely important to the Canadian economy. CML, ibid 18.

28 International Maritime Organisation (IMO), 'Member States' (*IMO*, 2018) <www.imo.org/en/About/Membership/Pages/MemberStates.aspx> accessed 24 July 2018. At the international level, Canada is very much involved – along with other countries – in conducting research (regulatory scoping exercise) on the regulatory framework that will govern unmanned vessels. The regulatory scoping exercise is taking place in coordination with the Maritime Safety Committee (MSC) of the IMO. Although work in this area is advancing, the IMO has not yet provided guidance on how best to address autonomous vessels.

tory framework in place will, most likely, not be substantial.[29] The analysis will not be exhaustive. It does however provide insight into the important impact technological advances will have on existing domestic rules and, while waiting for IMO guidance in this area, makes suggestions on the national direction regulation may follow. The study focuses at the national level on Canadian law, however the analysis may also be relevant to legislation of other maritime states.

2. Selected Canadian Regulatory Concepts and Unmanned Ships: An Exploration

Canada is a federation maintaining a division of powers between the federal and the provincial governments.[30] The federal government has jurisdiction over shipping and navigation.[31] Since unmanned vessels relate to navigation and shipping they should, in principle, fall within the federal jurisdiction.[32] 'Canadian maritime law' has been defined as 'all that body of law which was administered in England by the High Court on its Admiralty side in 1934 as such law may, from time to time, have been amended by the federal Parliament, and as it has developed through judicial precedent to date'.[33] Following this definition, federal legislation, regulations and English case law principles as received in Canada apply in this area. For this reason, federal enactments and case law principles relevant to our topic will constitute the main focus of analysis. What follows is an analysis of the Canadian law perspective on four key maritime law concepts (vessel, master, seaworthiness, pilotage) that are at the centre of any discussion concerning unmanned ships.

2.1 Vessel

Article 2 of the Canada Shipping Act (CSA) defines vessel as: 'a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construc-

29 DMAR (n 18) for the levels of vessel automation. In the present study, we will use the term 'unmanned vessel(s)' to designate the vessels with automation levels *RU: Remote-controlled vessel without crew on board* and *A: Autonomous Vessels* (i.e. regarding the suggestions made) but also to designate, in general, automation in shipping. The suggestions made take account of the fact that they have to be broadly worded to accommodate partially manned or manned vessels as well. For the rest, insurance coverage, which may play an important role in adopting or amending existing rules in this area, will not make part of the present analysis.

30 Gérald A Beaudoin, 'Distribution of Powers' (*The Canadian Encyclopedia*, 23 October 2015) <www.thecanadianencyclopedia.ca/en/article/distribution-of-powers/> accessed 24 July 2018.

31 *Constitution Acts 1867 to 1982*, s 91(10). Attribution of navigation and shipping to the federal government was intended to preclude provincial jurisdiction over maritime matters with a view to maintaining uniformity of the applicable rules at the domestic level. The need for uniformity in maritime law is omnipresent in Canadian case law. *Ordon Estate v Grail*, [1998] 3 SCR 437 para 84, *ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752, 788 (*ITO*). Provincial and federal courts have concurrent jurisdiction over maritime matters. *Federal Courts Act* (FCA) RSC 1985 c F-7 art 22(1).

32 This presupposes that the case in question is intrinsically connected to maritime matters. *ITO* (ibid 774).

33 *ITO-Intl* (n 31) 771.

tion'.[34] This broad definition focuses on the use of the vessel for navigation on water without regard to its propulsion or the fact that it is under construction.[35] Other acts refer to this definition or contain a similar – and often shorter - definition of the term.[36]

The proposed UK Code and Danish Maritime Authority Report (DMAR) definitions of an autonomous ship emphasize the absence, in whole or in part, of human control on board and the possibility to operate it remotely or autonomously,[37] an element that is absent from the CSA vessel definition. This is possible due to the presence of onboard sensors (i.e. cameras, radars),[38] algorithms and software that interpret data and propose appropriate actions and the shore control centre that, depending on the level of automation, may play a more or less important role in the navigation of the ship.[39] The proposed definitions add to the existing CSA definition of a vessel because they presuppose, on the one hand, the presence of a ship and, therefore, its capability of navigating on water without regard to the method or lack of propulsion adding, on the other hand, the fact that it is autonomous or remotely controlled without human presence on board. In this way, nothing in the CSA definition of the term vessel excludes its application to unmanned ships.[40] Rather, said proposals build on what is already present in the CSA definition. Considering, however, that the CSA when put into context reflects the current reality of a ship being controlled by persons present on board, it would be better to adopt a definition of an unmanned vessel that would not violate the CSA (and would include, therefore, the vessel's capability to navigate on water without regard to the method or lack of propulsion), adding the autonomous or remote controlling of the vessel without human presence on board.[41]

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34 CSA 2001 (SC 2001 c 26). The definition adds: 'It does not include a floating object of a prescribed class (*bâtiment*)'.

35 For details on propulsion see CML (n 26) 46s. On the broad definition of the term vessel see: *Cyber Sea Technologies, Inc. v Underwater Harvester Remotely Operated Vehicle*, 2002 FCT 794 (a remotely-controlled submersible constitutes a ship), *Salt Spring Island Local Trust Committee v B & B Ganges Marina Ltd.*, 2008 BCCA 544 (stressing the fact that a vessel should be used in navigation and that every ship is a vessel, but not every vessel is a ship.), *TJ Inspection Services v Halifax Shipyards*, 2004 NSSC 181, paras 38-39 (a topside structure does not constitute a vessel).

36 Referring to the CSA (n 34) – definition: Coasting Trade Act, SC 1992 c 31, art 2(1), Canada Transportation Act, SC 1996 c 10 s 147. For similar definitions see Canada Marine Act, SC 1998 c 10, art 2(1), Marine Liability Act, SC 2001 c 6 (MLA), arts 25(1) and 36(1). At the international and the domestic levels there is no comprehensive definition of the term vessel. The term is defined based on the purpose of each convention or act. Van Hooydonk (n 12) 406-09 citing different authors and conventions.

37 According to the UK Code, UK code (n 23) art 2: 'MASS' – Maritime Autonomous Surface Ship means, for the purpose of this code, a surface ship that is capable of being operated without a human onboard in charge of that ship and for which the level of control may encompass any of those shown at Table 2.3 above. The diagram referred to in the code is similar to the classification here presented (n 18) and accompanying text. DMAR (n 18) 67 proposes the following definition of 'autonomous ships': 'ships capable of providing – via automatic processes or systems – decision support or making it possible to take over parts of or the entire human control and steering of the ship, irrespective of whether the exercise of control/steering is done from the ship or from somewhere else.'

38 Rolls Royce, 'Remote and Autonomous ships The Next steps' Advanced Autonomous Waterborne Applications Initiative White paper 2016' 1-31 <www.rolls-royce.com/~/media/Files/R/Rolls-Royce/documents/customers/marine/ship-intel/aawa-whitepaper-210616.pdf> accessed 24 July 2018 (Whitepaper).

39 See (n 19) and accompanying text and (n 20) on the new technologies used.

40 For a similar conclusion based on international conventions and national laws examined see Canadian Maritime Law Association, 'CMI Questionnaire on Unmanned Cargo Ships' (2018) 1.1 <http://comitemaritime.org/wp-content/uploads/2018/05/CMI-IWG-Questionnaire-Unmanned-Ships-CANADA.pdf> accessed 24 July 2018 (CMLA) reasoning on a cargo ship, Van Hooydonk (n 12) 409, White paper (n 38) 37. Chircop (n 4) 9-10.

41 For specific wording that could be used to reflect this reality see the proposed definitions in (n 37). Case law could provide further precision of the proposed regulatory definition.

2.2 Master

Article 2 CSA[42] defines 'master' as 'the person in command and charge of a vessel. It does not include a licensed pilot, within the meaning of Section 1.1 of the Pilotage Act, while the pilot is performing pilotage duties under that Act. (*capitaine*)'. If this definition is examined in isolation, there is nothing that requires the physical onboard presence of the master.[43] What is required is a person in command and charge of a vessel. When the CSA and other national and international rules/conventions are read as a whole, however, they reflect the traditional view of a vessel operating with a master on board.[44] For example, provision for the master to use force or detain a person on board in order to maintain the security on the vessel (Article 83 CSA) is irrelevant if the master is not physically present.[45]

Proposed regulation on unmanned ships does not require the physical presence of the master on board but presupposes that such a person be able to discharge the tasks of a controlling officer remotely.[46] For vessels with a level of automation *RU: Remote-controlled vessel without crew on board*, it is likely that the remote operator will act as the master.[47] Obligations to issue bills of lading for

42 CSA (n 34). For a similar definition see Migratory Birds Convention Act a*rt 2.1 under 'master'. Under the* Marine Transportation Security Act, SC 1994 c 40, art 2.1.a (iv) an operator is defined – among other things – as 'a master or other person who has command or charge of the vessel, other than a pilot'.

43 As Van Hooydonk (n 12) 413 notes based on international conventions and domestic acts, such broad definitions of the term master are not directed at the new situation of unmanned shipping but could in principle be applied to it. Case law on the definition of a master is scarce. *B.C. Ferry Services Inc. v BC Ferry and Marine Workers' Union*, 2010 CanLII 86715 (BC LA) stated that 'by law and tradition, the Master of the Vessel is in charge of the vessel and has the responsibility for the safe operation and management of the vessel'. Although the case concerned a labor issue, it notes that the master's authority – as the person being in charge and command of the vessel - is found in the CSA (n 34).

44 The CSA (n 34), often refers to the master or crew on board. See, for example, art 16.4(e)(i), 82(1), 87, 94(1), 97(4). The Marine Personnel Regulations, SOR/2007-115 (MPR) accompanying the CSA contain similar provisions: art106 (2) (a) requires presence of the master on board for certification purposes. The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, Annex, ch. 1, reg. 1/1(3) (opened for signature 7 July 1978, entered into force 28 April 1984) 1361 UNTS 2 (STCW) often refers to seafarers/persons serving 'on board'. Also, Canadian case law often uses the term master in a way that human presence on board is required. *Spinney v The Ocean Mutual Marine Ins. Co* (1890) 17 SCR 326 cites the following: 'The said loss occurred and was caused by the barratry of the master and mariners on board of the said vessel'; *R. v Motor Vessel Glenshiel*, 2001 BCCA 417 para 1 referring to an 'act or omission of the master or some other person on board'. For a similar discussion under UK and international law see Carey (n 14) 16.

45 The mention 'on board' in various parts of the CSA (n 34) and MPR (ibid) may not always be adapted to the unmanned vessel reality.

46 Following the UK code (n 23) art 2: '"Master" […] mean[s] a specific person officially designated by the owning company/owner of the vessel as discharging the responsibilities of the Master of the vessel. This will be an employee of the company who has been assessed as competent to discharge these responsibilities in accordance with the provisions of this code. This person may be located anywhere provided that the required level of control and communication can be maintained to discharge these duties'. DMAR (n 18) 67 defines the remote operator as 'a person with the necessary qualifications who performs or monitors the navigation of one or more autonomous ships without being physically present on board the ship and who is entitled to represent the ship vis-à-vis the authorities'. The report notes that the remote operator should be considered equal to the master.

47 DMAR (n 18). See also Pritchett (n 5) 209 and Robert Veal and M Tsimplis, 'The integration of unmanned ships into the lex maritima' [2017] Lloyd's Maritime and Commercial Law Quarterly 303, 317.

the carriage of good by sea or to rescue distressed vessels and people at sea – a fundamental tenet of maritime law- may be discharged by the remote operator.[48] For fully autonomous vessels (level *A: Autonomous vessels*) a computer has command of the vessel and there does not appear to be any person who can directly hold the status of master as defined.[49] But a compelling argument can be made that the person who programmed the control system, the owner or charterer of the vessel or the vessel itself is 'in charge' and is thus the master who must fulfil his/her obligations such as the duty to rescue.[50] Further, the absence of the master in the event of unmanned merchant shipping does not mean that no valid transport document such as bills of lading can be issued but, rather, that these documents will be issued in electronic form.[51]

Probably not wanting to distance itself greatly from existing national and international standards (a justified approach while waiting for IMO direction), the UK Code designates as the controlling commander of any unmanned vessel (including those with levels of automation *RU: Remote-controlled vessel without crew on board* and *A: Autonomous vessel*) the master, a person specifically designated

48 Pritchett (n 5) 208-09 for the obligation to rescue vessels and people at sea. The master's duty to rescue is sanctioned by the United Nations Convention on the Law of the Sea (UNCLOS) (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, art 98(1), the International Convention for the Safety of Life at Sea (SOLAS) (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278, chapter V, regulation 33 and Canadian law (CSA arts 130-32) following a similar wording. According to DMAR (n 18) 3.5.2, the fact that a ship is unmanned should not exempt the master from his/her obligation to provide rescue. See also CMLA (n 40) 3.3 for a similar conclusion under Canadian law. The master's obligation to issue bills of lading is sanctioned by the Hague Visby Rules (art 3.3) applicable in Canada to the carriage of goods by sea. The Visby Rules refer to the Hague Rules [The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (adopted 25 August 1924, entered into force 2 June 1931) 120 LNTS 155 (1924)] as amended by two protocols: the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, (adopted 23 February 1968, entered into force 23 June 1977) (commonly known as the 'Visby Protocol 1968') and the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (adopted 21 December 1979, entered into force 14 February 1984). Although the remote operator may issue bills of lading in the case of remote-controlled vessels without crew on board, some functions relating to this obligation i.e. checking the quality and the quantity of goods being loaded and unloaded in different ports will probably need to be delegated to others (for example local port agents). For the delegation of functions see DMAR (n 18) 3.5.6.

49 Pritchett (n 5) 209 for the duty to rescue.

50 Pritchett (n 5) 209. The author adds that if a fully autonomous vessel fails to fulfill a legal obligation to rescue, it could be said to be defective and thus expose the manufacturer of the vessel to liability. DMAR - (n 18) 3.5.2 - notes that the challenge for remote controlled vessels without a crew and fully autonomous vessels is to be able to physically rescue persons, ships and goods. However, UNCLOS and SOLAS (n 48) do not seem to require that the obligation to rescue should exceed the technical capability of the vessel (design, equipment and arrangement). See also CMLA (n 48) and Carey (n 14) 18-20. Further, some authors suggest that technology and equipment can be developed to address rescue operations at sea by unmanned vessels. Erich D Grome, 'Spectres of the Sea: The United States Navy's Autonomous Ghost Fleet, its Capabilities and Impacts and the Legal Ethical Issues that Surround' (2018) 49 Journal of Maritime Law & Commerce 31, 52. DMAR (n 18) suggests that the IMO should clarify the content of the international conventions' provisions regarding rescue with respect to unmanned ships.

51 Van Hooydonk (n 12) 419. For the general trend towards digitalisation of transport documents see below (n 86). See also Anastasia Papadolpoulou, 'Autonomous technology: opportunities and challenges faced in shipping and transportation' (*Keystone Law,* 24 November 2017) <https://keystonelaw.co.uk/keynotes/autonomous-technology-opportunities-and-challenges-faced-in-shipping-and-transportation> accessed 28 July 2018.

by and an employee of the shipping company who may discharge his duties remotely.[52] If we follow this proposal that maintains the master as the person in charge and command of the unmanned vessel – such a suggestion is closer to the present reality – the CSA definition of the term 'master' does not warrant revisiting since it does not restrict the person in charge of the vessel to being physically present on board. Considering, however, that regulatory provisions currently applicable at the domestic and the international levels refer to the on board presence of the master or may translate in practice as requiring such presence, it would be preferable to revise the term, making it clear that the person in command and charge of the vessel may operate it remotely provided that the required tasks can be discharged remotely.[53] The specific qualifications, tasks and existing regulatory provisions referring to the on board presence of the master will also have to be revisited in order to adapt to the use of new technology and level of automation of the vessel.[54]

2.3 Pilotage

The CSA definition of the term 'master' excludes pilots;[55] pilots are subject to the Pilotage Act.[56] When a ship enters a mandatory pilotage area, local pilots with knowledge of the area are engaged to navigate the vessel.[57] According to Article 1.1. of the Pilotage Act, a pilot is 'any person who does not belong to a ship and who has the conduct of it'. Although the definition does not refer to the physical presence of a pilot, pilots do board vessels in order to navigate them.[58] Waivers to compulsory pilotage may be given to a vessel for different reasons– for example: the ship is engaged in rescue operations; the ship is in distress or seeking refuge; pilots are unavailable – provided for by regulation of the respective pilotage authorities.[59]

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52 See (n 46) for the proposed definition of a master. UK Code (n 23) art 1.1.6 states that the intent is to ensure a degree of equivalence with the provisions of the current IMO instruments. Art 1.1.14 rightfully adds that when relevant requirements are developed at the national, regional or international levels, revision of the code may be considered immediately.

53 See (n 44) (existing rules) and (n 46) (proposed definition of the term) and accompanying text. For a general commentary and the need for reform see CMLA (n 40) 1.4 concluding that under Canadian law a master cannot be a chief on shore remote controller, chief pre-programmer or another person responsible on paper but not immediately involved with the operation of the ship.

54 For some of these provisions see (n 44). If the master is the controlling commander, a question that will need to be answered by legislators is whether a damage caused by a defective automated system on a fully autonomous vessel may render the master - or crew -, the manufacturer or the programmer of the system liable. For similar questions see Comité Maritime International (CMI), 'CMI International Working Group Position Paper on Unmanned Ships and the International Regulatory Framework' (2018) 18 <http://comitemaritime.org/wp-content/uploads/2018/05/CMI-Position-Paper-on-Unmanned-Ships.pdf> accessed 24 July 2018. Case law could provide further precision regarding the regulatory definition of the term master, its qualifications, tasks and liability.

55 See (n 42) on the definition of the master and accompanying text.

56 RSC 1985, c P-14.

57 There are four pilotage authorities in Canada: Atlantic (Halifax); Laurentian (Montreal); Great Lakes (Cornwall); Pacific (Vancouver). According to the Pilotage Act art 18, pilotage authorities establish, operate, maintain and administer an efficient pilotage service within their respective regions. They have the power to designate compulsory pilotage areas within their geographic reach. See *Alaska Trainship Corporation et al. v. Pacific Pilotage Authority*, [1981] 1 SCR 261 for a decision on the scope of the Pacific Pilotage Authority's powers under the Pilotage Act.

58 Among others, Pilotage Act arts 20.1.l, 27.1(a), 33.1(c) also refer to the 'on board' presence of the pilot.

59 See, for example, the Pacific Pilotage Regulations, CRC c 1270 art 10.1, the Atlantic Pilotage Authority Regulations, CRC c 1264 art 5.1, 5.2, the Great lakes Pilotage Regulations CRC c. 1266 art 5. According to these regulations, in the case of unavailability of pilots the master or all persons in charge of the deck must be familiar with the route and the marine traffic control system in the compulsory pilotage area. For similar exemptions see the Laurentian Pilotage Authority Regulations CRC c. 1268 art 5. For respective Canadian pilotage authorities see (n 57).

Article 25(2) of the Pilotage Act provides that a licensed pilot who has the conduct of a ship is responsible to the master for its safe navigation. The pilot as well as the owner or master of a ship may be held liable for any damage or loss occasioned by it to any person or property on the ground due to the fault, neglect, want of skill or wilful and wrongful act of a licensed pilot (Article 41 Pilotage Act).[60] However, if a pilot is held liable for fault, neglect or want of skill, his/her liability is only limited to 1,000 CAD (Article 40(1) Pilotage Act).

For remotely-controlled or autonomous vessels, it is not certain whether it is technically possible to be subject to shore-based pilotage with a pilot navigating the ship remotely rather than from the bridge.[61] In the absence of regulation allowing shore-based pilotage – if such is technically possible – or, alternatively, an exemption to pilotage, the access to certain ports or to mandatory pilotage areas may be restricted for these types of vessels.[62] This will inevitably impede commerce. It is therefore crucial to provide for rules allowing shore-based pilotage or provide for an exemption to pilotage for unmanned vessels at the national and international level.[63] In case of the former, the definition of the term 'pilot' should include the possibility of remote operation without physical presence on board – similar to the definition of the term 'master'. This will clarify an element that is not excluded by the present statutory definition.

If shore-based pilotage is possible the licensing qualifications, tasks and provisions of the Pilotage Act referring to the onboard presence of pilots (for example, Articles 25, 26, 27 Pilotage Act)[64] will also need to be reviewed. For the rest, legislators will have to determine whether the existing liability regime applicable to pilots and provided for by the said act – for example, the fact that the pilot may be liable to the master (Article 25(2)), pilots' liability limits (Article 40(1)) as mentioned above – will remain the same.

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60 *Westshore Terminals Ltd v Leo Ocean SA* (2014) SA, 2014 FC 132 where due to the pilot's error in navigation there was a collision with the property of a third person. The pilot was held liable despite an expired certificate of competency and his liability was limited.

61 DMAR (n 18) 54, 21s. As the report suggests, for fully autonomous ships subject to mandatory pilotage, the operation must be presumed to change to a remotely controlled one with an operator taking over navigation. According to the Transport Canada Pilotage Act Review Discussion, currently, neither Canada's pilotage legislative or regulatory framework prescribes the use of any particular technology, such as shore-based pilotage systems to help navigate vessels. Canada needs to establish minimum standards for new technologies to ensure that adopting them does not compromise safety. Transport Canada, 'Pilotage Act Review Discussion' (*Transport Canada*, 2017) <www.tc.gc.ca/en/reviews/pilotage-act-review-discussion.html> accessed 26 July 2018.

62 ibid, DMAR (n 18). For a general discussion of these points see also Carey (n 14) 21-30.

63 DMAR (n 18). Case law could provide further precision of the adopted rules. For the role of Canada on unmanned vessels in general see (n 28).

64 See also Pilotage Act (n 58).

2.4 Seaworthiness

One fundamental obligations of the ship-owner in maritime law is to provide a seaworthy vessel.[65] This requires that the vessel be capable of withstanding the ordinary perils of the sea, be fit for the proposed trip and be crewed by competent crew.[66] Exercise of due diligence is generally required to carry out this obligation.[67] One of the attributes of a seaworthy ship is that it should be properly manned. Manning will constitute the specific focus of this part of the analysis. Under Article 82(2) CSA: 'No master of a Canadian vessel shall operate it unless it is staffed with a crew that is sufficient and competent for the safe operation of the vessel on its intended voyage and is kept so staffed during the voyage'.[68] This requirement has traditionally referred to the obligation of having a competent crew (i.e. experienced, trained, properly instructed) to operate it.[69]

In the case of unmanned vessels, it is critical that the obligation to provide a seaworthy vessel be

65 CSA (n 34) art 85. The master is responsible for the vessel's seaworthiness usually acting as a representative for the ship-owner. Seaworthiness runs like a thread through maritime law. William Tetley, *International Maritime and Admiralty Law* (International Shipping Publications 2002) 52-53. On this obligation see also the Hague, Hague Visby Rules (n 48) art III(1). Arctic navigation – which is not the focus of the present study – requires specific conditions for the construction, structure and design of a vessel following the adoption of the Polar Code (International Code for Ships Operating in Polar Waters). As a result, for a vessel to be seaworthy for arctic navigation additional conditions may apply. For more on the Polar Code, see IMO, 'Shipping in Polar Waters' <www.imo.org/en/MediaCentre/HotTopics/polar/Pages/default.aspx> accessed 24 July 2018. Navigating on ice may mitigate against use of unmanned cargo ships in arctic waters during seasons when ice may be present. CMLA (n 40), Additional Canadian Comments: 1.

66 *Vukorep v Bartulin* 2005 BCCA 142 (Vukorep) – citing case law regarding a seaworthy ship which must be fit for the intended voyage, in good repair, properly equipped and safe for those on board'. *Direct Transport Co. v Detroit & Windsor Ferry Co.* 1935 CanLII 317 (ON SC) 432 - seaworthiness applies not only to the condition of the vessel itself, but also to the condition of the cargo and there is a duty upon the owner of the vessel to insure that the cargo – particularly deck cargo – is properly secured before the vessel sets sail. *Doman Forest Products Ltd. v Arctic Hooper (Ship)* 2003 FCT 712 paras 157, 166, 178 - Seaworthiness has also been interpreted as including the provision of a competent master and crew, proper loading instructions given; it is not limited to the vessel's structural soundness. In the present case, the vessel was seaworthy. *Falconbridge Nickel Mines Ltd. v Chimo Shipping Ltd* 1969 CarswellNat 362 (Exch CC) para 61 – the vessel was unseaworthy due to an inadequately secured tractor that rendered the barge unstable - (*Falconbridge*). See also William Tetley, *Marine Cargo Claims*, vol 1 (4th ed, Yvon Blais 2008) 877-88 and CML (n 26) 507.

67 *Dominion Glass Co. Ltd. v The Ship Anglo Indian and Her Owners* [1944] SCR 409; *Primex Forest Products Ltd. v Harken Towing Co. Ltd.* 1997 CanLII 4161 (BC SC). See also Tetley, ibid 876, stating that due diligence is diligence of a reasonably prudent carrier as at the time of the relevant acts or omissions and not in hindsight. On the contrary, the common law duty of seaworthiness is absolute: it is no excuse that the owner did not know of a defect or that he exercised due diligence to make the vessel seaworthy.

68 This is an obligation that is sanctioned by international conventions adopted by Canada: UNCLOS (n 48) art 94(4)(b), Maritime Labor Convention (adopted 23 February 2006, entered into force 20 August 2013) 45 ILM 792 regulation 2.7 (MLC), the International Safety Management Code for the Safe Operation of Ships and for Pollution Prevention (adopted 17 November 1993, entered into force 1 July 1998) IMO Resolution A.741(18) art 6.2, SOLAS (n 48) regulations 14, 15, the Hague Visby Rules (n 48) arts III.1.b and IV.1. Usually, decisions on manning are decided at the domestic level. White Paper (n 38) 43.

69 *Robin Hood Flour Mills, Ltd. v N.M. Paterson & Sons Ltd* 1966 CarswellNat 407 para 24, 26 (*Robin*) - the ship was unseaworthy because it was not properly manned; citing English case law - see (n 66) on more cases regarding the requirement of having a competent crew. CML (n 26) 617, 507s.

maintained. This is one of the core concepts of maritime law.[70] One of the questions that arise with regard to these ships concerns responsibility for providing a seaworthy vessel. Proposals have been made that responsibility for vessel's seaworthiness should rest with the ship-owner since this person can ensure compliance with the obligation due to the technological insight possessed and the ability to make the necessary arrangements to fulfill this obligation.[71] Such a solution coheres with the present domestic and international reality and may be adopted.[72]

In this regard, the ship's manning – one of the attributes of the vessel's seaworthiness – requires ensuring crew competence.[73] Following Canadian regulatory provisions, the term 'crew' has been defined as 'a person other than a trainee or the Master engaged in the business of the ship'.[74] A 'seafarer' is defined as 'a person who is employed or is to be employed in any capacity *on board* a vessel'.[75] More general regulatory provisions seem to require the presence of crew-seafarers on board.[76] Taking these provisions into account an unmanned vessel cannot be manned if there is no crew on board.[77]

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70 As Carey (n 14) 3-4, rightfully notes, unseaworthiness exposes ship-owners to cargo claims since, in its presence, they may not benefit from the exclusions in the Hague and the Hague Visby Rules. Unseaworthiness can also void a marine insurance policy. The vessel's seaworthiness has a long history: under the Rhodian law [Kiantou-Pampouki (n 1) and accompanying text] there was no general obligation of the ship-owner to provide a ship in a good state and condition; however, a seaworthiness provision was to be found in situations where great and valuable cargo was loaded on ships. More specifically, merchants were recommended to ensure that the ship-owner provides a ship in a good state, with its proper tackle and a sufficient number of skillful mariners. The provision was not binding but operated as a mere recommendation affording no legal consequences to the parties involved. As reported by Nikolaos Karpantais, 'Seaworthiness in autonomous unmanned cargo ships' (LLM thesis, University of Rotterdam 2016) 7 <www.researchgate.net/publication/311452364> accessed 24 July 2018.

71 DMAR (n 18) 26, 68.

72 See (n 65) and accompanying text - the ship-owner is responsible for the vessel's seaworthiness. As it is currently the case, case law could further clarify questions on attribution of liability.

73 See (n 66) and (n 69) and accompanying text on the requirement of having a competent crew.

74 Transport Canada, 'Standard Relating to Design, Construction and Operational Safety of Sail Training Vessels- TP 13313 E' (2017) <www.tc.gc.ca/eng/marinesafety/tp-tp13313-menu-143.htm> (under 'definitions') accessed 24 July 2018.

75 MPR (n 44) art 1. Also, MLC (n 68) art 2.1.f contains a similar definition of a seafarer. Even though there is no reported Canadian case law on the definitions of 'crew' and 'seafarer', cases routinely refer to them as persons on board a vessel: *Rederiet A.P. Moller A/s v Seafarers' International Union of Canada* 1997 CanLII 4733 (FCA), *Boudreault v Great Circle Marine Service Inc.* 2004 CHRT 21.

76 MPR (n 44) arts 106.2.a among others, CSA (n 44) also refers to the 'master or crew on board'. The STCW (n 44) talks about a 'personnel on board', 'those on board', 'seafarers (on board)' which reflects the traditional view of having crew on board the vessel. For this and other national and international laws containing similar provisions see also Van Hooydonk (n 12) 413.

77 For this general discussion under UK law see Carey (n 14) 9. In this regard, authors have asked the question whether an ordinary, careful and prudent ship-owner should send a ship at sea under the command of a crew trained only on simulators. Karlis (n 3) 124. A similar question asks whether a prudent ship-owner shouldn't provide for a human presence on board an unmanned vessel in the case of goods declared hazardous before the sea voyage and that need to be handled/disposed in transit. DMAR (n 18) 89. It is hard to see at this stage how technology could handle such an incident and how a vessel could be considered seaworthy in this case in the absence of human presence on board.

It has been suggested that if the vessel is capable of operating safely without being manned this obligation may be fulfilled.[78] The suggestion stresses the end result of the obligation to provide a properly manned vessel – safety in navigation - rather than the presence of a crew on board. Another suggestion, evidently complementing the previous one, maintains the term 'crew' and defines it as 'a person employed or engaged in any capacity on-board a ship on the business of the ship or any person engaged in the direct control and operation of the ship from a remote location'.[79] This definition implies that a crew may still be involved in the control and the operation of an unmanned vessel but its physical presence on board is not required (shore-based crew).

The proposed definition of the term 'crew' may seem compatible with its corresponding one under Canadian law which does not exclude shore-based personnel.[80] However, the domestic and international definition of a 'seafarer' and the general Canadian regulatory context requiring the presence of crew on board do not conform to the unmanned vessel reality.[81] In adhering to the proposed definition, existing domestic and international rules requiring the presence of crew or seafarers on board need to be revisited to allow the operation of the vessel to be discharged remotely.[82] From a regulatory perspective, this also means that existing regulations relating to the presence of qualified crew members (crew members' articles of agreement regarding their position, documents of employment, wages, record of service, discharge, serious violation of contract or the death of a crew member[83])

78 White Paper (n 38) 43-44, DMAR (n 18) 23 (for ships remotely controlled), Veal and Tsimplis (n 47) 320, Carey (n 14) 4 citing case law.

79 UK Code (n 23) art 2 under 'crew'.

80 Transport Canada (n 74) and accompanying text.

81 See (n 75-76) and accompanying text on the requirement of having the crew on board. CMLA notes that amending or rethinking these international standards as we enter an era of increasingly unmanned ships is possible.

82 Combining the definition of a 'seafarer' under Canadian regulations [(n 75) and accompanying text on this definition] and the proposed definition of a 'crew' under the UK code [(n 79) and accompanying text on the definition of the term 'crew'] a seafarer could be defined as: 'a person who is employed or is to be employed in any capacity on board a vessel on the business of the vessel or any person engaged in the direct control and operation of the vessel from a remote location'. We could reason similarly for the term crew. Case law interpretation could provide further precision of the definition chosen. The suggested definition of the term crew or seafarer does not abolish the vessel's crew. In this way, it does not distance itself greatly from the present reality. This may counter the skepticism of unions regarding unmanned vessels. For the unions' scepticism see Arnsdorf (n 11). More general questions arise whether substitution of artificial intelligence for human judgement is socially acceptable. Chircop (n 4) 34. See also (n 77) for other questions in this area.

83 CSA (n 34) arts 91(1) (articles of agreement), 92 (Discharge), 93(1) (Record of sea service), 95 (Desertion or serious violation of contract), 97 (death of a crew member), *Marine Insurance Act* (SC 1993 c 22) s 11 (insurable interest - wages). *Makar v Rivtow Lion (Vessel)* 1981 FC 2773 (article of agreement), *Mark Fishing Co. v United Fishermen & Allied Workers' Union* 1972 CanLII 1016 (BC CA) (discharge). Also, with regard to the crew, certain acts' and international conventions' provisions that exclude crew members or the master from their scope could be maintained under the suggested definition. For example, CSA s 2 excludes from the term 'passenger' the master and the crew. For corresponding provisions see also the MLA (n 36) Part 3 art 28 (3) and Part 4 art 37(2). It is interesting to note that under the current law the master and crew members have a maritime lien for unpaid wages. This lien is highly ranked compared to liens of other maritime creditors. MLA (n 36) art 138(1)(b), CSA art 86(1). Case law: *Comeau's Sea Foods Ltd v The Frank and Troy* (1971) CF 556, *Osborne Refrigeration Sales & Service Inc v The Atlantean I* (1979) 2 FC 661, 1982 CanLII 2936 (FCA). Since in the presence of unmanned vessels crew, and therefore crew wages, may eclipse or reduce in number, so will the maritime lien benefiting them. This will constitute a bonus for mortgage creditors since the pool of claimants ranked before them (i.e. maritime liens) will shrink.

may be maintained and / or revised in order to accommodate the unmanned vessel reality.[84] It is only certain regulatory provisions that have as *a raison d'être* the physical presence of the personnel on board (i.e. onboard accommodation, shore leave)[85] that may be less relevant to remotely controlled or fully autonomous vessels.

The extent to which technology will be used, the level of the vessel's automation and regulatory choices made will play a role in determining what constitutes a seaworthy vessel.[86] In all cases, in order to provide for seaworthiness it will be important to monitor and understand how technology operates and the risks it may present for an unmanned ship.[87] This will allow regulation and ensuing case law to enhance safe navigation and justice in the choices made.

3. Conclusion

The analysis has highlighted that regulatory action will be required to address legal issues raised by unmanned vessels. Such action will require revisiting existing Canadian applicable rules.[88] Suggestions have not greatly departed from the present domestic – and international – regulatory framework since this is the current regulatory basis upon which shipping operates effectively.

To summarise the suggestions; first, even though the CSA definitions 'vessel' and 'master' and the Pilotage Act definition 'pilot' are sufficiently broad to accommodate the unmanned vessel, their remote operation/discharging of duties without human presence on board should be expressly provid-

84 Concerning the crew's training it is evident that corresponding – to the STCW (n 44) – training requirements will have to be developed for persons operating a ship remotely. White paper (n 38) 47, 48, Chircop (n 4) 25. Karlis (n 3) 123-24, Carey (n 14) 8 on the need for regulation in general.

85 Marine Transportation Security Regulations, SOR/2004-144 art 206(1)(c), 325.1.g (shore leave), 240(2)(h): (crew accommodations).

86 For example, a seaworthy vessel must have updated documentation (i.e. certificates) and charts on board. On an unmanned vessel, these will need to be available/produced digitally. Some countries (Denmark, Singapore, Norway) have already adopted regulations regarding the digital production of at least some of these documents. Denmark has already adapted its regulation to issue digital ship certificates and has, furthermore, concluded a Memorandum of Understanding (MoU) with the Singaporean and Norwegian maritime authorities on the spread of digital certificates internationally. DMAR (n 18). Canada does not currently issue digital certificates but considers such a possibility. The IMO (FAL.5/Circ.39/Rev.2) has invited governments to take the necessary actions at the national level to ensure that adequate legislation is in place for the use and acceptance of electronic certificates as may be required, providing guidelines to this effect.

87 Where there is less human control the reliability and problem-solving capacity of an autonomous system become crucial. Regulation does not provide clear-cut answers to questions regarding liability of autonomous operations whether, for example, the manufacturer, the ship-owner or other person should be liable in the case of defective equipment or programming rendering the vessel unseaworthy. For similar concerns see (n 54). Answers to such problems should be provided for. Legal conclusions applicable to road traffic may not be transferable to shipping. White paper (n 38) 50.

88 Although not the object of the present study, this also implies that international rules upon which domestic laws are based will also need to be revisited. For a recent discussion of the regulatory impact of unmanned vessels on international conventions see Chircop (n 4), CMI (n 54), Veal and Tsimplis (n 47).

ed for.[89] The qualifications and tasks of the master and pilot and the provisions referring to their 'on board' presence in existing rules should also be revisited.

Second, the obligation to provide a seaworthy vessel will certainly be a prerequisite for unmanned vessels as it is the case today. This obligation will most probably be entrusted to the ship-owner. To the extent to which technology will be used in rendering a vessel seaworthy, the level of technology of the vessel and regulatory choices made will play a role in determining the content of this obligation.

Third, regarding seaworthiness, minimum manning requirements may remain for unmanned ships, but they may not refer to maintaining a competent crew on board but, rather, to having qualified shore-based personnel to operate them. In this regard, although the term crew as defined by Canadian law is sufficiently broadly worded to accommodate the new reality contrary to the term seafarer, both terms need to be worded so that there is no requirement for physical presence on board. In all cases, existing rules concerning the (on board) presence, employment terms, tasks and qualifications of crew/seafarers should be revisited to determine whether they reflect the reality of a shore-based personnel.

The introduction of unmanned vessels at sea is certain. It promises safer and less costly operations. This new era of automation will inevitably bring change in the rules governing shipping. The object of the present article has been to examine specific key Canadian legal concepts and provisions – likely to be present in the laws of other maritime states - that will be affected by this new reality and to make suggestions for the direction that future regulation may take. The wind of change is blowing in shipping. Since we cannot control the wind (of technological change) we will have to adjust the sails.[90]

89 For pilotage, if shore-based pilotage is not possible, an exemption to mandatory pilotage for unmanned vessels would be necessary so that the new reality does not constitute a hurdle to trade.

90 Paraphrasing the lyrics of the song Ricky Skaggs, 'Can't control the wind' (Atlantic 1995).

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The Pending Maritime Delimitations between Spain and Morocco: Sovereignty, Status and Feasibility

*Eduardo JIMÉNEZ PINEDA**

Abstract

The pending maritime delimitations between Spain and Morocco are highly complex and noteworthy due to the existence of diverse factors, namely the particularity that the delimitations shall be conducted in two different seas: the Alboran Sea and the Atlantic Ocean. Moreover, various sovereignty issues must be addressed, such as the Spanish enclaves in North Africa, which are claimed by Morocco generating maritime entitlements, and the Western Sahara dispute and Morocco's intention to include the Western Sahara maritime areas under its jurisdiction. In terms of the latter issue, this article studies the fisheries agreements concluded between the European Union and Morocco and the recent decisions given by the Court of Justice of the European Union, declaring those agreements prohibited under international law in respect of Western Sahara waters. Other significant matters analyzed are the views of both countries, the existence of several overlapping maritime claims with third States and the negotiations that have been carried out thus far to reach an agreement delimiting the maritime boundaries. On this subject, it is crucial to determine whether a tacit agreement exists – on the basis of the hydrocarbon activities licensed by Spain and Morocco – establishing the maritime boundary between the Canary Islands and Morocco's Atlantic coast. For this purpose, the findings of recent international jurisprudence, particularly the judgement given by ITLOS on the Ghana/Côte d'Ivoire case, are considered.

Keywords: maritime delimitation, Alboran Sea, Atlantic Ocean, Spanish enclaves, Western Sahara waters, tacit delimitation agreement

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1. Introduction

Maritime delimitation – understood as the 'body of rules that regulates the drawing of boundaries between the overlapping maritime entitlements of neighbouring coastal States'[1] – holds a significant position in the Law of the Sea. The international courts and tribunals have played a key role in its emergence by developing the three-stage method to delimit the different maritime areas (territorial sea, contiguous zone, exclusive economic zone and continental shelf). The method consists of first

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1 Stephen Fietta and Robin Cleverly, A practitioner's guide to maritime boundary delimitation (OUP 2016) 3.

drawing a provisional median line; second, adjusting that line in accordance with the relevant circumstances (if applicable, examples include the coastal configuration, the cut-off effect, the presence of islands, geographic factors, or the presence of third States); and, thirdly, the disproportionality test. This approach has been consolidated and accepted by the international adjudicating bodies as the appropriate method for dealing with maritime delimitation cases.[2]

In this context, the pending maritime delimitations between Spain and Morocco, which include all the overlapping maritime areas between the two countries since they have not yet delimited any of their maritime boundaries, are of particular interest due to the two different areas where the delimitations have to be made (i.e. the Alboran Sea and the Atlantic Ocean), the existence of hydrocarbon and fishing resources in these areas, and the presence of several relevant aspects of international law, primarily sovereignty issues. By the same token, an analysis of the possible achievement of a tacit agreement between Spain and Morocco on their maritime boundary in the Atlantic Ocean, based on the hydrocarbon practice, is highly engaging from a legal perspective.

The mentioned aspects, among others, are analysed in this article, the main purpose of which is to provide an overview of the maritime delimitation situation between Spain and Morocco in light of the applicable international law (in particular, the United Nations Convention on the Law of the Sea, hereinafter UNCLOS), the respective national legislation, and international jurisprudence in this field.

2. The situation in the Alboran Sea

The maritime delimitation between Spain and Morocco in the Alboran Sea is particularly complex due to the existence of Morocco's sovereignty claims over five Spanish territories in North Africa. Moreover, both States have argued for a different method of delimitation, namely the equidistance line (on the part of Spain) and the equitable principles (on the part of Morocco).[3] This section will address the sovereignty issues (2.1), the repercussions of those issues for maritime delimitation (2.2), the situation in the Strait of Gibraltar (2.3), and the delimitation negotiations and some considerations about the potential alternatives (2.4).

2.1 Sovereignty issues and maritime entitlements

Both Morocco and Spain claim sovereignty over five territories in North Africa, namely: Ceuta, Melilla, Vélez de la Gomera, Alhucemas and the Chafarinas Islands. Spain puts forth strong arguments justifying its sovereignty over these territories, which, as a consequence of being integral components of the Spanish State, were not included on the list of non-autonomous territories drawn up

2 See Alex G Oude Elferink, Tore Henriksen and Signe Veierud Busch, *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?* (CUP 2018).

3 Rafael Casado Raigón and Víctor Luis Gutiérrez Castillo, 'Maroc et l'Espagne la délimitation de leurs espaces maritimes' (2001) VI Annuaire du Droit de la Mer 195, 196-97.

by the United Nations (UN) in 1947.[4] Concretely, Spain alleges the right of conquest, the *terra nullis* principle, longevity of occupation, national security reasons, and the 'territorial integrity of the State' principle.[5] However, despite such arguments, Morocco contends that it ought to be the sovereign State of the territories on the basis of the UN principle of decolonization, the threat to Morocco's national security, the obstruction to its economic and political independence, as well as the territorial integrity principle.[6] In light of the aforementioned arguments, it is important to note that Spain achieved international recognition of its sovereignty over the five territories by the Anglo-French Declaration in 1904. Nevertheless, Morocco, which achieved independence from France in 1956, rejects the binding effect of this Declaration because, like most of the new States resulting from the decolonization process, it considers the treaties signed during the colonial period to be non-binding in the post-colonial context.[7]

The different conceptions about sovereignty over the five territories claimed by Morocco have led to a number of potential disputes between the countries[8] – two of which clearly relate to maritime delimitation. The first dispute is State jurisdiction over the maritime entitlements generated by the five territories as a consequence of their coastal character.[9] Indeed, this is one of the most determinant factors preventing an agreement from being reached on the maritime boundaries of the two States since they disagree on a crucial element of this operation. The second dispute is the controversial aspects of the fisheries agreements that Spain and the European Union (EU) entered into with Morocco as a result of the uncertain limits of each State's jurisdiction.[10]

By the same token, another disputed territory between Spain and Morocco relevant for maritime delimitation purposes is Perejil Island (called 'Laila' by the Moroccans), located in the Strait of Gi-

4 The United Nationals and Decolonization, 'UN Non-Self-Governing Territories', <www.un.org/en/decolonization/nonselfgovterritories.shtml> accessed 15 June 2018.

5 Gerry O'Reilly, 'Ceuta and the Spanish Sovereign Territories: Spanish and Moroccan Claims' (1994) 1(2) BTB 1, 9-10.

6 José Antonio Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales* (9th edn, Tecnos 2003) 264-65; Saïd Ihrai, 'Le contentieux Maroco-Espagnol en matière de délimitation maritime' (2002) VII Annuaire du Droit de la Mer 199.

7 Julio González Campos, 'Las pretensiones de Marruecos sobre los territorios españoles en el Norte de África (1956-2002)' in Juan Domingo Torrejón Rodríguez (ed), *España y Marruecos en el centenario de la Conferencia de Algeciras* (Dykinson 2007) 82-84.

8 The potential disputes between the countries are: (1) the territorial dispute over the five territories in North Africa; (2) the lack of maritime delimitations; (3) the Western Sahara issue; (4) the economic cooperation and the exploitation of the resources, specially of fisheries; (5) the control by Morocco of irregular immigration; and (6) the national security and the different strategic interests: Alejandro Del Valle Gálvez, 'España-Marruecos: una relación bilateral de alto potencial conflictivo, condicionada por la Unión Europea-Panorama con propuestas' (2007) 14 REEI *passim* 4-9 <www.reei.org/index.php/revista/num14/articulos/espana-marruecos-una-relacion-bilateral-alto-potencial-conflictivo-condicionada-union-europea-panorama-con-propuestas> accessed 21 June 2018.

9 Gil Carlos Rodríguez Iglesias, 'Spain: Dependent Territories', *Encyclopedia of Public International Law IV* (2000) 565-67.

10 Carlos Ruiz Miguel, 'Las fronteras marítimas hispano-marroquíes desde el Derecho Internacional' (2004) 302 Grupo de Estudios Estratégicos <http://gees.org/articulos/las-fronteras-maritimas-hispano-marroquies-desde-el-derecho-internacional> accessed 18 June 2018.

braltar very close to Ceuta.[11] However, this territory is not traditionally included in the group of five territories claimed by Morocco, which considers Perejil Island as belonging to Morocco since 1956.[12] In this sense, a clarification must be made: in accordance with Article 121 UNCLOS, this feature cannot be considered an *island*, but rather a *rock* since it 'cannot sustain human habitation or economic life of its own'.[13] Nowadays, the status of this small rock has not yet been resolved and a special regimen of non-occupation is followed.[14] In a nutshell, Spanish sovereignty over this rock is doubtful, but Spain still has stronger arguments for affirming sovereignty than Morocco – mainly, the cession of Perejil from Portugal to Spain in 1581, Spain's certified presence in the rock since 1746, and the construction by Spain of a lighthouse in 1887; by comparison, Morocco's argument basically relies on the proximity of Perejil Island to the Moroccan coast (less than 200 metres) in addition to the need to fight against illicit traffic in narcotic drugs and not any title of possession.[15]

In this context, due to Morocco's 'advanced status' in relation to the EU,[16] the various maritime conflicts between Spain and Morocco can be partially dealt with and defused within the larger framework of EU relations.[17] In particular, a number of negative consequences resulting from the unresolved conflicts and tensions between the two countries, such as the lack of an agreed maritime boundary, have been tempered by EU action in the domains in which it enjoys exclusive or shared competence. As an example, concerning fisheries, the absent maritime delimitation between the two countries is tempered by the conclusion of fisheries agreements between the EU and Morocco. Thus, despite the States' distinct views on sovereignty over those enclaves, which have repercussions for maritime delimitation, the likelihood of disputes between Spain and Morocco arising from the absence of delimited maritime boundaries are reduced thanks to the common interest in cooperation and Spain's limited ability to take an autonomous position on account of EU competence in these areas.

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11 The different understandings about sovereignty over the Perejil Island even caused one the biggest diplomatic incidents between the two countries in recent years: in 2002, a group of six Moroccan officials took the rock for, supposedly, maritime control of the illegal drugs traffic and, a week later, the Spanish army recovered the rock and arrested the six Moroccan officials. See Richard Gillespie, '"This Stupid Little Island": A Neighbourhood Confrontation in the Western Mediterranean' (2006) 43 IP 110.

12 Romualdo Bermejo García, 'Algunas cuestiones jurídicas en torno al islote del Perejil' (2002) 25 Análisis del Real Instituto Elcano <http://biblioteca.ribei.org/96/1/Algunas_cuestiones_jur%C3%ADdicas_en_torno_al_islote_del_Perejil_-_Elcano.pdf > accessed 15 October 2018.

13 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art 121, para 3.

14 Djamila Chikhi, 'Les relations hispano-marocaines à l'épreuve de la crise Persil-Leila' (2003) 1 PESI 91.

15 Jaume Saura Estapà, 'A propósito de la soberanía sobre el islote de Perejil' (2002) 5 REEI 1-5 <http://www.reei.org/index.php/revista/num5/agora/proposito-soberania-sobre-islote-perejil> accessed 15 October 2018.

16 Morocco has had advanced status with the EU since 2008, the objectives of which are 'to strengthen dialogue and cooperation in the areas of politics and security', 'to progressively integrate Morocco into the EU internal market through legislative and regulatory convergence', and 'to extend the partnership to include new participants': European Union External Action, 'Morocco and the EU' (10 May 2016) <https://eeas.europa.eu/generic-warning-system-taxonomy/404_en/4347/Morocco%20and%20the%20EU> accessed 15 October 2018.

17 Del Valle Gálvez, 'España-Marruecos: una relación bilateral…' (n 8) 9-10.

2.2 Status of the delimitation

The status of the delimitations between Spain and Morocco in the Alboran Sea is a consequence of the different perspectives argued by the two countries. On the one hand, Spain has not declared an exclusive economic zone (EEZ) in the Alboran Sea. In this regard, Royal Decree 236/2013, which follows the equidistance method, declared an EEZ for Spain in the north-western Mediterranean excluding the Alboran Sea. On the other hand, Morocco has drawn 14 straight baselines in the Alboran Sea enclosing the Spanish territories,[18] thus cutting off even the territorial sea of Spain around those enclaves. Consequently, Spain officially protested Morocco's Decree regulating the Alboran Sea, which is considered an evident violation of Article 7 UNCLOS.[19] Nonetheless, Morocco reaffirmed its position regarding the sovereignty over the five territories when it ratified the UNCLOS on 31 May 2007, declaring that

> the laws and regulations relating to maritime areas in force in Morocco shall remain applicable without prejudice to the provisions of the United Nations Convention on the Law of the Sea. The Government of the Kingdom of Morocco *affirms once again that Sebta, Melilia, the islet of Al-Hoceima, the rock of Badis and the Chafarinas Islands are Moroccan territories. Morocco has never ceased to demand the recovery of these territories*, which are under Spanish occupation, in order to achieve its territorial unity. On ratifying the Convention, the Government of the Kingdom of Morocco *declares that ratification may in no way be interpreted as recognition of that occupatio*n.[20]

Accordingly, Morocco followed the equidistance method for the territorial sea but not for the EEZ or the continental shelf, to which Morocco inconsistently invokes equity principles.

Paradoxically, in the declaration marking Spain's signature of the UNCLOS in 1984, Spain included similar provisions about its sovereignty over the waters surrounding Gibraltar. Hence, Spain stated in a declaration made after ratification of the Convention, on 19 July 2002, that 'it does not accept the procedures provided for in part XV, section 2, with respect to the settlement of disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles.'[21] Furthermore, the delimitations between Spain and Morocco, which has not made any declaration in this respect, could be done by the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) or an arbitral tribunal if Spain would agree expressly with this point submitting the dispute by means of a special agreement. Consequently, the most feasible manner to carry out the delimitation is more likely through bilateral negotiations.

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18 Morocco did this by way of Decree nº 2-75-311 du 21 July 1975, BORM nº 3276 13 August 1975.

19 UNCLOS art 7(6) establishes: 'The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.'

20 Declaration of Morocco upon ratification of UNCLOS (31 May 2007) <www.un.org/depts/los/convention_agreements/convention_declarations.htm#Morocco> accessed 20 June 2018 [emphasis added].

21 Declaration made by Spain after ratification of UNCLOS (19 July 2002) <www.un.org/depts/los/convention_agreements/convention_declarations.htm#Spain%20Upon%20ratification> accessed 20 June 2018.

The current status and regulation of the five territories have, logically, decisive effects for the maritime claims of both countries. Given that all five territories are coastal, they give rise to entitlements over the adjacent waters in accordance with the UNCLOS. To address the relevant delimitations, Professor Casado Raigón and Professor Gutiérrez Castillo propose that three different groupings can be distinguished, which depend on the distance to the coast: (1) the Chafarinas Islands, Vélez de la Gomera and Alhucemas; (2) the Alboran Islands, the only territory not claimed by Morocco; and (3) Ceuta and Melilla, which are located on the African continent and constitute the most important Spanish territories in North Africa. [22] Even though a treaty between Spain and Morocco establishing their maritime boundaries seems impossible without first solving the sovereignty issues, the possible scenarios for each of the three groupings can nevertheless be analysed.

First, amongst the first group of islands, two of them – Vélez de la Gomera and Alhucemas – are uninhabited and situated very close to the Moroccan coast. However, 'uninhabited' does not necessarily mean 'incapable to sustain human habitation' in terms of Article 121(3) UNCLOS. On this matter, in the *Bangladesh/Myanmar* case,[23] ITLOS declared that 'neither case law nor State practice indicates that there is a general rule concerning to be given to islands in maritime delimitation' and 'the effect to be given to islands in delimitation may differ, depending on whether the delimitation concerns the territorial sea or other maritime areas beyond it.'[24] Moreover, 'while is not unprecedented in case law for islands subject to such treatment are usually "insignificant maritime features"'.[25] Therefore, the only maritime space that Spain could claim in applying Article 121(3) UNCLOS would be a territorial sea of 12 nautical miles (NM).[26] Nonetheless, the attribution of a territorial sea to these two islands could entail an inequitable result since they are surrounded by Morocco's mainland territory that would otherwise be cut off. For these reasons, a feasible solution would be the attribution to these two maritime features of a limited territorial sea smaller than 12 NM.

With regard to the Chafarinas Islands,[27] the existence of a Spanish military base, their larger size, and the greater distance to the Moroccan coast in comparison with Vélez de la Gomera and Alhucemas could justify not only the territorial sea as in the previous case but also an EEZ and a continental shelf. However, the acknowledgement for these islands of an EEZ and a continental shelf could represent a major difficulty in completing the maritime delimitation. In this sense, some scholars have highlighted the inconvenience, in terms of equity, of joining the hypothetical Chafarinas Islands

22 Casado Raigón and Gutiérrez Castillo (n 3) 207-08.

23 *Delimitation of the maritime boundary in the Bay of Bengal* (*Bangladesh/Myanmar*) (Judgment of 14 March 2012) ITLOS Reports 2012, 4.

24 ibid paras 147-48.

25 ibid para 151.

26 In this sense, the ICJ declared in *Nicaragua v Colombia* that 'a rock which is incapable of sustaining human habitation or economic life of its own under Article 121, paragraph 3, of UNCLOS, so this feature generates no entitlement to a continental shelf or exclusive economic zone': *Territorial and maritime dispute (Nicaragua v Colombia)* (Judgement) [2012] ICJ Rep 693, para 183 *in fine*.

27 Jesús Verdú Baeza, 'España en el norte de África. El caso de las islas Chafarinas' (2014) 27 REEI <www.reei.org/index.php/revista/num27/notas/espana-norte-africa-caso-islas-chafarinas> accessed 20 June 2018.

continental shelf to the Spanish mainland continental shelf.[28] Indeed, this last position seems more reasonable because Morocco, due to the proximity of these islands to the Moroccan coast, would hardly agree to confer all the maritime areas that could be claimed by Spain in relation to those islands. Thus, it would be more equitable, and logical, to establish a territorial sea around these islands facing Morocco's coast, and a territorial sea, a contiguous zone and an EEZ facing the Spanish coast – concretely, in the Gulf of Almería. Accordingly, the maritime spaces of these islands would not be isolated by Morocco's waters and, at the same time, these three small islands would not produce an inequitable result that leaves Morocco with less maritime spaces than it is entitled to.

Concerning the second grouping, the location of the Alboran Islands is considerably different than the first group. In particular, these two small islands are almost in the equidistance line that could be drawn between Spain and Morocco in the Alboran Sea – specifically, five NM south of this hypothetical line.[29] Furthermore, taking into account that these islands are uninhabited and could hardly 'sustain human habitation or economic life of their own,'[30] the 12 NM territorial sea that could be given to them would meet the Spanish mainland EEZ and continental shelf by the southern Spain area. Taking into account the closeness of these islands to the possible equidistance line and the fact that Morocco does not claim these islands, it is unlikely that a maritime boundary between Spain and Morocco will be drawn in the Alboran Sea that leaves the Alboran Islands out of Spanish mainland maritime zones as a whole.

Finally, regarding the third grouping, the scenario with Ceuta and Melilla is different from those mentioned above because these two Spanish territories in the north of Morocco are located on a mainland (although a different continent, i.e. Africa) and, as such, they can generate all the maritime areas allowed by international law. Regarding Ceuta, its maritime areas should be joined, northbound and in a north-westerly direction, to the Spanish maritime zones resulting from the Iberian Peninsula due to its closeness to the latter.[31] In relation to Ceuta's maritime areas in the south-easterly and southbound direction, the maritime boundary should be drawn through an equidistance line considering the length of the Ceuta coastline as well. In the case of Melilla, its great distance from the Spanish coast in the Iberian Peninsula, in addition to the fact that it is completely surrounded by Morocco's coastal territories, make joining the two continental shelves more complex. Nevertheless, a hypothetical maritime delimitation between Spain and Morocco in the area around Melilla could be done by joining a narrow band of Melilla's EEZ and continental shelf in a north-easterly direction with the EEZ and continental shelf belonging to the Spanish territories located in the Iberian Peninsula. On the other hand, the rest of its territorial sea would limit Morocco's territorial sea and EEZ in the southward and northbound directions.[32]

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28 Casado Raigón and Gutiérrez Castillo (n 3) 209.

29 ibid.

30 As mentioned before, these are the terms used by UNCLOS art 121(3) for the rocks that are not entitled to an exclusive economic zone or continental shelf.

31 José Manuel Lacleta, 'Las aguas españolas en la costa africana' (2003) 7 REEI, 9-10 and 11-14 <www.reei.org/index.php/revista/num7/agora/aguas-espanolas-costa-africana> accessed 21 June 2018.

32 Casado Raigón and Gutiérrez Castillo (n 3) 210.

2.3 Impact on the Strait of Gibraltar

The previous discussion on the lack of delimitation in the Alboran Sea has consequences for the Strait of Gibraltar – one of the world's most important straits in terms of international navigation.[33] In this sense, the Strait of Gibraltar is one of 120 straits in the world, of which 100 are covered by the territorial waters of the coastal States.[34] This is the case for the Strait of Gibraltar, which joins the Atlantic Ocean with the Mediterranean Sea and, as such, the high seas with the EEZ. For this kind of strait, Articles 37-44 UNCLOS establish the regimen of *transit passage*. In spite of the sovereign disputes between Spain and Morocco (and also the United Kingdom as the administering power over the Rock of Gibraltar[35]) and the repercussions in the absence of maritime boundaries, the parties agree to the right of vessels to transit passage and cooperate closely with each other, and with the International Maritime Organization, to further the safety of maritime traffic in this area.[36] Regarding transit passage in UNCLOS, Morocco has not made any declarations or reservations; Spain has only made a declaration upon the ratification of the Convention, on 15 January 1997, understanding that '[t]he provisions laid down in Part III of the Convention are compatible with *the right of a coastal State to dictate and apply its own regulations in straits used for international navigation*, provided that this does not impede the right of transit passage.'[37]

2.4 Negotiations at the high-level meetings and feasible solutions

With the aim of contributing to cooperation and a good relationship between Morocco and Spain, there are frequent high-level meetings between the two States, which are regulated by the *Treaty of friendship, good-neighbourliness and cooperation* between Spain and Morocco of 1991. The most recent 11th meeting took place in 2015;[38] while these meetings address issues going beyond maritime boundaries, due to the scope of this article, only the latter will be addressed here. For maritime delimitation purposes, it is important to note that both countries have been behaving recently in a

33 Ana Gemma López Martín, 'Navigation through the Strait of Gibraltar' 2017 21 SYbIL <www.sybil.es/archive/vol-21-2017/> accessed 21 June 2018.

34 Driss Dahak, 'El régimen jurídico de los Estrechos' (1982) II Coloquio internacional sobre la factibilidad de una comunicación fija a través del Estrecho de Gibraltar, 497.

35 Upon the accession to the UNCLOS, on 25 July 1997, the UK stated in relation to Gibraltar that 'with regard to point 2 of the declaration made upon ratification of the Convention by the Government of Spain, the Government of the United Kingdom has no doubt about the sovereignty of the United Kingdom over Gibraltar, including its territorial waters. The Government of the United Kingdom, as the administering authority of Gibraltar, has extended the United Kingdom's accession to the Convention and ratification of the Agreement to Gibraltar. The Government of the United Kingdom, therefore, rejects as unfounded point 2 of the Spanish declaration.' UN Division for Ocean Affairs and the Law of the Sea, 'Declarations and statements' <www.un.org/depts/los/convention_agreements/convention_declarations.htm#UK%20Upon%20accession> accessed 21 June 2018. Pablo Antonio Fernández Sánchez, 'La controversia sobre la titularidad jurídico-internacional de los espacios marítimos adyacentes a Gibraltar' (2015) 67 REDI 13.

36 Rafael Casado Raigón, 'Le détroit de Gibraltar' in Rafael Casado Raigón (ed), *L'Europe et la mer: pêche, navigation et environnement marin* (Bruylant 2005).

37 Declaration of Spain upon ratification of UNCLOS (15 January 1997) <www.un.org/depts/los/convention_agreements/convention_declarations.htm#Spain%20Upon%20ratification> accessed 25 June 2018 [emphasis added].

38 Tratado de amistad, buena vecindad y cooperación entre el Reino de España y el Reino de Marruecos (concluded 4 July 1991) (BOE 49, 26 February 1993) <www.boe.es/buscar/doc.php?id=BOE-A-1993-5422> accessed 20 June 2018.

way that decreases the disputed aspects (particularly, the sovereignty issues explained above) and to cooperate as much as possible.[39] In this sense, the rapprochement of Spain to Morocco's stance on Western Sahara, consisting of the integration of an autonomous Western Sahara with Morocco and the new official position of Morocco postponing its historical sovereignty claims, have been very helpful.[40] Moreover, the aforementioned contribution of the EU has improved the relationships between the two countries.

Even though there were no talks on determining the maritime boundaries in the last high-level meeting between the two countries in 2015, these conversations have been conducted in previous meetings, namely those held in 2003 and 2005.[41] The delimitation was likely not addressed in 2015 because of the recent (at the time) submission by Spain to the Commission on the Limits of the Continental Shelf (CLCS) for an extension of the continental shelf in the Canary Islands on 17 December 2014.[42]

In light of the above, the early conclusion of an agreement between Spain and Morocco delimiting their maritime boundaries in the Alboran Sea is improbable. Having said that, the lack of a declaration by Spain of an EEZ in the Alboran Sea, in contrast to the Mediterranean,[43] may suggest a certain predisposition by Spain to negotiate these issues in the future. Regardless of when the negotiations for reaching an agreement will take place, Spain will safeguard the status of Ceuta and Melilla as integral parts of Spain given their historic Spanish heritage and as established in the administrative division of Spain made by the Spanish Constitution of 1978. Finally, we should not lose sight of either the political aspects that such negotiations bring about or the extremely sensitive sovereignty issues, as evidenced by the Perejil incident.[44]

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39 Juan Domingo Torrejón Rodríguez, 'La XI Reunión de Alto Nivel hispano-marroquí. Análisis y reflexiones sobre su contexto y sobre las materias discutidas en el ámbito del diálogo político' (2015) 3 PESI 213, 217.

40 On this point, the Spanish-Moroccan Joint Declaration (Madrid, 5 June 2015) after the meeting stated that 'concerning the Western Sahara issue, the two Parties are pleased for the adoption, in April 2015, of the 2218 Resolution by the United Nations Security Council. In this context, Spain recognises the serious and believable efforts of Morocco. Equally, the two Parties have reminded the importance of the resumption of negotiations on solid bases, according to resolutions and parameters clearly defined by the Security Council and have emphasised the spirit of compromise and realism to reach a consensual and mutually acceptable political solution.' The full text of the declaration, in its French original version that has been translated to English by the author, can be found at <www.exteriores.gob.es/Embajadas/RABAT/es/Noticias/Documents/D%C3%A9claration%20XI%20RAN.pdf> accessed on 20 June 2018. However, the two recent decisions of the CJEU (Case C-104/16 P, Judgment of 21 December 2016; Case C-266/16, Judgement of 27 February 2018, referred below) in addition to the even more recent change in the Spanish Government may bring a new position of Spain in this regard since those decisions seem rectify, according to international law, the previous pragmatic approach of Spain.

41 Those two joint declarations can be consulted in Alejandro del Valle Gálvez and Juan Domingo Torrejón Rodríguez, *España y Marruecos. Tratados, declaraciones y memorandos de entendimiento (1991-2013)* (UCA 2014) 295, 309.

42 Submission by the Kingdom of Spain to the Commission on the Limits of the Continental Shelf (17 December 2014) <www.un.org/depts/los/clcs_new/submissions_files/submission_esp_77_2014.htm> accessed 20 June 2018.

43 Spain declared an EEZ of 200 NM in the north-western Mediterranean (from the Cape of Gata to the equidistance line with the neighbouring riparian States) by Real Decreto 236/2013, 5 April 2013, BOE 17 April 2013 <www.boe.es/buscar/doc.php?id=BOE-A-2013-4049> accessed 21 June 2018.

44 See (n 11) above on the Perejil incident.

3. The pending maritime delimitation in the area between the Canary Islands and Morocco's Atlantic coast

In the Atlantic Ocean, the maritime delimitation between Spain and Morocco, at first sight, seems easier than in the Alboran Sea; in principle, Spain and Morocco need only establish the maritime boundary between the Canary Islands and Morocco's Atlantic coast.[45] In this sense, this delimitation does not initially present a lot of difficulties in the northern region, since there are no special circumstances and the coasts are opposite one another. Nevertheless, the delimitation is again hindered by a sovereignty issue, namely the Western Sahara and Morocco's claim to this territory, over which Morocco can be considered as the *de facto* administering power.

In the same vein, another significant aspect regarding the maritime delimitation in that part of the Atlantic Ocean is the presence of some Portuguese islands north of the Canary Islands and facing Morocco's Atlantic coast. Concretely, we are talking about the Savage Islands (*Islas Salvages* in Spanish) and Madeira. The Savage Islands are located between the Canary Islands and Madeira – in particular, 80 NM north of the Canary Islands and 162 NM south of Madeira. Since the Spanish-Portuguese delimitation in this area is complicated,[46] and taking into account that this particular delimitation exceeds the scope of this article, the only concern relevant to the discussion at hand is that a hypothetical delimitation between Spain and Morocco north of the Canary Islands must be done on a trilateral level with Portugal aimed at respecting its maritime entitlements in that area.

In order to fully explain the situation of the pending maritime delimitations between Spain and Morocco in the Atlantic Ocean, this section will address some of the most important aspects, such as the Western Sahara issue (3.1), the hypothetical Canary Islands' archipelagic waters (3.2), Morocco's perspective regarding the delimitations (3.3), the negotiations carried out thus far between the two countries as well as the alleged tacit agreement about the maritime boundary (3.4), and an analysis of the relevant circumstances and the median line (3.5).

3.1 Western Sahara

First of all, the UN does not recognise either Spain or Morocco as the colonial power of Western Sahara, and it must be mentioned that a potential agreement establishing the maritime boundary with Western Sahara, according to international law, shall not be concluded with Morocco. In addition to the ICJ's Advisory Opinion of 16 October 1975 about Western Sahara,[47] the Court of Justice of the European Union (CJEU) pronounced in a recent 2016 judgment that 'the customary principle of self-determination … is, as the International Court of Justice stated in paragraphs 54 to 56 of its Advisory Opinion on Western Sahara, a principle of international law applicable to all non-self-gov-

45 Casado Raigón and Gutiérrez Castillo (n 3) 210-11.

46 See *contra* Amparo Serrano, 'The new maritime map of Portugal and the case of the 'Salvajes' Islands' (2014) 28 REEI, 17-28 <www.reei.org/index.php/revista/num28/articulos/nuevo-mapa-maritimo-portugal-caso-islas-salvajes> accessed 21 June 2018.

47 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.

erning territories and to all peoples who have not yet achieved independence';[48] accordingly, 'that principle forms part of the rules of international law applicable to relations between the European Union and the Kingdom of Morocco'.[49] Moreover,

> [i]n view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination, in relation to that of any State, including the Kingdom of Morocco, the words 'territory of the Kingdom of Morocco' set out in Article 94 of the Association Agreement cannot … be interpreted in such a way that Western Sahara is included within the territorial scope of that agreement.[50]

Prior to the CJEU's judgment of 21 December 2016, the *status quo* was the tacit acceptance by the EU (and consequently by Spain) of Morocco as the administering power and correct interlocutor to negotiate on the waters surrounding the Western Sahara coasts. As Professor Casado Raigón and Professor Gutiérrez Castillo argue, the conclusion of fisheries agreements between Morocco and the EU, including the sea to which Western Sahara is entitled, came to ratify this tendency.[51]

Notwithstanding this assertion, after the CJEU's judgment, the previous scenario ought to be called into question and Morocco can no longer be considered the correct representative of the interests of Western Sahara (the correct representative should be, presumably, the Front Polisario).[52] In accordance with the UN General Assembly resolutions,[53] this colonised territory has the right to self-determination and, in the words of the EU Advocate General, the right that the '*exploitation* (of the Western Sahara natural resources) *is carried out for the benefit of the people of that territory*'.[54]

In this line, on 27 February 2018, the CJEU issued its judgment in the *Western Sahara Campaign UK* case,[55] accepting the validity of the fisheries agreements between Morocco and the EU but declaring that the concept of 'territory of the Kingdom of Morocco'[56] 'must be construed as referring to the geographical area over which the Kingdom of Morocco exercises the fullness of the powers granted to sovereign entities by international law, to the exclusion of any other territory, such as that

48 Case C-104/16 P *Council v Front Polisario* [2016] ECR 973, para 88.

49 ibid para 89.

50 ibid para 92.

51 Casado Raigón and Gutiérrez Castillo (n 3) 212.

52 Markus W Gehring, 'Court of Justice further clarifies the application of the EU-Morocco Fisheries Partnership Agreement to Western Sahara' (*EU Law Analysis*, 1 March 2018) <http://eulawanalysis.blogspot.com/2018/03/court-of-justice-further-clarifies.html> accessed 29 August 2018.

53 Among others, the well-known Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by UNGA Res 1514 (XV) (14 December 1960), and Permanent sovereignty over natural resources, adopted by UNGA Res 1803 (XVII) (14 December 1962).

54 Case C-266/16 *Western Sahara Campaign UK* [2018] ECR 1, Opinion of AG Melchior Wathelet, para 293 [emphasis added].

55 Case C-266/16 *Western Sahara Campaign UK* [2018] ECR 118.

56 ibid para 61.

of Western Sahara.'[57] Consequently,

> [i]f the territory of Western Sahara were to be included within the scope of the Association Agreement, that would be contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, stated in Article 1 of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention is a specific expression.[58]

Therefore, 'the territory of Western Sahara is not covered by the concept of "territory of Morocco" within the meaning of Article 11 of the Fisheries Partnership Agreement';[59] hence, 'the waters adjacent to the territory of Western Sahara are not covered by the expression "waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco", in Article 2(a) of the Fisheries Partnership Agreement.'[60]

Thus, the maritime delimitation between Spain and Morocco over the Western Sahara waters, located south of the Canary Islands, would be invalid because Morocco is not the lawful sovereign State of this territory. For this reason, a pragmatic approach would be to exclude negotiations about maritime delimitation over this area from the framework of the maritime delimitation negotiations between Spain and Morocco, since they would be, at least in regard to that area and legally speaking, prohibited under international law.

3.2 The archipelagic character of the Canary Islands and the Canaries Waters Law

The maritime delimitation between Spain and Morocco in the Atlantic Ocean must be made in the area between the Canary Islands and Morocco, rather than between the Spanish mainland coast and Morocco. This archipelago comprises seven main islands, all of which are inhabited: El Hierro, La Gomera, La Palma, Tenerife, Gran Canaria, Fuerteventura, and Lanzarote. Historically, these islands have belonged to Spain since the 15th century; hence, in contrast to the Spanish territories in North Africa, this is likely the reason why they are not claimed by Morocco despite its close proximity.

Article 46(b) UNCLOS, in relation to archipelagic States, establishes that '"archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such'. Accordingly, the Canary Islands should be entitled to the same rights as the *archipelagic States* in terms of baselines and internal waters in relation to their effect on maritime delimitation purposes, among

57 ibid para 62.

58 ibid para 63.

59 ibid para 64.

60 ibid para 73.

others.[61] Nevertheless, the archipelagos of a State belonging to mixed States (as Spain is – not only because of the Canary Islands but also due to the Balearic Islands[62]) cannot benefit from the provisions of Part IV UNCLOS. This has been confirmed by the ICJ in the *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain*, declaring that 'the method of straight baselines is applicable only if the State has declared itself to be an archipelagic State under Part IV of the 1982 Convention on the Law of the Sea, which is not true of Bahrain in this case',[63] and, more recently, by the arbitral tribunal in the *South China Sea Arbitration*.[64]

Although international law prohibits Spain from delimiting the maritime areas surrounding the Canary Islands by drawing archipelagic baselines, Article 1 of Law 15/1978 of 20 February 1978 regarding the exclusive economic zone[65] establishes that 'in the case of archipelagos, the outer limit of the economic zone will be measured from the straight baselines joining the external points of the islands and rocks by which they are respectively formed, so that the resulting perimeter follows the general configuration of each archipelago.'[66] This provision was further developed by Law 44/2010 of 30 December 2010 regarding the Canaries waters (Canaries Waters Law).[67] Strictly speaking, these archipelagic lines enclose an area with a proportion between land and water within the UNCLOS limits.[68] The significant timespan between these two laws (more than 30 years) shows the difficulties of gaining approval since Spain has always been aware of its contradiction, at least apparently, with international law.

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61 Sean D Murphy, 'International Law Relating to Islands' in Académie de Droit International (ed), Collected Courses 2016 (Brill 2017) 144-50.

62 The reasons for this unequal treatment can be found in the negotiations of the Third Conference, where the mixed States (e.g. Ecuador, India, Denmark or Norway) were not able to receive the same treatment. See Rafael Casado Raigón, *Derecho Internacional* (3rd edn, Tecnos 2017) 324; José Antonio de Yturriaga Barberán, Ámbitos de soberanía en la Convención de las Naciones Unidas sobre el Derecho del mar: una perspectiva española (Ministerio de Asuntos Exteriores 1993) 408 ss; Carlos Jiménez Piernas, 'Incidencia del principio archipelágico en la problemática marítima y autonómica de Canarias' (1981) 33 REDI 523.

63 *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits) (Judgement) [2001] ICJ Rep 103, para 214.

64 *South China See Arbitration (Philippines v China)* (PCA 2016) Award of 12 July 2016, Case No. 2013-19 237, para 575.

65 Ley 15/1978, de 20 de febrero, sobre zona económica, BOE num 46, 23 February 1978 <www.boe.es/buscar/act.php?id=-BOE-A-1978-5340> accessed 20 June 2018.

66 Translation by the author.

67 Ley 44/2010, de 30 de diciembre, de aguas canarias, BOE num 318, 31 December 2010 <www.boe.es/diario_boe/txt.php?id=BOE-A-2010-20140> accessed 21 June 2018.

68 Esperanza Orhiuela Calatayud, 'La delimitación de los espacios marinos en los archipiélagos de Estado: Reflexiones a la luz de la ley 44/2010, de 30 de diciembre de aguas canarias' (2011) 21 REEI, 14 <www.reei.org/index.php/revista/num21/articulos/delimitacion-espacios-marinos-archipielagos-estado-reflexiones-luz-ley-442010-30-diciembre-aguas-canarias> accessed 21 June 2018.

Analysing further the content of the Canaries Waters Law,[69] it establishes that

> between the external points of the islands and rocks that … integrate the Canary Archipelago, a perimeter contour will be drawn following the general configuration of the archipelago, according to the Annex of this Law. The waters inside this perimeter contour will be called Canaries waters and constitute the special maritime area of the Canary Autonomous Community.[70]

From this provision, the use of the expression 'Canaries waters' instead of inter-island or archipelagic waters to refer to the waters enclosed by those archipelagic baselines stands out. In addition, its *Disposición Adicional Única* (i.e. additional disposition) declares that 'the drawing of the perimeter contour will not modify the delimitation of the maritime areas of the Canary Islands according to the way in which they are established by the Spanish legal system in virtue of the current international law.'[71]

Therefore, the Spanish legislation on this topic – particularly the Canaries Waters Law – does not have a clear effect and, in any case, that effect would only be relevant to the hypothetical internal waters, but not for the purposes of maritime delimitation. Moreover, taking into consideration the geographical configuration of the two eastern islands, Fuerteventura and Lanzarote, which are the relevant coasts for this maritime delimitation because they face the Moroccan coast, the natural features of the islands can have the same effect for the median line between them and Morocco as the drawing of archipelagic baseline. Consequently, the maritime delimitation could be reached here without the need for Spain to draw archipelagic baselines.

3.3 Morocco's perspective

Having explored Spain's position on the drawing of an equidistance line, we now need to consider Morocco's understanding before addressing the State practice of these two countries.[72] Morocco disagrees with the equidistance line,[73] largely arguing that 'the respective configuration of the Moroccan coasts lying opposite the coasts of the Canary Islands, constitutes a relevant circumstance of the geographic type established in Morocco's legislation that allows Morocco to refuse the application of the equidistance method.'[74] Thus, Morocco argues that the concavity of its coast should moderate the equidistance line on the basis of, *inter alia*, the ICJ's judgement in the *North Sea Continental Shelf*

69 Inmaculada González García, 'Archipelagos and islands' 2017 21 SYbIL <www.sybil.es/archive/vol-21-2017/> accessed 21 June 2018.

70 Translation by the author.

71 Translation by the author.

72 Saïd Ihrai (n 6) 199-225.

73 Siham Zebda, 'Cuestiones jurídicas en torno a la delimitación marítima entre Marruecos y España en la fachada atlántica' (DPhil thesis, University of Cádiz 2017) 288-326.

74 Abdelkader Lahlou, *Le Maroc et le Droit des pêches maritimes* (LGD 1983) 310-12 [translated from French to English by the author].

case.[75] Nonetheless, the ICJ's judgement related to a delimitation between States with adjacent coasts, the conclusions of which cannot be extended to a delimitation between States with opposite coasts.[76] Moreover, the concavity starts just north of the relevant area and, in this case, the concavity does not result in a cut-off effect. Regarding these two points, the findings of ITLOS in the *Bangladesh/Myanmar* case stand in opposition to Morocco's arguments since the Tribunal declared that 'for a coast to be considered as relevant in maritime delimitation it must generate projections which overlap with those of the coast of another party';[77] hence, 'in the delimitation of the exclusive economic zone and the continental shelf, concavity *per se* is not necessarily a relevant circumstance'.[78]

In addition, Morocco supports its argument based on the natural prolongation of its continental shelf, which is longer than that of the Canary Islands.[79] Indeed, as a result of their volcanic origin, the Canary Islands have a shorter continental shelf in the geographic sense, especially in comparison to Morocco's continental shelf, which stretches close to the islands.[80] However, Article 76(1) UNCLOS allows a State to declare a continental shelf of 200 NM even if it is shorter geographically-speaking. Thus, Morocco's argument is unfounded and cannot prevent consideration of the median line either as the equidistance line or the equitable boundary.

3.4 Negotiations and the hypothetical tacit agreement

Despite the clearly different positions of Spain and Morocco regarding the maritime delimitation between Morocco's Atlantic coast and the Canary Islands, there have been negotiations between them to reach an agreement in order to delimit a common maritime boundary for the EEZ and the continental shelf. As mentioned above, after the Perejil incident,[81] the two States initiated talks with this topic as one of their main goals. Since the first meeting in 2003, the working group in charge of the talks have met eight times to discuss negotiations regarding the maritime boundary in the area around the Canary Islands north of the boundary between Morocco and Western Sahara.[82]

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75 *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, para 89.

76 Also relevant here are international decisions dealing with maritime delimitations between opposite coasts, such as: *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Application to Intervene) (Judgement) [1984] ICJ Rep 3; *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v Norway*) (Judgement) [1993] ICJ Rep 38; (*Qatar v Bahrain*) (n 63); and *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgement) [2012] ICJ Rep 624.

77 *Delimitation of the maritime boundary in the Bay of Bengal* (*Bangladesh/Myanmar*) (Judgment, 14 March 2012) ITLOS Reports 2012, 4, para 198.

78 ibid para 292. ITLOS added in the same paragraph that 'however, when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result.'

79 Felipe Baeza Betancort, 'La delimitación de los espacios marítimos entre Canarias y Marruecos' (2013) 59 AEA 867, 881.

80 Vicente Jesús Navarro Marchante, 'Problemática jurídica sobre la delimitación de los espacios marítimos del archipiélago canario (a propósito de la Ley 44/2010)' (2011) 80 RDP 149, 173.

81 See (n 11) above on the Perejil incident.

82 The boundary between Morocco and Western Sahara is located in the parallel of latitude 40° 27' and hence the area to be delimited between Spain and Morocco is in a northbound direction of that parallel. See Vitoriano Ríos Pérez, 'Islas o archipiélago? antecedentes e iniciativas parlamentarias sobre la delimitación del Mar de Canarias' (*Islas o Archipiélago*, July 2007) <http://islasoarchipielago.com/> accessed 21 June 2018.

As noted by Professor Espósito Massicci, there is neither official data published by the governments nor unambiguous information about the conclusions of this working group.[83] However, it seems clear that during the fourth meeting of the working group, which took place on 15 July 2003, both States agreed to draw a provisional *equidistance median line* between the coasts even though in a package deal context. That is to say, the agreement would not be final until all the agreements would be accepted and formalised by an international treaty.[84] The agreement thus failed in principle because, after that meeting, the States did not agree to turn it into a treaty. The last meeting of the working group was on 10 October 2005 in Madrid, and both parties blamed the other for not continuing with the negotiations.[85] Arguably, responsibility for the failure of these negotiations largely rests with Morocco since they were based on an alternation principle and, accordingly, the following meeting should have been convened by Morocco – but it was not.

Notwithstanding the lack of a treaty, which would have made the agreement on the provisional median line official, there is still a discussion to be had as to whether both States are *de facto* respecting that median line in their respective State practice. In this regard, the hydrocarbon concessions given by both governments to certain oil companies in order to research the existence of oil fields in the subsoil between the Atlantic coast of Morocco and the Canary Islands are relevant. If the States have authorised the mentioned concessions to explore their subsoil just between their coasts and that provisional median line, it may mean that they are accepting – tacitly and *de facto* – the binding character of that line as the maritime boundary between them.[86] Nevertheless, in the *Ghana/ Côte d'Ivoire* case, the ITLOS Special Chamber stated that

> the oil practice, no matter how consistent it may be, cannot in itself establish the existence of a tacit agreement on a maritime boundary. Mutual, consistent, and long-standing oil practice and the adjoining oil concession limits might reflect the existence of a maritime boundary, or might be explained by other reasons.[87]

In this sense, in December 2001, the Spanish government (by Royal Decree 1462/2001[88]) authorised the oil company Repsol to research the existence of oil fields in an area located 5 NM from Fuerte-

83 Carlos Espósito Massicci, 'Sobre el establecimiento de una línea mediana como límite marítimo provisional entre España y marruecos frente a las costas de las Islas Canarias' (2005) 13 RJUAM 91, 92-93.

84 The Spanish Government answer to the member of the parliament, Paulino Rivero Baute, about the reasons for not informing the Canaries Government about the drawing of a provisional median line during the seventh meeting of the work group (that took place on 26 October 2004) BOCG num 284, 31 October 2005.

85 Juan Domingo Torrejón Rodríguez (n 39) 225.

86 Philippe Gautier, 'Conduite, accord tacite et délimitation maritime', in Société Française Pour Le Droit International (ed), *Droit des frontières internationales* (Pedone 2016) 145-50.

87 *Delimitation of the maritime boundary in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*) (Judgment, 23 September 2017) ITLOS Reports 2017, to be published, para 215 <www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf> accessed 22 June 2018.

88 Real Decreto 1462/2001, de 21 de diciembre, por el que se otorgan los permisos de investigación de hidrocarburos, BOE num. 20, 23 January 2002 <www.boe.es/buscar/doc.php?id=BOE-A-2002-1363> accessed 22 June 2018.

ventura (in the territorial sea) and 10 NM from Lanzarote (in the contiguous zone).[89] These Spanish concessions were hardily protested by Morocco through a *note verbale* sent to the Spanish Embassy in Rabat on 31 January 2002.[90] Nevertheless, such protests took place before the negotiations of the provisional median line and thus cannot be viewed as a rejection of that line by Morocco.

More recently, in March 2012, Spain authorised (by Royal Decree 547/2012[91]) hydrocarbon prospecting in the maritime area between 5 NM and 43 NM from Lanzarote and Fuerteventura[92] – that is, after the negotiations of the provisional median line. Importantly, Morocco did not protest these new concessions in the same area thereby changing its previous reaction in relation to the earlier concessions. Moreover, Morocco has authorised prospecting in this area several times since then, the last occurring in Tarfaya at the end of 2017.[93] In all of these authorisations, the licences issued by Morocco were for places between the Moroccan coast and the provisional median line negotiated in 2003 to delimit the EEZ and the continental shelf.[94] Nonetheless, as declared by the ITLOS Special Chamber in *Ghana/Côte d'Ivoire*, 'proof of the existence of a maritime boundary requires more than the demonstration of longstanding oil practice or adjoining oil concession limits.'[95]

Remarkably, in the *Ghana/Côte d'Ivoire* case, the Special Chamber observed 'that States often offer and award oil concession in an area yet to be delimited' and usually 'align their concession blocks with those of their neighbouring States so that no areas of overlap arise.'[96] In this regard, the Special Chamber declared that 'to equate oil concession limits with a maritime boundary would be equivalent to penalizing a State for exercising such caution and prudence.'[97] Thus, it would run contrary to

89 Millán Requena Casanova, 'España concede a la empresa Repsol YPF permisos de investigación de hidrocarburos en aguas situadas, en aplicación del método de la equidistancia, más allá del mar territorial de las islas Canarias frente al litoral marroquí' (2002) 54 REDI 501.

90 In that verbal note Morocco said, between other clarifications, 'selon les normes du Droit International coutumier, la délimitation du plateau continental est effectuée par voie d'accord, dans le but de parvenir à une solution équitable. Au cas où les Etats concernés ne parviennent pas à conclure un accord définitif, ils procèdent à des arrangements provisoires de caractère pratique, qui sont sans préjudice de la délimitation finale. Ainsi, sur le plan procédural, l'accord des deux pays est donc incontournable pour délimiter, à titre définitif ou provisoire, le plateau continental'. The full text of the verbal note was published by Morocco's official news agency (MAP) on 31 January 2002.

91 BOE num 69, 21 March 2012 <www.boe.es/diario_boe/txt.php?id=BOE-A-2012-3935> accessed 22 June 2018. This *Real Decreto* came to ratify the previous one (*Real Decreto* 1462/2001, 21 December 2001) that was annulled by the Spanish Supreme Court (*Tribunal Supremo*) on 2004, with the following stop of the prospections, because it did not comply with Spain's environmental law, by a previous judgement of the Spanish Supreme Court, i.e. *Sentencia de la Sección tercera de la Sala de lo Contencioso-Administrativo del Tribunal Supremo, del 24 de febrero de 2004.*

92 Cabildo de Lanzarote, 'Argumentario general sobre las prospecciones petrolíferas en Canarias' (*Datos de Lanzarote*, 3 January 2013) 4 <www.datosdelanzarote.com/uploads/doc/Argumentario-sobre-las-prospecciones-petrol%C3%AD-feras-en-Canarias-20130222093835965propetrol.pdf> accessed 22 June 2018.

93 RLP, 'Marruecos adjudica a ENI prospecciones de petróleo frente a Canarias' ABC (Las Palmas de Gran Canaria, 29 December 2017) <www.abc.es/espana/canarias/abci-marruecos-adjudica-prospecciones-petroleo-frente-canarias-201712281123_noticia.html> accessed 22 June 2018.

94 Rafael García Pérez, 'Las prospecciones petrolíferas en aguas canarias y su impacto en las relaciones hispano-marroquíes' (2012) 13 REIM <https://revistas.uam.es/index.php/reim/article/view/894/882> accessed 22 June 2018.

95 *Ghana/Côte d'Ivoire* (n 87) para 215.

96 ibid para 225.

97 ibid.

Articles 74(3) and 83(3) of UNCLOS and 'it would also entail negative implications for the conduct of States in the area to be delimited elsewhere.'[98]

Nonetheless, to be clear, according to the jurisprudence of ITLOS, the hydrocarbon practice alone is not enough to prove the existence of a tacit agreement on the maritime boundaries; the tacit agreement would have to be substantiated through other types of State practice, such as fishing activities, marine environment protection, migration control or any activity other than hydrocarbons, which could demonstrate the State's conduct in relation to the line tacitly *agreed to*. In fact, the existence of a tacit agreement in the context of maritime delimitation has been accepted by international jurisprudence, concretely in *Peru v Chile*, in which the ICJ recognised a tacit agreement in the context of a previous proclamation and declaration,[99] which 'the Parties reached concerning the extent of their maritime boundary.'[100]

In view of the foregoing, the respect given to the median line – located in the Atlantic Ocean between the coasts of Morocco and Spain's Canary Islands – by both States in their respective hydrocarbon activities' practice is not enough to assume the existence of a tacit agreement between the two countries accepting that line as their maritime boundary.

3.5 Possible relevant circumstances and the median line

As previously discussed, the two opposite coasts of Spain and Morocco in the Atlantic Ocean must be delimited – preferably by a single maritime boundary for the EEZ and the continental shelf. The relevant coasts in this delimitation are, on the one side, the eastern coasts of Gran Canaria, Fuerteventura and Lanzarote and, on the other side, the western Atlantic coast of Morocco at the points where they overlap with those of the coast of Spain in the Canary Islands.

From the baselines, a provisional median line based on a pure equidistance approach can be drawn. Following the three-stage method, it is necessary to consider whether there are relevant circumstances to adjust that provisional median line. The three main circumstances argued by Morocco – namely, the longer extension of its continental shelf, the greater length of its coast, and the concavity of its coast – should be rejected. In fact, these circumstances lack sufficient relevance in terms of adjustment of the provisional median line for the following three reasons. Firstly, regarding the longer extension of Morocco's continental shelf: logically, in geographic terms, the continental shelf generated by a continent is longer than that generated by volcanic islands; nevertheless, Article 76(1) UNCLOS applies equally to both States and entitles each to claim a continental shelf. Secondly, regarding the greater length of Morocco's coast: the entirety of Morocco's Atlantic coast cannot be taken into account; rather, only the relevant coast can be considered, and, in this case, the lengths of the relevant coasts do not differ significantly. Thirdly, regarding the concavity of the coast of Morocco: the concavity, which only starts in the area of the relevant coasts and is greater to the north of this area, does not apply in delimitations of opposite coasts (in contrast to the delimitation of adjacent coasts) and

98 ibid.

99 *Maritime Dispute (Peru v Chile)* (Judgment) [2014] ICJ Rep 3, 41, para 102.

100 ibid para 103.

does not produce any cut-off effect that could justify an adjustment of the median line in order to reach an equitable result.

Therefore, the maritime boundary delimitation between Spain and Morocco could be carried out by bilateral negotiations or it could be decided by an international court or tribunal in a hypothetical delimitation case between Spain and Morocco. In relation to the latter, even if that international adjudicating body would not accept the existence of a tacit agreement, there is no reason to adjust the median line between the relevant coasts of the Canary Islands and Morocco's Atlantic coast. Consequently, the maritime boundary in this area should be, in any case, the median line.

4. Conclusion

The conclusion of the pending maritime delimitations between Morocco and Spain both in the Alboran Sea and the Atlantic Ocean are, despite the associated difficulties, critical to solving the current disputes and to avoid the development of new disputes between the two countries. In terms of current disputes, reaching an agreement – or a decision issued by an international adjudicating body, even though this option would be complicated in light of the States' declarations – delimiting the maritime boundaries between Spain and Morocco would settle the associated sovereignty issues, since the agreed maritime boundary would require clarification of which State possesses full control over the territory in question in order to define the pertinent maritime entitlements. In terms of new disputes, these could arise as a result of the living (mainly fisheries) and non-living (especially hydrocarbon fields) resources existing in the Alboran Sea and the Atlantic Ocean, which, due to the lack of a delimited maritime boundary, could trigger claims by both States over those undelimited and disputed maritime areas and could even lead to serious disputes like the Perejil Incident.

Moreover, the sovereignty issues are also the main causes of the lack of delimitation – particularly in the Alboran Sea, but also in the Atlantic Ocean – and must be overcome in order to reach an agreement establishing the maritime boundaries between the two States. In addition, a different method of delimitation is argued by each State (equidistance in the case of Spain and equity in the case of Morocco) and, as such, the different conceptions of the effect that ought to be given to the *relevant* circumstances hinder the achievement of a possible agreement. Nevertheless, the existence of negotiations between the two countries aimed at reaching such an agreement and the momentum of the bilateral relations demonstrate that, in the not-too-distant future, an agreement on maritime boundaries could be reached. In this sense, the negotiated median line for the Atlantic Ocean leads the way for future negotiations even though that line, and the hydrocarbon activities carried out in that area, cannot be understood as a tacit delimitation agreement.

Finally, regardless of when the negotiations will be resumed, it seems that there is no reason to adjust the median line in the Atlantic Ocean between Spain (Canary Islands) and Morocco. However, regarding the delimitations in the Alboran Sea, the particularities of each Spanish enclave in North Africa should be duly considered – hence, modifying and reducing the respective maritime areas as appropriate – in order to facilitate achievement of the pending maritime delimitations between Spain and Morocco.

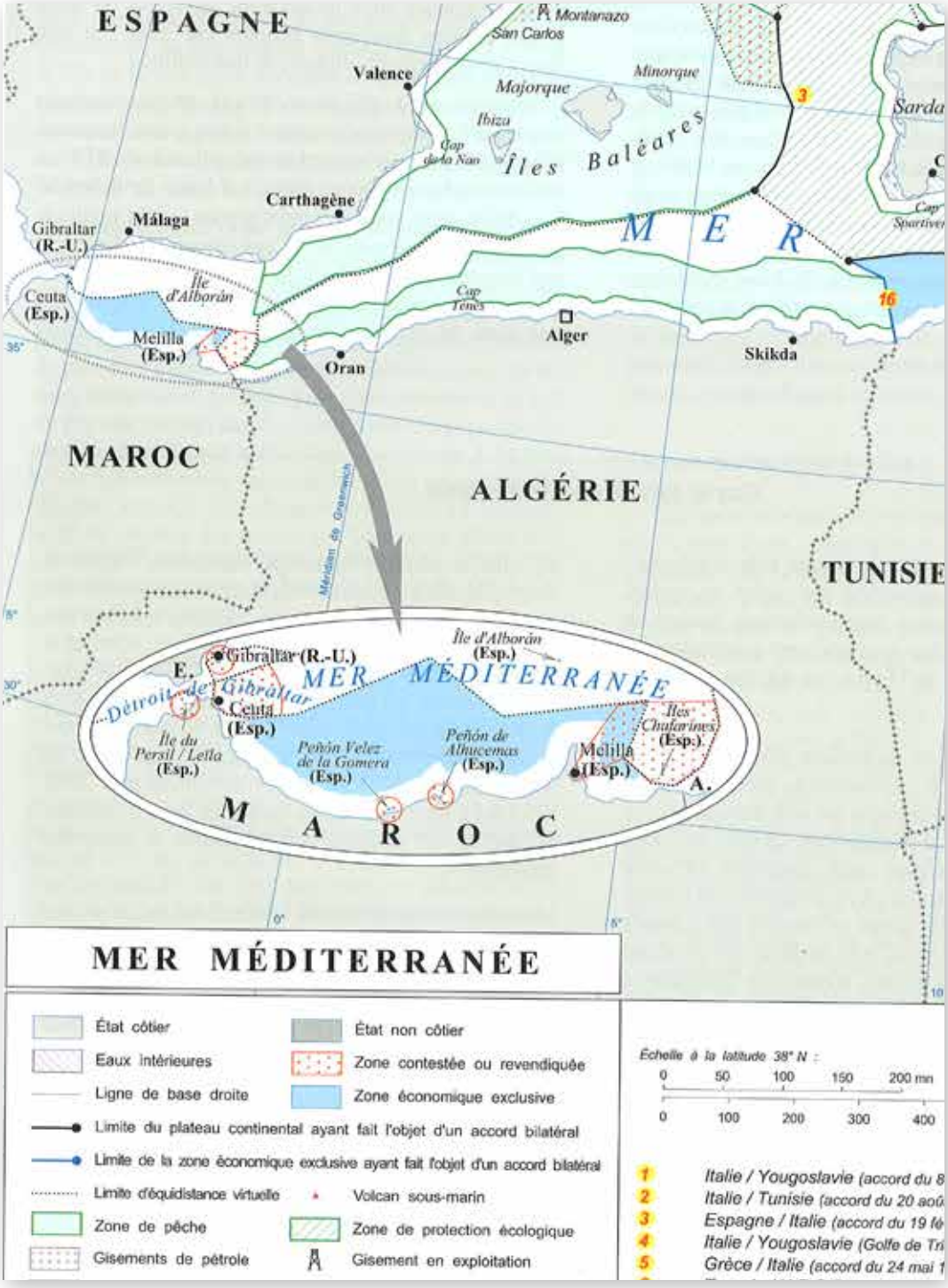

Figure 1 – Map of the maritime areas pending delimitation between Spain and Morocco in the Alboran Sea with the Spanish enclaves pointed out: Didier Ortolland and Jean-Pierre Pirat, *Atlas géopolitique des espaces maritimes: frontières,* énergie*, transports, piraterie, pêche et environnement* (2nd edn, Technip 2010) 86.

Figure 2 – Map of Spain and Morocco in the Atlantic Ocean: *Lloyd's Maritime Atlas of World Ports and Shipping Places* (Colchester, LLP Ltd 1999) 10.

Maritime Safety and Security Law Journal

Marine biodiversity beyond national jurisdiction: The launch of an intergovernmental conference for the adoption of a legally binding instrument under the UNCLOS

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Abstract

On 24 December 2017, the United Nations General Assembly adopted Resolution 72/249 dealing with the development of an International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. In line with the Resolution, a new intergovernmental conference met for the first time in September 2018 and will meet three more times before the beginning of 2020, under the auspices of the United Nations, in order to draw up this legally binding instrument under the United Nations Convention on the Law of the Sea. Although Resolution 72/249 sets the future procedural agenda for the collective adoption of such an instrument, it does not provide a specific deadline for the adoption of the future treaty and leaves some uncertainties. Moreover, the 'package deal' agreed to in 2011 – comprised of several elements including marine genetic resources, protected areas and environmental impact assessments – will have to be 'unpacked' during the negotiating process, underlining the fact that, so far, the substantial issues at stakes remain contentious and uncertainty prevails about the specific content of the future instrument.

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1. Introduction

On 24 December 2017, the United Nations General Assembly (UNGA) adopted Resolution 72/249 dealing with the development of an *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*. As per this Resolution, the UNGA 'decides to convene an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory committee [which met four times in 2016-2017] on the

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elements and to elaborate the text of an internationally binding instrument under the Convention',[1] launching the final official process of negotiation of a new international treaty dealing with the conservation and sustainable use of marine biodiversity beyond national jurisdiction. It would be the third implementing instrument adopted under the United Nations Convention on the Law of the Sea (UNCLOS).[2] The first agreement – adopted in 1994, just before the entry into force of the Convention – was related to Part XI of the UNCLOS and the definition of the Area's common heritage of mankind regime, the Area being defined by Article 1(1) UNCLOS as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.[3] The second implementing agreement is the UN Fish Stocks Agreement (UNFSA), adopted in 1995.[4]

Resolution 72/249 is, in fact, the achievement of more than ten years of discussions between States within the framework of the UNGA. Although it is just a preliminary step in the long process toward the adoption of a new implementing agreement under the UNCLOS, this step is decisive for the future regime governing more than half of the earth's surface.[5] Moreover, the particularity of the oceans is that, as compared to the land spaces, they constitute a volume comprised of a huge and diverse biomass. Indeed, they are the 'cradle' of humanity, as life first appeared in the oceans. Although the high seas are often and unduly presented as a 'no man's land', or a real 'far west' by the media,[6] it is important to stress that they are regulated by the UNCLOS and other international conventions, which form an important basis for all activities taking place in international areas (including the high seas and the Area).

The discussion regarding the need for a new instrument related to marine biodiversity beyond national jurisdiction started in 2004 within the framework of the UNGA, when the *Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine*

1 'International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' UNGA Res 72/249 (24 December 2017) UN Doc A/RES/72/249, para 1: 'Decides to convene an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee on the elements and to elaborate the text of an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, with a view to developing the instrument as soon as possible'.

2 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

3 The technic of amendments (Arts 312-316 UNCLOS), then, was not used to modify the Convention: Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3.

4 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (United Nations Fish Stocks Agreement).

5 Indeed, the high seas represent 64% of the surface of the oceans: see Glen Wright and others, 'Protect the neglected half of our blue planet' *Nature* (6 February 2018) <www.nature.com/articles/d41586-018-01594-1> accessed 1 November 2018.

6 Editorial, 'The High Seas Shouldn't be Like the Wild West' *Bloomberg* (5 April 2016) <www.bloomberg.com/opinion/articles/2016-04-05/the-high-seas-shouldn-t-be-like-the-wild-west> accessed 1 November 2018; Robin McKie, 'The oceans' last chance: "It has taken years of negotiations to set this up"' *The Guardian* (5 August 2018) <www.theguardian.com/environment/2018/aug/05/last-chance-save-oceans-fishing-un-biodiversity-conference?> accessed 1 November 2018.

biological diversity beyond areas of national jurisdiction (BBNJ Working Group) was established.[7] Indeed, Resolution 59/24 adopted on 17 November 2004 indicated that the BBNJ Working Group's mandate was 'to indicate, where appropriate, possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity beyond national jurisdiction'.[8]

At this point, some States believed that the UNCLOS contained several gaps and was insufficient to protect marine biodiversity efficiently beyond national jurisdiction,[9] while other States argued that the existing legal framework was satisfactory. For example, Article 192 UNCLOS affirms broadly that 'States have the duty to protect and preserve the marine environment'. According to the first group of States, Article 192 does not state precisely the concrete way and means to protect and preserve the marine environment beyond areas of national jurisdiction.[10] The protection of the marine environment in international maritime areas (the high seas and the Area) differs from the protection of the marine environment in areas under national jurisdiction because the principle of the exclusive jurisdiction of the flag State applies in those areas, so States must cooperate in order to take conservation measures, while it is the competence of the coastal State in areas under national jurisdiction. For the latter group, Article 192 is seen as a useful and adequate general basis that does not need to be 'completed' by a legally binding agreement.[11] The BBNJ Working Group was thus created to conduct an assessment of the international regime governing activities in areas beyond national jurisdiction. It met several times between 2006 and 2015, in order to identify the potential gaps of the current legal regime regarding marine biodiversity in those areas.

It is noteworthy that, in 2011, the BBNJ Working Group recommended to the UNGA that

> a process be initiated [...] with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS.[12]

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7 According to the Art 22 of the UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, the UNGA can create subsidiary bodies necessary for the accomplishment of its functions.

8 'Oceans and the law of the sea', UNGA Res 59/24 (17 November 2004) UN Doc A/RES/59/24, para 73. The term 'biodiversity' can be defined according to the Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, Art 2, as 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'.

9 See Kristina Gjerde and others, 'Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction' (IUCN, 2008).

10 This opposition of views was still present in 2014: 'Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly' (5 May 2014) UN Doc A/69/82, para 22.

11 ibid.

12 'Oceans and the law of the sea', UNGA Res 66/231 (24 December 2011) UN Doc A/RES/66/231, Annex – 'Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction', para (a).

The mandate of the BBNJ Working Group, then, became more precise and ambitious. It also agreed, during the same meeting, on the existence and the content of a 'package deal', which is a series of elements gathering, 'together and as a whole', the potential gaps identified so far: the legal regime of marine genetic resources, the possibility to create marine protected areas or any other area management tool, the content and modalities of the obligation to conduct environmental impact assessments, and the obligation and modalities of the transfer of marine technology and capacity building.[13] These elements currently remain the constitutive elements of a future legally binding instrument.

Finally, after three years of discussions, in order to appreciate the consistency and details of the issues, the BBNJ Working Group held its last meeting in January 2015, leading to the adoption by the UNGA of Resolution 69/292 on 6 July 2015.[14] In this Resolution, the UNGA convened a Preparatory Committee (PrepCom) aimed at the development and elaboration of recommendations to the UNGA on the elements of a draft text of a legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity in international maritime areas. Once the mandate of the PrepCom is fulfilled, and depending on the 'progress' achieved, the UNGA will convene an intergovernmental conference to start official discussions on the adoption of this instrument.[15] Accordingly, the PrepCom met four times between 2016 and 2017, and addressed its recommendations to the UNGA in September 2017.[16] These recommendations include the core elements of the future international instrument – clarifying the different options at stake, but leaving them open – which forms a skeleton of a future agreement that States still have to negotiate carefully.

Resolution 72/249 was adopted in this context on 24 December 2017 and convened, as a result of the processes conducted by the PrepCom, an intergovernmental conference with the mandate of negotiating a legally binding instrument under the basis of Resolution 69/292 and the recommendations of the PrepCom. As will be discussed (Section 2), it sets the future agenda and the procedure for the adoption of a new implementing agreement. Moreover, the Resolution recalls the substantial issues at stake: the 'package deal' agreed on in 2011, composed of several elements: marine protected areas, marine genetic resources, environmental impact assessment and transfer of marine technology – capacity building. The substantive elements of the package will now have to be 'unpacked'

13 ibid.

14 See Julien Rochette and others, 'A new chapter for the high seas? Historic decision to negotiate an international legally binding instrument on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction' (*IDDRI*, 2015(2)).

15 'Development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction', UNGA Res 69/292 (6 July 2015) UN Doc A/RES/69/292, para 1(a).

16 IISD Reporting Services, 'Summary of the fourth session of the preparatory committee on marine biodiversity beyond areas of national jurisdiction: 10-21 July 2017' (*Earth Negotiation Bulletin*, 25 141); 'Chair's streamlined non-paper on elements of a draft text of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, and Report of the Preparatory Committee established by General Assembly resolution 69/292' (21 July 2017); Cymie Payne, 'Biodiversity in High Seas Areas: An Integrated Legal Approach' (2017) 21(9) ASIL Insights.

in order to reach a consensus on some very sensitive issues (Section 3). The final outcome of this process remains, all in all, uncertain and raises important challenges and prospects.

2. The procedural steps set by Resolution 72/249: toward a new implementing agreement under the UNCLOS

2.1 A new but incomplete agenda for negotiation of the future international legally binding instrument

Resolution 72/249 sets, first, the procedural steps toward the adoption of a new implementing agreement. After a three-day organizational session, which took place 16-18 April 2018, the intergovernmental conference will meet for four sessions of ten days each. The first session took place 4-17 September 2018,[17] and the three other sessions will occur between March 2019 and the first half of 2020. The Resolution thus sets the agenda for the next two years of discussions; accordingly, the future instrument will probably not be adopted before the end of 2020 at the earliest. Besides, the Resolution does not provide a specific deadline for the adoption of an international instrument: the first paragraph adds only that the process is launched 'with a view to developing the instrument as soon as possible', which is not precise at all. Actually, the expression 'as soon as possible' is the result of a compromise between the States in favour of the adoption of an implementing agreement before the end of 2020 with a specific deadline, and the States that remain reluctant on the adoption of a treaty and want to keep a margin of appreciation regarding the future of the process.

This compromise on the agenda and lack of precision also characterized other steps in the BBNJ discussions. For instance, the BBNJ Working Group in January 2015 also did not set a specific agenda for the creation and the convening of the PrepCom, waiting for the UNGA to decide on this point in Resolution 69/292, adopted on 15 June 2015. The imprecision of the recommendations of the BBNJ Working Group was the counterpart of the acceptability for all States of the expression 'legally binding agreement', instead of the expression 'international instrument'.[18] Therefore, imprecision appears as a way to protect the interests of the participant States, while leaving the last word and the final decision-making to the UNGA. These compromises are a testimony of the fact that 'much of

17 For a summary of this session, see the website of the Doalos specially dedicated to the Intergovernmental Conference <www.un.org/bbnj/> accessed 27 December 2018, and the report made by the International Institute for Sustainable Development reporting service: IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018' (*Earth Negotiation Bulletin*, 25-179, 20 September 2018), <http://enb.iisd.org/oceans/bbnj/igc1/> accessed 27 December 2018.

18 'Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction to the sixty-ninth session of the General Assembly' (23 January 2015). See Nathalia Frozel Barros, Pascale Ricard, 'Analyse d'un compromis: le lancement des négociations pour un accord de mise en œuvre de la CNUDM sur la biodiversité marine au-delà des limites de la juridiction nationale' (2014) XIX Annuaire du droit de la mer, 197.

the actual negotiating process is linguistic in nature, with words debated as much for their symbolic and political significance as for their practical implications', as Bodansky appropriately states.[19]

2.2 A consensus-based discussion according to traditional law of the sea

The UNGA in Resolution 72/249 '[d]ecides that the conference shall exhaust every effort in good faith to reach agreement on substantive matters by consensus'.[20] Indeed, it became a tradition in the various UN Conferences on the Law of the Sea, since 1968, to expend, as a priority, all efforts to reach a common position by consensus, which helps guarantee the efficient and voluntary application of the instrument by the parties.[21]

In fact, it appeared that only consensus would allow States to reach a balance on very sensitive political and economic issues through the collaboration of different groups gathered according to their common interests, although the UNCLOS was eventually adopted by a vote.[22] Thus, Resolution 72/242 also sets that if every effort to reach agreement by consensus has been exhausted, then 'decisions of the conference on substantive matters shall be taken by a two-thirds majority of the representatives present and voting'.[23] This option appears quite realistic in the current context, as some States remain particularly reluctant to the adoption of a new international instrument on marine biodiversity conservation and sustainable use beyond national jurisdiction - such as, to varying degrees, the Russian Federation, the United States and Iceland.[24]

It is important, however, to keep in mind that the consensus-based decision-making process has been criticized as leading to the adoption of unambitious decisions, pushing the content of the agreement negotiated to the lowest standard, and giving a detrimental veto power to each participant.[25] To that end, one can wonder when exactly would it be appropriate to switch from paragraph 17 (dealing with consensus) to paragraph 19 (related to the voting process) of Resolution 72/249 – or, in other words, when to consider that all efforts to reach consensus have been exhausted, without emptying the agreement of all its substance. Eventually, it seems that the use of consensus in these different processes favoured increased participation of States in the discussions.

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19 Daniel Bodansky, *The art and crafts of international environmental law* (Harvard University Press 2011) 170; the author adds that 'linguistic debates serve as a proxy for more substantive conflicts, allowing success or failure to be measured not just by the substantive outcomes, but by the inclusion or exclusion of particular terms'.

20 UNGA Res 72/249 (2017) para 17.

21 Suren Movsisyan 'Decision making by consensus in international organizations as a form of negotiation' (2008) 3 21st Century 77, 81.

22 With 130 for, 4 votes against (the United States, Israel, Turkey and Venezuela) and 17 abstentions.

23 UNGA Res 72/249 (2017) para 19.

24 See, eg, 'Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly' (n 10) para 22.

25 See, eg, Willem Riphagen, 'The role of general principles of law and General Assembly resolutions' in Antonio Cassese and Joseph Weiler (eds), *Change and stability in international law-making* (Walter de Gruyter 1988) 46-45; Guillaume Devin and Marie-Claude Smouts, *Les organisations internationales* (Armand Colin 2011) 91.

2.3 Participants to the discussions: the challenge of universal participation

In line with the 'need to ensure the widest possible and effective participation in the conference' and in accordance with Resolution 69/292,[26] the future instrument will be open to all the United Nations' members.[27] It should not, however, affect the status of either the UNCLOS non-Parties or the content of the related agreements,[28] such as the mandate of the regional fisheries or environmental bodies and frameworks. Indeed, some States are not parties to the Convention, including the United States, Turkey, Colombia and Venezuela. These States expressly asked not to be subject to existing conventional obligations without their consent, although the future instrument will fundamentally rest on the UNCLOS. Indeed, non-State Parties to the UNCLOS wish to keep the guarantee that they will not be obliged to ratify it, according to freedom to consent in international law and relativity of treaties.[29]

Besides, the European Union (EU) will also directly take part in the negotiations, being the only international organization member of the UNCLOS and having an 'exclusive competence' for the conservation of marine biological resources, as well as shared competences in other relevant fields, such as fisheries and environment.[30] Indeed, the EU has a mixed competence for the conservation and sustainable use of marine biodiversity beyond national jurisdiction,[31] so the future legally binding instrument dealing with the conservation and sustainable use of marine biodiversity will be a 'mixed agreement'.[32] However, the repartition of these competences appears to be ambiguous: it is difficult to set if the creation of a marine protected area is an issue related to marine biological resources conservation only – and then an exclusive competence of the EU – or also of environmental

26 UNGA Res 72/249 (2017) para 9.

27 So far, not all the UN's Member States are participating to the discussions, but at least all the major coastal States and fishing nations, and the participation have been increasing, especially for African States.

28 UNGA Res 72/249 (2017) para 10.

29 One can, however, discuss the fact that the UNCLOS is nowadays considered as customary international law. See Tullio Treves, 'Codification du droit international et pratique des États dans le droit de la mer' (1991) 223 RCADI 9-287.

30 UNGA Res 72/249 (2017) para 11.

31 Art 4 of the Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/13 states, indeed: '2. Shared competence between the Union and the Member States applies in the following principal areas: […] (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (g) transport; (i) energy; […]', meaning that States can adopt protective and reinforced measures where the EU did not. The commercial policy is an exclusive competence of the EU, and the research and development policy has a particular status: Art 3(1)(e) and 4(3) TFEU: 'In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programs; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs'.

32 Which means that the subject matter of an agreement does not fall under the exclusive competence of the EU, but (also) under the shared competences, so the EU countries also have to sign the agreement.

protection in general, and thus a shared competence between the EU and Member States.[33]

The legal basis regarding the participation of the EU in the negotiations on conservation and sustainable use of marine biodiversity beyond national jurisdiction for the development of a legally binding instrument is to be found in Resolution 72/249, according to which the UNGA decided that 'for the meetings of the conference, the participation rights of the international organization that is a party to the Convention shall be as in the Meeting of states Parties to the Convention and that this provision shall constitute no precedent for all meetings to which Assembly resolution 65/276 of 3 May 2011 is applicable'.[34] Resolution 65/276, referred to by the UNGA, is entitled 'Participation of the European Union in the work of the United Nations', and gives the EU a status of 'observer'. The EU, then, can by exception directly participate to the discussions regarding biodiversity beyond national jurisdiction. However, as the future agreement will be 'mixed', Member States are also to be represented. The *substantive* ambiguity stressed before on the repartition of competences raises some uncertainties about the *formal* representation of the EU and its Member States.[35] This issue was addressed in Council Decision (EU) 2016/455 of 22 March 2016.36 According to Article 4 of

33 This ambiguity already led to difficulties in the Commission for the conservation of the marine flora and fauna in the Antarctic (CCAMLR). The Commission introduced an action on partial annulation against the decision of the Council on the approbation of the presentation on the behalf of the Union *and* its Member States, of a document dealing with the creation of a protected area in the Weddel sea. The case was introduced on 23 November 2015 (C-626/15) and was joint to a second case introduced by the Commission on 20 December 2016 (C-659/16), about the decision of the Council of 10 October 2016 dealing with the establishment of the position of the EU for the 35th annual meeting of the CCAMLR, about the creation of three new protected areas. The Court concluded that the decision on the creation of marine protected areas under the CCAMLR was adopted in the context of the shared competences dealing with the protection of the environment, and that the Council was competent to adopt the contested documents in order to not only ensure internal consistency, as regards the mere definition of shared competences, but also the external coherence of its actions in the context of the Antarctic Treaty System. Joined cases C-626/15 and C-659/16 *Commission v Council* [2018] ECR, para 133.

34 The same formula was used in Res 69/292, according to which the UNGA decided that 'the rules relating to the procedure and the established practice of the committees of the General Assembly shall apply to the procedure of the preparatory committee, and that, for the meetings of the preparatory committee, the participation rights of the international organization that is a party to the Convention shall be as in the Meeting of States Parties to the Convention', adding that 'this provision shall constitute no precedent for all meetings to which Assembly resolution 65/276 of 3 May 2011 is applicable' (para 1(j)).

35 For Elie Jarmache, '*on aurait pu penser la question des compétences résolue et bien établie dans le système européen de prise de décision, et le rôle respectif des différents acteurs bien connu. Force est de constater qu'il n'en est rien*': Elie Jarmache, 'Fondements juridiques de l'action de l'Union européenne et application spatiale. "L'espace maritime communautaire"' in INDEMER, *Droit international de la mer et droit de l'Union européenne. Cohabitation, Confrontation, Coopération?* (2014 Colloque international, 17-18 octobre 2013, Pedone) 17-24.

36 Council Decision (EU) 2016/455 of 22 March 2016 authorising the opening of negotiations on behalf of the European Union on the elements of a draft text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction [2016] OJ L79/32: This Decision was adopted in the context of the PrepCom, but has the same substance as the decision adopted for the opening of the Intergovernmental Conference in September. The latter, however, is not available online so far. See also, more generally, the document of the Council of the EU, *EU Statements in multilateral organizations – General Arrangements* (2 October 2011, doc. 15901/11), and Catherine Flaesch-Mougin, 'Représentation externe et compétences de l'Union européenne: quelques réflexions à propos des arrangements généraux du Conseil relatifs aux déclarations de l'Union dans les organisations multilaterals' in Chahira Boutayeb (ed), *La Constitution, l'Europe et le droit, Mélanges en l'honneur de Jean-Claude Masclet* (2013, Publications de la Sorbonne) 571.

this Decision,

> to the extent that the subject matter of the negotiations falls within the competences of both the Union and its Member States, the Commission and the Member States should cooperate closely during the negotiating process, with a view to ensuring unity in the international representation of the Union and its Member States.

Last but not least, to reach the objective of a 'universal participation', the intergovernmental meetings will include observers, such as international organizations, non-governmental organizations (NGOs) and experts, in order to give a voice to the interests of the international community as a whole.[37] The participation of civil society in decision-making in international law is one of the principles of international environmental law, as consecrated in Principle 10 of the *Rio Declaration on Environment and Development*, stating that '[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level'.[38]

Nevertheless, the law of the sea has traditionally a strong interstate character, prioritizing the interests of States, in particular coastal States. Conversely, in the adoption of 'environmental' conventions or during the conferences of the parties to such conventions, non-State actors play an important role[39]. As regards the discussion related to marine biodiversity beyond areas of national jurisdiction, thus far, non-State stakeholders are participating by having the opportunity to make statements, after States, during the main discussions. In addition, side events are organized by those actors in order to increase awareness and bring expertise to some specific issues. However, it appears that civil society plays a secondary role in such discussions. During certain sessions of the BBNJ Working Group and PrepCom, indeed, some States were reluctant to open the discussion and asked to meet in small informal closed groups.[40] The creation of a specific Conference of the Parties for the implementation of the agreement may facilitate the integration and participation of all the relevant stakeholders in the future.

As regards the procedural aspects of the process toward adoption of a new implementing agreement under the UNCLOS, one could conclude that some uncertainty remains concerning the exact future agenda and that some improvements could be made – for instance, concerning opening up participation to NGOs and other non-State actors.

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37 UNGA Res 72/249 (2017) paras 12-13.

38 Rio Declaration on Environment and Development (Rio de Janeiro, 13 June 1992) UN Doc A/CONF.151/26 (vol I) 31 ILM 874 (1992).

39 Eg the International Union for the Conservation of Nature or the scientific committee of the organization concerned play an important expert function in the process.

40 Lack of transparency has been mentioned, for instance, in the 2011 and 2012 sessions of the BBNJ Working Group. IISD, 'Summary of the fifth meeting of the Working Group on marine biodiversity beyond areas of national jurisdiction: 7-11 May 2012' (*Earth negotiation bulletin*, 25, 83) 9: 'NGOs had already experienced a closed-door drafting group at last year's meeting of the Working Group. Notwithstanding the initial modification of the organization of work not to refer to "closed" sessions this year, NGOs and IGOs remained outside the shut doors of the Friends of the Co-Chairs group for the whole of Thursday and Friday morning. This procedural approach was discussed at various points in plenary, with certain countries and the whole NGO cohort questioning whether the General Assembly rules of procedure were being applied'.

3. The substantive issues: unpacking the 'package deal', challenges and uncertainties of the future negotiating process

3.1 Origins and functions of the 'package deal'

The 'package deal' agreed on in Resolution 66/231 and referred to in Resolution 72/249 can be seen as a consequence of the expression used in the Preamble of the UNCLOS, according to which 'the problems of ocean space are closely interrelated and need to be considered as a whole'. Indeed, physically, the ocean space is an integrated whole, entirely connected, and the issues related to the oceans can influence others. Moreover, the notion of biodiversity itself, defined as the variability of life and the interrelations between species, genes and ecosystems,[41] is inherent to the idea of an 'integral whole'. The use of this notion of 'package deal' traduces the idea of a series of elements that are dependent on one another and cannot be considered separately.

Moreover, the notion of 'package deal' refers to a negotiating technique, a decision-making process traditionally used in law of the sea discussions[42] – the UNCLOS being seen as a 'package deal' in itself or an overall acceptable treaty – which implies that nothing is individually agreed until everything is agreed. According to Caminos and Molitor, 'the package deal represented one of the most significant features of the negotiations; i.e., the leitmotif of UNCLOS III'.[43] This negotiating technique is thus focused on compromise and consensus,[44] yet entails consequences, such as the prohibition of reservations to the Convention, according to Article 309 UNCLOS, in order to maintain its consistency. However, following Article 310 UNCLOS, States are able to make a declaration during ratification of the Convention, clarifying a point of interpretation; this 'compromised' practice could then be used as a 'hidden reservation'.[45] The compromise reached with these two complementary Articles was nonetheless reproduced in the 1995 UNFSA and could be used again in the future agreement on marine biodiversity beyond national jurisdiction as a consequence of the 'package deal'.

During the intergovernmental conference, States will have to open 'Pandora's box', and try to reach a consensus while choosing between all the available options for each of its component, to make this 'integral whole' concrete and acceptable. The 'package deal' thus remains a fragile and strong concept at the same time.

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41 Art 2 Convention on Biological Diversity.

42 Hugo Caminos and Michael R Molitor, 'Progressive Development of International Law and the Package Deal' (1985) 79(4) AJIL 871, 874.

43 ibid 884.

44 See Michael Hardy, 'Decision making at the law of the sea conference' (1975) 11 RBDI 442, 444.

45 See Daniel Vignes, 'Les déclarations faites par les États signataires de la Convention des Nations Unies sur le droit de la mer, sur la base de l'article 310 de cette convention' (1983) 29 AFDI 715-748, and Alain Pellet, 'Les réserves aux conventions sur le droit de la mer' in *La mer et son droit, Mélanges offerts à Laurent Lucchini et Jean Pierre Quéneudec* (Pedone 2003) 515.

3.2 Content of the package deal: main issues and available options

3.2.1 Marine genetic resources, including questions on the sharing of benefits

As regards the legal status of marine genetic resources, the 'gaps' revealed by the BBNJ Working Group and PrepCom between 2006 and 2017 stressed a clear opposition between developed and developing countries. Indeed, in the 1982 UNCLOS, States focused mainly on the mineral resources of the deep seabed to negotiate the 'common heritage of mankind' status for the Area and its resources: according to Article 136, '[t]he Area and its resources are the common heritage of mankind'. This formulation might be interpreted broadly, although the definition of the 'resources of the Area' appears quite narrow in the UNCLOS.[46] However, marine genetic resources of the deep seabed are also to be exploited by States[47] in order to develop medicines, pharmaceutical engineering or cosmetics, for instance, and the lack of precision of the UNCLOS on this point led to a significant disagreement between the different interest groups. On the one hand, developed States were in favour of a strict application of the principle of freedom of access and use for marine genetic resources situated in the high seas but also in the Area. On the other hand, developing countries (mainly the G77[48] and China) argued that marine genetic resources should also be considered as being the 'common heritage of mankind', likewise mineral resources of the Area. This issue remains a crucial point of contention, especially regarding the sharing of benefits.[49]

According to the report of the PrepCom adopted by the UNGA on 31 July 2017,[50] one of the main disagreements rests on the modalities of the sharing of benefits of the exploitation of resources. The group of African States, and the G77 and China, are defending an extension of the common heritage status for marine genetic resources and an equitable sharing of benefits of their exploitation. However, it seems that other States would be more in favour of free access or an intermediate regime for the genetic resources of the Area and potentially that of the high seas. This intermediate regime could be

46 Art 133 UNCLOS: 'For the purposes of this Part: (a) 'resources' means all solid, liquid or gaseous mineral resources in situ in the Area or at beneath the seabed, including polymetallic nodules; (b) resources, when recovered from the Area, are referred to as minerals'.

47 According to Art 2 of the Convention on Biological Diversity, the notion of 'genetic resource' 'means genetic material of actual or potential value'; see Claudio Chiarolla, 'Intellectual property rights and benefit sharing from marine genetic resources in areas beyond national jurisdiction: current discussions and regulatory options' (2014) 4(3) Queen Mary Journal of Intellectual Property 171.

48 The Group of 77 (G77) was established on 15 June 1964 by the developing countries signatories of the 'Joint Declaration of the Seventy-Seven Developing Countries', issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva, and is still one of the most important group of States in the context of the UN discussions.

49 See Tullio Scovazzi, 'Negotiating conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction: prospects and challenges' (2015) 24(1) The Italian Yearbook of International Law 63; Elisabeth Druel, Kristina Gjerde, 'Sustaining marine life beyond boundaries: Options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea' (2014) 49 Marine Policy 90-97.

50 'Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (31 July 2017) UN Doc A/AC.287/2017/PC.4/2, para 3.

inspired by the *Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the Convention on Biological Diversity*,[51] adopted in 2010, which creates a mechanism of bilateral negotiation and agreement on the terms of the sharing of benefits between the State of origin of the resource and the State asking for access. Although it does not apply in areas beyond national jurisdiction, its principles – such as the principle of equity – could be relevant for the construction of a specific regime for marine genetic resources beyond national jurisdictions. Such a specific regime could also be inspired by Article 82 UNCLOS, dealing with the sharing of benefits of mineral resources of the continental shelf beyond 200 nautical miles.[52] During the first meeting that took place in September, the G77 and China 'supported an ABS [access and benefit sharing] drawing on the Nagoya Protocol, the International Seabed Authority (ISA), and the ITPGRFA [International Treaty on Plant Genetic Resources for Food and Agriculture]'.[53]

Secondly, it will be necessary to determine the different types of benefits that would be shared, mainly monetary and non-monetary. Developed States are in favour of an exclusive non-monetary sharing, based on the transfer of knowledge or technology and the research results of the exploitation processes. This question is thus directly related to the articulation of this instrument with the current regime of intellectual property rights, in the framework of the World Trade Organization and the World Intellectual Property Rights Organization.[54] For instance, it is not necessary under the existing regimes to indicate the origin of the resource used to obtain a patent. Moreover, patenting a microorganism is possible under the TRIPS agreement.[55] A traceability requirement could, at least, be introduced for marine genetic resources in areas beyond national jurisdiction, if access to those resources is regulated, as required by the group of small island developing States.[56] Either way, the articulation of the future instrument with the existing regime related to intellectual property rights will need to be clarified. The introduction of special permits could be another way to regulate and control access to marine genetic resources, but it appears very constraining for a number of States and incompatible with the current frameworks. A system of notice-based access, including a dis-

51 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya (adopted 29 October 2010, entered into force 12 October 2014) UNEP/CBD/COP/DEC/X/1.

52 Art 82 UNCLOS: '1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. 2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production […] 4. The payments or contributions shall be made through the Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.'

53 IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 4.

54 ibid 5.

55 Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, Art 27(3)(b): 'Members may also exclude from patentability: (b) plants and animals *other than micro-organisms*, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.'

56 IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 5.

closure of origin and purpose, is another option that was introduced in the discussion in September by Brazil.[57] This notification process is also favoured, notably by China and Norway, in addition to a code of conduct or guidelines on access.[58] Finally, *ex situ* monitoring of the utilization of marine genetic resources in areas beyond national jurisdiction will need to be addressed as well, which also depends on the other elements discussed.

Hence, the economic consequences associated with this question of access and sharing of benefits of marine genetic resources still represent a highly important and controversial issue.

3.2.2 Area-based management tools, including marine protected areas

As regards area-based management tools, the participants to the negotiations will have to determine the modalities of a future regime dedicated to the identification and creation of marine protected areas (MPAs) and other management tools. Indeed, the current treaties and regional frameworks only allow for the creation of regional and/or sectorial MPAs. For instance, organizations created by regional seas conventions have the power to create MPAs beyond national jurisdiction in their fields of competence, as is the case for the Commission for the Conservation of Antarctic Marine Leaving Resources (CCAMLR), which recently managed to designate an MPA in the Ross Sea after several years of discussions following the designation of the Arcade Sea MPA.[59] Moreover, global organizations, such as the International Maritime Organization, have the power to designate sectorial protected areas.[60] Those protected areas, therefore, are only opposable to the parties of the treaty concerned. In order to reinforce their efficiency as a conservation tool, and also to make it possible to create protected areas even in areas where no regional framework have any spatial competence, the future international agreement would at least encourage and build new tools and processes in order to develop a real network of MPAs beyond national jurisdiction, in conformity with general and identified principles as the 'ecosystemic approach'.[61]

According to the PrepCom during its fourth session, '[t]he issues on which there is a divergence of views […] include: the most appropriate decision-making and institutional set up, with a view

57 ibid 4.

58 ibid.

59 CCAMLR Conservation measure 91-05 (2016), *Ross Sea region marine protected area*. See also Conservation measure 91-04 (2011), *General framework for the establishment of CCAMLR Marine Protected Areas*.

60 Eg the MARPOL particularly sensitive areas (PSSAs) are areas needing special protection from activities of navigation, because of their ecological, scientific or socio-economical characteristics.

61 The ecosystemic approach is defined by the CBD as 'a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way". It is "based on the application of appropriate scientific methodologies focused on levels of biological organization, which encompass the essential structure, processes, functions and interactions among organisms and their environment'. 'Ecosystem approach', Decision V/6 COP 2000, A(1).

to enhancing cooperation and coordination, while avoiding undermining existing legal instruments and frameworks, and the mandates of regional and/or sectoral bodies'.[62] Thus, the relationship with existing relevant instruments, frameworks and global, regional and sectorial bodies, is one of the main issues to be considered. The future instrument would, at least, 'enhanced cooperation between relevant legal instruments […] without prejudice to their respective mandates' and 'to the rights of coastal States'.[63] Then, it would clearly state 'who would make the decision and on what basis', and clarify the role of each stakeholder. The report adds that '[t]he text would address the question of the involvement of coastal states adjacent to an area for which area-based management tools […] are proposed'.[64] Coastal States claim, indeed, that in order to take into account their sovereign rights over their continental shelf, they would necessarily have to consent to the creation of a marine protected area in areas adjacent to their EEZ, especially when the protected area overlaps with their extended continental shelf.

In addition, it could be useful to create a global scientific committee, which would be in charge of the evaluation of marine protected areas or other area-based management projects, the harmonization of the criterion for the designation of protected areas,[65] and the monitoring of the surveillance and management of those areas.[66] The difficulty here is the question of the relationship between this organ and the existing global or regional scientific committees of each relevant organization. The global committee could, however, provide for a mechanism of 'international recognition' of the existing regional MPAs, in order to overcome the principle of relativity of treaties and raise the effectiveness of the regional conservation measures. Another tool to overcome the relative effect of regional treaties could be inspired by the 'non-contracting cooperating party' statute already existing in regional fisheries management organizations (RFMOs)[67] and stemming from Article 8(4) UNFSA.[68]

Finally, as regards marine protected areas, three options have been envisaged for the designation, implementation, monitoring and review processes: a global, regional or hybrid model.[69] The first

62 IISD Reporting Services, 'Summary of the fourth session of the preparatory committee' (n 16) 12.

63 'Report of the Preparatory Committee established by General Assembly resolution 69/292' (n 50) para 4.2.

64 Eg for the States of the EU, who proposed during the first session in September that the coastal State 'could propose changes to MPA designation if the MPA would undermine their rights under UNCLOS'. IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 7.

65 Those criteria could be directly inspired by the existing criteria applying in regional and sectorial organizations, See 'Chair's streamlined non-paper on elements of a draft text' (n 16) 22, para 99.

66 IISD Reporting service, 'Summary of the third session of the preparatory committee on marine biodiversity beyond areas of national jurisdiction: 27 March - 7 April 2017' (*Earth Negotiations Bulletin*, 25, 129) 6.

67 It is the case of the International Commission for the Conservation of Atlantic Tunas: see *Recommendation 03-20 on criteria for attaining the status of cooperating non-contracting party, entity or fishing entity in ICCAT*. The non-contracting cooperating party shall, for instance, 'inform ICCAT of the measures it takes to ensure compliance by its vessels with ICCAT conservation and management measures'.

68 According to which 'Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply'.

69 'Chair's streamlined non-paper on elements of a draft text' (n 16) 21.

approach, a global overarching framework, would lead to the creation of a centralized mechanism, in order to develop a global network of MPAs. The international entity (a conference of the parties and/or scientific committee) would be competent to designate protected areas in areas where no regional framework currently exists, according to recognized criterion (only four regional bodies currently have spatial competence in areas beyond national jurisdiction: the OSPAR Commission, the CCAMLR, the Barcelona System, and the Secretariat of the Pacific Regional Environment Programme). All States and organizations would be associated with the decision-making process. It would also include a list of the existing protected areas, providing for global recognition of those areas, but the difficulty would rest in the definition of the respective function of existing regional and global frameworks, without undermining their mandates, and the association of coastal States. Colombia and Singapore, for instance, declared that they were in favour of such an option during the first session of September.[70]

The second approach, the 'regional and sectorial approach', would be defined as a '[g]eneral policy guidance to promote cooperation and coordination would be provided at the global level, while recognizing the full authority, without oversight from a global mechanism, of regional and sectoral organizations in decision-making'.[71] According to this approach, the functions and competences of the regional sea organizations and RFMOs would be sufficient and must prevail, so there is no need for a formal and global mechanism. The new instrument would only provide for common criterion and directives, also encouraging enhanced coordination, consultation and cooperation between organizations. It would be absolutely necessary, within such an approach, to encourage the creation of regional frameworks where they do not yet exist. The Russian Federation, for example, has advocated for a strictly regional option.[72]

The last model is called a 'hybrid' or intermediate approach, which would bring together different elements of the other two approaches: '[g]eneral guidance and objectives would be developed at the global level to enhance cooperation and coordination and provide a level of oversight to the decision-making and implementation by regional and/or sectorial mechanisms'.[73] The protected area would be proposed at the global level, with a determination of the appropriate conservation measures needed. However, the final designation and management would be done at the regional level, where appropriate frameworks already exist. This approach could constitute a compromise and is favoured by different groups and States such as Australia, New Zealand, Chile and Japan.

3.2.3 Environmental impact assessment

The obligation to conduct an environmental impact assessment has been consecrated in several instruments and judicial decisions, namely Article 206 UNCLOS, Article 14 CBD, and by the In-

70 IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 7-8.

71 'Chair's streamlined non-paper on elements of a draft text' (n 16) 22.

72 IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 8.

73 'Chair's streamlined non-paper on elements of a draft text' (n 16) 21.

ternational Court of Justice in the 2010 *Pulp Mill on the River Uruguay* case, which solidified the obligation's international customary law character where there is a risk of transboundary damage.[74] However, the general obligation to conduct an environmental impact assessment remains imprecise, as it does not specify the exact process and content of such an assessment.

The PrepCom defined environmental impact assessment as 'a process to evaluate the environmental impacts of activity to be carried out in areas beyond national jurisdiction, with an effect on areas within or beyond national jurisdiction, taking into account interrelated socioeconomic, cultural and human health impacts, both beneficial and adverse'.[75] Within this general basis, States will have to decide, among other issues, if the obligation to conduct an environmental impact assessment is applicable to all activities at sea or if certain activities could be exempted because of their small impact on marine biodiversity. Moreover, would the obligation only apply to certain activities taking place in areas beyond national jurisdiction, or also to activities on land or at sea that may have an impact on the high seas or the Area?[76] It may also be important to take into account the cumulative effects of the different activities at sea while assessing an activity through the concept of 'strategic environmental assessment' – but this issue also necessitates further discussion.[77]

Furthermore, the threshold of the 'acceptable' level of impact when conducting of an environmental impact assessment is also one of the elements to be settled by States.[78] The *Protocol on Environmental Protection to the Antarctic Treaty*[79] could, to that end, be a useful model[80]. Indeed, Article 8 of the Protocol imposes on State Parties an obligation to carry out environmental impact assessments for their activities in the Antarctic Treaty area identified as having '[more than] a minor or transitory impact', and Annex I details the process to be followed when conducting an assessment according to this threshold.

The process of conducting an environmental impact assessment could either be centralized by a global body in charge of monitoring implementation by the Member States of their obligations, the gathering of the assessments and harmonization of the evaluation's criteria, or remain a duty of individual States coupled with a reporting obligation. The degree of participation of civil society in this

74 *Pulp Mill on the River Uruguay (Argentina v. Uruguay)* (Judgement) [2010] ICJ Rep 14, para 204, reiterated in *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (Judgement) [2015] ICJ Rep 665, para 101-05.

75 'Chair's streamlined non-paper on elements of a draft text' (n 16) 6.

76 IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 10-11.

77 'Report of the Preparatory Committee established by General Assembly resolution 69/292' (n 50) para 5-7. See also IISD Reporting service, 'Summary of the fourth session of the preparatory committee' (n 16) 13: China, the Russian Federation and the US proposed even to 'delete' the section mentioning strategic environmental assessments.

78 IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 10.

79 Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) 30 ILM 1461. The Espoo Convention, on environmental impact assessment in a transboundary context, was also mentioned as it could be a relevant model for the new dispositions in this respect. Convention on environmental impact assessment in a transboundary context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309.

80 'Chair's streamlined non-paper on elements of a draft text' (n 16) 30-31.

process also needs to be determined,[81] such as the publication of evaluations or reports, the creation of a 'clearing house mechanism', and, importantly, the decision-making following the environmental impact assessment.

3.2.4 Transfer of technology and capacity building

The idea of capacity building for developing States, and the dispositions related to transfer of marine technology,[82] aim to help such States in the practical and effective implementation of a future agreement. The agreement would also emphasize the need to take geographically disadvantaged States, the least developed countries, and small island developing countries, among others, into consideration. The UNCLOS already deals with the transfer of technology and capacities, notably in Article 266 and more generally in Part XIV on technology transfer. The goal here is then to adapt these dispositions and make them operational in the context of marine biodiversity conservation beyond national jurisdiction. A 'clearing house mechanism' or global 'centre for the exchange of information' could be created, containing scientific and technical data or repertory of best practices.

The promotion of education and marine scientific research is also fully part of this process. States will have to set the modalities of access to technologies and human or technical resources and boost the development of new means of cooperation. The International Oceanographic Commission of the UNESCO could play an important role in this field. Moreover, cooperation with international organizations, especially the International Seabed Authority as it is developing a sophisticated regime as regards the exploration and future exploitation of the deep seabed resources, is to be developed or reinforced. The question of financing is nonetheless at the heart of this subject and will surely need specific consideration.[83] States are also to decide if capacity building and the transfer of technology mechanism is to function on a voluntary basis or if a mandatory approach should be envisaged; the idea of a trust fund is also part of the discussion, and the issue of intellectual property rights reappears here as this may be an obstacle to technology dissemination.[84]

3.3 Transversal issues, beyond the package deal

Beyond the elements of the 'package deal', other issues will need to be clarified during the intergovernmental conference. The first issue is the possible institutional arrangements that the conven-

81 ibid.

82 Defined as 'the transfer of instruments, equipment, vessels, processes and methodologies required to produce and use knowledge to improve the study and understanding of the nature and resources of the oceans': ibid 8.

83 IISD Reporting Services, 'Summary of the Fourth Session of the Preparatory Committee' (n 16) 15.

84 IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 13-14.

tion will settle: some States support a conference of the parties as a decision making body,[85] others prefer strengthening existing frameworks, including RFMOs. The creation of a scientific or technical body, as already mentioned, is also envisaged, as is a Secretariat. The exact nature and functions of this decision-making body or forum would then need to be more precise. Its functions could be linked to the exchange of information, review of the implementation of the agreement, promotion of cooperation, but also the decision and recommendation making related to implementation. As regards marine genetic resources, a potential role for the International Seabed Authority has been envisaged and will depend on the status and corresponding regime of those resources.

Finally, the instrument 'would address financial issues relating to the operation of the instrument'.[86] Dispute settlement, which is already addressed in the UNCLOS, could be completed, as well as the dispositions of the UNCLOS related to responsibility and liability. Indeed, the definition of the 'genuine link', the link that is supposed to exist between the flag State and the ship according to Article 91 UNCLOS on the nationality of ships, could be specified in order to combat the phenomenon of flags of convenience and reinforce control over ships. The issue of high seas fisheries and the potential overlap between the future instrument and fisheries is also highly controversial and will be determinant for a number of delegations.[87] Actually, fishing is one of the greatest threats to the conservation of marine biodiversity. Although fisheries are already dealt with by existing international and regional instruments, such as the 1995 UNFSA, the issues of coordination, coherency and implementation will surely need to be strengthened during future discussions.

Indeed, according to Wright and others, a new agreement 'could strengthen and clarify the overall fisheries management framework and implement a number of overarching provisions to further improve the integration of biodiversity considerations into fisheries management'.[88] Fisheries could be directly or indirectly included in a future instrument through the area-based management tools and marine protected areas' dispositions, as well as the environmental impact assessment regime, and encouragement to adhere to the relevant international instruments in this field, such as the FAO

85 As regards the potential creation of a COP, an emerging question would be its articulation or relationship with the existing Meeting of the Parties of the UNCLOS. According to Art 319(2) (e) of the Convention, the Secretary-General of the United Nations convenes the Meeting of the Parties when it is 'necessary'. This meeting is actually closer to a 'diplomatic conference' than a COP, compared to the existing conferences resulting from multilateral environmental law agreements, as, for instance, the COP of the CBD, which has the power to adopt decisions. One of its functions is to elect members of the ITLOS (Annex VI, Art 4(4)), or to vote the budget of the Tribunal (Annex VI, Arts 19(1) and 18(7)). It also has an important role regarding the functioning of the International Commission of the Limits of the Continental Shelf, as it adopted some important decisions, like the decision SPOLS/189, in 2008, regarding the fixation of the starting date for the ten years period for the submission.

86 'Chair's overview of the third session of the Preparatory Committee' (2017) 17 <www.un.org/depts/los/biodiversity/prepcom.htm> accessed 1 December 2018.

87 Elisabeth Druel and Kristina M Gjerde, 'Sustaining marine life beyond boundaries: Options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea' (2014) 49 Marine Policy 90, 96; Glen Wright and others, 'High seas fisheries: what role for a new international instrument?' (IDDRI Study 03/2016).

88 Wright and others (ibid) 16.

guidelines and treaties, or to join an existing regional framework dealing with fisheries. More generally, the consecration of some general and guiding principles will at least allow for enhanced consistency in the global regime of marine biodiversity beyond areas of national jurisdiction. In this way, a future international instrument would not 'undermine' the existing frameworks, but, on the contrary, could *underline* them and make the existing instruments related to fisheries more effective.[89]

All in all, as regards the substance of the future legally binding instrument, there are many options on the table, which become increasingly detailed after each cycle of formal and informal discussion between States. Regarding the most controversial issue, marine genetic resources, the G77 and China may soften its position for the establishment of a benefit sharing mechanism, even if the concrete modalities are not settled. Concerning the area-based management tools, the hybrid approach also leaves space for a compromise to be reached and with an overarching institutional cooperation principle and development of means to that aim, it seems that the construction of global networks of protected areas are worth envisaging. Concerning the other elements, the debate is also becoming more concrete and precise. The first session of the intergovernmental conference, indeed, is a good illustration of the will of States to contribute to the process and make it possible to reach consensus. Resolution 72/249, thus, marked a real shift in international policy on the conservation and sustainable use of marine biodiversity in international maritime areas.

4. Conclusion

The panorama drawn here shows that, so far, neither the content nor the future procedural agenda for the adoption of a future legally binding instrument is agreed yet, so there is little certainty on the future of the process. Thanks to the discussions that took place by the PrepCom, States and the other participants explored the potential issues at stake and available options, making the future work in the framework of the intergovernmental conference more political: to reach the widest and most ambitious possible consensus. Indeed, the protection of marine biodiversity beyond national jurisdiction is a crucial issue for the whole mankind.

The start of negotiations in September 2018 shows that progress has been made and that a positive achievement remains possible: compromise can lead to the adoption of a broad, perhaps ambiguous, but hopefully ambitious agreement. However, one can observe that this useful instrument will undoubtedly be insufficient to ensure that marine biodiversity is effectively conserved in areas beyond national jurisdiction. Other efforts would need to be made in parallel to the new process, as regards for instance land-based pollution, climate change, and the implementation of an international responsibility regime at sea.

89 ibid 10.

Maritime Safety and Security Law Journal

Marine Spatial Planning Framework Integration: Synergies, Compatibility and Incompatibility Issues. Evidence from Greece.

*Foteini STEFANI, Anestis GOURGIOTIS and Georgios TSILIMIGKAS**

Abstract

The Directive of the European Parliament and the Council of July 2014 established a general framework for Marine Spatial Planning (MSP) among EU Member States. The Directive aims to promote the sustainable development of marine areas and equitable use of marine resources. Within this context, Greece has initiated the procedure of the Directive's transposition into the national legislation. This paper focuses on the examination of the terms for the integration of the MSP Directive in the national spatial planning system in Greece. The main research focus is the transposition of EU MSP Directive in Greece and the challenges Greek authorities have to face, in correlation with the basic problems of spatial planning in Greece. Taking into account that the Greek spatial planning system has a significant number of tools for integrating MSP guidelines at almost all planning levels, this paper begins with a detailed presentation of the main provisions for the marine areas of the spatial planning legislation and the system of spatial planning in Greece. It then proceeds to a critical presentation of the main issues related to the first effort to transpose the EU MSP Directive into national legislation at the end of 2016.

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1. Introduction

The European Union (EU) is surrounded by oceans and seas. More than 200 million EU citizens live in coastal areas and of the approximately 88 million who also work in these areas, 5.4 million are employed in the marine and shipping sectors.[1]

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1 Communication from the Commission to the European Parliament, the council, the European economic and social committee and the committee of the regions 'Blue growth opportunities for marine and maritime sustainable growth (Text with EEA relevance)' COM [2012] 494 final, 2.

Seas and oceans are drivers to the European economy in terms of achieving the goals of the Europe 2020 strategy for smart, sustainable and inclusive growth.[2] 'Blue Growth' is the long-term strategy to support sustainable growth in the marine environment and marine sectors as a whole. The EU is seeking to introduce common management principles for its Member States, by promoting Maritime Spatial Planning (MSP) and Integrated Coastal Zone Management (ICZM).[3] MSP represents a key instrument for Blue Growth and can contribute to the aim of boosting economic growth, as well as increasing the stability, transparency and predictability of the investment climate. MSP can facilitate the development of Blue Growth sectors in a context of increasing competition for space and limited ecosystem resources.[4]

MSP is a public interdisciplinary process of analysing and synthesising the spatial and temporal distribution of human activities in the marine environment in order to achieve ecological, economic and social goals, determined by political processes.[5] Its principles include integrated planning, taking into account site specificities, adaptive management, and participatory processes. In that framework, the purpose of the Directive of the European Parliament and of the European Council 'Establishing a Framework for MSP' adopted in 2014[6] is to promote the sustainable development of marine areas and the sustainable use of marine resources. The Directive also focuses on the contribution of MSP to the development of greater confidence and certainty for investors.[7]

However, it is necessary to consider MSP in relation to the terrestrial space, especially coastal zones, due to the interactions that occur. The need to ensure consistency between terrestrial spatial planning and MSP is evident in the definitions and principles contained in key institutional and policy texts at European level. The 2008 'Roadmap for MSP and the achievement of common principles in the EU' identifies as a key priority the coherence between coastal zone planning systems and MSP.[8] However, the 2014 Directive is limited to spatial planning of the marine environment excluding ICZM. Member States did not reach an agreement on adopting legislative measures in this domain, due to the impact such an act would have had on the decision-making processes of national planning authorities,[9] more specifically because of the implications on the competences of national planning authorities.

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2 ibid.

3 Council Decision 2010/631/EU of 13 September 2010 concerning the conclusion, on behalf of the European Union, of the Protocol on Integrated Coastal Zone Management in the Mediterranean to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean [2010] OJ L 279/1 and Protocol on Integrated Coastal Zone Management in the Mediterranean [2009] OJ L34/19.

4 European MSP Platform, 'MSP for Blue Growth' <www.msp-platform.eu/faq/msp-blue-growth> accessed 30 July 2018.

5 Charles Ehler and Fanny Douvere, 'Marine Spatial Planning: A Step-by-Step Approach toward Ecosystem-based Management' (Intergovernmental Oceanographic Commission and Man and the Biosphere Programme, IOC Manual and Guides No 53, ICAM Dossier no 6 Paris: UNESCO, 2009)

<http://unesdoc.unesco.org/images/0018/001865/186559e.pdf> accessed 30 July 2018.

6 Council Directive (EU) 2014/89 Establishing a framework for maritime spatial planning [2014] OJ L257/135.

7 Antonia Zervaki, 'The Legalization of Maritime Spatial Planning in the European Union and Its Implications for Maritime Governance' (2016) 30 (1) Ocean Yearbook 32, 42.

8 Commission of the European Communities, 'A Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU' (Communication) COM (2008) 791 final 10, 11.

9 Antonia Zervaki, 'Introducing Maritime Spatial Planning Legislation in the EU: Fishing in Troubled Waters?' [2015] 1 Maritime Safety and Security Law Journal 95, 105.

Despite the exclusion of ICZM from its scope, the Directive aims to promote coherence between MSP and existing states' practice in integrated coastal zone management.[10] In this respect, the synergies among, and the compatibility of, coastal and marine uses are key issues for economic development, social and territorial cohesion and the environmental protection of the islands, the coastal zone and the marine areas.

The main focus of this paper concerns the challenges Greek authorities face for the transposition of the EU MSP Directive. These partially relate to the basic problems of spatial planning in Greece. Furthermore, it focuses on MSP efforts in Greece and also presents the options competent authorities have regarding the integration of MSP at different spatial planning levels.

Despite the fact that Greece has an adequate number of tools for the integration of MSP at almost all spatial planning levels (national, regional and local), MSP is not covered independently in Greek policy and legislative frameworks, except within the Strategic spatial plan for Aquaculture and Renewable Energy Resources. Spatial planning is the reference for the coordination and harmonisation of sectoral policies, programmes and investment projects carried out by different actors in the same area. Moreover, the Greek spatial planning system needs to overcome fundamental problems in order to deliver an effective and functional MSP. The main problems emerging from the implementation of spatial planning in Greece relate to: (a) inadequate harmonisation between different spatial planning levels, mainly due to significant delays in updating procedures; (b) the fragmentation and complexity of legislation, and the 'pluralism' of planning; (c) the ineffective cooperation between development policies and spatial planning; (d) the possibility for recourse to the Supreme Administrative Court for questions on the implementation of spatial plans that controvert the validity of their specific provisions.[11]

Spatial issues are often more intense on islands and in coastal zones due to population concentration and location of economic activities.[12] Insularity constitutes one of the key features of Greece. With a coastline of more than 15,000 km and with more than 3000 islands corresponding to 19% of the total surface of the country, prosperity and economic growth of a coastal area are directly linked with sustainable use of marine space.[13] Of 13 regions in Greece, only one is neither coastal nor insular. Coastal areas and seashores are characterized as a 'public good' and are protected by Article 24 of the Greek Constitution.[14]

10 ibid 107.

11 Anestis Gourgiotis and Georgios Tsilimigkas, 'A new approach for the spatial planning in Greece' [In Greek: *Mia nea proseggisi gia to xorotaksiko sxediasmo stin Ellada*] (2016) 26 Aeichoros 103, 114-115.

12 Georgios Tsilimigkas, Maria Pafi and Anestis Gourgiotis, 'Coastal landscape and the Greek spatial planning: evidence from wind power in the South Aegean islands' [2018] Journal of Coastal Conservation: Planning and Management 1, 2.

13 ibid 33.

14 Konstantinos Lalenis and Ioannis Papatheocharis, 'Greece', in Rachelle Alterman et al (eds), Mare Nostrum Project, First Interim Report: Existing Knowledge on the Legal-Institutional Frameworks for Coastline Management: The International, EU and National Levels, ENPI CBC MSB Grant Agreement I-A/1.3/093, Septmeber 2013, 26-41, 26.

2. Marine spatial planning and spatial planning in Greece

2.1 Greek spatial planning system

According to the EU Compendium of Spatial Planning Systems and Policies, Greece follows the so-called 'urbanism' planning tradition, which 'has a strong architectural character and concern with urban design, townscape and building control'.[15] A great number of Local Plans for towns and settlements of the country were formed according to the first Decree of 1923 concerning Town Plans. On the contrary, strategic spatial planning in Greece developed slowly compared to other European countries. National and regional spatial planning legislation has existed for over 40 years. The first provisions for ex-urban spatial planning were introduced within the Greek Constitution of 1975 and Law 360/1976.[16] Law 360/1976 was never implemented and was amended by Law 2742/99 'Spatial Planning and Sustainable Development Law'. This law provided at the national level a national territorial plan, namely the General Framework of Spatial Planning and Sustainable Development (GFSPSD).[17] It also contained provisions for sectoral territorial plans for the whole country, namely the Special Frameworks of Spatial Planning and Sustainable Development (SFSPSD), including Renewable Energy,[18] Industry,[19] Aquaculture,[20] and Tourism.[21] At the regional level, the Law 2742/99 provided regional spatial plans, namely the Regional Frameworks for Spatial Planning and Sustainable Development (RFSPSD),[22] one for each of 12 of the 13 regions of the country (excluding the region of Attica).

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15 European Commission, The EU Compendium of Spatial Planning Systems and Policies, CX-03-97-870-EN-C, 23/09/1997, 37.

16 Official Government Gazette, 'On Planning and Environment' (1976) [In Greek: *Peri xwrotaksias kai perivallontos", Efimeris tis Kyverniseos,* A' 151.].

17 Official Government Gazette, 'General Framework of Spatial Planning and Sustainable Development' National spatial planning framework and sustainable development (2008) [In Greek: *Geniko plaisio xorotaxikou sxediasmoy kai aiforou anaptiksi, Efimeris tis Kyverniseos*, A' 128].

18 Official Government Gazette, 'Special Framework for Spatial Planning and Sustainable Development for Renewable Energy Sources and Strategic Environmental Impact Assessment' (2008) [In Greek: *Eidiko plaisio Chorotaxikoú Schediasmou kai Aeifóroy Anaptyxis gia tis Ananeosimes piges Energias kai tis stratigikis meletis periballontikon epiptoseon aytoy, Efimeris tis Kyverniseos,* B' 2464].

19 Official Government Gazette, 'Special Framework for Spatial Planning and Sustainable Development for Industry and Strategic Environmental Impact Assessment' (2009) [In Greek: *Eidiko plaisio Chorotaxikoy schediasmoy kai Aeifóroy Anaptyxis gia tin viomixania kai tis stratigikis meletis periballontikon epiptoseon aytoy, Efimeris tis Kyverniseos*', ΑΑΠ 151].

20 Official Government Gazette, 'Special Framework for Spatial Planning and Sustainable Development of Aquaculture and Strategic Environmental Impact Assessment' (2011) [In Greek: *Eidikó plaisio Chorotaxikoy Schediasmoy kai Aeiforoy Anaptyxis gia tis Ydatokalliergeies kai tis stratigikis meletis periballontikon epiptoseon aytoy, Efimeris tis Kyverniseos*, B' 2505].

21 Official Government Gazette, 'Special Framework for Spatial Planning and Sustainable Development of Tourism and Strategic Environmental Impact Assessment' (2009) and its amendment [In Greek*: Eidikó plaisio Chorotaxikoy Schediasmoy kai Aeiforoy Anaptyxis gia ton tourismo kai tis stratigikis meletis periballontikon epiptoseon aytoy, Efimeris tis Kyverniseos* B'3155].

22 Official Government Gazette, 'Regional Frameworks for Spatial Planning and Sustainable Development' (2003, 2004). These frameworks came into force in 2003, 2004 and are currently under revision. The revision of the Regional Framework for Spatial Planning for the Region of Crete and its Strategic Environmental Impact Assessment, came into force in December 2017 [In Greek: *Egkrisi anatheorisis tou perifereiakoy xorotaksikoy plasioy tis perifereias Kritis kai egkrisi tis stratigikis meletis periballontikon epiptoseon aytoy Efimeris tis Kyverniseos,* ΑΑΡ 260].

Other spatial planning tools included the regulatory plan for the metropolitan areas of Athens and Thessaloniki that entered into force in 1985. The regulatory plan of Athens was replaced in 2014 by the New Master Plan of Athens-Attica.[23] Furthermore, urban plans, and 'Urban Development Control Zones' which established land usage in areas outside the statutory town plans, were approved through urban legislation.[24]

The strategic spatial planning Law 2742/99 was amended by Law 4269/2014 'Regional Planning and Urban Planning Reform - Sustainable Development'[25] and Law 4447/2016: 'Spatial planning – Sustainable development'[26] which are currently in force. Today, apart from the constitutional provisions, the 2016 Law introduces the National Strategy of Spatial Planning (NSSP) that will replace the previous General Framework of Spatial Planning and Sustainable Development (GFSPSD). Under the NSSP two types of planning are provided: Strategic spatial planning and Regulatory spatial planning (Diagram 1). Strategic spatial planning provides objectives and guidelines on spatial development and business activities and protection provisions at the regional level. Regulatory spatial planning mainly provides the delineation of land uses and the build-up percentage. The law also comprises a wide range of planning tools, which extend from strategic plans at the national and regional level to regulatory town plans at the local level (Diagram 2).

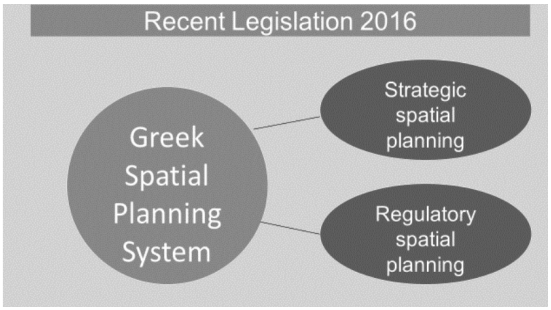

Diagram 1: Greek spatial planning system.

Diagram 2: Levels of spatial planning, 2016.

Source: Stefani, Gourgiotis and Tsilimigkas.

23 Official Government Gazette, 'The New Master Plan of Athens/Attica' (2014) [In Greek Neo Rythmistiko Sxedio Athinas-Attikis, Efimeris tis Kyverniseos, A' 156].

24 Law 1337, Official Government Gazette, 'Extension of urban development plans and residential development' (1983) [In Greek: *epektasi ton poleodomikon schedion kai oikistiki anaptyxi, Efimeris tis Kyverniseos* A' 33] and Law 2508 Official Government Gazette, 'On sustainable residential development of towns and settlementsin the country and other provisions' (1997) [In Greek: *Viosimi oikistiki anaptyxi ton poleon kai oikismon, Efimeris tis Kyverniseos* A' 124].

25 Official Government Gazette, 'Regional Planning and Urban Planning Reform - Sustainable Development' (2014) [In Greek: *Chorotaxiki kai poleodomiki metarithmisi - Viosimi anaptyks*i,] Efimeris tis Kyverniseos in Greek A' 142].

26 Official Government Gazette, 'Spatial Planning and sustainable development' (2016) [In Greek: *Chorikos sxediasmos kai biosimi anaptyksi,* Efimeris tis Kyverniseos in Greek A' 241].

The levels of strategic spatial planning are, as detailed in Diagram 3:

- The Special Frameworks on Spatial Planning (SFSPSD)
- The Regional Spatial Plans of the 13 regions of the country for the development and spatial structure of the regions. The New Master Plan of Athens/Attica[27] is included in this level of regional planning.

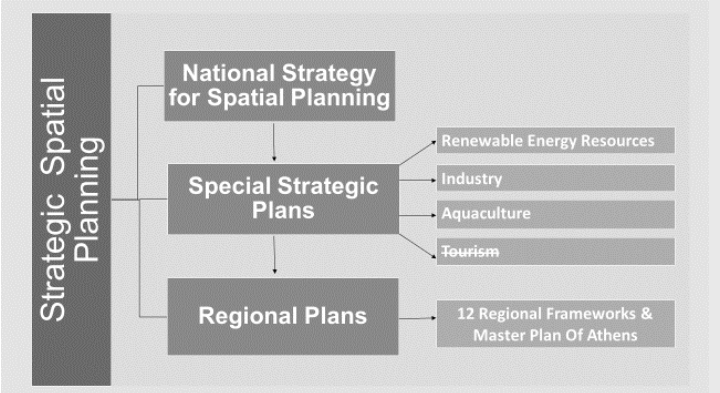

Diagram 3: Levels of strategic spatial planning in Greece.

Source: Stefani, Gourgiotis and Tsilimigkas.

Diagram 4 details the levels of regulatory spatial planning:

- The local spatial plans that establish the spatial organisation and development, the land uses and the building ratio for each municipality or group of neighbouring municipalities
- The Special Local Spatial Plans that establish land uses and building ratio. In certain areas for the development of public projects and private investments that are of strategic national importance
- The implementation plans.

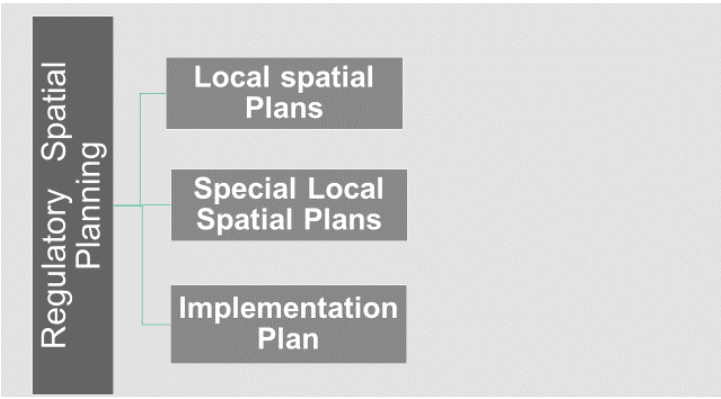

Diagram 4: Levels of regulatory spatial planning.

Source: Stefani, Gourgiotis and Tsilimigkas.

27 Official Government Gazette, 'The New Master Plan of Athens/Attica' (2014) [In Greek: Neo Rythmistiko Sxedio Athinas-Attikis, Efimeris tis Kyverniseos A' 156].

In order to be more flexible and responsive, the new institutional framework aims to face the problems and shortcomings of the spatial planning system by addressing a series of issues. Firstly, Diagrams 5 and 6 detail the reduction of the spatial planning levels. A paradigm example of this is that the New Master Plan of Athens is equal to a regional plan and the existing Master Plan of Thessaloniki will be incorporated in the Regional Spatial Plan of Central Macedonia. Secondly, the introduction of local Special Spatial Plans to facilitate public projects or private investments of strategic importance. Thirdly, the effective cooperation between spatial planning and development policies. The recent legislation establishes clearly the connection between development policies and spatial planning as the development strategy must have a spatial dimension adapted to the problems and prospects of the regions and towns.

Diagram 5: Amendments of Strategic Spatial Planning Levels in Greece.

Source: Stefani, Gourgiotis and Tsilimigkas.

Diagram 6: Amendments of the Regulatory Spatial Planning Levels in Greece.

Source: Stefani, Gourgiotis and Tsilimigkas.

The new legislation adopts the spirit of the previous legislation and establishes a hierarchical structure between different plan types. The lower level spatial plans must follow the directions of the upper levels and can further define them at the regional and local level. However, this harmonisation and specification has encountered several obstacles. The necessary modifications in case of opposite directions provided by the lower level spatial plans are not automatic and certain procedures must be followed to enable revision to occur.[28]

At the national level, the main competence for national, regional and local planning lies with the Ministry for Environment and Energy which is responsible for the elaboration, monitoring, assessment and revision of national, regional and local plans. Other Ministries with sectoral competence such as industry, tourism, agriculture, aquaculture and transport, may intervene in the formulation and integration of spatial planning policy especially in the field of sectoral spatial plans.[29]

Other executive bodies such as the decentralized authorities, the regions and the municipalities are empowered to implement the spatial plans and legislation, although the role of municipalities remains mostly advisory.

2.2 Marine spatial planning in Greece

The management of the marine environment was included initially in the 2011 amendment Law 4030/2011.[30] More specifically, it was founded on the principle of integrated management of marine space and coastal areas. Moreover, the Special Frameworks for Spatial Planning refer to the development and organisation of the national space in marine, coastal and insular areas. This principle aims to protect the marine ecosystem and promote sustainable development by coordinating and harmonising individual policies, programs, and investment plans of different uses in the same area such as productive activities, recreation and sports activities.

The 2014 legislation for spatial planning, urban reform, and sustainable development[31] adopted (to a lesser extent) a similar logic. Special reference for marine areas is only found in the chapter for the Special Spatial Strategic Plans. Specifically, the reference addresses the need to provide guidance for the spatial development and organisation of areas of the national territory of particular importance such as coastal areas, marine areas and islands. This provision remains in Law 4447/2016: 'Spatial Planning – Sustainable Development and Other Provisions'. It should also be underlined that there is a particular reference to the marine space in the principles of the aforementioned National Spatial Strategy. In particular, emphasis is given to the sustainable development of the marine, insular and coastal areas.

28 If conflicting directions arise between the Regional Plans and Special Strategic Plans, a relevant decision of the Ministry of Environment and Energy is issued after a submission of the competent Directorate.

29 Espon Interstrat, Current context of integrated territorial development strategic planning in Greece (European Union, 2013).

30 Official Government Gazette (2011). The article 41 'Additions of Law 2742/99' of Law 4030/2011 [Efimeris tis Kyverniseos in Greek A' 249].

31 Law 4269, Official Government Gazette, 'Regional Planning and Urban Planning Reform - Sustainable Development' (2014) [*In Greek: Chorotaxiki kai poleodomiki metarithmisi - Viosimi anaptyksi*, Efimeris tis Kyverniseos in Greek A' 142].

Based on the aforementioned legal and policy framework for spatial planning, a number of tools provide various institutional directions and provisions (of strategic and statutory character) for marine and coastal areas. According to this, in the General Framework of Spatial Planning, the strategic options for the organisation of the national space include the sustainable use and management of the marine space, as well as the spatial organisation and development of coastal zones and islands. This strategic framework includes guidelines that directly or indirectly affect these particular areas. More particularly, MSP elements are incorporated in the key priorities and strategic guidelines proposed for the spatial development and organisation of the national territory on issues such as: (i) ports of the cities, as spatial development poles; (ii) the specification of the role of ports and guidelines for their infrastructure upgrading; (iii) aquaculture activities and coastal fisheries; (iv) specific guidelines for the development of coastal and island territories; (v) sustainable management of marine resources and protection of the marine environment; and (vi) guidelines adopted for mitigating the impact of climate change and desertification.[32]

Concerning the sectoral spatial policies, aquaculture is the only marine activity that has enacted a legal framework focused on the spatial plan at the national level since 2011. During the last thirty years, Greece has registered a spectacular growth of its aquaculture sector. The Greek marine area has advantages including an extensive insular and mainland coastline, a variety of natural protected areas, purity of coastal waters and ideal oceanographic conditions temperature, salinity and water renewal. These advantages especially favoured marine fish aquaculture that developed into one of the most productive economic sectors in the country. The Special Framework of Spatial Planning for Aquaculture establishes the National Model for the Organization of Aquaculture activity by setting guidelines for the promotion of a spatial development model that ensures the strengthening of the sector with respect to environmental protection. Its aim is the production of multiplier effects at local, regional and national levels. The framework is mainly oriented to marine fish and shellfish aquaculture, since the need for spatial arrangement is more urgent for these types of farming. It also designates the accompanying facilities on the continental shelf and defines those that may be located in the public domain coastal strip. It supports the organised zones for the development of aquaculture managed in appropriate areas that are represented on a map. This map derives from the assessment of spatial, environmental, economic characteristics, and the existing aquaculture units. The precise desirable location of the organised zones is designated at a lower spatial level with a Presidential Decree considering specific spatial, environmental and economic criteria. However, it recognises the need for individual location in special cases under spatial prerequisites. As regards the reduction of conflicts between different uses, the framework sets criteria for the compatibility between aquaculture units with other marine activities.

The Special Framework of Spatial Planning for Renewable Energy Resources (RES), establishes spatial guidelines and criteria that enable the development of sustainable RES installations integrated with the natural and anthropogenic environment. The framework excludes areas for the location of

32 Foteini Stefani and Georgios Tsilimigkas, 'The importance of maritime spatial planning in the protection and development of Greek marine space' [2015] (Proceedings of the 4th Panhellenic Congress in Spatial Planning and Regional development, Volos, September 2015) (Greece, University of Thessaly Press) (in Greek) 4, 5 conference prd4.prd.uth.gr.

wind farms, designates minimum distances from specific activities and uses, establishes maximum wind power densities and sets specific prerequisites for the embodiment of wind installations in the landscape. Special divisions involve the offshore marine area, the inhabited islands and uninhabited islets. For these areas, specific criteria for wind farms are defined. The wind infrastructures are authorised in all sea areas of the country that meet wind capacity requirements (they are not authorised in areas such as shipping lanes).

The Special Framework of Spatial Planning for Tourism, and its amendment, is notable for its significant contribution to marine and coastal areas despite its abolition by the Supreme Administrative Court. The Special Framework of Spatial Planning for Tourism is no longer applicable following the Supreme Administrative Court decisions 3632/2015 and 519/2017.

According to the goal of the Special Framework, tourism shall increase its competitiveness and also increase the tourist season through spatial organisation. There are distinct categories of marine tourism such as cruises, leisure boats, fishing and diving. For the best possible combination of marine tourism activities, eleven units with corresponding support centres (which would be equipped with modern docking, refuelling and repairing facilities) were introduced. For the further development of leisure tourism, the framework proposed to densify the network of tourist ports through development of marinas, anchorages and shelters. The 2013 framework amendment provided guidelines for the spatial organisation and development of marine tourist activities such as cruises, yachting, fishing, and diving; building upon this, priority areas for large cruise ships were proposed.

Emphasis is given to the fact that a Special Framework for Spatial Planning of coastal zones and islands, which was necessary to specialise and complement the guidelines of the General Framework of Spatial Planning, was brought forth. It related to the development and organisation of the coastal zones, the islands and the marine areas of the national territory, which could contribute to their sustainable management. Despite the importance and necessity of a policy focusing on these particular areas this plan never entered into force.

In the 12 Regional Spatial Frameworks,[33] the marine spatial planning elements concern marine transport and connectivity between ports, the development of fisheries and aquaculture, the protection of marine resources, and the management of coastal areas. Furthermore, there are two major Greek marine protected areas of significance national importance – the National Marine Park of Alonissos in the Sporades islands (for the protection of monk seal *Monachusmonachus*), and the National Marine Park of Zakynthos in the Ionian Sea (for the protection of the sea turtle *Caretta caretta*). In addition, for the protection of seabirds, Mediterranean seals, sea turtles and cetaceans, a recent Joint Ministerial Decision extended the Marine Protected Areas network of Greek national waters from 6.1% to 22% of marine surface area.[34]

33 Official Government Gazette, 'Regional Frameworks for Spatial Planning and Sustainable Development' (2003, 2004).

34 Official Government Gazette, 'Revision of national list of sites of the European Natura 2000 ecological network' (2017) [in Greek, B' 4432].

That marine space for Greece is of vital importance, for both socioeconomic and environmental reasons, and that 12 of the 13 regions of the country have direct access to the sea is reflected in the current revision of the Regional Frameworks for Spatial Planning, which contains elements related to coastal and marine areas. It is noted that both the Law 4269/2014, as well as the recent Law 4447/2016, strengthen the role of the Regional Spatial Frameworks, without essentially transforming their character. The Regional Frameworks provide guidelines and specific directions for each municipality on basic spatial issues that must be adopted at the local planning level. In this respect, the synergy and compatibility of coastal and marine uses are key issues for economic development, social and territorial cohesion, and the environmental protection of the islands, the coastal zone and the marine areas. The specification of the directions from the regional to the local level with binding terms is the main prerequisite for their implementation.

The New Master Plan of Athens-Attica[35] defines crucial elements for marine spatial planning; these are:

- the role and designation of major ports (including Piraeus, Lavrio, Rafina, Aegina)
- the improvement of marine connectivity among the islands of Attica
- the protection and promotion of coastal areas as part of the ICZM of Attica
- the protection and classification of wetlands
- the upgrading of the waterfront of the metropolitan area
- the protection and upgrading of the coastal landscape of Attica.

The above multiple strategic directions for the Metropolitan Region of Attica are very important for its future priorities and competiveness at the international and European level. The New Master Plan of Athens intends to activate the processes of economic and spatial maritime development of Attica based on its multidimensional identity and its comparative advantages, placing environmental sustainability and social cohesion as an integral part of this development. These goals could be achieved through the implementation of marine spatial plans in connection with the local spatial plans. At the local planning level, only a few Local Plans[36] make reference to marine space. For example, the Local Plan of Mytilene Island[37] includes a special field for aquaculture installations and designates two sea areas for the development of aquaculture. Thus, it provides investment security for a crucial Greek productive sector over other competitive coastal uses. Additionally, it sets minimum distances from residential areas.

The above analysis demonstrates that marine space is taken into consideration in a fragmented way in the existing national spatial planning system. Although the plans referenced herein contain significant directions for the coastal and marine areas and islands, MSP in Greece has not been addressed independently in national legislation and has not been the subject of a single, integrated

35 Official Government Gazette, 'The New Master Plan of Athens/Attica' (2014) [In Greek: Neo Rythmistiko Sxedio Athinas-Attikis, Efimeris tis Kyverniseos A' 156].

36 In Greek: *Geniko Poleodomiko Sxedio (GPS) and Sxedio Xorikis kai Oikistikis Organosis Anoixtis Polis.*

37 Official Government Gazette, 'Local Plan of Mytilini' (2007) [Geniko Poleodomiko sxedio Mytilinis in Greek, Efimeris tis Kyverniseos AAΠ 328].

policy. Additionally, there are some uses and vital activities for the country's economy for which no spatial approach exists, despite their great impact (Table 1).

Spatial planning of sectoral policies

Current MSP related uses	Spatial planning Framework	Development Policy
Shipping	None	Existence of sectoral policy
Ports (all categories)	General Framework	Existence of sectoral policy
Fisheries	None	Existence of sectoral policy
Aquaculture	Special Framework of Aquaculture	Existence of sectoral policy
Renewable energy resources	Special Framework of RES	Existence of sectoral policy
Submarine cables and pipelines	None	Existence of sectoral policy
Industry	Special Framework of Industry	Existence of sectoral policy
Tourism	Special Framework of Tourism	Existence of sectoral policy
Oil and gas	None	Existence of sectoral policy
Under water cultural heritage	None	Existence of sectoral policy

Table 1: Spatial planning of sectoral policies.

Source: Economou,[38] 2013 modified by Stefani, Gourgiotis and Tsilimigkas.

Finally, in the recent Ministerial Decisions[39] on the specifications of the Local Plans there is no reference to the marine environment either for the development of productive activities such as aquaculture, or the linkage to the MSP. This, combined with the lack of reference to climate change measures and to landscape protection and improvement as necessary specifications of the regional plans, raises questions about the relation and effectiveness of local planning with these crucial European policies.

38 Dimitris Economou, 'Maritime Spatial Planning' (in Greek) (Meeting 'Blue Growth and marine areas in Greece', Rhodes, South Aegean Region, Greece, August 2013) 9, Conference papers.

39 Official Government Gazette, 'Specifications for the Local Plan studies' (2017) [In Greek: Texnikes Prodiagrafes meleton Topikon Xorikon Sxedion toy n. 4447/2016 B'1975] and 'Specifications for the Special Local Plan studies' [In Greek: Texnikes Prodiagrafes meleton Eidikon Xorikon Sxedion toy n. 4447/2016 B' 1976].

3. Issues emerging from the transposition of the directive into the national law

A bill was put forward for consultation for the transposition of the Directive for MSP. The main issues of the first transposition effort of the EU MSP Directive into the Greek national legal system at the end of 2016 are highlighted below. Moreover, this article proceeds to a critical presentation of the points raised by this transposition with the contents of the Directive and the current spatial planning system in Greece.

The main provisions of the Directive for 'Maritime Spatial Planning' are:[40]

- The establishment of a framework for MSP which promotes the "*sustainable growth of marine economies, the sustainable development of marine areas, and the sustainable use of marine resources*" within the EU's Integrated Marine Policy, taking into account land-sea interactions;
- The scope shall apply to marine waters and shall not apply to coastal waters or parts thereof falling under a Member State's town and country planning and "*shall not influence the delineation of marine boundaries by the Member States in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS)*";
- 'MSP' is defined as the process by which human activities in marine areas are analysed and organised by the competent authorities to achieve ecological, economic and social objectives;
- The key objective is the promotion of sustainable marine development and growth applying an ecosystem-based approach. MSP is also intended to contribute to the sustainable development of the marine energy sectors, marine transport, fisheries and aquaculture, tourism, extraction of raw materials, and the preservation, protection and improvement of the environment, including resilience to climate change impacts;
- "*Member States shall establish means of public participation by informing all interested parties and by consulting relevant stakeholders and authorities and the public concerned at an early stage in the development of marine spatial plans*".

The MSP Directive attempts to strike a balance between economic, social, and environmental concerns and objectives in line with the ecosystem approach. It is also a multipurpose process focusing mainly on the creation of favourable conditions for the economic uses of the marine environment in line with the Commission's Blue Growth Agenda.[41]

The November 2016 Bill consisted of two parts, but it was not accompanied, as is customary, by an explanatory report. Part I of the Bill, that concerns the transposition of the EU Directive, follows to some extent the structure of the latter and additionally gives emphasis to the Protocol on Integrated

40 The Italics in the text are taken from the text Chapter I/ General Provisions and Chapter II/ MSP, of the Directive 2014/89/EU, EP&C (European Parliament and of the Council), establishing a framework for marine spatial planning.

41 Zervaki (n 7) 42.

Coastal Zone Management in the Mediterranean[42],[43] and coastal zones. The second Part refers to the national implementation measures and designates the General Secretariat for Spatial Planning and Urban Environment of the Ministry of Environment and Energy, which is the competent authority for spatial planning in Greece, as the competent authority for the enforcement of MSP.

Regarding the content of the Bill, the main issues are:

- Following the Directive, MSP is defined as the process by which human activities in marine and coastal areas are analysed and organised by competent authorities to achieve ecological, environmental, economic and social goals;
- Equally, the application of an ecosystem-based approach is defined as a key objective. The MSP is also intended to contribute to sustainable development of the marine energy sectors, marine transport, fisheries and aquaculture, tourism, extraction of raw materials, and the preservation, protection and improvement of the environment, including resilience to climate change impacts;
- Additionally, it applies not only to marine waters but also to coastal zones and ICZM is introduced into MSP processes within the context of the EU IMP (integrated maritime policy);
- Moreover, 'Integrated Coastal Zone Management' and 'marine waters' are defined as per the Protocol on Integrated Coastal Zone Management of the Mediterranean to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, approved by the European Union in the Decision 2010/631/EU of 13 September 2010 (OJ L 279/2010);
- Regarding the establishment and implementation of marine spatial planning in accordance with the institutional and governance levels determined by the Member States, MSP consists of the National Spatial Strategy for Marine Space as a substantial part of the National Spatial Strategy and the marine spatial plans. The National Spatial Strategy for Marine Space determines the strategic guidelines for marine and coastal zones and indicates the necessity for the development of Marine Spatial Plans in spatial units. The National Spatial Planning Strategy for the Marine Area is composed under the responsibility of the General Secretariat for Spatial Planning and Urban Environment of the Ministry of Environment and Energy and is approved by an Act of the Council of Ministers and communicated to Parliament. The Marine Spatial Plans correspond to the Regional Spatial Planning level and refer to marine and coastal spatial units that are not related to the regional administrative boundaries;
- The competent authority when composing the National Spatial Strategy and the MSP plans takes into account activities and uses in marine waters and coastal zones;
- The competent authority shall ensure at the early stage of the MSP process that public authorities, stakeholders and the public are able to participate in a public consultation.

In accordance with the comments on the Bill, and considering that Greece has not ratified the Protocol on Integrated Coastal Zone Management in the Mediterranean,[44] a key point that raised issues

42 Council Decision 2010/631/EU (n3).

43 UNEP/MAP/PAP, Protocol on Integrated Coastal Zone Management in the Mediterranean. Priority Actions Programme (2008).

44 Council Decision 2010/631/EU (n 3).

for discussion was that the Bill applies not only to marine waters but also to coastal zones. The Bill did not follow the precise spirit of the Directive as coastal areas are included within the scope of the MSP to every single article, introducing ICZM into MSP processes, which is not included in the provisions of Directive 2014/89/EU. This has created confusion as regards the tools for determination of uses in terrestrial areas, considering that part of the coastal zone is already regulated by spatial and urban planning. Furthermore, the inclusion of Article 8 of the Protocol was suggested by some participants (this means that the coastal zone may vary depending on the relief and geomorphology, the population density and the specific needs and characteristics of each area). In this context, the necessity to promote the institutional framework for Integrated Coastal Zone Management (ICZM) was also suggested so that the two frameworks – MSP and ICZM – can be complementary.

Another crucial concern about which there is ambiguity is the time and manner of the Bill's implementation. According to the Bill, Marine Spatial Plans correspond to the Regional planning level and the Bill refers to marine and coastal spatial units that are not linked to administrative boundaries. On the contrary, Law 4447/2016 'Spatial Planning - Sustainable Development' specifies that the spatial development and organisation of coastal and marine areas should be defined in National Spatial Frameworks. More specifically, article 5, states that the national spatial Frameworks provide guidelines for the spatial development and organisation of areas of national importance such as coastal and marine areas and islands.

4. Discussion

The 2016 Bill on MSP is a significant step towards the transposition of the Directive. The implementation of the Directive for 'Maritime Spatial Planning' should also be based on existing national, regional and local rules and mechanisms.

Comprehensive marine and terrestrial spatial planning constitutes a significant parameter of the integrated approach vis-a-vis marine space management. The land / sea interaction is significant and often characterised not only by the concentration of activities and their conflicts or synergies, but also by significant impacts on natural resources and ecosystems. These findings have led to the development of MSP and ICZM initiatives, which aim to ensure the sustainability of the actions that are being developed in the marine and coastal area.[45]

The Protocol on Integrated Coastal Zone Management in the Mediterranean as reflected in the relevant European Council Recommendation (2002) and the Protocol of the Barcelona Convention for

45 Spyros Niavis, Dora Papatheochari and Charis Coccossis, 'Exploring the socioeconomic dimensions within the link of Maritime Spatial Planning and Integrated Coastal Zone Management: The case of the Adriatic-Ionian region', (2016) in Greek. Aeichoros-Spec. Issue MSP 23 *Spatial development and planning, marine spatial planning and integrated coastal area management* 64, 66.

the Protection of the Marine Environment of the Mediterranean,[46] is the coordinated implementation of the various policies affecting the coastal zone that are related to activities such as aquaculture, fisheries, agriculture, industry, energy, shipping, tourism, infrastructure development and adaptation to climate change.

The main objective of MSP and ICZM is to ensure the sustainability of the activities in marine and coastal areas. Despite the common objective, the long-term perspective, the similarities and convergences (such as ensuring the active involvement of local communities and stakeholders), there are some important differences in the structure and implementation processes between the two. In spatial terms, MSP mainly regulates uses that are developed in the marine environment, while ICZM aims to regulate uses of coastal areas.[47] MSP controls uses of regional, even national or international-scale, with the responsibility of planning given to national authorities. ICZM projects are of a lesser scale, with local authorities principally in charge of planning and implementation. In addition, MSP has greater legal commitments than the more flexible ICZM projects. From the abovementioned issues it is clear that MSP has a spatial character whilst ICZM has a managerial one.[48]

In comparison with the previous points, the Special Framework for coastal zones and islands, which has never been institutionalised, referred to the spatial organisation and integrated management of the wider coastal area (land and sea) through the establishment of zones, the elimination of land-use conflicts and the operational regulation of development activities. The coastal area was categorised into three management areas (the Critical Zone, the Dynamic Zone and the Transitional Zone), where land uses and building restrictions were defined. For the accurate determination of the width of the terrestrial section of the Critical Zone and Dynamic Zone of coastal areas, a series of characteristics such as geographic, geomorphological, social, economic, environmental, the seashore, the beach, existing constructions (including ports and roads), and existing activities would be considered. The Critical Terrestrial Coastal Zone was divided into two individual zones. The first zone had 50m width from the designated sea line and the second zone had 100m width. In this second zone, residential and leisure uses (according to the guidelines of the existing Special Spatial Plan for Tourism) were to be permitted. It was noted that if the specific characteristics of the area required different identification, the width may be modified on a case-by-case basis according to relief and geomorphology.

In conclusion, taking into consideration: a) the specified timeframe b) the issues that arose from the recent transposition effort of the MSP Directive c) the fact that the transposition has not yet completed, it is necessary to transpose immediately the MSP Directive into Greek legislation in accordance with the spirit of the Directive. Moreover, the coherence of MSP with the objectives and

46 Protocol on Integrated Coastal Zone Management [2009] (n 3) and the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) 1976.

47 Spyros Niavis, Dora Papatheochari and Charis Coccossis, 'Exploring the socioeconomic dimensions within the link of Maritime Spatial Planning and Integrated Coastal Zone Management: The case of the Adriatic-Ionian region', (2016) in Greek. Aeichoros-Spec. Issue MSP 23 *Spatial development and planning, marine spatial planning and integrated coastal area management* 64, 67-68.

48 ibid.

options of national and regional spatial planning policies must be restored. Ensuring the coherence between terrestrial spatial planning and MSP for an integrated policy framework constitutes another key issue. It is a priority to determine the degree of interaction with the existing spatial frameworks and the determination of the implementation levels, in connection with recent legislation (Law 4447/2016) or the need to modify it.

The establishment of a parallel spatial planning framework for the sea, taking also into account the coastal areas, will be an impossible burden for the Greek spatial planning system and the development policies. In particular, MSP is a complex and multidimensional process, whose character is principally determined by the application scale.[49] Maritime Spatial Plans in Greece can be developed at national, regional and local levels. The key issues are the often poor interaction with the development policies and coherence with the existing spatial plans (Strategic special/Regional/Local Plans). At large spatial scales, strategic MSP should ensure and promote synergies and compatibilities between spatial, development, and sectoral policies. At small spatial scales, the character of MSP is regulatory and should be based on resolving conflicts and promoting synergies between marine uses.[50]

Additionally, in this context, the General Secretariat for Spatial Planning of the Ministry of Environment and Energy being the proposed competent authority should ensure close cooperation with the co-competent bodies which implement sectorial policies for overcoming the often competitive objectives and ensure synergies between the policies adopted and the programs as they are implemented.[51] A key factor for resolving problems and effective implementation is the consultation between the political governance and administration bodies for national and regional spatial levels, and the participatory processes by involving the stakeholders and local users for local level.[52] It is necessary to proceed to the gradual promotion of MSP through pilot studies and cross-regional, at-scale projects due to Greece's extensive coastlines and the need to ensure topological continuity and to enable where necessary the area for MSP to be defined ad hoc, based on particular needs, especially in areas where pressures arise from usage conflicts.

Greece must amplify its efforts for the transposition of the Directive and marine spatial plans. It is necessary to prepare an integrated medium and long term approach to MSP based on the characteristic conditions of the country in order to achieve sustainable blue growth.

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49 Georgios Tsilimigkas and Nikolaos Rempis, 'Marine uses, synergies and conflicts. Evidence from Crete Island, Greece' (2017) 22(2) Journal of Coastal Conservation 235, 241.

50 Georgios Tsilimigkas and Nikolaos Rempis, 'Marine spatial planning and spatial planning: Synergy issues and incompatibilities. Evidence from Crete Island, Greece' (2017) (139) Ocean & Coastal Management 33, 40.

51 Foteini Stefani, Georgios Tsilimigkas and Anestis Gourgiotis, 'Issues of establishing a comprehensive framework for marine Spatial Planning' [In Greek: Zitimata syntaksis enos oloklиromenou plaisiou gia ton Thalassio Xorotaksiko Sxediasmo] (2016), Aeichoros. -Spec. Issue MSP 23, *spatial development and planning, marine spatial planning and integrated coastal area management* 135,147.

52 Nikolaos Rempis, George Alexandrakis, Georgios Tsilimigkas and Nikolaos Kampanis, 'Coastal use synergies and conflicts evaluation in the framework of spatial, development and sectoral policies' (2018) 116 Ocean and Coastal Management 40.