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Turkish Straits and Safety of Navigation: the Case of the *Vitaspirit*

*Selim CIGER**

Abstract

The Turkish Straits remain one of the most congested and perilous international waterways in the world. There have been a great number of incidents, resulting in physical damage, pollution and loss of life. A recent accident, where the bulk carrier 'Vitaspirit' suffered engine malfunction and crashed into the Bosporus coastline, has once again demonstrated the risks involved in passage through the Turkish Straits and led to a lively debate in Turkey regarding the possible solutions to improve navigational safety. This article reflects on and assesses the proposed solutions: it will be demonstrated that, whilst potentially helpful, some of the proposed measures have challenges, both legal and practical, and are unlikely to prove efficient in short term. There exist a few measures such as proliferation of stand-by tugs, which despite being relatively simple, carry a considerable potential of reducing the risk of accident. However, the costs involved in realizing such resolutions may act as an impediment to their eventual adoption. In light of these realities, the article also considers whether there are ways in which the financial burden of such measures could be alleviated under the existing legal framework governing the Turkish Straits.

Keywords: Maritime accidents, Safety of navigation, International straits, Turkish Straits, Montreux Convention on Turkish Straits

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1. Introduction

Consisting of the Istanbul Strait (Bosporus), the Sea of Marmara and the Canakkale Strait (Dardanelles), the Turkish Straits connect the Black Sea to the Mediterranean and they are amongst the most important international waterways, possessing both strategic and commercial significance.[1] Almost half a million vessels have navigated through the Turkish Straits in the last decade alone,

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1 Ferenc A Vali, *The Turkish Straits and Nato* (Hoover Institution Press 1972); Tulio Scovazzi, 'Management regimes and responsibility for international straits' (1995) 19 Marine Policy 137, 146-147.

making the Straits one of the busiest waterways in the world.[2] It is also one of the most perilous: whilst the Canakkale Strait, an approximately 38 nautical miles long waterway with a width varying between 0.75 and 4 nautical miles, is relatively easier to navigate through, the unique features of the Istanbul Strait, an S shaped channel with several sharp turns and a width of only 0.4 nautical miles at its narrowest points makes the passage a considerable challenge for the vessels traversing through its waters.[3] Also factoring in weather conditions, strong surface currents and a significant amount of local traffic, passage through the Istanbul Strait becomes very tricky.[4] The problem is further compounded by the fact that the Istanbul Strait is situated on the coast of one of the most populous cities in the world with a distinct cultural and economic importance. A recent incident has once again demonstrated the dangers posed to Istanbul by accidents taking place in the Bosporus and renewed interest in various proposals aiming to minimise the risks involved in Straits passage.

This article evaluates the proposals put forward following the incident to increase navigational safety in the Istanbul Strait, from both legal and practical perspectives: first, it provides a brief account of the *Vitaspirit* incident that occurred in April 2018. Then, following a concise analysis of the Montreux Convention and the domestic regulations applicable to transit under Turkish law, the article focuses on suggestions put forward by various stakeholders subsequent the incident that may reduce the risk of similar accidents in future and consider the efficacy of these proposals in the face of legal, practical and financial considerations. Finally, the article concludes with a view on additional measures to help circumvent perceived obstacles to their implementation.

2. *Vitaspirit* Incident

On 7 April 2018, the bulk carrier '*Vitaspirit*' allided with the shoreline and crashed into one of the oldest mansions in the Bosporus coast, almost destroying the property and causing widespread panic amongst the patrons in nearby restaurants but, luckily, no loss of life or pollution was incurred.[5] The investigation findings regarding the exact cause of accident have not been made public; however, it is reasonably clear, at this stage, that problems associated with the vessel's machinery played a sizeable

2 Directorate for Maritime Commerce, 'Vessel Transit Statistics for the Turkish Straits' <https://atlantis.udhb.gov.tr/istatistik/gemi_gecis.aspx> accessed 2 February 2019.

3 Scovazzi (n 1) 147; Necmettin Akten, 'Analysis of Shipping Casualties in the Bosphorus' (2004) 57 Journal of Navigation 345, 346-348.

4 Andrew Scharfenberg, 'Regulating Traffic Flow in the Turkish Straits: A Test for Modern International Law' (1996) 10 Emory International Law Review 333, 335-336; Kristina Martin, 'Conflicts in Marine Environmental Protection: The Turkish Straits as a Case Study' (1999) 9 Transnational Law & Contemporary Problems 681, 683-684; Elif Uzun, 'Tehlikeli Madde Taşıyan Ticaret Gemileri Hakkındaki Milletlerarası Standartlar ve Boğazlardan Geçiş' (*International Standards Regarding Merchant Vessels Carrying Dangerous Cargo*) (2003) 23 Milletlerarası Hukuk Bülteni (*Bulletin for International Law*) 851, 853.

5 This was not the first accident of this kind in the Straits: in 2010, a bulk carrier has also collided into the shoreline due to engine malfunction and damaged another historical mansion, see Hurriyet, 'Dev gemi Esma Sultan Yalısı'na çarpti' (*Gigantic Vessel crashes into Esma Sultan Mansion*) (Hurriyet, 19 June 2010) <www.hurriyet.com.tr/gundem/dev-gemi-esma-sultan-yalisi-na-carpti-15072699> accessed 4 February 2019.

part in the incident.[6] Indeed, the first reports and the intercom records between the voluntary pilot advising the vessel and the Directorate of Coastal Safety have indicated that the Maltese flagged vessel suffered both rudder and engine failure and could not stop despite attempting to do so. News reports detailing the accounts given by the ship's captain and officers during court proceedings contend that the ship had begun to lose power due to a leak in her main engine shortly before the accident and although the captain had attempted to run the ship aground in a shallow area nearby the crash site, he failed due to lack of power.[7] The ship's voyage data recorder transcriptions suggest that the power loss in the main engine was caused by heat due to loss of engine coolant which was, in turn, instigated by a crack present in one of the cylinders in the engine block.[8] Therefore, apart from inquiries regarding whether the master was negligent in navigation, engine problems would, naturally, raise questions regarding the vessel's seaworthiness.

Regardless, the accident highlights, once more, the hazards of a very busy waterway adjacent to a mega city populated by over 15 million people.[9] Official numbers demonstrate that each year around 45000 vessels transit the Turkish Straits, with roughly one fifth of those carrying hazardous or noxious cargo.[10] Accidents similar to the *Vitaspirit* incident, though on a smaller scale are not rare and according to the official figures there were around 120 accidents in the Marmara Sea in 2017.[11] Inhabitants of Istanbul have also suffered maritime accidents with catastrophic consequences: notably the *Independenta* disaster, which was caused by the collision between the tanker *Independenta* and the general cargo ship *Evrialy* resulting in forty three casualties, around 90000 tonnes of crude oil spill and a fire that went on for almost two months, is first to come to mind.[12] Unfortunately, the

6 See Yalçın Ünsan, 'Bir Kazanın Mühendislik Anatomisi' (*Anatomy of an Accident from an Engineer's Perspective*) (2018) 10 Yeni Deniz Mecmuası 47 (*New Sea Magazine*).

7 Anadolu Agency, 'Yalıya Çarpan Geminin Mürettebatı Kazayı Anlattı' (*Crew of the Vessel Crashing into the Mansion describes the accident*) (Anadolu Agency, 12 April 2018) <https://aa.com.tr/tr/turkiye/yaliya-carpan-geminin-murettebati-kazayi-anlatti/1116199> accessed 2 February 2019; Sozcu, 'Yalıya Carpan Geminin Murettabatı ve Kaptanı Ifade Verdi' (*Master and the Crew of the Vessel Crashing into the Mansion Gives Their Statement at Court*) (Sozcu, 12 April 2018) <www.sozcu.com.tr/2018/gundem/yaliya-carpan-geminin-murettebati-ve-kaptani-ifade-verdi-2346079/> accessed 2 February 2019.

8 Istanbul News Agency, 'Yalıya Çarpan Geminin Kara Kutusu Çözümlendi' (*Black-box of the Vessel Crashing into the Mansion has been Deciphered*) (Istanbul News Agency, 16 April 2018) <www.istanbulhaber.com.tr/yaliya-carpan-geminin-kara-kutusu-cozumlendi-haber-924064.htm> accessed 2 February 2019.

9 According to 2017 figures, see Turkish Statistical Institute, 'Population of provinces by years, 2000-2017' <www.turkstat.gov.tr/UstMenu.do?metod=temelist> accessed 2 February 2019.

10 Directorate for Maritime Commerce, Vessel Transit Statistics for the Turkish Straits (Directorate for Maritime Commerce 2018) <https://atlantis.udhb.gov.tr/istatistik/gemi_gecis.aspx> accessed 2 February 2019.

11 Directorate for Maritime Commerce, Statistics for Maritime Accidents, (Directorate for Maritime Commerce 2018) <https://atlantis.udhb.gov.tr/istatistik/diger_deniz_kazalari.aspx> accessed 2 February 2019; it must be noted that not all of these accidents involve vessels passing through the straits. Although details for 2017 statistics are not yet available, 2015 statistics demonstrate out of 40 incidents at least 10 took place in the Straits, see Chief Coordination Centre for Search and Rescue, Statistics for Incidents/Accidents, (Chief Coordination Centre for Search and Rescue 2018) <http://atlantis.udhb.gov.tr/denizkaza/yayin/aakb_bol.asp> accessed 26 January 2019.

12 For major accidents in the Straits, see Cahit Istikbal, 'Turkish Straits: Difficulties and the Importance of Pilotage' in Nilufer Oral and Bayram Öztürk (eds), *Turkish Straits: Maritime Safety and Environmental Aspects*, (Turkish Marine Research Foundation 2006) 74; Christopher C Joyner and Jeanene M Mitchell, 'Regulating Navigation through the Turkish Straits: A Challenge for Modern International Environmental Law' (2002) 17 The Internatıonal Journal of Marine and Coastal Law 521, 529-530.

Independenta was not the first incident of this magnitude: a collision between *World Harmony* and *Peter Zoranic* had resulted in some 18000 tonnes of oil spill and the ensuing fire claimed twenty lives in 1960.[13] Nor it was the last: in 1994, a collision between the tanker *Nassia* and the bulk carrier *Ship-broker* caused a 20000 tonnes oil spill and a fire that resulted in twenty nine casualties.[14] As this short history demonstrates, the risk of such disasters, unfortunately, cannot be considered as too remote and that this is so is confirmed by the *Vitaspirit* accident. Fortunately the *Vitaspirit* was not carrying any dangerous cargo and there was no oil spill from the bunkers of the vessel; however any accident taking place in a waterway as perilous and busy as Bosporus is highly dangerous: subsequent reports revealed that the *Vitaspirit* had been closely followed by the tanker *Sienna* carrying around 80000 tonnes of crude oil and owing to the swift response of the Directorate of Coastal Safety, the vessel was made to reduce speed and redirected to an anchor point with the tug assistance, averting the risk of a second accident.[15]

The accident and the ensuing public interest brought about a stimulating discussion regarding what can be done in order to minimize risks of such incidents in the Straits. The proposed solutions will be evaluated below in detail; however, it must be emphasized that the solutions for maritime safety in the Bosporus cannot be discussed without considering the legal regime applicable to the transit through the Straits first, as if a legal vacuum exists. Therefore, a brief overview of the Montreux Convention is due here.

3. The Montreux Convention Regarding the Regime of the Straits

Passage through the Dardanelles and Bosporus Straits is regulated under 'The Montreux Convention Regarding the Regime of the Straits' (the Convention).[16] The Convention provides a complex framework concerning transit through the Turkish Straits and addresses various issues regarding the manner of passage, services to be offered to the vessels in transit and applicable charges as well as setting out specific regulations on the passage of warships and their presence in the Black Sea.[17] The

13 K Cemal Güven, 'Oil Pollution in the Black Sea and Turkish Straits' in Oral and Öztürk (n 12) 135, 140; Joyner and Mitchell (n 12) 528.

14 Istikbal, 'Pilotage' (n 12) 75.

15 Hurriyet, 'Sienna Durdurulmasa Felaket Olurdu' (*It Would be Disastrous if the Sienna had not been Stopped*), (Hurriyet, 12 April 2018) <www.hurriyet.com.tr/gundem/sienna-durdurulmasa-felaket-olurdu-40802273> accessed 2 February 2019.

16 See in general: Eric Brüel, 'Turkish Straits' (1943) 14 Nordisk Tidsskrift International Ret 3, Parts I-III; CL Rozakis and PN Stagos, *Turkish Straits* (Nijhoff 1987); Nihan Ünlü, 'The Montreux Convention and the Development of the Legal Regime of the Turkish Straits', (DPhil thesis, University of Birmingham 2001) also see the publication by the same author *The legal regime of the Turkish Straits* (Nijhoff 2002); Yüksel Inan, 'The Turkish Straits and The Legal Regime of Passage' in David D Caron and Nilufer Oral (eds), *Navigating Straits: Challenges for International Law* (Brill 2014); RR Churchill and AV Lowe, *The Law of the Sea* (3rd ed, Manchester University Press 1999) 114-115; Ayşenur Tütüncü, 'Evaluation of the Montreux Convention in the Light of Recent Problems' in Selma Ünlü and others (eds), *Oil Spill along the Turkish Straits Sea Area; Accidents, Environmental Pollution, Socio-Economic Impacts and Protection* (Turkish Marine Research Foundation 2018) 44.

17 The Convention constitutes a special regime under the United Nations Convention on the Law of the Sea (UNCLOS) art 35 (c), therefore the applicability of the UNCLOS to Turkish Straits are limited to matters outside the ambit of the Montreux Convention, in the event that Turkey becomes a party to the UNCLOS in the future, Inan (n 16) 201; Churchill and Lowe (n 16) 115.

detailed nature of the legal framework contained in the Convention precludes an exhaustive treatment of the subject here; however, the salient points are as follows: first, the Convention specifically affirms 'the principle of freedom of transit[18] and navigation by sea in the Straits.'[19] Nevertheless, the exercise of this freedom is subject to certain limitations and rules differ, mainly depending on whether the vessel in question is a merchant vessel or a warship as well as whether such transit takes place in time of war or peace.[20]

In peacetime, merchant vessels[21] enjoy complete freedom of navigation in the Straits by day or night, regardless of their flag or cargo.[22] The right of passage will not be subject to any formalities except the sanitary controls to be exercised at a station near the entrance to the Straits as prescribed under Article 3 and no taxes or charges other than those already allowed under the Convention can be levied on those vessels that transit without calling at a port in the Straits.[23] The taxes and charges applicable to the vessels transiting the Straits in accordance with Article 2 are elaborated in the Annex I of the Convention[24] and the vessels passing through the Straits shall provide their name, nationality, tonnage, destination and last port of call to the officials at the abovementioned stations in order to facilitate collection of the charges or taxes due.[25] Pilotage and towage remain optional for merchant vessels transiting through the Straits in peacetime.[26] They may only be made compulsory in time of war, if Turkey considers herself under threat of imminent danger of war; however, no charge shall be levied in such case.[27]

Finally, Article 28 sets out that the Convention would remain in force for twenty years from the date of its entry into force and any party could denounce the Convention by giving notice two years prior

18 The term 'transit' is used, in the English translation of the Montreux Convention, in lieu of 'passage' in the original French text of the Convention. Despite the choice of words, it must be noted that the 'freedom of transit' under the Montreux Convention and the transit passage regime under the UNCLOS, or the 'right of transit' as it is sometimes called, are not the same, as the latter concept is largely the product of the UNCLOS and its usage was rare in the law of the sea, and as a legal notion it certainly lacked the connotations the transit passage regime entails today, at the time the Montreux Convention was concluded, see Sevin Toluner, 'The Regulation of Passage through the Turkish Straits and the Montreux Convention' (1981) 44 Annales de la Faculte de Droit D'Istanbul 79, 81-84; Gunduz Aybay and Nilufer Oral, 'Turkey's Authority to Regulate Passage of Vessels through the Turkish Straits' (1998) Journal of International Affairs Vol.III-2 230, text preceding fn. 17; Inan (n 16), 209. Indeed, it is recorded that many delegates of the third United Nations Conference on the Law of the Sea regarded the transit passage as a novel concept in international law, see Churchill and Lowe (n 16) 111.

19 Art 1.

20 The discussion here is mainly reserved to the passage of merchant vessels in peace time. For limitations during time of war, see arts. 4-6; and for the highly complex passage regime for the warships, see Brüel (n 16) Part III, 178-187; Ünlü (n 16) Chapter 6.

21 The Montreux Convention, art 7 describes the 'merchant vessels', in an inclusive manner, as 'all vessels that are not covered' by the Section II which defines the military vessels in detail.

22 Art 2.

23 ibid.

24 See below, text following (n 82).

25 Art 2.

26 Arts 2 and 4.

27 Art 6; although the art. 5 is silent, arguably, the pilotage and towage may also be made obligatory when Turkey is belligerent, see Ünlü (n 16) 110, note 215; also see Brüel (n 16) Part III, 160.

to the expiry of the said period, otherwise the Convention would continue to remain in force until two years after such notice is given. This has so far never happened; and the Convention has been in force for the last eighty two years. Of course, the long tenure of the Montreux Convention has not been without challenges and some aspects of the Convention have endured a significant amount of pressure. Indeed, apart from some dissatisfaction concerning the technical classifications regarding the military vessels, now perceived as somewhat outdated,[28] the most significant shortcoming of the Convention is often considered to be the lack of provisions on environmental protection and prevention of pollution in the context of Turkish Straits passage.[29] This is not wholly surprising, as environmental issues were not as prominent at the time of drafting and the drafters could not, realistically, have been expected to anticipate either the drastic increase in the amount of vessels transiting through Turkish Straits or the catastrophic consequences that could potentially ensue from accidents involving vessels carrying hazardous cargo.[30] Obviously, the Convention also leaves margin for amendment and it would be possible to introduce certain regulations on maritime safety through the revision procedure in accordance with the elaborate scheme set out under Article 29 and alleviate the environmental concerns posed by the increasing traffic. However, previous attempts to revise certain aspects of the Convention demonstrate that amending the existing legal framework is not an easy task: the Convention touches many issues of political and strategic nature, therefore the balance struck therein has proven very difficult to disturb.[31] As a result, prospects of any revision for reasons of maritime safety remains unlikely in near future.[32]

4. Measures Taken to Improve the Maritime Safety in the Straits: Traffic Regulations Applicable to the Navigation Through the Straits under Turkish Law

Apart from ensuring the freedom of navigation and dealing with matters related to the general characteristics of the passage, the Montreux Convention does not include any specific provisions regarding the technical aspects of navigation such as the management of traffic flow through the Straits, navigational safety or accident prevention. Over the years, increasing traffic and resultant accidents have necessitated certain precautions to be taken in order to improve navigational safety

28 Scovazzi (n 1) 148; Churchill and Lowe (n 16) 115.

29 Scovazzi (n 1) 148; Joyner and Mitchell (n 12) 527.

30 See Joyner and Mitchell (n 12), 527, the annual traffic in the Straits amounted to approximately 4500 vessels in 1936. Over a period of 80 years, the figure has increased ten-folds, see above, (n 10).

31 Scovazzi (n 1) 148.

32 Or, any amendment in general, cf Ünlü (n 16) 271-272.

in the Turkish Straits. To this end, Turkey adopted a set of domestic regulations in 1994, establishing standards for traffic management, setting up a speed limit, instituting norms for vessel towing and tugs and bringing detailed reporting requirements as well as assigning a new traffic separation scheme in the Straits.[33]

Prior to the preparation of the 1994 regulations, the Turkish government had presented to the International Maritime Organization (IMO) a set of proposals for a traffic separation scheme (TSS) and draft rules for ships transiting the Straits in order to facilitate their review.[34] It is generally accepted that Turkey possesses the right to regulate matters related to the security or the administration in the Straits, without touching the essence of the right of passage under the Montreux Convention.[35] However, the draft rules and TSS as well as the subsequent 1994 regulations which were largely based on the former have met with considerable dissent from the international community, especially Black Sea littoral states, who perceived them as contradictory to the principle of freedom of passage under the Montreux Convention and a working group was created under the auspices of the Maritime Safety Committee (MSC) within the IMO to consider the technical aspects of the said proposals.[36] After finishing its review, the working group has produced a set of 'Rules and Recommendations on Navigating Through the Straits of Istanbul, the Strait of Canakkale and the Sea of Marmara' and these were adopted by the Committee in June 1994, along with the TSS formerly proposed by Turkey.[37] Subsequent to the IMO discussions, Turkey affected minor changes to the 1994 Regulations and the amended regulations entered into force on 1 July 1994. However, these amendments were deemed to be very limited by a number of states and Russia, arguing that the regulations contradicted the IMO recommendations, brought the issue to the IMO Legal Committee.[38] The Legal Committee has subsequently deferred the issue to the MSC, a decision which was also supported by the IMO Council, and so began a long, fruitless period of debate at the Committee regarding the TSS and the regulations applicable to the vessels navigating through the Straits.[39] The main issue concerned the apparent difference of opinion between Turkey and the Black Sea littoral and user states regarding the conformity of 1994 Regulations with the IMO recommendations and, on a broader level, the Montreux Convention. This continued for the majority of IMO discussions and it was so severe at times that it resulted in Turkey boycotting the meetings for an extended period of time.[40] It was not

33 Maritime Traffic Regulations for the Turkish Straits and the Marmara Region (1994 regulations), Republic of Turkey, Official Gazette, 11 Jan 1994, Vol. 21815, page 3, arts 7-8; for detail, see Ünlü (n 16), Chapter 5; Glen Plant, 'Navigation regime in the Turkish Straits for merchant ships in peacetime' (1996) 20 Marine Policy 15; Aybay and Oral (n 18); 'Milen Dyoulgerov, Navigating the Bosporus and the Dardanelles: A Test for the International Community' (1999) 14 The International Journal of Marine and Coastal Law 57.

34 Plant, 'Navigation' (n 33) 17-18.

35 Toluner (n 18), drawing support from the *travaux preparatoires* of the Convention where Turkey explicitly reserved its rights to exercise judicial and administrative control, see 81 and 83-84; Inan (n 16) 214; Joyner and Mitchell (n 12) 537-539 and 551; Scharfenberg (n 4) 381-387; but cf Glen Plant, 'The Turkish Straits and tanker traffic: an update' (2000) 24 Marine Policy 193, 196-200.

36 Plant, 'Navigation' (n 33) 17-18.

37 Plant, 'Navigation' (n 33) 19-20; Dyoulgerov (n 33) 80.

38 Plant, 'Navigation' (n 33) 22.

39 For a detailed account on the IMO debate, see Plant, 'Update' (n 35); Debora Schweikart, 'Dire Straits: The International Maritime Organization In The Bosporus And Dardanelles' (1996-1997) 5 Yearbook of International Law 29; Nilufer Oral, 'Turkish Straits and the IMO: A Brief History' in Oral and Öztürk (eds) (n 12), 22-28; Dyoulgerov (n 33) 79-83.

40 Plant, 'Update' (n 35) 203; Dyoulgerov (n 33) 81.

until 1998 that Turkey's stance softened and the Turkish Government submitted to the IMO a set of amendments to the 1994 Regulations and Vessel Traffic Service plans to address some of the user states' concerns, as well as promising to cooperate in future IMO discussions on safety of navigation in the Straits.[41] Despite the agreement towards the preparation of a new report on maritime safety, very little progress was made in the following sessions and in May 1999 the MSC decided to cease discussions on the issue, which effectively concluded the IMO proceedings on the safety of navigation in the Straits.[42]

In the meantime Turkey, taking IMO recommendations into account, has affected several important changes to the 1994 Regulations, and the new version of the regulations entered into force on 6 November 1998.[43] Although the 1998 Regulations were largely based on the 1994 Regulations, most articles have been reworked and several have been amended in order to address the controversial issues.[44] A key change concerns the passage of large vessels and vessels carrying nuclear, hazardous or noxious cargo, as well as nuclear-powered ships which were previously, in effect, made subject to the permission of the coastal authority: article 25 and 26 of 1998 Regulations now make clear that these vessels may pass through the Straits, in cooperation with the authorities so that their passage may be planned beforehand and it is ensured that they pose no risk to the existing traffic or the environment. Similarly, the definition of 'large ship', which entailed said specific conditions, was reworked to refer to the vessels longer than 200 metres[45], so that fewer vessels are subject to these special transit measures. Secondly, article 20 of the 1998 regulations deals with the temporary suspension of traffic and is now limited mostly to force majeure, which is markedly less liberal than its counterpart under the 1994 regulations, language of which allowed the suspension of traffic in many cases, including boat races or scientific research. Finally, article 17 of the 1998 regulations relaxed the rigid conditions on towing prescribed by the 1994 version and allowed ships to be towed by any vessel suitable for towing in accordance with the IMO standards. The 1998 Regulations also streamlined the specific provisions, separately, applicable to Istanbul and Canakkale Straits and tempered the precautions to be taken regarding the vessel traffic.[46] Aforementioned changes have dealt with some of the most controversial aspects of the 1994 Regulations[47] and, were mostly, regarded positively.[48] Additionally, in 2003, Turkey introduced a Vessel Traffic Services (VTS) system, comprised of sophisticated monitoring and communication systems, in order to improve traffic handling capabilities in the Straits. In addition to supervising the traffic flow, VTS provides information and navigational assistance to

41 Plant, 'Update' (n 35) 205-206.

42 ibid; Oral (n 39) 27-28.

43 Maritime Traffic Regulations for the Turkish Straits (1998 regulations), Official Gazette, 6 Nov 1998, Vol. 23515 (Duplicate), 2.

44 Ünlü (n 16) 155; except the reporting requirements which remained, largely, the same despite proving highly controversial at the time, ibid 183.

45 See also art 2 (j) for updated definition of the 'deep draught vessels'.

46 cf arts 36-56 under 1994 regulations and 32-48 under 1998 regulations.

47 Plant, 'Navigation' (n 33) 22; Ünlü (n 16) 194.

48 Inan (n 16) 213-215; Plant, 'Update' (n 35) 211-212.

vessels transiting through the Straits and although participation in the system is not mandatory, due to the obvious benefits, most vessels opt to use the VTS.[49]

Overall, these measures appear to have been successful in enhancing maritime safety in Turkish Straits as the number of accidents were found to have significantly declined over the years, especially since the implementation of the VTS.[50] There is no available study on the accidents occurring in the last decade such that the impact of the regulatory safeguards on the frequency of the accidents can be accurately pinpointed; however, it could be observed that there has been no major accident or severe oil spill[51] since the TSS and the 1998 regulations had entered into force.[52] Therefore, it could be suggested that the measures taken by Turkey can be regarded as beneficial for transit safety on the whole. Moreover, it appears that this view is also shared by the user states to some degree too, as, despite the initial controversy, most vessels navigating through the Straits have been adhering to the regulations without any major protest for quite some time.[53]

5. An Overview of Further Solutions Recently Proposed to Increase the Maritime Safety in the Straits

Despite the positive effects of aforementioned measures, the risk of accident in the Straits cannot be wholly negated as a significant proportion of accident risk arises in connection with the prevalence of unseaworthy vessels with defective equipment or vessels employing incompetent or inefficient crew sailing, often, under flags of convenience.[54] In such cases, a TSS or guidelines for safer navigation may be insufficient to prevent incidents. The case of the *Vitaspirit* demonstrates that there are further steps that may be taken in the Straits.

Following the incident, several proposals aiming to reduce the risk of similar accidents have been put forward by the various stakeholders. First of these proposed solutions is the so-called Istanbulmax project, details of which have recently made public via interviews given by some of the academ-

49 Salih Orakci, 'General Directorate of Coastal Safety and Salvage Administration' in Oral and Öztürk (eds) (n 12) 62; Oral (n 39) 28.

50 Inan (n 16) 214; see analysis in Nur Jale Ece, 'İstanbul Boğazı'nda Meydana Gelen Deniz Kazalarının İncelenmesi ve Analizi' (*Evaluation and Analysis of Maritime Accidents in Istanbul Strait*) (2011) 3 Dokuz Eylül Üniversitesi Denizcilik Fakültesi Dergisi (*Dokuz Eylul University Faculty of Maritime Studies Journal*) 37, 53-55.

51 Except the *Volgoneft-248* incident, in which the oil tanker was broken in two due to unseaworthiness and resulted in some 1200 tonnes of oil spill, see Oya Özcayir, 'Role of Port State Control and the Straits' in Oral and Öztürk (eds) (n 12) 30 and 48.

52 Istikbal, 'Pilotage' (n 12) 75.

53 Indeed, according to the official statistics, vessels that do not adhere to the reporting requirements, one of the most controversial aspects of the Regulations, are less than 1% of total vessels navigating through the Straits in 2017, see 'Vessel Transit Statistics for the Turkish Straits' (n 2).

54 Orakci (n 49) 64-65; Ece, 'Istanbul Strait' (n 50) 47 and 54-55 citing crew incompetence and malfunction among the primary cause of accidents.

ics involved in the program.[55] The project aims to set certain standards for the vessels to pass through the Turkish Straits that would be determined in accordance with the unique features of the Straits and help increase navigational safety. Exact details concerning the designs that the working group is currently considering are not yet clear; however, one initial plan advocates that the maximum length for the Istanbulmax vessels should be under 200 metres and the vessels must be equipped with dual engines as well as a twin-rudder.[56]

Another noteworthy proposal was put forward by the DEDER (*Deniz Emniyet Dernegi - Association for the Safety at Sea*). It concerns the utilising of a number of tugs and tows as a swift response unit. Pointing out that the 60 metres average water depth of the Bosporus makes anchoring futile in most cases, the Association suggests strategically positioning a number of tugs and tows in designated areas such as coves of Büyükdere, Beykoz, İstinye, Küçüksu and Bebek and organising them to patrol their district, ready to offer assistance to the vessels experiencing navigational or mechanical difficulties.[57]

The third is the 'Kanal Istanbul' (Istanbul Canal) scheme. The ambitious project aims to construct an approximately 45 km waterway in the west of Istanbul, connecting the Sea of Marmara with the Black Sea and help minimise the risks posed to the densely populated coastline by providing a safer sea passage in addition to the Bosporus Strait. The preliminary works for the project commenced in 2018 and construction is projected to begin this year, pending the environmental impact report that is currently under consideration.[58] Once completed, the Istanbul Canal is expected to handle a significant proportion of the maritime traffic currently passing through the Bosporus Strait, especially those vessels carrying hazardous or noxious substances.[59]

Nevertheless, the eventual success of these proposals is not free from dispute. Indeed, there exists some concern with regard to the effectiveness of these proposals on various grounds, especially when one considers the implications of the legal regime already applicable to the Turkish Straits. During the period that the Montreux Convention has been in force, Turkey has carefully overseen the right

55 However, apparently, the idea of a ship design based on capacity specifications of the Istanbul Straits is not unfamiliar to marine engineers as one article refers to term 'Istanbulmax' as early as 2007, see Nur Jale Ece and others, 'The Strait of Istanbul: Tricky Conduit for Navigation' (2007) 5 European Journal of Navigation 17, 24.

56 Hurriyet, 'Boğazlara Istanbulmax' (*Istanbulmax for the Straits*) (Hurriyet, 11 April 2018), <www.hurriyet.com.tr/gundem/bogazlara-istanbulmax-40801143> accessed 2 February 2019.

57 DEDER, 'Boğaz'a Çözüm Önerimiz Yüzer-Gezer Romörkorler' (*Our Proposal for a Solution in the Straits is Patrolling Tugs*) <www.deder.org/haber-dernegimizin-bogazlar-Icin-Onerisi-quotyuzer-gezer-romorkorlerquot-54.html> accessed 5 May 2018; also see Cahit Istikbal, 'Bogaz'da kaza ve Montrö'yü savunmak' (*Accident in the Bosporus and Defending the Montreux*) (2018) 48 #Tarih Magazine 18, 22.

58 Hurriyet, 'Kanal Istanbul'da Zemin Etüdü Tamam' (*Ground Study is Completed in Istanbul Canal*) (Hurriyet, 06.10.2018) <www.hurriyet.com.tr/ekonomi/kanal-istanbulda-zemin-etudu-tamam-40978274> accessed 2 February 2019; also see Istanbul Association of Architects in Private Practice (*ISMD*), 'Mega Istanbul' (ISMD, 2018) <https://en.megaprojeleristanbul.com/#canal-istanbul> accessed 2 February 2019.

59 For a recent and comprehensive legal analysis, see Hatice Kubra Ecemis Yilmaz, *The Legal Status of the Canal Istanbul in International Law* (Wildy, Simmonds and Hill Publishing 2018); also see Ayşenur Tütüncü, 'Montreux Convention and Canal Istanbul' (2017) 37 Public and Private International Law Bulletin 113; Selman Öğüt, 'The Assessment of Kanal Istanbul Project in terms of International Law' (2014) 10 Review of International Law & Politics 119.

of passage for the merchant vessels in a fair and efficient manner and, certainly, there does not seem to be any change to that intention. However, to be completely effective, one of the abovementioned solutions would have to restrict the right of navigation through the Bosporus Strait. Indeed, it may be somewhat early to speculate but critics already point out that it appears difficult to champion that allowing right of passage only to those vessels which conform to the Istanbulmax standards would be compatible with Turkey's obligations under international law.[60] Perhaps it might be possible to argue that giving priority to Istanbulmax vessels in transit based on their capability of safer navigation could be justified as part of steps taken to control and ensure the efficient traffic flow and improve navigational safety without preventing the right of passage itself, which is ultimately for the benefit of all vessels passing through the Straits.[61] Nonetheless, it must not be forgotten that comparable regulations introduced in 1994 met with considerable dissent from Black Sea littoral states and proved highly problematic.[62]

Similarly, when the Istanbul Canal is completed, it would provide a second waterway alternative to Bosporus Strait; however, merchant vessels would still be free to navigate through the latter under the Montreux Convention.[63] Of course, due to its manmade qualities, it is likely that the Istanbul Canal would offer a considerably less dangerous and a potentially speedier passage in comparison to heavily congested Bosporus Strait with its numerous sharp bends and turns, which mean that the most vessels may opt to pass through the former. However, the costs involved in construction of a project as ambitious as the Istanbul Canal would ensure that passage through the channel is unlikely to be without considerable charges. Granted, passage through the Straits is not free of charge either, as Turkey is entitled to levy charges for sanitary controls, navigational aids and life-saving services under Annex I of the Montreux Convention; however, Turkey is currently charging these fees at a heavily discounted rate[64] and transit costs for the Turkish straits are often regarded as very modest in comparison to similar tolls on artificial waterways such as Suez or Panama Canals.[65] As a result, it could be thought that a significant number of the vessels are going to opt for the cheaper alternative,

60 See M Deniz Vank, 'Istanbulmax Projesi Seyir Güvenliğine Yönelik Yeni Gemi Inşa Dizayni Projesidir' (*Istanbulmax is a New Ship Design Project in The Context Of Navigational Safety*) (Virahaber, 17 April 2018) < www.virahaber.com/istanbul-maks-projesi-seyir-guvenligine-yonelik-yeni-gemi-insa-dizayni-projesidir-8985yy.htm> accessed 2 February 2019.

61 Yücel Güçlü, 'Regulation of the Passage through the Turkish Straits' (2001) 6 Journal of International Affairs 128, text to fn. 25 therein; Matteo Fornari, 'Conflicting Interests in the Turkish Straits: Is the Free Passage of Merchant Vessels Still Applicable' (2005) 20 The Internatıonal Journal of Marine and Coastal Law 225, 239.

62 See above text to (n 34).

63 cf Ecemiş-Yılmaz (n 59) 253.

64 See below text to (n 98).

65 Scharfenberg (n 4) 387; in 1994, transit costs for a laden Panamax-size ship (of approximately 65,000 deadweight tons) was said to be about $9,000 for Turkish straits, whereas the figures were $150,000 and 80,000 for Suez Canal and the Panama Canal, respectively, see Janet Porter, 'Turkish Shipowners Say They'd Pay $250 Million To Better Bosporus Safety' (JOC.com, 7 June 1994), <www.joc.com/maritime-news/turkish-shipowners-say-theyd-pay-250-million-better-bosporus-safety_19940607.html> accessed 2 February19. In the last 25 years, tariffs for the Turkish straits remain the same whereas the quotes recently taken online for a comparable vessel from one shipping agency indicates that the estimated costs for transiting the Suez and Panama Canals have increased and current rates are at, approximately, $160.000 and $120.000, respectively, see <www.wilhelmsen.com> accessed 2 February 19.

as the costs involved in transit are likely to be an important consideration for shipowner interests using the Straits.[66]

In any case, the difficulties with the Montreux Convention regime set aside, two proposals under discussion require considerable time before they can be implemented: construction of a channel requires substantial funds and time; standards for vessel designs need to be accepted by the shipping industry before they can be effective and, even then, building ships that conform to the Istanbulmax standards requires further time. Consequently, though they have the potential to be beneficial, it appears that neither of these proposals could become effective in decreasing the risk of maritime accidents in near future.

At this juncture, DEDER's proposal is, perhaps, worth reconsideration. The proliferation of stand-by tugs are more advantageous than other proposals in two respects: first, they provide a practical solution to the risk of accident posed by the vessels experiencing mechanical difficulties or malfunctions, which cannot always be neutralized by passive measures such as traffic schemes or a regulatory framework. Stand-by tugs are regarded as an important accident prevention measure, capable of averting oil spills or further pollution damage by keeping disabled vessels drifting or running aground.[67] They had previously been deployed in different regions including Neah Bay, Washington[68] and the northern coast of Scotland[69] and there have been calls for the adoption of similar initiatives in the Bering[70] and Malacca Straits.[71] Similarly, formation of a swift response unit patrolling the Straits would increase the operational capabilities of already available fleet of tugs and rescue vessels by decreasing the response time in contingencies and complement the existing measures by providing an additional safeguard.[72]

The second advantage of a swift response unit consisting of tugboats patrolling the Straits, in the context of present discussion, is that they hardly pose any risk of upsetting the legal regime set out by the Montreux Convention. Indeed, the proposal merely seeks to improve the number and operational capability of tugs and tows available to provide assistance to the transiting vessels, in the event

66 Indeed, that the safety does not always outweigh the costs can be demonstrated by the fact that half the ships passing through the Bosporus choose not to pay for voluntary pilotage services despite the risks involved, see statistics for the ships passing through the Turkish Straits at, <https://atlantis.udhb.gov.tr/istatistik/files/DIGER_ISTATISTIKLER/TURK_BOGAZLARI_GEMI_GECIS_ISTATISTIKLERI/Yillara_Gore_Karsilastirma_Tablosu.xlsx> accessed 2 February 2019.

67 Henry P Huntington and others, 'Vessels, risks, and rules: Planning for safe shipping in Bering Strait' (2015) 51 Marine Policy 119, 123.

68 Washington Department of Ecology, 'Emergency response towing vessel (ERTV)' 2014 <https://ecology.wa.gov/Regulations-Permits/Reporting-requirements/Emergency-response-towing-vessel> accessed 2 February 2019.

69 UK Department of Transport, 'New emergency towing vessel for Scotland' 2016 <https://www.gov.uk/government/news/new-emergency-towing-vessel-for-scotland> accessed 2 February 2019.

70 Huntington and others (n 67) 123.

71 Trygve A Meyer, 'Tanker Design Features and the Safety of Navigation' (1998) 2 Singapore Journal of International & Comparative Law 517.

72 At the moment, there are more than twenty tugs and emergency response vessels belonging to the Directorate for Coastal Safety, located in eight different stations in the Istanbul and Canakkale Straits, see Directorate of Coastal Safety, 'Annual Report for 2017' 18-19 <http://kiyiemniyeti.gov.tr/Data/1/Files/Document/Documents/Ji/D4/hz/WM/FAAL%C4%B0YET%20RAPORU%202017.pdf> accessed 1 February 2019.

that they require aid. Therefore, it is preferable to the other proposals such as Istanbulmax, which potentially run the risk of contradicting the principle of freedom of passage under the Montreux Convention. Moreover, establishing a fleet of tugs patrolling the Straits can also be accomplished in the relatively near future, thus making it more advantageous to the other proposals.

Overall, DEDER's proposal is more favourable than the other two proposals for both practical and legal reasons. Granted, both Istanbulmax and Istanbul Canal have respectively the potential to provide a conclusive solution by aiming to encourage passage of vessels that are more suitable to the geographical features of the Straits and providing an alternative waterway more apt to accommodate a higher volume of traffic. However, the significant time and money necessary to realize these two proposals, as well as the complications with respect to the Montreux Convention mean that their effectiveness is bound to be limited, especially in the immediate future. It is also true that DEDER's proposal cannot be the ultimate solution. The eventual success of the stand-by tugs would depend on a degree of cooperation[73] with the vessel in distress and even then they do not wholly negate the risk of accident. Nevertheless, a swift response unit consisting of tugs and tows could be realized in relatively shorter time, it is compatible with the Montreux Convention and it maintains a considerable potential to improve the maritime safety in the Straits by providing a swift and effective safeguard against the risk of accidents, especially those produced by sub-standard vessels transiting the Straits.[74]

6. Financing the Measures to be Adopted for Safer Navigation

It has been argued that of the three solutions proposed so far, only DEDER's proposal, the stand-by tugs and tows, shows immediate prospect of success in terms of providing a swift and effective measure for increasing the transit safety in Turkish Straits. Then the only outstanding issue with this proposal would seem to concern the costs in providing these services. The Directorate of Coastal Safety possesses a sizeable fleet of tugs and tows, stationed in eight different anchor points in Istanbul and Canakkale Straits;[75] however, considering the substantial amount of traffic, the number of tugs and tows available should ideally be increased in order to minimise the risk of accidents involving vessels navigating the Turkish Straits. Moreover, in addition to increasing the number of available tugs, the vessels must also be appropriately equipped, properly manned and continuously kept patrolling their district, ready to intervene in potential emergencies. As a result, costs of maintaining a swift response unit consisting of tows and tugs would likely require a considerable amount of funding.[76]

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73 The Association suggests that the vessels navigating the Straits should consider taking a pilot on board and upon entering the Straits a number of crew members should be on stand-by at the mooring stations in the front and rear of the vessel, ready to help with connecting up, see (n 57).

74 See above text to (n 54).

75 See above (n 72).

76 Although there is no study detailing the exact amount of funds necessary for realizing the project, purchasing costs alone could, conservatively, be estimated to amount more than 50 Million euros, as the allocated budget for the purchase of two new small sized tugs was set at around 9 Million euros in 2015 by the Directorate, see the 'Annual Report for 2017' (n 72) 36.

DEDER proposes that the expenses accrued in the operation of stand-by tugs and tows should, ideally, be jointly funded by contributions from vessels transiting the Bosporus Strait. Similar schemes under which the coastal states sought to channel certain expenses for the benefit of general interest to the user states in part are not novel.[77] Indeed, there exists the Cooperative Mechanism for Straits of Malacca, under which states using the straits of Malacca pledged their support to the states bordering the straits with a view to improving the navigational safety and protection of the environment regarding the passage and have been providing assistance to the littoral states in various ways such as contributing to a fund created for financing the establishment and maintenance of the navigational aids necessary for ships navigating the straits.[78] In principle, a similar cooperation mechanism could also be conceived for the Turkish Straits: apart from resulting in loss of life and damage, maritime accidents in the Straits also threaten the environment due to a large number of vessels carrying hazardous and noxious cargo. Effects of pollution caused by maritime accidents in Turkish Straits are going to be felt, primarily, in Turkish waters. However, due to the high annual flow rates from Black Sea into the Mediterranean Sea, it is likely that the pollution damage caused by a major maritime accidents would not be limited to Turkish waters but could also affect the Mediterranean through the Aegean Sea.[79] Moreover, even if the environmental considerations set aside and the issue is viewed from a solely practical standpoint, user states would still have much to benefit from measures increasing transit safety because major maritime accidents may result in disruption of traffic and, at times, closure of the Straits.[80] Therefore, a similar initiative makes good sense in case of Turkish Straits as well since minimising the risk of accidents in the Straits is ultimately for the benefit of not just Turkey but also the user states, especially Black Sea littoral states and neighbouring countries such as Greece.[81]

However, whether such initiatives are really necessary for the Turkish straits is somewhat open to question, because, as mentioned above,[82] Turkey is already entitled under international law to charge the vessels transiting the Straits for certain services. Indeed, a unique feature of the Montreux Convention is that Annex I allows Turkey to levy charges or taxes for sanitary controls, lighthouses or lifesaving services. Therefore, *prima facie*, the charges and taxes already applicable under the Montreux Convention could well be considered as a second venue for financing the operational costs of

77 cf Plant, 'Update' (n 35) 212; Ecemiş-Yılmaz (n 59) 218-220.

78 See Joshua H Ho, 'Enhancing Safety, Security, and Environmental Protection of the Straits of Malacca and Singapore: The Cooperative Mechanism' (2009) 40 Ocean Development & International Law 233; David H. Anderson, 'Funding and Managing International Partnerships for the Malacca and Singapore Straits, Consonant with art 43 of the UN Convention on the Law of the Sea' (1999) 3 Singapore Journal of International & Comparative Law 444; Kiyoshi Saishoji, 'Japan's Contribution to Safe Navigation in the Straits of Malacca and Singapore' (1998) 2 Singapore Journal of International & Comparative Law 511.

79 Ünlü (n 16) 143.

80 As was the case following *the Nassia* accident in 1994, see Joyner and Mitchell (n 12) 537-538.

81 cf Plant, 'Update' (n 35) 213.

82 Above, text to (n 65).

stand-by tugs, as well as certain other measures to improve the navigational safety.[83] Nevertheless, due to the reasons that will be discussed below, it appears unlikely that this pool may create sufficient revenue for financing additional measures at the moment. Then, the more pertinent question is whether Turkey is entitled to increase the amount of applicable charges. The amount of charges or taxes permitted is also regulated by the Montreux Convention, which sets out the maximum figures that could be levied on ships transiting through the Straits based on a set number of gold francs[84] per ton of their net register tonnage and at different rates depending on the type of service. As the amount of relevant charges or taxes cannot exceed these figures, the first question is whether the amounts currently charged from the vessels navigating the Straits are below the threshold established by the Montreux Convention.

According to the Convention, the applicable charges can be paid in gold francs or in Turkish liras, at the rate of exchange valid on the time of payment. So, with the Convention's entry into force, the Turkish authorities had begun to charge the vessels in Turkish liras, based on the current rate of exchange applicable to golden franc. This practice seemed to have worked without any difficulties for a long time because the value of gold was officially fixed by member states and kept stable as it had been backed by the dollar convertibility of gold in accordance with the Bretton Woods agreement.[85] However, following the collapse of the Bretton Woods system, the official dollar price for gold ceased to correspond with the value of gold in private markets as the market price for gold has gradually surpassed the official rates of exchange.[86] Indeed, in 1974, a year after the last official price for the gold had been, following a series of devaluations, set by the US at $42.22 per ounce of gold, price of gold was quoted around US$160 in private markets[87] and it has climbed up to the amounts of US$850 by the end of January 1980.[88] Eventually, it became clear that without the dollar convertibility of gold, the par value system cannot be preserved and the international monetary system was in need

83 Indeed, there are opinions supporting this view, cf Sezer Ilgın, '82. Yılında Montrö Sözleşmesine ve Gemilerin Türk Boğazlarindan Geçiş Rejimine Ilişkin Değerlendirme' (*Reviewing the Montreux Convention and Legal Framework for Vessels Transiting Turkish Straits in its 82th Anniversary*) (University of Piri Reis, 20 July 2018) <www.pirireis.edu.tr/montro-bogazlar82-yil> accessed 2 February 2019.

84 The gold franc referred here is 'franc germinal', rather than the 'Poincare franc' as can be discerned by the approximate rate of exchange figures between Turkish lira and the gold franc given under footnote 1 in the Annex I; see Tahir Çağa, 'Gemilerden Altin Frank Esasi Üzerinden Alinan Resimlere Dair' (*Regarding the dues levied on vessels in accordance with the Gold Franc values*) (1982) 3 İdare Hukuku ve İlimleri Dergisi (*Journal of Administrative Sciences and Law*) 35, 36-37.

85 See for detail, Joseph Gold, 'Public International Law in the International Monetary System' (1984) 38 Southwestern Law Journal 799; Paul P Heller, 'The Value of the Gold Franc – A Different Point of View' (1974) 6 Journal of Maritime Law and Commerce 73.

86 Gold (n 85) 816-817.

87 Heller (n 85) 91.

88 The rates were recorded at two important court decisions concerning the value of gold frank in relation to the application of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), see: *Trans World Airlines, Inc. v. Franklin Mint Corp*., 466 US 243, 258; *SS Pharmaceutical Co. Ltd. v Qantas Airways Ltd*. [1989] Lloyd's Rep 1 319, 324., see TMC Asser, 'Golden Limitations of Liability in International Transport Conventions and the Currency Crisis'(1974) 5 Journal of Maritime Law and Commerce 645; L Bristow, 'Gold franc—Replacement of Unit of Account' [1978] 1 Lloyd's Maritime and Commercial Quarterly 31.

of a substantive reform.[89] The reform came in the shape of amendments effected to the Articles of Agreement of the International Money Fund, which have abolished the existing par value system and allowed the members to adopt any exchange arrangement as they see fit as long as they do not maintain the external value of its currency in terms of gold.[90] Therefore, by doing away with the existing par value system, the amendments abolished both the official price of gold and the member state obligations to maintain the value of their currency in accordance with it.[91]

The amendments became effective on 1st of April 1978 and Turkey adopted the amendments on 21st of April 1978 with the Act No. 2146.[92] Therefore, from this date on, there exists no official rate of exchange for the gold under Turkish law. Regardless, Turkey continued to calculate the applicable charges based on the last official, but now fictitious, price of gold until the early 80's. It was not until 1982 that the Turkish Government readjusted the method of calculation that was in use for converting the gold francs into Turkish lira, adopting a formula based on the market price of gold, instead of its last official price.[93] However, an almost ten-fold increase in charges applicable to transit were, unsurprisingly, not received well in shipping circles and amid protests from both domestic and foreign shipping lines, the Government decided to reconsider the charges. Following an interim period, the authorities, despite retaining the new method of calculation, appeared to have taken a step back and chosen to apply the charges at a heavily discounted rate.[94] Whilst the details concerning the rate of discount are not precisely clear, one commentator intimates that the market price of gold was cut down around 80% at that time and the value of 1 gold franc was fixed at approximately US$ 0,8, for purposes of stability.[95] An online quote taken from the website of the Directorate of Coastal Safety demonstrates that the aforementioned rates still remain the same; however, due to the increase in price of gold since 1980s, the rate of discount is, in fact, significantly higher now at more than 90%.[96]

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89 Joseph Gold, 'Gold in International Monetary Law Change, Uncertainty, and Ambiguity' (1981) 15 Journal of International Law & Economics 323, 348-349.

90 ibid 353.

91 Gold (n 89) 354; Çağa, 'Gold Franc' (n 84) 41.

92 Çağa, 'Gold Franc' (n 84) 41; see Republic of Turkey, Official Gazette, 22.04.1978, Vol. 16267.

93 See for detail Tahir Çağa, 'Çanakkale ve Istanbul Boğazlarindan Transit Geçen Ticaret Gemilerinden Alinacak Resimlere Dair' (*Regarding the dues to be levied on Merchant vessels transiting through the Canakkale and Istanbul Strait*) (1994) 54 İstanbul Üniversitesi Hukuk Fakültesi Mecmuası (*Istanbul University Faculty of Law Journal*) 221, whose meticulous work on this subject has, indubitably, been instrumental in the government's eventual decision to revise the method of calculation; also see Ismail Demir, 'Montrö Sözleşmesi'ne Göre Alınan Geçiş Ücretleri (Resim ve Harçlar)' (*Transit tolls levied in accordance with the Montreux Convention (Charges and Dues)*), in Rahmi Deniz Özbay and Cihan Yapıştıran (eds) *VIII. Türk Deniz Ticareti Tarihi Sempozyumu Bildiriler Kitabı* (*Collected Papers for the VIIIth Symposium on History of Turkish Shipping Law*) (Istanbul Yayınları 2016) 61, <http://tdtts.deu.edu.tr/wp-content/uploads/2017/07/TDTTS-8.4.pdf> accessed 2 February 2019; and Cihat Yaycı, 'An Assessment on the Implementation of Gold Franc in the Framework of Montreux Convention' (2013) 5 Bilge Strateji (*Bilge Strategy*) 149.

94 Çağa, 'Merchant vessels' (n 93) 230-235.

95 Çağa, 'Merchant vessels' (n 93) 235.

96 The quotes indicate that a merchant vessel of 25.000 net register tonnage incurs an amount of approximately US$ 2.015 for the lifesaving services. Considering that the aforementioned services are to be charged at 0.10 gold francs, the value of gold franc still appears to be set at US$ 0.8, see Directorate of Coastal Safety, Fee calculator <www.kiyiemniyeti.gov.tr/lighthouse_and_salvage_fee_calculator?> accessed 2 February 2019.

Considering that the gold franc is worth about US$ 12 according to current exchange rates,[97] Turkey is charging only a fraction of the amounts that are permitted under the Montreux Convention at the moment.[98] Although it appears that a price raise had been considered from time to time in past,[99] to date this has not happened, despite the fact that Turkey has introduced numerous additional services after the Montreux Convention's entry into force to improve transit safety.[100] As a result, the charges applicable to the vessels transiting the Turkish Straits remain the same since 1982.

Reducing the applicable charges is well within the rights of Turkey, as the Montreux Convention Annex I sets out the maximum figures that could be levied on the vessels transiting the Straits but also allows the Turkish Government to reduce them as long as the reductions are applied to all vessels equally regardless of their flag.[101] Just as well, under Annex I, increasing the charges applicable to transit are also within Turkey's discretion up to the figures delineated in the Convention, provided they are necessary to cover the costs of services mentioned therein.[102] Since it has been demonstrated above that the charges applicable to the vessels transiting through the Straits are well under the threshold established under the Montreux Convention, raising the current fees appears permissible. Then the second question is whether stand-by tugs can be considered as a type of service which is subject to taxes or charges under the Convention. Out of the three principal categories under the paragraph I of Annex I only the last one, namely the section (c), could be considered as broad enough to entertain whether emergency tugs would fall under the services envisaged therein. Indeed, section (c) of the first paragraph reads as 'life-saving services' and then goes on to provide examples of services in such nature. The term 'life-saving services' appears sufficiently broad to cover the operation of a swift response unit consisting of tugs and tows to intervene in emergencies. Moreover, although the reference to life may suggest that the emphasis here is on services aiming the preservation of human life at sea, the term used in original, French, text of the convention is sauvatege,[103] which could be argued to convey a much broader meaning. Stand-by tugs are, obviously, not one of the services explicitly mentioned in the article; however, it is noteworthy that the examples given there do not appear to be listed in a restrictive manner but merely elaborate some of the services to be included in the category prescribed under Annex I, para 1(c). Therefore, the language of the article appears to have left some margin for a wider interpretation. In this context, a good argument had been made

97 One gold franc consists of 0,290323 gr pure gold and according to the current exchange rate (XAU/USD: 1311) 1 gr of gold is approximately worth US$ 42,16, at the time of writing, see XE Corporation <www.xe.com/currencycharts/?from=XAU&to=USD&view=1D> accessed 4 February 2019.

98 Çağa, 'Merchant vessels' (n 93) 229; A Nüriddin Gürpınar, 'Türk Boğazlarından Geçiş Ücreti: Altın Frank 'Franc Germinal'' (*Charges applicable for transiting through the Turkish Straits: Gold Franc 'Franc Germinal'*) (2011) 16 Anadolu Nümizmatik Bülteni (*Anatolian Numismatic Bulletin*) 3, 15.

99 See, Infotrac Newsstand '(Gen) Energy Minister Says Turkey Might Consider Increasing Fees to Cut Oil Tanker Traffic through Straits' (Infotrac Newsstand, 7 Jan 2011) <http://link.galegroup.com/apps/doc/A245980301/STND?u=sdu&sid=STND&xid=d64cd994> accessed 2 February 2019.

100 See below, text to (n 104).

101 Annex I, para 1.

102 Annex I, para 4.

103 Meaning rescue or salvage, see Cambridge Dictionary Online Edition <https://dictionary.cambridge.org/dictionary/french-english/sauvetage> accessed 2 February 2019.

that Turkey's right to levy charges for 'life-saving services' might be read as to include costs of providing services such as navigational warning services or voluntary VTS systems now, in accordance with the technological developments in relation to shipping safety and marine environmental protection as well as the progress made in regulation of these areas since the Montreux Convention has entered into force.[104] Arguably, the same point could be maintained regarding the stand-by tugs considering their potential to prevent marine accidents and 'life-saving services' may well be construed as encompassing the operation of tugs and tows stationed in specific areas in the Straits, ready to provide assistance to vessels in distress.

To summarise, there is an argument for a proportional increase in charges applicable to vessels navigating through the Turkish Straits in order to cover the costs of stand-by tugs, through a liberal interpretation of the Annex I, para 1(c), under the Montreux Convention. Such a move could go a long way to alleviate financial difficulties involved in the realization of DEDER's proposal and help decrease the risk of accidents in the Straits. However, if the Turkish Government chooses not to increase the current charges, perhaps for political reasons, then the only remaining way of realizing the proliferation of stand-by tugs in near future appears to be Turkey bearing the costs through her own financial means. This would not be a first, as Turkey already covers the costs of a number of initiatives adopted to decrease the risk of accident in the Straits since the Montreux Convention entered into force. A good example is the state-funded modern VTS system, which commenced operation in December 2003 and has considerably improved navigational safety[105] in Bosporus Strait.[106] Similarly, there are calls for providing free towage and pilotage services to the vessels transit of which are deemed as dangerous, costs of which are to be subsidized by the government.[107] These proposals make good sense, especially considering that vessels navigating without a pilot are regarded to be one of the factors that cause or contribute to accidents in the Turkish Straits.[108] Further, whilst it cannot be denied that state funded stand-by tugs would be expensive, there may be some merit in providing funding considering their potential in decreasing the risk of accident in Turkish Straits. Moreover, once realized, financing the operational costs of stand-by tugs may prove to be relatively easier than comparable schemes as tugs and tows might, arguably, claim remuneration for their services from the vessels they have aided, subject to 'no cure, no pay' principle.[109] Therefore, if state funding is the only reliable way of increasing the number of available tugs and realizing an effective swift response unit of stand-by tugs, bearing the costs through Turkey's own financial means might also be worth considering.

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104 Plant, 'Update' (n 35) 200.

105 See analysis in Ece, 'Istanbul Strait' (n 50) 53-55.

106 Turkish Ministry of Foreign Affairs, 'Note on Turkish Straits' <www.mfa.gov.tr/the-turkish-straits.en.mfa> accessed 2 February 2019; solely the installation costs of the VTS was said to be around 40 Million USD at 1999, see Necmettin Akten, 'The Strait of Istanbul (Bosphorus): The seaway separating the continents with its dense shipping traffic' (2003) 9-3 Turkish Journal of Marine Sciences 241, 249.

107 Vank (n 60).

108 Scharfenberg (n 4) 337; Akten, 'Analysis of Shipping Casualties in the Bosphorus' (n 3) 356; for a statistical analysis see Nur Jale Ece, 'Kılavuzluk Hizmetlerinin Deniz Emniyetine Katkısı: İstanbul Boğazı'nda Kazaya Karışan Gemiler İle Kılavuz Kaptan Almaları Arasındaki İlişkinin Analizi' (*Contribution of Pilotage services to Maritime Safety: Analysis regarding vessels involving an accident in Istanbul Strait and pilotage services*) (2016) 4 Journal of ETA Maritime Science 3.

109 See *Turkish Code of Commerce*, arts 1299 and 1304.

7. Conclusion

Whilst the alternative routes becoming available due to global warming such as North Sea passage through Arctic Ocean or major infrastructural projects such as 'One Belt, One Road' initiative may, in future, alleviate some of the pressure on Turkish Straits,[110] for the time being, the Straits remain one of the most congested and hazardous international waterways of the world. Measures taken in the last decades have considerably contributed to the safety of navigation. Nevertheless, whilst it is impossible to rule out the risk of maritime accidents altogether, discussion following the *Vitaspirit* incident demonstrates that certain steps could be taken to increase navigational safety and reduce the likelihood of such accidents taking place in the Straits. Of such measures, some require a sizeable investment in time or money, and others both. Similarly, viability of some of these measures remain uncertain, especially when the constraints of the legal framework currently applicable to the Turkish Straits is taken into account. Therefore, measures that do not require considerable time and money or that could be realized without risking violating the Montreux regime, immediately become more preferable.

This article has argued that of the proposals currently under consideration, development of a swift response unit consisting of tugs and tows appears to have the greatest potential of increasing navigational safety in the Bosporus in the near future and alleviating the risk of major accidents taking place in the Straits. It is true that such an initiative would also require funding and the financial burden of supporting such measures could act as an impediment to their eventual adoption; however there exist steps that could be taken to help secure necessary funds. Regardless, expenditure involved in redressing the pollution damage in the aftermath of a maritime accident would far outweigh the costs to be accrued by subsidising modest, yet efficient, initiatives such as stand-by tugs. Although, the destruction of a monumental mansion possessing immense historic and cultural value cannot be disregarded, the *Vitaspirit* incident was a near miss in many ways. Steps to ensure that the risk of such accidents are minimised must be taken soon, or the next time might be too late.

110 See Alan Bjerga and others, 'Choking On Our Harvest: Threats Loom Over Global Food Trade' (Bloomberg, 18 May 2018) <www.bloomberg.com/graphics/2018-food-trade-chokepoints/> accessed 2 February 2019.

Maritime Safety and Security Law Journal

An Incident of 'Piracy' off the Coast of Suriname? The Definition of Piracy and the Use (and Misuse) of International Law Terminology

*Jessica SCHECHINGER**

Abstract

According to media coverage, a 'pirate attack' took place off the coast of Suriname in April 2018. This submission assesses whether the violent incident meets the definition of piracy under international law, reviews different (legal) definitions, and highlights the importance of the location of the attack. It is argued that the use of the term 'piracy' and related terminology should have been avoided, as the incident seemingly occurred within Suriname's territorial sea.

Keywords: Piracy, Definition, Suriname, High Seas, Guyana, Armed Robbery at Sea, EEZ, Maritime Crime, UNCLOS, Jurisdiction

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1. Introduction: the Incident and its Definition by the Media

A 'pirate attack' reportedly took place off the coast of Suriname in April 2018 (hereinafter the 'April incident').[1] Twenty Surinamese and Guyanese fishermen were attacked by masked men, cut with machetes, and forced to hand over their catch.[2] Those who survived were reportedly forced to jump overboard, some with car batteries tied to their legs.[3] Only five fishermen survived the vicious attack; three bodies have been found, and twelve remain missing.[4] The attackers are thought to be Guyanese

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1 H Boerboom, 'Pirate attack off Suriname leaves 16 missing and feared dead' (*AP News*, 30 April 2018) <https://www.apnews.com/489b058f696a4e309510feb6441ea623> accessed 26 August 2019.

2 N Marks, 'Pirates burn, beat, and toss fishermen overboard off Suriname: survivors' (*Reuters*, 11 May 2018) <https://www.reuters.com/article/us-suriname-piracy/pirates-burn-beat-and-toss-fishermen-overboard-off-suriname-survivors-idUSKBN1IC23C> accessed 26 August 2019.

3 'Zeepiraten slaan toe; groot aantal vissers nog vermist 01 mei 2018' (*STVS News Suriname*, 1 May 2018) <https://www.youtube.com/watch?v=tZkMP1IfrqY> accessed 26 August 2019.

4 'Vijfde overlevende van voorval zeepiraterij terecht' (*Politie Suriname*, 3 May 2018) <http://www.politie.sr/vijfde-overlevende-van-voorval-zeepiraterij-terecht/>. The remaining missing men are now considered legally dead, C Paulus, 'OM blijft bij fikse strafeis in zeeroofzaak' (*dwtonline*, 29 June 2019) <http://www.dwtonline.com/laatste-nieuws/2019/06/29/om-blijft-bij-fikse-strafeis-in-zeeroofzaak/> both accessed 27 August 2019.

due to their accented English.[5] A number of suspects were arrested and several confessed; the criminal trial is ongoing.[6]

Small-scale attacks targeting fishing boats regularly occur on the rivers and off the Coasts of Suriname (and Guyana).[7] Usually, these attacks result in engines and catch being taken. However, the extreme violence of the April incident seems to be exceptional.[8] To some extent, this might be explained by linking this incident to an underlying conflict between (Guyanese) fishermen, relating to contested fishing grounds.[9] Interestingly, almost all victims as well as the (alleged) attackers are thought to be Guyanese. Guyanese and Surinamese authorities suspect that the attack was in retaliation for the killing, in March 2018, of the alleged leader of a gang involved in several prior incidents in Surinamese waters.[10] A number of violent acts, for example the April incident, the March 2018 incident,[11] a February 2018 robbery incident on the Marowijne river,[12] and a May 2018 robbery off the coast of Suriname[13] are all thought to be connected.

Although more (legally) neutral terms – such as 'aanvallen op zee'[14] (attacks at sea), and 'overval met dodelijke afloop'[15] (attack resulting in death) – were used, 'piracy' and 'pirates' were most often referenced. The Dutch national public broadcaster *NOS* used the Dutch legal term for (maritime)

5 Boerboom (n 1).

6 I Cairo, 'Guyanese Minister: "Verdachten hebben bekend"' (*De Ware Tijd/Suriname Nieuws*, 12 May 2018) <https://fathh.com/suriname/nieuws/77056/guyanese-minister-verdachten-hebben-bekend.html>; H Boerboom, 'Surinaamse politie pakt twee hoofdverdachten vissersmoorden op' (*NOS*, 1 June 2018) <https://nos.nl/artikel/2234524-surinaamse-politie-pakt-twee-hoofdverdachten-vissersmoorden-op.html> both accessed 26 August 2019; Paulus (n 4).

7 'Pirates "massacre" Guyana fishermen off Suriname coast' (*BBC*, 4 May 2018) <https://www.bbc.com/news/world-latin-america-43999237>; 'Sixteen Fishermen Feared Dead After Pirate Attack (Courtesy of Gray Page)' (*Brandenburg Marine News*, 3 May 2018) <https://brandenburgmarine.com/news/425-sixteen-fishermen-feared-dead-after-pirate-attack-courtesy-of-gray-page> both accessed 26 August 2019.

8 Ibid.

9 'Suriname authorities continue search…Attack on fishing boats "revenge for pirate captain's death"' (*Kaieteur News Online*, 2 May 2018) <https://www.kaieteurnewsonline.com/2018/05/02/suriname-authorities-continue-searchattack-on-fishing-boats-revenge-for-pirate-captains-death/> accessed 26 August 2019.

10 Marks (n 2); D Chabrol, 'Five held in Guyana, Suriname for piracy; extradition of Guyanese suspects unnecessary' (*Demerara Waves*, 9 May 2018) <https://demerarawaves.com/2018/05/09/five-held-in-guyana-suriname-for-piracy-extradition-of-guyanese-suspects-unnecessary/>; 'Politiebericht over dodelijke aanslag op ondernemer' (*Starnieuws Suriname*, 4 April 2018) <http://www.starnieuws.com/index.php/welcome/index/nieuwsitem/46425>; I Cairo, 'Politie arresteert groot aantal verdachten piraterij' (*De Ware Tijd/Suriname Nieuws*, 7 May 2018) <https://fathh.com/suriname/nieuws/76693/politie-arresteert-groot-aantal-verdachte-piraten.html> all accessed 26 August 2019.

11 'Politiebericht over dodelijke aanslag' (n 10).

12 'Kapitein vissersboot komt om bij zeeroof' (*De Ware Tijd/Suriname Nieuws*, 27 February 2018) <https://fathh.com/suriname/nieuws/72606/kapitein-vissersboot-komt-om-bij-zeeroof.html> accessed 27 August 2019.

13 N Marks and A Kuiper, 'Pirate attack off Suriname leaves at least a dozen missing, feared dead' (*Reuters*, 3 May 2018) <https://www.reuters.com/article/us-suriname-piracy/pirate-attack-off-suriname-leaves-at-least-a-dozen-missing-feared-dead-idUSKBN1I42TO> accessed 27 August 2019; H Boerboom, 'Na bloedbad op boot bij Suriname opnieuw visser gedood' (*NOS*, 3 May 2018) <https://nos.nl/artikel/2230202-na-bloedbad-op-boot-bij-suriname-opnieuw-visser-gedood.html> accessed 27 August 2019.

14 Cairo (n 10).

15 'Verdachte vast voor dodelijke overvallen vissersschepen Suriname' (*NU.nl*, 4 May 2018) <https://www.nu.nl/buitenland/5252366/verdachte-vast-dodelijke-overvallen-vissersschepen-suriname.html> accessed 27 August 2019.

piracy ('zeeroof', literally 'sea robbery').[16] Generally, in (online) newspaper articles, some form of the term 'piracy' has been used to describe the April incident: for example, 'pirate attack' by *Reuters*, *BBC*, *The New York Times*, and *The Washington Post*;[17] 'zeeroof' or 'piraterij' by *NOS* and *De Ware Tijd* (Suriname);[18] 'piracy' by *Demerara Waves* (Guyana);[19] and 'high sea piracy attack' by *Kaieteur News* (Guyana).[20] As to the two affected heads of state, Suriname's President Dési Bouterse labelled the attack an 'act of piracy'[21] ('zeeroof'), and Guyana's President David Granger 'piracy'.[22] Guyana's Minister of Public Safety Khemraj Ramjattan also referred to pirates ('piraten').[23]

It is interesting to assess whether the incident meets the definition of piracy under international law. It is argued that use of the term 'piracy' and related terminology should have been avoided, as the incident seemingly occurred within Suriname's territorial sea.

2. The Definition of Piracy Under International Law

The word 'piracy' has been deliberately put in quotation marks when referring to the April incident, because it is not evident that this incident was actually an act of (maritime) piracy under international law. The definition of piracy, reflecting customary international law, is found in Article 101 et seq. of the 1982 United Nations Convention on the Law of the Sea (LOSC).[24] This definition provides three criteria: first, two (private) vessels must be involved; second, the violent act must occur on the high seas (or in a state's exclusive economic zone (EEZ), see section 3); and third, the act must be 'committed for private ends'.

States may adopt piracy legislation – domestic definitions may replicate the LOSC definition, or may be wider (see below, Guyana's 2008 Hijacking and Piracy Act), or narrower (see below, Suriname's Criminal Code) than the international law definition. States may also criminalise attacks that

16 Article 381 Wetboek van Strafrecht (Netherlands' Criminal Code) 1881.

17 Marks and Kuiper (n 13); 'Pirates "massacre" Guyana fishermen' (n 7); 'Pirate Attack Off Suriname Leaves 16 Missing and Feared Dead' *The New York Times* (New York, 30 April 2018); H Boerboom/AP, 'Pirate attack off Suriname leaves 16 missing and feared dead' *The Washington Post* (Washington, 30 April 2018).

18 H Boerboom, 'Drie arrestaties voor bloedige zeeroof Suriname' (*NOS*, 4 May 2018) <https://nos.nl/artikel/2230358-drie-arrestaties-voor-bloedige-zeeroof-suriname.html>; 'Dertig arrestaties tegen piraterij in Suriname' (*NOS*, 7 May 2018) <https://nos.nl/artikel/2230821-dertig-arrestaties-tegen-piraterij-in-suriname.html>; Cairo (n 10); 'Vermoedelijk opnieuw een zeeroof met dodelijke afloop' (*De Ware Tijd/Suriname Nieuws*, 3 May 2018) <https://fathh.com/suriname/nieuws/76480/vermoedelijk-opnieuw-een-zeeroof-met-dodelijke-afloop.html> all accessed 27 August 2019.

19 Chabrol (n 10).

20 'High sea piracy attack…Several more arrested in Suriname', *Kaieteur News Online* (6 May 2018) <https://www.kaieteurnewsonline.com/2018/05/06/high-sea-piracy-attack-several-more-arrested-in-suriname/> accessed 26 August 2019.

21 Boerboom (n 18).

22 'Pirates "massacre" Guyana fishermen' (n 7); G Gonsalves, 'President Granger Denounces Piracy Attack' (*Headline News Guyana*, 3 May 2018) <https://headlinenewsguyana.com/president-granger-denounces-piracy-attack/> accessed 26 August 2019.

23 Cairo (n 6).

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

take place within their territorial sea or internal waters as acts of piracy under national law. For instance, Guyana's 2008 Hijacking and Piracy Act includes in its definition of piracy in section 5(a)(i) acts that occur 'on the rivers, internal waters or the territorial sea of Guyana'.[25] This does not aid the uniform implementation of the LOSC definition.

National piracy legislation may provide for universal (enforcement) jurisdiction over individuals having committed an act of piracy, according to Article 105 LOSC. However, only an act of piracy according to international law allows states to assume universal jurisdiction. Therefore, determining whether an attack is an act of piracy under international law is important.

Based on the available information, the April incident appears to meet the first ('two ship') requirement. Strictly speaking, the April incident comprised several attacks, however, they are referred to as singular (the incident or attack) in this submission. Based on testimonies, twenty fishermen on four fishing boats (five on each boat) were approached by (an)other (private) boat(s), and boarded and attacked by the crew of the other boat(s); one survivor speaks of his boat being approached by a boat containing ten masked men, who boarded and attacked him and his fellow fishermen.[26] Whether the second ('high seas') requirement is met, will be discussed in section 3.

The third ('private ends') requirement is usually seen as excluding politically motivated acts.[27] However, whether ideologically motivated acts are excluded (for example environmental activism in the *Arctic Sunrise* case),[28] is debated. The International Law Commission, in its Commentary to Article 39 of the 1956 Draft Articles Concerning the Law of the Sea, clearly indicated that an 'intention to rob (*animus furandi*) is not required. Acts of piracy may be *prompted by feelings of hatred or revenge,* and not merely by the desire for gain';[29] thus, if the April incident was retaliatory, this would likely not prevent the requirement from being met (in any event the fish catch was reportedly taken).

3. The 'High Seas' Requirement: the Importance of the Attack Location

An important issue is that an act can only be defined as piracy under international law if it has taken place on the high seas or in the EEZ – Articles 101 and 58(2) LOSC read together extend the

25 Chapter 10:08 Guyana's Hijacking and Piracy Act 2008.

26 H Boerboom, 'Overlevende zeeroof Suriname: wist dat ik zou sterven als ik aan boord zou blijven' (*NOS*, 6 May 2018) <https://nos.nl/artikel/2230618-overlevende-zeeroof-suriname-wist-dat-ik-zou-sterven-als-ik-aan-boord-zou-blijven.html> accessed 27 August 2019.

27 D Guilfoyle, 'Political Motivation and Piracy: What History Doesn't Teach Us About Law' (*EJIL: Talk!*, 17 June 2013) <https://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/> accessed 27 August 2019. See also the view that the relevant distinction is not between private/political acts, but between private/public (i.e. state sponsored) acts, A Petrig, 'Piracy' in D Rothwell, AG Oude Elferink, K Scott and T Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 843-865, at 847.

28 AG Oude Elferink, 'The Arctic Sunrise Incident and the International Law of the Sea' (*JCLOS Blog*, 28 February 2014) <http://site.uit.no/jclos/files/2014/02/The-Arctic-Sunrise-Incident-and-the-International-Law-of-the-Sea.pdf> accessed 26 August 2019.

29 (Emphasis added); UN Doc A/CN.4/104, 'Report of the International Law Commission on the Work of its Eighth Session' (23 April-4 July 1956) Official Records of the UNGA, 11th Session, Supplement No. 9 (A/3159), 282.

applicability of the definition of piracy to the EEZ. A violent attack occurring in a different maritime zone might constitute 'armed robbery'[30] at sea (if the other requirements for the definition of armed robbery are met), but not piracy under international law.

Some United Nations Security Council (UNSC) resolutions on the situation off the coast of Somalia indicate that the high seas criterion should not be widened beyond the LOSC definition of piracy. The term 'armed robbery at sea' is used by the UNSC for 'piratical' acts occuring in the territorial sea. The UNSC stated that the Somali situation was unique. Further, the authorisations given concerning Somalia's territorial waters to combat piracy applied only to the Somali situation, and were not to be interpreted as 'establishing customary international law'.[31]

It is unclear where exactly the April incident took place, but media reports provide some information, including a survivor's testimony. Cherwien Lowell (alternatively spelled Sherwin Lovell) mentioned that he jumped into the Atlantic Ocean and swam and floated eight kilometres (km) to the Surinamese shore.[32] Considering that 1 nautical mile (nm) is 1.852 metres, 8 km would be 4.3 nm, which is within the 12 nm Surinamese territorial sea – this conclusion would be the same, even if eight miles would have been meant instead of km (which is approximately 7 nm). A Surinamese police force press release also states that the incident occurred in Surinamese 'territorial waters' ('territoriale wateren' in the original).[33] Other reports mention that the attack took place near the Wia Wia Bank, which also suggests it happened near to shore.[34]

Further, Suriname's 1910 Criminal Code (Wetboek van Strafrecht), in Article 444 provides that pursuant to the domestic definition of piracy, only acts that have taken place on the high seas ('open zee' in the original) constitute piracy.[35]

On the available information, the April incident does not fall within the definition of piracy (under international law nor under Suriname's domestic law), also meaning the attackers were not 'pirates'. As this incident seemingly occurred in Suriname's territorial sea, terms such as 'piracy', 'pirate attack', 'zeeroof', and especially 'high sea piracy attack', should have been avoided.

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30 'Armed robbery at sea' is defined in paragraph 2.2 of the Annex of IMO Resolution A.1025(26), adopted on 2 December 2009 (Agenda item 10), at the 26th Assembly Session of the IMO, Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.

31 See UNSC Res 1816 (02-06-2008) UN Doc S/RES/1816, paras 7, 9; reaffirmed in later resolutions including UNSC Res 1846 (02-12-2008) UN Doc S/RES/1846; UNSC Res 2246 (10-11-2015) UN Doc S/RES/2246.

32 Boerboom (n 26). See also (n 34), other fishermen confirmed this account, and indicated that the incident happened near to the coast.

33 'Dertien verdachten in verzekering gesteld door Onderzoeksteam KPS in zaak zeepiraterij' (*Politie Suriname*, 7 May 2018) <http://www.politie.sr/dertien-verdachten-in-verzekering-gesteld-door-onderzoeksteam-kps-in-zaak-zeepiraterij/> accessed 27 August 2019.

34 'Zeepiraten slaan toe nabij de Wia Wia Bank, aantal vissers vermist' (*Politie Suriname*, 30 April 2018) <http://www.politie.sr/zeepiraten-slaan-toe-nabij-de-wia-wia-bank-aantal-vissers-vermist/>; 'Nieuwe arrestaties in zaak zeeroof' (*De Ware Tijd/Suriname Nieuws*, 6 May 2018) <https://fathh.com/suriname/nieuws/76660/nieuwe-arrestaties-in-zaak-zeeroof.html>; email from Guyanese journalist N Marks (22 November 2018), on file with the author. His statement in Marks (n 2), that the incident occurred '30 miles (48 km) from the coast', is based on information from 'public security officials in Guyana'. However, he mentioned that fishermen indicated that the incident happened much nearer to the coast. This is also the view of the Surinamese police and Lowell, see (n 32 and 33). Further, the Wiawia bank is considered a 'tidal flat', see <https://www.geographic.org/geographic_names/name.php?uni=-1355383&fid=4448&c=suriname> all accessed 27 August 2019.

35 Suriname's Wetboek van Strafrecht (Criminal Code) 1910.

4. The Common Use (and Misuse) of Terms That Have a Distinct Meaning in International Law

It has been argued that the April incident has wrongly been defined as an act of 'piracy'.36 However, the Oxford Dictionary, for instance, defines (maritime) piracy as '[t]he practice of attacking and robbing ships at sea'.37 According to this (non-legal) definition, the April incident would qualify as an act of 'piracy', because the fishermen were attacked at sea and their catch was taken. It seems that calling this incident 'piracy' – in a non-technical, non-legal sense – was therefore correct.

Terms that have a distinct meaning in international law are, however, frequently (wrongly) used.38 But should the non-technical and non-legal use of words, such as 'piracy', be surprising, or a cause for confusion, frustration, or concern? After all, surely non-lawyers are not to be aware of correct legal terminology? And should we expect them to use the proper terminology? Also, arguably, the almost 'automatic' use of the word 'piracy' in these cases is understandable, because the term conveys a meaning (a vicious attack at sea) which is clear and attractive. Although linguistic accuracy is extremely important for lawyers, and there are legal consequences attached to the term 'piracy', the question arises whether it is really that terrible that 'piracy' is used in a non-technical sense. Should we perhaps view it as purely a technical term, the meaning of which has changed, and that has been incorporated into our everyday language? Are we (international lawyers) perhaps overly sensitive to any incorrect use of 'our' legal terminology, and should we perhaps learn to live with it?

5. Concluding Remarks

The non-technical use of international law terms such as 'piracy' seems to have become common, probably because 'our' terminology is used more widely and more often outside of the law. Clearly, the term 'piracy' provides an image – of a vicious attack at sea – that is easily comprehensible.

Nonetheless, it is important for (legal) clarity and consistency that not every violent act that takes place at sea is automatically labelled an 'act of (maritime) piracy'. Ideally, the correct (legal) terminology should be used at all times, to avoid confusion. Therefore, for incidents taking place in a state's territorial sea, the term 'piracy' should be avoided. However, as coverage of the April incident illustrates, this may be unrealistic, as both journalists and state officials tend to almost exclusively use the word 'piracy', and will probably continue to prefer using this term when referring to violent incidents occurring at sea. Therefore, we should probably learn to live with this (mis)use of international law terminology, although it might be frustrating at times.

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36 See also, in a different context, VJ Schatz, 'The alleged seizure of the El Hiblu 1 by rescued migrants: Not a case of piracy under the law of the sea' (*Völkerrechtsblog*, 31 March 2019) <https://voelkerrechtsblog.org/the-alleged-seizure-of-the-el-hiblu-1-by-rescued-migrants/> accessed 26 August 2019, explaining why the 'hijacking' of the *El Hiblu 1* merchant vessel by migrants in the Mediterranean Sea in March was not an act of piracy under the LOSC.

37 Oxford Dictionary (Online) <https://www.lexico.com/en/definition/piracy> accessed 27 August 2019.

38 Errors are made in international law terminology (for example 'genocide'). Also, for instance, the terms 'International Criminal Court' and 'International Court of Justice' are often used interchangeably.

A maritime crime, not constituting an act of piracy in this case, that took place in a part of the world that is usually less extensively covered in the media sparked this short submission. Based on the available information, it is inaccurate to describe the April incident as an act of piracy. Although the distinction is a technical one, it matters, legally speaking.

Maritime Safety and Security Law Journal

Delivering Refugees and Migrants to a 'Place of Safety' Following Rescue by States at Sea

*Fenella M.W. BILLING**

Abstract

Irregular migration by sea leads states such as Italy and Australia to conduct maritime rescue operations involving refugees and other migrants. During these operations, states must deal with the question of where to disembark survivors. The law of the sea regime obliges states to ensure survivors are delivered to a 'place of safety', arguably requiring maritime officers to merely consider the physical safety of survivors immediately on disembarkation. Non-binding International Maritime Organization guidelines state that the need to avoid disembarking refugees and asylum-seekers in the states of departure or origin is also a consideration. The guidelines refer to other 'relevant' international law, including treaties dealing with 'refugee refoulement' or refoulement in connection with a risk of torture. Under the international human rights law regime, including international refugee law, states' obligations in relation to non-refoulement are broader and prohibit the return of refugees and migrants to states where they directly or indirectly face persecution, torture or other serious harm. In interpreting 'place of safety', this work argues that there is insufficient consensus to integrate the two legal regimes. Nevertheless, states can be under co-existing human rights obligations that place limits on disembarkation of rescued refugees and migrants.

Keywords: Maritime Rescue, Refugees, Migrants, Disembarkation, 'Place of Safety', Non-Refoulement

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1. Introduction

The law of the sea notion of 'rescue' involves retrieving persons in distress, providing for their medical or other basic needs and delivering them to a 'place of safety'.[1] However, states have returned ref-

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1 International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR Convention), Annex para 1.3.2 and para 1.3.13 as amended by IMO Resolution MSC 70(69) (adopted 18 May 1998); see further 2.1.2 below.

ugees and irregular migrants to countries of origin or transit.[2] Refugee and migrant returns may be contrary to international obligations protecting human rights such as the right to leave any country and the prohibition on collective expulsion.[3] While refugee and migrant returns may be consistent with a narrow definition of 'safety' in treaties creating international obligations for ocean governance, such returns may be contrary to the principle of *non-refoulement* under human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR)[4] and more specifically under the 1951 Convention Relating to the Status of Refugees (Refugee Convention).[5] The *non-refoulement* principle encompasses important absolute obligations of protecting human life and personal security. The interpretive debate is about the extent of integration of two international law regimes – the law of the sea and international human rights law. These regimes deal with state and community interests on the one hand and individual interests on the other. Of particular concern is the extent to which maritime officers and their advisers carrying out the duty to assist under the 1982 United Nations Convention on the Law of the Sea (LOSC)[6] must consider *non-refoulement* in designating a 'place of safety' and disembarking survivors under the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention)[7] and the 1979 International Convention on Maritime Search and Rescue (SAR Convention).[8]

States' international obligations under law of the sea and international human rights law regimes can be envisaged as either integrated or co-existing. A wide definition of the term 'place of safety' leads to considerations about disembarkation that integrate the principle of *non-refoulement,* protecting refugees from being returned to a country where they have a well-founded fear of persecution and all survivors from return to serious harm. The content of the term 'safety' may thus require maritime officers and their advisers to individually identify whether any survivors may be refugees and to assess any specific risk of harm.[9] Based on law of the sea, a narrow definition of 'place of safety' involves providing for immediate and basic requirements such as removal from danger to a place of physical safety, as well as the provision of food, shelter and medical assistance. The term can be so

2 The declaratory term 'refugee' is defined in the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2) and refers to a person who, owing to a well-founded fear of persecution, is outside their country of nationality (or residence, in the case of stateless persons) and is therefore unable or unwilling to avail themselves of the protection of that state. 'Irregular migrant' refers to a person seeking entry into a foreign state without documentation.

3 See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 12(2) and Protocol No. 4 arts 2(2) and 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 21 September 1970) as amended by Protocol No. 14 (entered into force 1 June 2010) CETS no. 194 (ECHR).

4 ICCPR art 6 and 7.

5 Refugee Convention (n 2).

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

7 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention).

8 SAR Convention (n 1).

9 See Violeta Moreno-Lax, *Policy Brief 4: The Interdiction Of Asylum Seekers At Sea: Law and (mal)practice in Europe and Australia* (Kaldor Centre for International Refugee Law, May 2017) 11.

narrowly defined that the rescue operation may be regarded as terminated once the survivors are 'safely' on board an assisting ship that has sufficient facilities to shelter survivors until a more permanent destination is found. In such a situation, disembarkation of refugees and irregular migrants may no longer be an issue in relation to the duty to assist, but the result of an administrative decision on asylum that is nevertheless governed by international obligations concerning asylum procedure and *non-refoulement*, under international refugee law and more broadly under international human rights law (IHRL). In either case it may be relevant that a potential country of disembarkation is known to detain migrants in conditions involving serious human rights abuse; or, like Libya and Sri Lanka which are discussed below, is not a signatory to the Refugee Convention,has no asylum procedure and criminalises irregular migrants. This work determines the extent to which the duty to deliver rescued refugees and irregular migrants to a 'place of safety' is defined by the principle of *non-refoulement*. Section 2 examines the rules about the duty to render assistance, disembarkation and delivery to a 'place of safety' under the LOSC, SOLAS and SAR conventions and guidelines of the International Maritime Organization (IMO). Section 3 investigates the principle of *non-refoulement* and its extraterritorial application under international refugee law and IHRL. Section 4 deals with state practice concerning refugee and migrant disembarkation and the principle of *non-refoulement* in relation to the European Union (EU), including Italy, and Libya along the Central Mediterranean route and in Section 5 in relation to Australia and Sri Lanka. Section 6 analyses the meaning of a 'place of safety' and the relevance of the principle of *non-refoulement* in the context of the nature of the LOSC.

2. Disembarkation to a 'Place of Safety' Under the Law of the Sea

2.1 Treaty Obligations - Disembarkation and Delivery to a 'Place of Safety'

2.1.1 Duties to Assist and to Provide Search and Rescue Services

The maritime duty to render assistance to persons in distress at sea is codified in Article 98(1) LOSC. Flag-states are obliged to create a general duty in domestic law requiring the shipmaster to render assistance to persons in danger of being lost at sea, regardless of nationality, status or circumstances.[10] Under the SOLAS convention, rescued persons are to be treated with humanity, in accordance with 'the capabilities and limitations of the ship'.[11]

Article 98(2) LOSC places states parties under a general duty to cooperate in operating adequate and effective search and rescue services. Initially established in the first UN Convention on the Law of the Sea 1958, this provision has been filled out by the SOLAS and SAR Conventions.[12] The duty

10 See SOLAS ch V, reg 33.1; SAR Annex 2.1.10.

11 SOLAS ch V, reg 33.6.

12 SOLAS ch V, regs 7 and 15 as amended and the preamble; SAR Annex as amended and the preamble; Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 447; Kristina Siig and Birgit Feldtmann, 'UNCLOS as a system of regulation and connected methodology – some reflections' (2018) MarIus 502 SIMPLY 2017 64-65.

may be broken down into two types of obligations. Firstly, states agree on SAR 'regions', each of which comes under the responsibility of the coastal state with a proactive duty to operate adequate and effective SAR services, including operating a 'rescue co-ordination centre' (RCC).[13] Secondly, states parties have a shared obligation to co-ordinate services with neighbouring states as necessary.[14] The primary RCC shall initiate the process of identifying the "…most appropriate place(s) for disembarking persons found in distress at sea…" and relevant RCCs should be authorised to cooperate.[15]

2.1.2 Disembarkation and Delivery to a 'Place of Safety'

Amendments to the SAR and SOLAS Conventions in 2004 brought the concept of a 'place of safety' to the fore.[16] The amendments came as a result of the Tampa incident, in which a Norwegian merchant vessel was refused permission by Australia to disembark migrants rescued on the high seas.[17] The Conventions require states parties to cooperate to ensure that shipmasters '… providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage….'[18] Thus, to complement the shipmaster's duty to render assistance, the coastal state responsible for the SAR region in which survivors are recovered must:

> exercise *primary responsibility* for ensuring such *co-ordination and co-operation* occurs, so that survivors assisted are *disembarked from the assisting ship* and *delivered to a place of safety* … as soon as reasonably practicable.[19]

It is noteworthy that the relevant conventions clearly connect the duty to assist, including through embarkation, with efficiently terminating the assisting ship's role in the rescue operation through disembarkation. An additional connection is made between disembarkation from the assisting ship and delivery to a 'place of safety', although these may be read as two separate limbs of the duty borne by the coastal state and thus its RCC.[20] The provisions do not involve clear duties to disembark or

13 SAR Annex paras 1.3.1, 1.3.2, 2.1.4 and 2.3; SOLAS ch V, reg 7.

14 SAR Annex ch 3, 3.1.1.

15 See e.g. SAR Annex ch 3, 4.8.5, as amended by IMO Resolution MSC 155(78) (adopted 20 May 2004).

16 SAR Annex ch 1, 1.3.2 as amended by IMO Resolution MSC 70(69) (adopted 18 May 1998) and 3.1.9, as amended by IMO Resolution MSC 155(78) (adopted 20 May 2004); and see SOLAS ch V reg 33, 1.1 as amended by IMO Resolution MSC 153(78) (adopted 20 May 2004); but see definition of 'search and rescue service' in SAR Annex ch 1, 1.3.3 and SOLAS ch V reg 2.5.

17 See e.g. Donald R. Rothwell, 'The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty' (2002) 13 PLR 118.

18 SAR Annex ch 3, 3.1.9; see also SOLAS ch V, reg 33, as amended.

19 SAR Annex ch 3, 3.1.9 (emphasis added); see also SOLAS Preamble and ch V, reg 33, 1.1.

20 See Martin Ratcovich, 'The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?' (2015) AYBIL Vol 33, 93-94, referring to A Proelss, 'Rescue at Sea Revisited: What Obligations Exist Towards Refugees?' (2008) SIMPLY 1, 14-21, arguing against a duty to deliver to a place of safety.

accept disembarkation.[21] Moreover, while the SAR and SOLAS conventions use the term 'place of safety', neither define it. However, the provisions oblige states to take into accountthe particular circumstances of the case and guidelines developed by the International MaritimeOrganization.

2.2 The Notion of 'Safety' Under IMO Guidelines

2.2.1 Guidelines About Delivery to a 'Place of Safety'

The IMO's *Guidelines on the Treatment of Persons Rescued at Sea*[22] were published at the same time the SOLAS and SAR Conventions were amended and the 'place of safety' concept became central.[23] Although non-binding, authorities are nevertheless *bound to consider* them.[24] The Guidelines thus indicate subsequent state practice relevant to treaty interpretation.[25]

Under paragraph 2.5, the state responsible for the SAR region where survivors are recovered is obliged to provide or ensure the provision of a place of safety as soon as reasonably possible. Paragraph 6.12 provides that arrival at a place of safety will terminate the rescue operation, thus relieving the 'assisting' ship's master and flag-state of further legal obligations in connection with the survivors.

According to the Guidelines, a *place of safety* is one where the safety of life is no longer threatened and basic human needs can be met, while transportation arrangements for '…the survivors' next or final destination' are determined (6.12). A place of safety provides survivors with more than merely being out of immediate danger (6.13). In addition to necessities such as food, shelter and medical assistance (6.12), there should be adequate facilities and equipment to sustain additional persons without jeopardising the safety of others (6.13). Beyond providing for emergency care, the Guidelines state that the identification of a place of safety depends on the circumstances of each case, including a consideration of the factors and risks relevant to survivor's safety (6.15 and 6.16). This may include assessing the situation on board, as well as '… on scene conditions, medical needs, and availability of transport or other rescue units' (6.15). IMO's non-binding *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* (IMO Principles) suggest that all relevant parties should cooperate to ensure disembarkation takes place swiftly, taking into account the shipmaster's preferences and '…the immediate basic needs of rescued persons.'[26]

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21 Rothwell (n 17) 120; Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff 2010) 96-97; Gallagher and David (n 12) 456.

22 International Maritime Organization (IMO), *Guidelines on the Treatment of Persons Rescued at Sea* Resolution MSC 167(78) (adopted 20 May 2004); see further the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR) 9th ed. (IMO Publishing, 2013) referred to in Ratcovich (n 20) 88.

23 See 2.1.2 above.

24 SOLAS ch V, reg 33, 1.1.

25 Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(3)(a); Efthymios Papastavridis, 'Rescuing Migrants at Sea and The Law of International Responsibility' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control (*Routledge 2017) 166.

26 International Maritime Organization (IMO), *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* (2009) FAL.3/Circ.194, principle 3.

Despite the SAR and SOLAS conventions creating a duty to cooperate to ensure timely disembarkation and delivery to a place of safety, the IMO Guidelines do not suggest that this must be the nearest port.[27] The Guidelines state that a place of safety may be on land or may even be a rescue ship or another ship participating in the rescue operation (6.14 and 6.18). However, even a rescue vessel at sea that is sufficiently equipped and manned to be a temporary place of safety, '… should be relieved of this responsibility as soon as alternative arrangements can be made' (6.13).

While non-binding, this guidance is relevant to determining the scope of flag-state obligations. In particular, the combination of paragraphs 6.12, 6.13, 6.14, 6.16 and 6.18 is significant. Collectively, these guidelines separate assessment of a place of safety from the question of disembarkation and leave open that if a well-equipped assisting vessel is regarded as the place of safety, then the rescue operation may terminate prior to a further 'administrative' disembarkation. At the international level, this would leave the question of asylum procedure to be resolved under IHRL and more specifically international refugee law. However, such an interpretation is nevertheless subject to disembarkation '...as soon as reasonably practicable.'[28]

The IMO Guidelines specify that if asylum seekers and refugees alleging a 'well-founded fear of persecution' are rescued at sea then the '… need to avoid disembarkation in territories where [their] … lives and freedoms … would be threatened *is a consideration* …' (6.17).[29] Other guidelines for shipmasters suggest that if rescued people claim asylum at sea then, having alerted the closest RCC and the UNHCR, the shipmaster should '… not ask for disembarkation in the country of origin or from which the individual has fled.'[30] While not strictly prohibitive, paragraph 6.17 can thus be read as a guideline not for maritime officers but for the RCC or other state authorities making the decision about where to disembark. However, the guidelines do not identify whether such a consideration is triggered by self-identification, identification by an organization or whether there is an obligation on maritime officers to enquire of each irregular migrant whether he or she has an international protection claim.

Taken together with the SOLAS and SAR conventions, the Guidelines cast doubt on whether the duty of coastal states to cooperate in a rescue operation involves a duty to disembark survivors. In an attempt to clarify the issue in 2009, the IMO Principles state that if '…disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued…'[31] However, the international law on a state's right to refuse disembarkation and state practice remain unsettled.[32]

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27 Mallia (n 21), 102-103 and 106-108, arguing that delivery to a place of safety necessitates disembarkation; Moreno-Lax (n 9) 8.

28 SAR Annex ch 3, new 3.1.9; SOLAS Preamble and ch V, reg 33, new 1.1.

29 IMO (n 22) (emphasis added).

30 See UNHCR, *Rescue at Sea: A guide to principles and practice as applied to refugees and migrants* (September 2006) 10.

31 IMO (n 29) principle 3.

32 Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 146-148; Gallagher and David (n 12) 460; Douglas Guilfoyle and Efthymios Papastavridis, 'Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea', Background Paper, UNHCR Regional meeting, Bangkok, 3-4 March 2014.

2.2.2 'Non-SAR Considerations': Status and Needs of Refugees and Migrants

Under the heading 'Non-SAR considerations', the IMO Guidelines state that matters dealing generally with survivors' status, including migrants, asylum seekers or refugees, or their needs after disembarkation are beyond the scope of the SOLAS and SAR Conventions and are most often handled by the appropriate authority at the place of disembarkation (6.19 and 6.21).[33] The IMO Principles also suggest that the question of return or repatriation follows disembarkation.[34] Nevertheless, RCCs may be requested by their national authorities to begin coordination in relation to non-SAR considerations before disembarkation, including informing, involving and obtaining the assistance of relevant international organisations or national authorities of other countries (6.19 and 6.21). Shipmasters may be requested by an RCC to gather and impart relevant information about a ship in distress or the survivors (6.22). Thus, carrying out the request under 6.22 is not expressed as an obligation on shipmasters under the guidelines, but as an action assisting the instructing state.

2.2.3 Relevant International Law

Paragraphs 7 and 8 of the Appendix to the Guidelines, on 'relevant international law', refer to: expulsion and *refoulement* of refugees under the 1951 Refugee Convention; *refoulement* in connection with torture under other international law; and the general relevance of the 2000 UN Convention on Transnational Organized Crime and its Migrant Smuggling Protocol and Protocol on Trafficking in Persons.[35] Of particular note, the Migrant Smuggling Protocol's Article 19 is a 'saving clause' that reiterates the relevance *inter alia* of international human rights law and the principle of *non-refoulement* in relation to refugees. Moreover, Article 5 contains a prohibition on criminal prosecution of migrants who are the object of smuggling, arguably making a domestic policy of criminalisation of irregular migration in countries such as Libya and Sri Lanka a relevant consideration for state party authorities in disembarkation.

3. Disembarkation of Refugees and Migrants and the Principle of *Non-Refoulement*

3.1 The Principle of Non-Refoulement in International Refugee Law

Article 33(1) of the Refugee Convention prohibits refugees from being returned:

> in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.[36]

33 IMO (n 26) principle 2.

34 ibid, principle 4.

35 IMO (n 22) Annex 34, Appendix: 'Some Comments on Relevant International Law', referring to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (Migrant Smuggling Protocol).

36 Refugee status under the Refugee Convention is declaratory and thus art 33(1) applies to persons recognized as refugees and to asylum seekers: Alice Edwards, 'International Refugee Law' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law*, 3rd ed. (OUP 2018) 547.

The notions of persecution and threats to life and freedom in both Articles 1A(2) and 33(1) include 'serious human rights violations and other forms of serious harm'.[37] Thus, not every human rights violation will be relevant to *non-refoulement* under the Refugee Convention. International protection is only intended to provide sanctuary from serious violations that demonstrate 'fracturing' of state protection.[38] In addition, the principle of *non-refoulement* prohibits return to the country from which a person has originally fled as well as any transit country along a migratory route where the person would face a reasonably foreseeable risk of *refoulement* to the state of origin ('chain r*efoulement*').[39] The prohibition is subject to exception on the grounds of national security or serious criminal convictions.[40]

Customary law rules about *non-refoulement* supplement treaty and domestic law, arguably protecting treaty obligations against future denunciation. In relation to refugees, customary norms have the potential to create obligations to be followed by states not party to the 1951 Convention or its 1967 Protocol. In 2003, Lauterpacht and Bethlehem argued that the principle of *non-refoulement* may be a cardinal norm of customary international law, subject to exceptions based on national security or public safety not involving non-derogable rights.[41] Conversely, in 2010 Hathaway pointed in particular to a 'pervasive', if not 'dominant', state practice against the principle in relation to all individuals facing serious harm in departure or origin states, including refugees, belying the principle as a customary norm.[42] More recently, Costello and Foster have argued that the principle of *non-refoulement* in relation to refugees is not only binding on all states as part of customary international law but is even approaching *jus cogens* status.[43]

3.2 The Principle of Non-Refoulement Under IHRL

The protection of life and person under general international and regional human rights treaties is broader than under international refugee law because it applies to *all* people. Articles 6, 7 and 10 of

37 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (HCR/1P/4/ENG/REV.3, Geneva, 2011) 1ff.

38 Edwards (n 36) 545.

39 ibid 547.

40 Refugee Convention art 33(2).

41 Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in Erika Feller, Volker Türk and Francis Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), 140-150, 154-155 and 159-160; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (OUP 2007), 345ff; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007) 15ff; *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECHR, 23 February 2012 paras 23 and 134, referring to the UNHCR, *Note on International Protection* (A/AC.96/951, 13 September 2001) para 16; Edwards (n 36) 547, referring to the Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees (HCR/MMSP/2001/09, 16 January 2002) para 4.

42 James C. Hathaway, 'Leveraging Asylum' (2010) 45 Texas International Law Journal, 503-536, 506 and 515-516ff.

43 Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' (2015) 46 NYIL 273; and Moreno-Lax (n 9) 9.

the ICCPR and 2, 3 and 5 of the ECHR protect life and freedom and prohibit torture, cruel, inhuman and degrading treatment. Thus, under IHRL, migrants may be protected against crowded or poor conditions of detention, or a life of poverty in absence of state welfare, which may not amount to 'serious harm' under the Refugee Convention.[44] Under IHRL, the right to life and the prohibition on torture and other ill-treatment are 'non-derogable' and guarantee 'absolute' protection.[45] The IHRL provisions include an obligation on states to refrain from transferring a person to another state where there are substantial grounds for believing that the person will face a real risk of violation.[46] The UN Convention against Torture and other human rights treaties also protect the principle of *non-refoulement*.[47]

Not only is the prohibition on torture said to be a fundamental norm under customary international law but it is also accepted as a *jus cogens* norm.[48] However, the definition and status under customary international law of inhuman and degrading forms of ill-treatment is uncertain and state practice is inconsistent. Arguably *non-refoulement* in relation to a risk of cruel treatment falling outside the definition of torture should also be protected under customary international law.[49] However, there is little evidence that states accept this position. The argument that *non-refoulement* is a principle of customary international law is strongest in relation to a risk of torture.

3.3 Extraterritorial Application of Non-Refoulement

A number of international and regional bodies including the Human Rights Committee, the Committee Against Torture and the International Court of Justice have confirmed extraterritorial jurisdiction of human rights obligations.[50] The Parliamentary Assembly of the Council of Europe referred to the relevance of the Refugee Convention to maritime operations and supported the UNHCR's opinion about the extraterritorial application of the principle of *non-refoulement* in maritime operations.[51] The Assembly called upon member states to guarantee systematic protection of human rights, including the principle of *non-refoulement* '… regardless of whether interception measures are implemented within their own territorial waters, those of another state on the basis of an ad hoc agreement, or on the high seas.'[52]

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44 See e.g. *MSS v Belgium and Greece* 53 EHRR 28; *Warda Osman Jasin et al v Denmark* Communication No 2360/2014 (Human Rights Committee, 4 September 2015).

45 See ICCPR art 4(2); ECHR art 15.

46 Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law*, 3rd ed. (OUP 2018), 174; *Soering v the United Kingdom* (1989) 11 EHRR 439; *Hirsi Jamaa* (n 41) para 114.

47 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1486 UNTS 85 (CAT) art 3; see also the Committee on the Rights of the Child, General Comment 6 (2005). See also Charter of Fundamental Rights of the European Union, OJ 2012/C 326/02 (CFR), including art 19(2).

48 Lauterpacht and Bethlehem (n 41) 152; Rodley (n 46) 167-168; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, 422 para 99.

49 Lauterpacht and Bethlehem (n41), 155-158, arguing that a customary norm of *non-refoulement* exists in relation to all non-derogable proscribed ill-treatment.

50 UNHCR 2007 (n 41) paras 33-39.

51 Council of Europe, Parliamentary Assembly Resolution 1821 (2011), paras 7-8; and ibid paras 12-19.

52 Council of Europe ibid para 9.3.

State practice on the question of extraterritorial application of *non-refoulement* to migrant returns from the high seas remains unsettled.[53] For example, the US Supreme Court found that *non-refoulement* under Article 33 Refugee Convention only applies to refugees who have reached foreign state territory.[54] However, the act of *refoulement* does not necessarily require prior entry to a foreign state's territory.[55] The Inter-American Commission on Human Rights found that US returns of Haitian asylum seekers to their country of origin interfered with the right to seek asylum in other countries.[56]

3.3.1 The Position Under the ECHR

Under the ECHR, states may lawfully deport individuals.[57] Nevertheless, an individual's right to protection from being removed to another state where they face a real risk of violation of convention rights such as the prohibition on torture and ill-treatment is well-accepted in ECtHR case law.[58] This applies even if the individual entered the state irregularly.[59] Likewise, a state may not transfer an individual to another state where there is a real risk of 'chain *refoulement*'.[60] Moreover, although a state's jurisdictional competence under Article 1 ECHR is mainly territorial, in exceptional circumstances a Convention state will be regarded as having extraterritorial jurisdiction, where the state exercises 'authority and control' over an individual or 'effective control' over an area.[61]

3.3.2 Hirsi Jamaa and a Prohibition on Migrant Returns to Libya

In the 2012 ECtHR decision, *Hirsi Jamaa and Others v Italy*, about two hundred migrants were intercepted by Italian authorities on 6 May 2009, approximately 35 nautical miles south of Lampedusa, within the Maltese SAR Region. They were transferred onto Italian military ships and returned to Libyan authorities in Tripoli. Some migrants were subsequently granted refugee status by the UNHCR office in Tripoli.

Italy claimed that freedom of navigation on the high seas meant that the identity of the parties concerned in the rescue was irrelevant.[62] Italy argued that the maritime operation had not been voluntary or coercive and therefore did not trigger human rights jurisdiction.[63] Thus, it was argued that the

53 See *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, para 42; Edwards (n 36) 548.

54 *Chris Sale, Acting Commissioner, Immigration and Neutralization Service, et al v Haitian Centers Council Inc., et a*l (1993) 509 US 155, paras 183-187; the UK House of Lords indicated its support of the US Supreme Court position in *Sale* in *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1, paras 29-31.

55 Seline Trevisanut 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection' (2008) Max Planck UNYB 12, 205, 243.

56 *The Haitian Centre for Human Rights et al v United States*, Case 10.675 IACommHR Report No 51/96 (13 March 1997).

57 *Chahal v UK* 23 EHRR 413; *Hirsi Jamaa* (n 41) para 113.

58 See e.g. *Soering* (n 46); *SF and others v Sweden*, App no 52077/10 (ECHR, 15 August 2012).

59 *Mubilanzila Mayeka and Kanika Mitunga v Belgium* 46 EHRR 449.

60 *MSS* (n 44).

61 *Al Skeini and others v The United Kingdom*, App no 55721/07 (ECHR, 7 July 2011); *Chagos Islanders* 35622/04 Admissibility Decision (ECHR, 11 December 2012).

62 *Hirsi Jamaa* (n 41) para 65; see Douglas Guilfoyle, 'Jurisdiction at sea: migrant interdiction and the transnational security state' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control* (Routledge 2017), 120.

63 *Hirsi Jamaa* ibid para 95; Guilfoyle ibid 120.

intercepted migrants were accompanied to Libya in accordance with bilateral agreements to combat illegal immigration.[64] However, the ECtHR found that Italy exercised both *de jure* (due to exclusive flag-state jurisdiction) and *de facto* authority and control over the survivors and had extraterritorial jurisdiction.[65] Italy had been bound to identify any potential claims for asylum in accordance with the prohibition on collective expulsion under Article 4 of Protocol No. 4 ECHR.[66] In addition, Italy was obliged to avoid transferring the irregular migrants to Libya, having regard to the conditions they would be facing, of which Italy knew or should have known.[67] Relevant conditions included: inhuman and degrading treatment and the lack of a proper asylum procedure in Libya; and the real risk of *refoulement* to the states of origin, and being subjected there to torture or other serious harm as returned migrants and refugees.[68] The Court concluded that the general impossibility of making the Libyan authorities recognise refugee status granted by UNHCR officers was relevant, apparently treating protection of refugees from serious harm as a subset of the protection of all individuals offered by Article 3 ECHR.[69]

4. EU Approaches to Delivering Rescued Migrants to Safety in the Central Mediterranean

4.1 EU Operations in the Central Mediterranean

Since the entry into force of the Lisbon Treaty in 2009, the EU and member state authorities applying EU law must comply with the Charter of Fundamental Rights (CFR),[70] including Article 19(2) that specifically prohibits removal to states where there is a 'serious risk' that the individual will be subject to the death penalty or to '… torture or other inhuman or degrading treatment or punishment.'

From 2014 the focus of Operation Triton coordinated by 'Frontex'- renamed the European Border and Coast Guard Agency in 2016 - has been border security and migration control.[71] Nevertheless, in line with *Hirsi Jamaa*, the Frontex maritime border surveillance Regulation 656/2014 is consistent with the CFR Article 19(2) and subjects operations to a broad understanding of the *non-refoulement*

64 ibid paras 65-66, 93.

65 ibid paras 70, 74, 80-81.

66 ibid paras 185-186.

67 ibid paras 131, 156-157.

68 ibid paras 88-89, 123-126, 156-157, 202-203.

69 ibid paras 134 and 156. See also *MSS* (n 44).

70 CFR (n 47).

71 Moreno-Lax (n 9) 3-4; Giorgia Bevilacqua, 'Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities' in Gemma Andreone (ed.) *The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests* (Springer Open 2017) 168-169.

principle and respect for fundamental rights.[72] Article 4 of the Regulation prohibits disembarkation where the participating Member States are aware or ought to be aware that disembarked persons will be at risk contrary to the *non-refoulement* principle. According to Article 4(3), prior to disembarkation, rescued persons should be given the opportunity to express reasons for believing that disembarkation would violate the principle.

Under Article 10, interception in the territorial sea should result in disembarkation in the coastal Member State. Where possible, following interception on the high seas, disembarkation takes place in the country of departure in cooperation with the relevant RCC; otherwise, the vessel should be disembarked in the Member State hosting the operation. Disembarkation at a place of safety following search and rescue is carried out in cooperation with the relevant RCC. Guilfoyle notes the difficulty in finding cases where the Regulation and the disembarkation obligations have been applied.[73] One potential oversight of the Regulation is that it does not expressly provide for procedural safeguards, remedies or judicial oversight.[74]

From 2015, the EUNAVFOR Med Operation Sophia crime control mission has operated on the Central Mediterranean high seas under UN Security Council Resolution 2240. The EU as an international organisation is committed to acting in accordance with international law.[75] Although the goal of the mission is to break the business model of migrant smugglers, the mission is subject to the LOSC duty to render assistance, which can arise as irregular migrants attempt the crossing. The Resolution allows interception and seizure of migrant smuggling vessels, with flag-state consent or following *bona fide* attempts to obtain flag-state consent. The Resolution generally requires states to act in compliance with human rights,[76] but does not provide detailed rules in relation to the principle of *non-refoulement*.[77]

4.2 EU and Italian Cooperation with Libya Following the *Hirsi Jamaa* Case

Since the *Hirsi Jamaa* ruling prevented returns to Libya, the EU and Italy have supported Libyan coastguard operations to pull back migrant smuggling vessels through provision of funding,

72 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJEU L 189/93, recitals 8-13 and art 9(1); Steve Peers, EU Justice and Home Affairs: vol. I EU Immigration and Asylum Law 4th ed. (OUP 2016), 154-155.

73 Guilfoyle (n 62) 125. See also Annelise Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 248-251; Peers ibid 159-160.

74 Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein and Brian Opeskin, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) *ICLQ* 67,

315-351.

75 Treaty on European Union (Consolidated) OJ 2012/C326/01 (TEU) art 3 and 21. See also Charter of the United Nations, 24 October 1945, 1 UNTS XVI art 1.

76 United Nations Security Council Resolution 2240, para 13; see Bevilacqua (n 71) 182.

77 See Efthymios Papastravridis, 'EUNAVFOR *Operation Sophia* and the International Law of the Sea' MarSafeLaw Journal 2/2016, 57-72; Bevilacqua (n 71) 178-179.

vessels, training and assistance.[78] Given international reports documenting serious human rights violations,[79] the partnership's focus raises questions about the EU and Italy indirectly circumventing *non-refoulement*.[80] In addition, Italian vessels in Libyan waters arguably present as a 'maritime blockade', a measure that is incompatible with the prohibition on *refoulement*.[81] Another aspect of the cooperation preventing departures from Libya and thus avoiding issues relating to *non-refoulement* is the approach by Italy and Libya seeking to curb the humanitarian response of non-governmental organisations in maritime search and rescue.[82] However, EU funding is also channelled into UNHCR and IOM efforts that arguably improve migrant safety in Libya, including resettlement and evacuation, improved conditions of detention and human rights education for detention and border authorities.

5. Disembarkation of Migrants in Australia's Cooperation with Sri Lanka

5.1 Operation Sovereign Borders and the Maritime Powers Act 2013 (MPA)

In addition to 'turnbacks' or 'towbacks' of migrants,[83] successive Australian governments have returned migrants in cooperation with countries of departure, including Sri Lanka ('takebacks'). Controversies have arisen about minimum incorporation and implementation of Australia's international obligations, in the application of Australian domestic law, such as the *Maritime Powers Act* 2013 (Cth), the *Navigation Act* 2012 (Cth) and Australian constitutional and administrative laws.[84]

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78 See European Council and Council of the EU, *Press Releases and Statements, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route* (3 February 2017); and *Memorandum of Understanding* (Libya-Italy, Feb 2017) <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 12 October 2017; Francesca Mussi and Nikolas Feith Tan, 'Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia' in Fiona De Londras and Siobhan Mullally (eds) 10, 2015 Irish Yearbook of International Law (Harts 2017) 87, 92-100.

79 See UN Security Council, *Report of the Secretary-General on the United Nations Support Mission in Libya* S/2017/283 (4 April 2017); UN Security Council, *Letter dated 1 June 2017 from the Panel of Experts on Libya*, S/2017/466.

80 See Fenella M W Billing and Nikolas Feith Tan, 'Balancing legal obligations in Europe's cooperation with Libya in the fight against migrant smuggling' in Bettina Lemann Kristiansen, Katerina Mitkidis, Louise Munkholm, Lauren Nuemann and Cécile Pelaudeix (eds.) *Transnationalisation and Legal Actors: Legitimacy in Question* (Routledge, 2019); Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows' in S. Judd (ed) *Research Handbook on International Refugee Law (*Edward Elgar, Forthcoming); Alessia de Pascale, 'Migration Control at Sea: The Italian Case' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 281ff.

81 Moreno-Lax (n 9) 9-10.

82 See Kristof Gombeer and Melanie Fink, 'Non-Governmental Organisations and Search and Rescue at Sea' MarSafeLaw Journal 4/2018, 1-25.

83 Official Committee Hansard, *Senate Legal and Constitutional Affairs Legislation Committee Estimates* (20 October 2014) 137-160.

84 See Nicholas Gaskell, 'Australian Merchant Shipping and Maritime Powers Laws' (2014) *Il diritto marittimo* 116/2-4 310, 328-330. See also Susan Kneebone, 'Controlling Migration by Sea: The Australian Case' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 362-366.

Part 3 MPA 2013 gives broad enforcement powers to 'maritime officers' including the s.69 power to detain or require a person to remain on the vessel at sea; and power under s.72 to take a person to a place in the Australian migration zone or outside Australia. Safeguard provisions include s.74, requiring an assessment on reasonable grounds that a person is 'safe' in the place to which he or she is transferred; and s.95 providing that any person being held must be treated with '… humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.'

In 2011, in *Plaintiff M70/2011 v Minister for Immigration, Citizenship and Another*, the Australian High Court found that Australia's international obligations prevented the government from making a declaration for the transfer of irregular migrants to Malaysia, as Malaysian legal obligations did not require protection of asylum seekers or provision of proper asylum procedure.[85] However, with the introduction of the MPA and fierce adherence to dualist policy and executive power, a new s.75A MPA states that any failure to comply with international obligations does not invalidate an action taken as a matter of national law.[86] Further, MPA powers will not be limited by the provisions of the *Migration Act* 1958 (Cth), including provisions incorporating the principle of *non-refoulement*. Section 75B provides that the rules of natural justice do not apply to the exercise of maritime powers.[87] Under s.75C, restrictions on exercising powers in relation to a foreign vessel may be subject to an executive direction based on national interest.

5.2 Current Cooperation with Sri Lanka

According to official statements, persons coming from Sri Lanka who are individually assessed at sea under an 'enhanced screening process' and not found to have a *prima facie* protection case are returned to Sri Lankan authorities.[88] The process allows no opportunity for the decision to be reviewed and leaves open the possibility that returned migrants include refugees.[89] Reports suggest that on at least one occasion an asylum seeker eligible to be transferred for a full refugee determination voluntarily returned to Sri Lanka with the other migrants.[90] In addition, Australian authorities have returned people into Sri Lankan criminal investigators' custody amid reports of a culture of torture.[91]

85 *Plaintiff M70/2011 v Minister for Immigration, Citizenship and Another* [2011] HCA 31.

86 But see VCLT art 27, providing that national law may not be invoked to justify failure to perform international treaty obligations.

87 Sections 75A-C were inserted by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth).

88 See Peter Dutton, Minister For Home Affairs, 'People smuggling boat returned to Sri Lanka' (Media release, 17 August 2016, update 27 August 2018); Australian High Commission Columbo, 'Three illegal people smuggling vessels disrupted in recent months' (Media release, 24 January 2018); and UNHCR, 'Returns to Sri Lanka of individuals intercepted at sea' (7 July 2014) <http://www.unhcr.org/afr/news/press/2014/7/53baa6ff6/returns-sri-lanka-individuals-intercepted-sea.html> accessed 22 April 2018.

89 See Kaldor Centre for International Refugee Law (Kaldor Centre), 'Turning back boats' (Factsheet, 26 February 2015) 3.

90 See Scott Morrison, 'Australian Government returns Sri Lankan people smuggling venture' (Media Release, 7 July 2014). See also Kaldor Centre ibid.

91 See Kaldor Centre, ibid 4; Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka' (A/HRC/34/54/Add.2, 22 December 2016); OHCHR, 'Sri Lanka routinely tortures security suspects amid stalled reform process, UN expert finds' (news release, 18 July 2017), reporting that Tamils are disproportionately torture victims; Niro Kandasamy, 'Not 'all is forgiven' for asylum seekers retuned to Sri Lanka' (The Conversation, 9 March 2017) <http://theconversation.com/not-all-is-forgiven-for-asylum-seekers-returned-to-sri-lanka-73361> accessed 23 April 2018.

Questions arise about extrajudicial criminal justice surrender, as well as arbitrary detention, torture and conditions of detention in Sri Lanka contrary to IHRL, and also about criminal prosecution of migrants contrary to Article 5, Migrant Smuggling Protocol. Such returns may be contrary to the principle of *non-refoulement* and the LOSC duty to deliver to a 'place of safety'.[92]

As a migrant destination, Australia's coastline differs from the Mediterranean and the migrant flow is comparatively very small.[93] In addition, the high-level instability and high risks for migrants generally in Libya distinguish it from Sri Lanka as a location for migrant returns. A significant factor explaining different regional approaches is that extraterritorial *non-refoulement* obligations under the ECHR have been well defined and carry greater weight of legal enforceability, with similar obligations found in the CFR and woven into EU law.[94]

6. A Broad or Narrow Notion of Survivors' 'Safety' Under the Law of the Sea?

The lack of express provisions protecting human rights during disembarkation raises questions concerning the integration of the law of the sea with human rights norms, returning to the question of a wide or narrow interpretation of 'safety'. Concerning state policies rejecting extraterritorial application of IHRL jurisdiction for breaches of *non-refoulement*, the question is important because a narrow interpretation of safety may provide destination states with the justification under the law of the sea for intercepting unflagged vessels and returning people to foreign states.[95] Such an interpretation may thus encourage states to circumvent rather than respect fundamental rights and the principle of *non-refoulement* as bases for cooperation.

6.1 Interpreting the Term 'Place of Safety' in the Context of the Law of the Sea

6.1.1 Ordinary Meaning of 'Safety' in Light of the Context, Object and Purpose

In application of Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), the starting point to interpret the meaning of the 'place of safety' under the SOLAS and SAR conventions is the complementary obligations in Article 98 LOSC with the purpose of protecting '*safety on and over the sea*': the duty of the shipmaster to render assistance to those in distress; and the obligation of the coastal states to cooperate in setting up and coordinating effective search and rescue services. The duty of the shipmaster may be seen as an extension of the *duty of the flag state* under the LOSC Article 94 to establish measures ensuring '*safety*' and '*safety of life*' at sea. The coastal states' duty to cooperate is elaborated on in the SOLAS and SAR conventions, with the coastal state in the relevant SAR region bearing primary responsibility to ensure disembarkation of survivors from the assisting

92 See IMO (n 22) Appendix, para 7.

93 Gaskell (n 84) 335-336.

94 See *Hirsi Jamaa* (n 41); CFR art 19(2); TEU art 3. See also 4.1 above.

95 Guilfoyle (n 62) 119-120; Moreno-Lax (n 9) 5-6.

ship and delivery as soon as possible at a place of safety. Coastal states also have other safety-related responsibilities under the LOSC, for example, in relation to prescriptive and enforcement jurisdiction regarding 'safety of navigation' in connection with innocent passage and the territorial sea.[96] Various provisions of the LOSC refer *inter alia* to 'safety of navigation',[97] 'safety aids',[98] 'safety zones',[99] 'safety of operations'[100] and preventing 'damage to the health and safety of persons'.[101] In the context of pollution of the marine environment, Article 225 refers to avoiding adverse consequences in enforcement measures against foreign vessels, including avoiding bringing a vessel to an 'unsafe port'. An unsafe port or 'place' is arguably one where there is an immediate risk of physical damage, injury or harm to the objects of a maritime operation, such as vessels, crew or passengers.[102] Therefore, the conventions may be interpreted as providing a general rule precluding delivery to a place where it is known or ought to be known that survivors' immediate, physical safety will be put at risk. According to IMO Guidelines, this will depend on various *factors and risks*, including on-scene conditions, the situation on board the assisting ship and the medical needs of survivors.

The IMO Guidelines provide that states must additionally consider refugee *refoulement* in designating a place to deliver survivors, whenever those claiming to be refugees are present. Bearing in mind that the Guidelines are non-binding, as a minimum under the law of the sea, states must demonstrate that the legal effect of the principle of *non-refoulement* was taken into consideration in the decision. This may preclude delivery to places where there is a real risk to asylum seekers or refugees of arbitrary detention, torture or serious abuse in immigration detention, a lack of asylum procedure in the country of disembarkation or chain *refoulement*. This guideline is consistent with the position that the principle of *non-refoulement* under the Refugee Convention is an exception to state sovereignty. However, neither the LOSC, SOLAS or SAR conventions, nor the IMO Guidelines, absolutely prohibit states from disembarking asylum seekers or refugees in countries such as Libya or Sri Lanka. The final resolution of the application of the principle of *non-refoulement* in specific situations is left to states. Protection of rescued refugees against *refoulement* is merely one of a number of considerations under the law of the sea, leaving refugees poorly protected. In fact, the IMO Guidelines make it clear that finding broader solutions for refugees are 'non-SAR considerations' that usually apply after the point of the first disembarkation.

The IMO Guidelines make no mention of considering *non-refoulement* in connection with the return of 'irregular migrants'. Furthermore, in 'Comments on Relevant International Law' the Guidelines refer only to the prohibition on return to a place where a survivor may be at risk of torture; and make no mention of the relevance of other risks not amounting to torture. Inconsistent state practice, as outlined in sections 4 and 5, does not help to fill in the gaps.[103]

96 LOSC arts 21-22.

97 LOSC arts 42, 225 and 262.

98 LOSC art 43.

99 LOSC art 60 and 111.

100 LOSC art 194 and Annex 3, art 17(1)(b)(xii).

101 LOSC art 225.

102 See the definition of 'safety', Oxford English Dictionary.

103 VCLT art 31(3)(b).

6.1.2 The Meaning of 'Safety' in the Normative Context of the LOSC

One method to interpret the meaning of delivery to a 'place of safety' under the SOLAS and SAR conventions, as an application of the LOSC, may be to consider whether relevant general principles of law assist.[104] The principle of flag-state jurisdiction is one such principle. The duty to assist may be seen as an extension of the duty of the assisting ship's flag-state to ensure 'safety of life at sea'. However, this is insufficient to determine the extent to which *non-refoulement* is relevant to disembarkation;[105] and does not overcome the lack of a binding provision in relation to disembarkation.[106]

The norms of the LOSC centre on balancing 'contrasting state-focused interests', including the sovereignty of coastal states and the flag-state's claim to freedom of the seas, with the community interest in the oceans as 'common heritage of mankind'.[107] Thus, core principles underlying the LOSC are concerned with issues in relation to the rights and responsibilities of states over the sea, as well as peaceful use, utilisation and protection of the oceans and marine resources.[108] This supports a conclusion that the LOSC was not intended to be a rights-creating treaty for the protection of individual interests.[109]

Rules about enforcement jurisdiction emphasise that maritime enforcement measures against infringements of immigration law are permissible exercises of sovereignty. Article 19(2)(g) LOSC lists the 'unloading' of any persons in the territorial sea in contravention of the immigration laws of the coastal state as contrary to peace, good order and security. Therefore, in order to prevent non-innocent passage, the LOSC would appear to allow states to refuse entry to port and turn back foreign boats carrying irregular migrants detected in territorial waters or in a relevant contiguous zone.[110] The LOSC provision applies without an express safety clause related to the protection of individuals claiming to be refugees or individuals generally. Alternatively, customary international law provides for an accepted right of entry to port for ships in distress to protect the safety of those on board – though not necessarily to disembark anyone there – that must be weighed against the risk of harm to the port state and local population.[111]

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104 See Siig and Feldtmann (n 12); Case C-15/17 *Bosphorus Queen Shipping Ltd. Corp. v Rajavartiolaitos* (CJEU, 28 February 2018) (Opinion of Advocate General Wahl).

105 Siig and Feldtmann ibid 71-79.

106 Bevilacqua (n 71) 179-180; Trevisanut (n 55) 235.

107 Siig and Feldtmann (n 12) 69-70, with reference to Grotius and the arguments of *mare liberum* and *mare clausum*.

108 ibid 71-79.

109 See also Case C-308/06 *The Queen, on the application of Intertanko and others v Secretary of State for Transport* ECLI:EU:C:2008:312 para 64, concluding in relation to marine pollution enforcement that the LOSC does not confer rights on individuals capable of being relied on against the state; Efthymios Papastavridis, 'Is there a right to be rescued at sea? A skeptical view' (2014) QIL, Zoom-in 4, 17, 20-24, arguing against interpreting the right to be rescued into the LOSC; but see Seline Trevisanut, 'Is there a right to be rescued at sea? A Constructive view' (2014) QIL, Zoom-in 4, 3, 7-8, arguing that a right to be rescued under the LOSC is the corollary of the duty to assist and part of 'community interests'.

110 LOSC arts 25 and 33; Gaskell (n 85) 330 and 335.

111 See Myres S. McDougal and Willian T. Burke, *The Public Order of the Oceans* (Yale University Press, 1962, reprint New Haven Press, 1987) 110; R.R. Churchill and A.V. Lowe, *The Law of the Sea* 3rd ed. (Manchester University Press, 1999) 63; and IMO Guidelines on Places of Refuge for Ships in Need of Assistance Resolution A.949(23), Adopted 5 December 2003, when safety of life is not involved.

6.2 Interpreting 'Safety' Differently in Light of the *Non-Refoulement* Principle?

6.2.1 A Case of Systematic Integration?

A final interpretative step is to consider whether there is a broad international consensus that co-ordination and designation of a 'place of safety' by coastal states involves an absolute duty to protect rescued refugees and irregular migrants, from *refoulement*.[112] Proponents of this approach find support in Article 31(1)(c) VCLT, inviting interpretation that is consistent with relevant rules of international law.[113] Thus, the principle of 'systematic integration', involves the interpretation of international obligations by reference to their wider normative environment going beyond the treaty in question.[114]

As an example of support for systematic integration, paragraph 9.5 of Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe suggests that states should interpret a place of safety as one which not only provides for the immediate needs of those disembarked, but as a place that:

> …in no way jeopardises their fundamental rights, since the notion of 'safety' extends beyond mere protection from physical danger and must take into account the fundamental rights dimension of the proposed place of disembarkation…[115]

The Parliamentary Assembly went on to consider that such a broad notion of safety would include ensuring protection of particularly vulnerable groups in maritime operations and access to fair and effective asylum procedures.[116]

No treaty has been made specifically connecting obligations relating to the protection of refugees and other individuals with the LOSC, SOLAS or SAR conventions. This creates a significant gap in the consensus of integration between the law of the sea and international human rights law regimes.[117]

6.2.2 Limiting Excess of Power Under the LOSC

Treves argues human rights principles and *considerations of humanity* may be relevant in the assessment of LOSC cases, giving examples of cases examining excessive use of power and limitation of

112 See *Bosphorus* (n 104) paras 56 to 57, speaking of a 'broad international consensus' of the need to protect the marine environment from ship-source pollution.

113 VCLT art 31(3)(c).

114 Ratcovich (n 20) 95ff, referring to Marti Koskenniemi, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (UN Doc A/58/10, 5-9 May 2003); Natalie Klein, 'A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants' (2014) ICLQ 63, 807-808.

115 Council of Europe (n 51) para 9.5.

116 ibid paras 9.6, 9.11-9.12 and 9.19; see further Jens Vedsted-Hansen, 'The asylum procedures and the assessment of asylum requests' in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar, 2014)Edward Elgar Publishing, Incorporated 2014.

117 But see Ratcovich (n 20) 105ff and 120.

power.[118] This approach finds support in Article 31(1)(c) VCLT, although it may be contrasted with system-based integration of human rights principles to create additional duties that go beyond the LOSC provisions. The distinction to be made is between addressing *excess of power* compared with interpreting additional rights-bearing duties into the LOSC, SOLAS and SAR conventions.

Limiting excess of power may include preventing national authorities from handing over rescued migrants directly to another state, where it is known that they will be at an immediate risk of torture or other serious harm. This is to be contrasted, for example, with a decision to remove migrants from a crowded vessel and disembark them at a temporary location, even though the living standards are below what would be appropriate for medium or long-term care. In the second scenario, without reliable assurances, the disembarking state may need to maintain a level of control over the situation after disembarkation to avoid future breaches of fundamental human rights or refugee law obligations. Disembarking states may also be able to engage the active cooperation of international organisations such as the UNHCR at the 'place of safety' to assist in making specific arrangements for asylum seekers.[119]

This approach is consistent with the decision in *Khlaifia and Others v. Italy*,[120] where the ECtHR examined the circumstances of the disembarkation in September 2011 of three migrants at facilities on Lampedusa. The conditions were basic and overcrowded, though the migrants enjoyed a degree of free movement and their stay lasted only 3-4 days.[121] In these circumstances, the court found:

> [it] could not criticise, in itself, the decision to concentrate the initial reception of the migrants on Lampedusa. As a result of its geographical situation, that was where most rudimentary vessels would arrive and it was often necessary to carry out rescues at sea around the island in order to protect the life and health of the migrants. It was therefore not unreasonable, at the initial stage, to transfer the survivors from the Mediterranean to the closest reception facility…[122]

While the case was not a *refoulement* situation and Italy remained in control at all relevant times, it demonstrates that *even under the ECHR* the standard for 'safety' may be relaxed in the extreme context of rescue of large numbers of migrants and delivery to a temporary place of safety.

6.2.3 Non-Refoulement as a Co-Existing Obligation

There is some international support for the relevance of human rights obligations to disembarkation of survivors. For example, the Australian High Court decision of *CPCF v Minister for Immigration and Border Protection* demonstrates how the concept of a safe place for disembarkation under the Australian *Maritime Powers Act* 2013 (Cth) can be interpreted consistently with Australia's interna-

118 Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley J. Int'l Law 1, 3-6; see further Klein (n 113), 809; *M/V 'Saiga' (No. 2)* (*Saint Vincent and the Grenadines v Guinea*), 1 July 1999, ITLOS Reports 1999 155.

119 UNHCR, *Guidelines on Temporary Protection or Stay Arrangements* (February 2014); UNHCR, "A Model Framework for Cooperation following Rescue at Sea Operations involving Refugees and Asylum-Seekers", Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea - how best to respond? Summary Conclusions, Djibouti, 8-10 November 2011.

120 *Khlaifia and Others v Italy* App. no. 16483/12 (ECHR 15 December 2016).

121 ibid para 190-193.

122 ibid para 181.

tional obligations.[123] In the context of the rescue, on board detention and transfer of 157 Sri Lankan asylum seekers, who had fled a refugee camp in India, French CJ of the Australian High Court stated that the content of the phrase 'safe for the person to be in that place' may involve a risk assessment on the part of those directing and advising maritime officers. In obiter, French CJ found that:

> A place which presents a substantial risk that the person, if taken there, will be exposed to persecution or torture would be unlikely to meet the criterion "that it is safe for the person to be in that place". The constraint imposed by s 74 embraces risks of the kind to which the non-refoulement obligations under the Refugees Convention and the Convention against Torture are directed.[124]

If such risks exist, French CJ found they may amount to a 'mandatory consideration' in the exercise of maritime power.[125] Gageler J also stated:

> A person is not safe in a place if the person is exposed there to a real risk of harm for any reason, including but not limited to a reason which would give that harm the character of persecution within the meaning of the Refugees Convention.[126]

The majority approach of the Australian High Court appears to be that maritime officers need to *consider* the risks to physical safety of survivors in the place of disembarkation. They may otherwise need to rely on the knowledge of executive and other authorities in consideration of the broader or procedural aspects of safety that are encompassed in the principle of *non-refoulement* under international refugee and human rights laws.[127] A number of the judgments referred to the principle of statutory interpretation in dualist systems that, unless otherwise stated, the general words of a statute should be interpreted in conformity with international obligations. However, it was stated that this principle is not one of legislative constraint; nor constraint of the executive in the exigencies of a situation.[128]

The Australian case demonstrates that even without systematic integration of *non-refoulement* obligations into the meaning of the 'place of safety' under the LOSC, SOLAS and SAR conventions, disembarking states conducting refugee and irregular migrant returns may be liable for violations of coexisting international obligations. The LOSC recognizes the application of co-existing, non-conflicting rules.[129] The *non-refoulement* obligations creating legal rights are relevant under overlapping frameworks such as the 1951 Refugee Convention, the ICCPR and the CAT and are confirmed by

123 *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1.

124 ibid para 12 (French CJ).

125 ibid para 12 (French CJ).

126 ibid para 370 (Gageler J).

127 ibid paras 107, 109-110 and 113 (Hayne and Bell JJ); 294, 296-298 (Keifel J); 370-372 and 383-391 (Gageler J); 426-427 (Keane J).

128 ibid paras 383-391 (Gageler J); 219 (Crennan J). See also Peter Billings, 'Operation Sovereign Borders and interdiction at sea: CPCF v Minister for Immigration and Border Protection' (2016) 23 *AJ Admin L* 76.

129 LOSC art 293.

customary international law, at least insofar as they relate to torture and refugee *refoulement*.[130] These obligations are presumed to apply, subject to the question of jurisdiction under the specific treaty. Therefore, in addition to implementing the duties involved in rescue and disembarkation under the SOLAS and SAR provisions and the accompanying guidelines, refugee and irregular migrant returns by the state may trigger jurisdiction under IHRL and refugee law treaties, prohibiting disembarkation in departure or origin states.[131] Refugees and irregular migrants are distinguishable from other survivors by the vulnerability that results from lack of state protection. This includes a lack of protection in and by the country of nationality, including diplomatic assistance abroad, as well as the lack of proper asylum procedures and protective systems in the transit states. This is particularly grave in the case of refugees, where the lack of state protection amounts to persecution.

7. Conclusion

A normative approach to interpreting the relevant LOSC, SOLAS and SAR provisions about disembarkation and delivery to a 'place of safety', leads to a conclusion that ensuring survivors' safety involves more than just removal from danger and the provision of emergency care. Under the SOLAS and SAR conventions, a place of safety has been conceived as one where survivors will be provided with temporary care, including provision of necessities, such as water, food, shelter, sanitation, medical, psychological, special needs and family tracing assistance that goes beyond the crowded deck. At this place, transport may be arranged to transfer survivors to the next or final destinations, where they can receive medium or longer term levels of care. Although not currently reflected as a mandatory consideration in the IMO guidelines, as a necessary minimum safeguard, maritime officers, state rescue authorities and their advisers need to consider whether there will be any real risk of serious harm to the survivors immediately on disembarkation at a place of safety, based on reasonably available information. This may include a risk of torture or physical or sexual abuse at the hands of the authorities.

According to SOLAS and SAR conventions and IMO guidelines, maritime officers involved in rescue are not obliged to consider broader aspects of the principle of *non-refoulement*. Moreover, SAR region states coordinating rescue are urged to disembark survivors on home territory if no other timely solution is available. However, when exercising a duty to cooperate and weighing up the various 'safety' considerations, state RCCs and other national authorities must consider the need to avoid disembarking asylum seekers or refugees claiming a well-founded fear of persecution at places of origin or departure, contrary to the principle of *non-refoulement* under the 1951 Refugee Convention and customary international law. In the context of rescue in hostile maritime environments, this does not equate to a prohibition on disembarking rescued refugees and irregular migrants at origin or departure ports. Instead, under the law of the sea, assessing the conditions at a proposed place of

130 See section 3 above.

131 Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm' (2018) JCMS 56/1 119, 121-122, 126.

safety is one of a number of factors to be taken into account, in particular by the coastal state in the SAR region where survivors are assisted. As appears from the law of the sea treaty provisions and guidelines, the final decision about safe disembarkation is for states to determine, in accordance with international obligations. This conclusion reflects the intended outer-limits of the LOSC; and, in the sphere of maritime rescue, acknowledges the LOSC as a framework convention, complemented by other relevant international agreements.

Respect for *non-refoulement* in operations on the high seas relies on states' acceptance of the extra-territorial application of the principle under co-existing international human rights law obligations. A consideration of EU-Libya and Australia-Sri Lanka cooperation demonstrates the significant influence of the particular human rights framework on state practice in rescue operations; and the need for greater legal certainty. At present, closer harmonisation between the international regimes of the law of the sea and human rights law is unrealistic.[132] Therefore, to avoid fragmentation of international obligations, the perspectives presented here highlight the need for *bona fides* implementation of the duty to render assistance, by planning and carrying out maritime operations in a manner that is consistent with other international obligations.[133] Upholding international obligations at sea is the logical and consistent extension of upholding the same obligations on home territory.[134]

132 Guilfoyle (n 62) 124-125; and Klein (n 115), 811-813.

133 VCLT arts 26-27; Guilfoyle 124; Moreno-Lax (n 9) 9; *Bosphorus Queen Shipping Ltd Corp. v Rajavartiolaitos* ECLI:EU:C:2018:557, paras 45 and 67.

134 See TEU art 21.