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COASTAL STATE OBLIGATIONS IN THE CONTEXT OF REFUGEES AT SEA UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS¹

Stefan Kirchner,² Katarzyna Geler-Noch³ and Vanessa Frese⁴

ABSTRACT

As early as 2004, the International Maritime Organization (IMO) created “Guidelines on the Treatment of Persons Rescued at Sea,” which followed IMO Assembly resolution A. 920(22) on the review of safety measures and procedures for the treatment of persons rescued at sea. These Guidelines are supplemented by an appendix entitled “Some comments on relevant international law” (“Comments”). It comes as no surprise that the IMO’s work in this area refers to other maritime documents such as the Law of the Sea Convention (UNCLOS), the International Convention for the Safety of Life at Sea (SOLAS), and the International Convention on Maritime Search and Rescue (SAR). Reference in the Comments to the 1951 Refugee Convention is made only briefly. In this context, the differing obligations of the flag state, the coastal state, and the ship’s master can lead to situations in which the protection awarded to refugees is less than complete, as happened in the 2001 case of the MV Tampa. The IMO Guidelines seek to prevent such a

1. The research for this article is partially based on research undertaken for the course “Human Rights in the Maritime Sector,” taught by Stefan Kirchner at the University of Lapland in the Winter Term 2013-2014. All opinions expressed in this article are only attributable to the authors.

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scenario by requiring flag and coastal states to “have effective arrangements in place for timely assistance to shipmasters in relieving them of persons recovered by ships at sea.” However, these rules are often unenforceable by individual claimants - unlike the European Convention on Human Rights (ECHR). This research project examines the question of whether such a positive obligation on the part of the coastal state also exists under the ECHR. It is the overall aim of this research project to contribute to a better understanding of the maritime application of the ECHR and of human rights obligations of state actors in the maritime sector.

I. INTRODUCTION

Human rights abuses at sea are an often overlooked problem. Essentially, these abuses are often “out of sight, out of mind,” and maritime-related human rights issues therefore receive little attention. This is striking, when taking into account the importance of the sea to the economy, as well as the longstanding naval traditions of many European states. This is particularly true with regard to the human rights of seafarers⁵ and as applied to the increasing influx of refugees that try to reach Europe by sea, which has become impossible to overlook in recent years. Lately, the sea has become the primary way for refugees and illegal immigrants to enter the European Union.⁶ Time and again, attempts to cross the seas have ended in disaster. Leaving the coast of Northern Africa, refugees and illegal migrants primarily attempt to reach either the European mainland, (e.g. Spain) or towards islands such as Malta, the Canary Islands, or Lampedusa, a small Italian island close to Northern Africa which has become famous for the large number of refugees who have taken refuge there and for the many refugees who have died off its shores.⁷ The sea is often treacherous and the boats that refugees use for the crossing are often far from seaworthy – neither built nor equipped to operate on the sea, far from shore. Nonetheless, nature and weather are not the only dangers for refugees. It is not unheard of for

5. For more on the human rights of seafarers (prior to the Maritime Labor Convention of 2006), see ALASTAIR D. COUPER, *VOYAGES OF ABUSE: SEAFARERS, HUMAN RIGHTS AND INTERNATIONAL SHIPPING* 139 (1999).

6. Silja Klepp, *A Contested Asylum System: The European Union Between Refugee Protection and Border Control in the Mediterranean Sea*, 12 *EUR. J. MIGRATION & L.* 1, 2 (2010).

7. On the Lampedusa tragedy of 2013, see Livia Borghese et al., *Italy Mourns More than 100 Migrants Killed in Lampedusa Shipwreck*, CNN (Oct. 4, 2013), <http://edition.cnn.com/2013/10/04/world/europe/italy-migrant-boat-sinks/>.

smugglers to abandon refugees at sea, on boats that purposely lack the necessary amount of fuel to return to shore.⁸ In this way, the smugglers avoid being arrested for human smuggling by the coastal state authorities. Oftentimes, the refugees pay for this ploy with their lives.⁹ While many efforts have been made by the coast guards in southern Europe to save these refugees, thousands have lost their lives in the last few years.¹⁰

II. REFUGEES AT SEA

This problem is by no means limited to Europe. For thousands of years people have sought a better future beyond the sea. However, traveling by sea is inherently dangerous. While the contemporary world takes the transport of goods by sea for granted, and despite the fact that the globalized economy would not be possible without the work of seafarers, the public perception of maritime travel is overly influenced by romanticized ideas of the sea. When disaster strikes there are often calls for action, but the understanding held by policy makers is often insufficient to address the underlying problems. For example, the *Costa Concordia*¹¹ disaster elicited many reactions among lawmakers, but it was by no means the worst disaster of its kind that had occurred within the course of just a few weeks.¹² Generally, political perceptions of maritime issues are limited, and politicians therefore lack the practical expertise that is required to properly regulate maritime issues. This is a problem that has been taken into account by the International Maritime Organization (IMO). In some instances, however, state level public policy can effectively let those they seek to regulate and protect fall through the cracks of an incomplete legal system that by its very nature will always remain a work in progress. This is particularly the case when

8. RAY WALSER ET AL., THE HERITAGE FOUND., THE HUMAN TRAGEDY OF ILLEGAL IMMIGRATION: GREATER EFFORTS NEEDED TO COMBAT SMUGGLING AND VIOLENCE (2011), available at <http://www.heritage.org/research/reports/2011/06/the-human-tragedy-of-illegal-immigration-greater-efforts-needed-to-combat-smuggling-and-violence>.

9. *Id.*

10. EUR. PARL. ASSEMBLY, *The "Left-to-Die Boat": Actions and Reactions*, 21st Sess., Doc. No. AA14CR21ADD1 (2014), available at <http://assembly.coe.int/Main.asp?link=/Documents/Records/2014/E/1406241000ADDE.htm>.

11. See Eur. Union Civil Prot. Team, Observation Mission, Giglio Island, 26-29 Jan 2012, *Costa Concordia*, available at https://www.msb.se/Upload/Insats_och_beredskap/Brand_raddning/RITS/Concordia_Mission_final_report.pdf.

12. *List of Shipwrecks in 2012*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_shipwrecks_in_2012 (last visited Apr. 15, 2015).

it comes to saving lives at sea. While maritime travel and work at sea are, and always have been, inherently dangerous, the development and enforcement of new norms does not allow states to remain idle.

III. NON-REFOULEMENT: THE DANGER OF BEING *JUS COGENS*

The principle of *non-refoulement*, which at first glance seems to be a state obligation under Article 33 of the Convention relating to the Status of Refugees,¹³ is interpreted by the Court as a comprehensive, individual right, stemming from Article 3 of the European Convention of Human Rights¹⁴ (ECHR) in conjunction with Article 13. This individual right leads to states' duties to both provide the necessary protection on the high seas to persons in distress and to also provide refugees the opportunity to apply for asylum or international protection under the Geneva Convention.¹⁵ Article 4(1) of the Dublin Convention requires that refugees stay in the country in which they first seek refuge.¹⁶ Against this background, some states have no interest in having refugees come under their jurisdiction in the first place because of the principle of *non-refoulement*, the obligation to not send refugees back to areas¹⁷ where there is a real risk that they will be persecuted.¹⁸ This principle is included in Article 33(1) of the 1951 Refugee Convention,¹⁹ which has been ratified by 145 states, including almost all European states.²⁰ It is even argued that the principle of *non-refoulement* has achieved the status of *jus cogens*;²¹ that is, a norm of international law from which no

13. U.N., Convention Relating to the Status of Refugees art. 33, 28 July 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention], available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>.

14. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Nov. 4, 1950.

15. Albrecht Weber, *Menschenrechtlicher Schutz von Bootsflüchtlingen. Bedeutung des Straßburger Hirsi-Jamaa-Urteils für den Flüchtlingsschutz*, ZAR 8/2012, at 265, 269, available at http://www.zar.nomos.de/fileadmin/zar/doc/Aufsatz_ZAR_12_08.pdf.

16. Council Regulation 343/2003, 2003 O.J. 50/1–5/10 (EC).

17. See Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13(4) INT'L J. REFUGEE L., 533, 533 (2001), available at <http://ijrl.oxfordjournals.org/content/13/4/533.abstract>.

18. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, 301(2005).

19. Refugee Convention, *supra* note 13, at art. 33(1).

20. U.N. High Commissioner for Refugees, *State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol* (July 25, 1951), available at <http://www.unhcr.org/3b73b0d63.html>.

21. Allain, *supra* note 17, at 533.

deviation is permitted.²² The widespread acceptance of the principle of *non-refoulement* has caused some states to devise ways to avoid accepting refugees into their jurisdiction altogether.²³ Refugees are often not welcome and in many countries face restrictions with regard to where they can reside,²⁴ and despite having the willingness to work and the requisite skills (after all, wanting to work in a developed country in order to provide for a family back home is one of the key incentives for many refugees to risk their lives at sea), many countries deny work permits to refugees. Instead of being perceived as providing a benefit, refugees are often seen as an unwanted fiscal burden to the public.²⁵

Because of the principle of *non-refoulement*, it is no longer permissible for states to send refugees back to countries in which they are at risk. This incentivizes states to designate unsafe countries as being sufficiently safe to return to; however, this designation does not release states from accepting refugees from countries that are actually too dangerous to return to. It is well-established that the principle of *non-refoulement* applies where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 of the ECHR in the receiving country.²⁶ Article 3 prohibits torture and inhumane and degrading treatment. Thus, it provides an effective means of protection against the deportation of refugees to states where there is risk that the

22. See *Jus Cogens*, CORNELL UNIV. LAW SCH., http://www.law.cornell.edu/wex/jus_cogens (last visited Apr. 15, 2015).

23. Australia exempted certain territories from its migration zone with the *Migration Amendment (Excision from Migration Zone) Act 2001* and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*. As a result Australia was not obliged to grant a person a visa for their stay in Australia even if they were a recognized UNHCR refugee.

24. See Tony Paterson, *Swiss Introduce Apartheid-like Restrictions: Local Authorities Ban Asylum Seekers from Public Places*, INDEPENDENT (Aug. 7, 2013) <http://www.independent.co.uk/news/world/europe/swiss-introduce-apartheidlike-restrictions-local-authorities-ban-asylum-seekers-from-public-places-8750765.html>.

25. See *Streit um Kosten der Asylbewerber-Unterkunft*, MERKUR-ONLINE.DE (Nov. 24, 2009), <http://www.merkur-online.de/aktuelles/politik/streit-kosten-asylbewerber-unterbringung-meta-538808.html> (Ger.); *Flüchtlingswesen kostet Steuerzahler 134 Millionen*, in: KRONENZEITUNG, July 30, 2013, available at http://www.krone.at/Oesterreich/Fluechtlingswesen_kostet_Steuerzahler_134_Millionen-Beachtliche_Summe-Story-370589 (Austria).

26. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), ¶ 88 (1989); *Chahal v. United Kingdom*, App. No. 22414/93, Eur. Ct. H.R. ¶ 74, (Nov. 15, 1996), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004#{"itemid":\["001-58004"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004#{).

individual will be subjected to torture, or to inhuman or degrading treatment or punishment.

Exposing an applicant to degrading detention and living conditions also invokes the ban on *refoulement*. When assessing conditions of detention, the European Court of Human Rights takes into account their cumulative effects, the applicant's specific allegations and the duration of detention.²⁷ In the case of Article 3 of the ECHR, the Court does not focus on whether the risk is one of torture or ill treatment, as both are prohibited under the Convention to the same extent. Article 3 also prohibits indirect removal through an intermediary country, of an alien, to a country where he or she runs such a risk of torture or inhuman or degrading treatment.²⁸ Even removal to a contracting party to the Convention does not discharge the sending state from the responsibility of ensuring deportation will not result in violation of the refugee's fundamental rights under the Convention. The sending state cannot justify its actions on the Dublin Regulation²⁹ by simply stating that a Member State which is responsible for processing any asylum application is the state through which the asylum-seeker entered the territory of the European Union. Therefore, some governments have sought ways in which to limit their obligations proactively. The prohibition on *refoulement* provides an incentive for states to prevent refugees from initially coming within their jurisdiction. In principle, there are two ways in which states attempt to do so. The first way is to declare that, for immigration purposes, some regions of the national territory do not fall under the jurisdiction of that nation's immigration authorities. In other words, arriving in specific areas is not considered equivalent to actually immigrating, and a request for asylum made in such an area is considered invalid. While some countries do this with regard to specially designated areas in international airports,³⁰ Australia has actually designated several islands off its coast to be outside of

27. *Garabayev v. Russia*, App. No. 38411/02, Eur. Ct. H.R. ¶ 75 (June 7, 2007), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80960#{"itemid":\["001-80960"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80960#{).

28. *TI v. United Kingdom*, App. No. 43844/98, Eur. Ct. H.R. ¶ B6 (Mar. 7, 2000), [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-5105#{"itemid":\["001-5105"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-5105#{).

29. Council Regulation, *supra* note 16.

30. *See What Type of Visa do I Need to Transit Through an Airport in France?*, FRANCE DIPLOMATIE, <http://www.diplomatie.gouv.fr/en/coming-to-france/getting-a-visa/article/what-type-of-visa-do-i-need-to> (last visited Apr. 12, 2015) (explaining that in order to leave the international zone at the airport, a specific visa is necessary).

Australia for immigration purposes.³¹ In addition, Australia has been transferring refugees to detention centers outside the country, such as Papua-New Guinea.³² In contrast, the member states of the European Union cooperate in their efforts to secure the EU's external borders, including the maritime borders, in the framework of FRONTEX.³³ This initial effort to secure the border has become a *de facto* permanent rescue operation, which in 2013 was labeled by the Italian navy "Operation Mare Nostrum."³⁴

IV. RESCUE AT SEA

A. Duties

The duty to rescue is deeply ingrained into the law of the sea. States are not the only actors who have a duty to rescue. Rather, there is a long-standing expectation and duty of mutual help between ships during emergencies at sea. Therefore, the international law of the sea also imposes an obligation on the captain of the ship.³⁵ Although diverting course to perform a rescue will usually result in a substantial financial loss for the owner and operator of the ship from additional wages paid, fuel costs incurred, and time lost, there is a general understanding in the maritime sector that costs arising as a consequence of fulfilling this age-old obligation are simply part of doing business in this field. The problem of owners or operators asserting opposition to their master of the ship rescuing strangers has been seen as early as 1880 in *Scaramanga*

31. See Melissa Phillips, *Out of Sight, Out of Mind: Excising Australia from the Migration Zone*, CONVERSATION (May 17, 2013), <http://theconversation.com/out-of-sight-out-of-mind-excising-australia-from-the-migration-zone-14387>.

32. JANET PHILLIPS, PARLIAMENT OF AUSTRALIA, THE 'PACIFIC SOLUTION' REVISITED: A STATISTICAL GUIDE TO THE ASYLUM SEEKER CASELOAD ON NAURU AND MANUS ISLAND, (2012), *available at* http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution#_Toc334509636.

33. *Missions and Tasks*, FRONTEX, <http://frontex.europa.eu/about-frontex/mission-and-tasks/> (last visited Apr. 12, 2015) (stating that "Frontex promotes, coordinates and develops European border management in line with the EU fundamental rights charter applying the concept of Integrated Border Management.").

34. *Operation Mare Nostrum*, MINISTRY OF DEFENSE: MARINA MILITARE, <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx> (last visited Oct. 2, 2014).

35. The terms "captain" and "master" are used interchangeably in this article since it is customary in many parts of the world to refer to a ship's commanding officer as the "captain" even though he might not be a "captain" within the meaning of military law.

v. Stamp.³⁶ There, the court held that “[t]o all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences, which may result to a ship or cargo from the rendering of the needed aid.”³⁷ It follows from Article 98 (1) of the United Nations Law of the Sea Convention (UNCLOS)³⁸ (as well as from Chapter V, Regulations 7, 10(a) and 33 of the International Convention for the Safety of Life at Sea (SOLAS))³⁹ that flag states must enact domestic legislation to force the master of a ship to provide assistance in such emergencies. States are, for example, required under Chapter V Regulation 7 of SOLAS to maintain search-and-rescue equipment.⁴⁰ While there are isolated instances in which companies that operate ships have instructed captains *not* to provide the help owed under the international law of the sea, it can be assumed that captains will usually not falter in their obligation, as they often feel as bound by notions of honor and maritime tradition as by law.

In this context, it is important to note that different obligations exist on the part of the captain of the ship, the flag state, and the coastal state. These obligations both predate UNCLOS and are codified in UNCLOS,⁴¹ but they are also specified in more detail in SOLAS⁴² and the International Convention on Maritime Search and Rescue (SAR).⁴³ The master of the ship has an obligation to provide assistance to vessels in need.⁴⁴ States are obliged under Article 98 (1) of UNCLOS to require through national law that masters of ships flying their flags to “(a) . . . render assistance to any person found at sea in danger of being lost; (b) . . . proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; [and] (c) after a collision, . . . render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of

36. *Scaramanga v. Stamp*, 5 C.P.D. 295 (1880).

37. *Id.* at 304.

38. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

39. International Convention for the Safety of Life At Sea, Nov. 1, 1974, 1184 U.N.T.S. 3 [hereinafter SOLAS].

40. *Id.*

41. UNCLOS, *supra* note 38.

42. SOLAS, *supra* note 39.

43. International Convention on Maritime Search and Rescue, Apr. 27, 1979, 1405 U.N.T.S. 119 [hereinafter SAR].

44. UNCLOS, *supra* note 38, at art. 98(1).

registry and the nearest port at which it will call.”⁴⁵ Article 98 (1) of UNCLOS therefore describes both the duties of the master of the ship *and* of the flag state.

Article 98 (2) of UNCLOS, on the other hand, only describes the measures that coastal states “shall” take, such as the establishment of a search-and-rescue system.⁴⁶ Article 98 (2) of UNCLOS can be interpreted to impose a duty on states to rescue, rather than merely a duty to provide assistance.⁴⁷ The master of the ship is required to take action but does not owe a specific result. The coastal states, on the other hand, owe a specific result in the form of the establishment of a search-and-rescue system. Unless the coastal state has also ratified a search-and-rescue system, the obligations under Article 98 (2) of UNCLOS remain weak due to the use of the word “shall.” It is SAR which solidifies the coastal state’s legal obligations in this regard, just like it is SOLAS which solidifies the legal obligations regarding the safety of ships with regard to the flag state.

B. Falling Through a Gap in the Law

Discrepancies between these obligations can lead to gaps in the legal protection afforded to refugees. The provision of assistance owed under Article 98 (1) of UNCLOS might require bringing survivors of a shipwreck into the nearest port. The coastal state in question, however, would, if one were to look only at the wording of Article 98 (2) of UNCLOS, not necessarily be in violation of its obligations under this article if it were to deny the rescued persons entry into its territory. However, coastal states have a duty to provide assistance without regard to whether the person in need has entered the state’s coastal waters with or without permission.⁴⁸ In other words, the duty to provide assistance to persons who suffer an emergency at sea also includes persons who plan to migrate to the coastal state illegally.

SAR defines the scope of the duty to rescue as “an operation to retrieve persons in distress, provide for their initial medical and other needs and deliver them to a place of safety.”⁴⁹ Since there is no legal

45. *Id.*

46. UNCLOS, *supra* note 38, at art. 98(2); *see also* SAR, *supra* note 43, at Annex ch. 1.1.

47. *See* Jessica E. Tauman, *Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis*, 11 PAC. RIM L. & POL’Y J. 461, 473 (2002).

48. SAR, *supra* note 43, at Annex ch. 2.1.10.

49. *Id.* at Annex ch. 1.3.2.

definition for the term “place of safety,”⁵⁰ there is no specific requirement under international law which would require coastal states to allow rescued persons to disembark.⁵¹ After all, the nearest or most accessible “place of safety” might not even be within the territory of the coastal state. As an example, imagine a ship is off the neighboring and adjacent coasts of Sweden and Finland. Due to bad weather this ship suffers an emergency in Sweden’s territorial sea and rescue zone in the Baltic Sea, and Swedish vessels are able to come to the rescue and save those on board. In the meantime, the weather conditions have changed in a way that return to Swedish port is no longer safely possible and the closest port of refuge is located in Finland. In this hypothetical, the definition of the “place of safety” is therefore dependent on external circumstances. Alternatively, a ship’s draft might be such that a port, which would be a sufficient place of safety for a smaller vessel, is completely inaccessible. At most, international law should provide for very general descriptions of the characteristics expected from a place of safety. This necessary uncertainty, though, makes it harder to impose specific obligations upon states. However, this is not necessarily the purpose of UNCLOS or SAR. Their purpose is to make sure that human lives are saved as effectively as possible. Imposing further requirements upon coastal states in the context of the law of the sea could run counter to this purpose. While the law of the sea contains a human rights dimension,⁵² it is not intended to facilitate access to the coastal state’s land territory beyond the customary implied permission given to trading vessels to enter a port for trade. Immigration is no longer a similarly protected purpose for entry into a foreign port.

Until a few years ago, this problem was only hypothetical as the moral force of the customs of seafaring was sufficient to handle such cases. Stricter immigration laws in wealthy countries, aimed at keeping out those who look for better economic opportunities in foreign nations, have changed the picture dramatically.

50. Eur. Parl. Assembly, Resolution 1821, ¶¶ 5.2, 9.4. (June 21, 2011), *available at* <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1821.htm>.

51. U.N. High Commissioner for Refugees, Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea (Final version, including Annexes), ¶ 7 (Mar. 18, 2002), *available at* <http://www.unhcr.org/3e5f35e94.html>.

52. See Alex G. Oude Elferink, *The Arctic Sunrise Incident: A Multi-Faceted Law of the Sea Case with a Human Rights Dimension*, 29 INT’L J. MARINE & COASTAL L. 244 (2014).

Of particular note is the experience of the crew of the ship *MV Tampa*, a roll-on/roll-off container cargo ship⁵³ flying the flag of Norway.⁵⁴ On August 26, 2001, the *Tampa* responded to a maritime emergency involving refugees from Afghanistan off the coast of Australia.⁵⁵ About 450 refugees were rescued and taken on board the *Tampa*.⁵⁶ Not being equipped to transport or care for such a large number of people, the ship headed for Australia in order to bring the refugees to land.⁵⁷ Upon arrival to Australia, the captain of *Tampa* was arrested for human smuggling because the refugees did not possess valid immigration documents.⁵⁸

C. IMO's Arrested for Human Smuggling

The debate on the substantive nature of the right to rescue came to global attention in the *Tampa* affair between Norway and Australia.⁵⁹ *Notes verbales* between Norway and Australia clearly distinguished between the obligation to assist (which was what the *Tampa* did) and the obligation to rescue.⁶⁰ Australia considered the rescue to be finished the moment the refugees had been on board the *Tampa*.⁶¹ During negotiations, differing interpretations of the term “rescue” prevented a speedy solution. The IMO Secretary General intervened and ordered a review of the relevant IMO instruments due to the potentially serious consequences of the divergent views, and it was concluded that new interpretation of the SOLAS and the SAR Conventions was needed.⁶² The purpose of this review was to ensure that three basic humanitarian principles, which are part of the law of the sea, were met, namely: (i) persons in distress at sea will be provided assistance regardless of nationality, status, or the circumstances in which they are found, (ii)

53. *Tampa*, SHIPPING DATABASE, <http://www.shippingdatabase.com/ship.php?shipid=166504> (last visited Apr. 15, 2015).

54. *Id.*

55. Julian Burnside, *Refugees: The Tampa Case*, FUTURE LEADERS, <http://www.julianburnside.com.au/asylum-seekers/australias-treatment-of-refugees-the-tampa-case/> (last visited May, 12, 2015).

56. *Id.*

57. *Id.*

58. *Id.*

59. See Frederick J. Kenny, Jr. & Vasilios Tasikas, *The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea*, 12 PAC. RIM L. & POL'Y J. 143 (2003).

60. *Id.* at 159.

61. *Id.*

62. *Id.* at 144, 165; I.M.O. Res. A.920(22), E/A22/Res. 920 (Nov. 29, 2001).

vessels that recover persons in distress at sea will be allowed to deliver the rescued to a place of safety, and (iii) rescued persons, regardless of their nationality, status, or the circumstances in which they are found, including undocumented migrants, asylum seekers, refugees, and stowaways, will be treated on board in the manner prescribed by the relevant IMO instruments and in accordance with international law and human rights law as well as longstanding humanitarian maritime traditions.⁶³

In reaction, the IMO adopted guidelines which aimed to ensure legal certainty for seafarers who fulfill their obligations with regard to those who are in need of assistance at sea and to prevent those who have been rescued, whether refugees or others, from falling into a kind of legal limbo.⁶⁴ Refugees are most at risk because they cannot be sent back to their respective countries of origin. The IMO's guidelines are directed to the states which have ratified either SOLAS or SAR.⁶⁵ While not binding as such, the IMO's guidelines direct states in the application of SOLAS and SAR, and in general, IMO guidelines enjoy a high rate of compliance, at least among the more developed states. But even this distinction developing and developed nations has been eroding, for the better. While there are still some states which offer flags of convenience, enabling ship owners to operate ships at very low environmental and employment standards, the situation has been improved significantly in recent years as the shipping industry has undergone a process of professionalization and globalization. In particular, the latter is of importance for understanding the way in which the shipping industry works.⁶⁶ At the same time, the IMO benefits from the fact that many who are involved in its work, including those involved in the legislative⁶⁷ process, have had practical experience in the field. This helps to ensure a relatively high rate of compliance with IMO guidelines.⁶⁸

Changes to the IMO regime were finally contained in Resolution A.920(22) that entered into force on July 1, 2006.⁶⁹ This resolution

63. *Id.*

64. *Id.*

65. I.M.O. Res. A868(20), 20th Sess. (Nov. 27, 1997).

66. Shipping is by its very nature an international business that inherently spreads beyond national borders, and it is an industry that remains first and foremost focused on profit generation.

67. In the widest sense of the term.

68. Compliance with IMO guidelines is predominantly dependent on the practicability of such rules. It is therefore imperative that they are created with the input of people actually working in this sector.

69. I.M.O. Res., *supra* note 59.

primarily contains clarifications on how states and seafarers will cooperate to assist any persons rescued at sea regardless of status.⁷⁰

The Guidelines on the Treatment of Persons Rescued at Sea adopted by the IMO specify that the obligation of the master of a ship to render assistance should be complemented by the corresponding obligation of states to rescue.⁷¹ After the *Tampa*, however, the shipmaster was granted a certain degree of discretion when assessing the safety of life at sea: “[t]he owner, the charterer, the company operating the ship . . . or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master’s professional judgment, is necessary for safety of life at sea.”⁷² Overall, the new and amended provisions make it clear that states are to resolve any international conflicts arising out of a SAR mission and that these are not the responsibility of master and crew.⁷³ Governments are responsible for coordinating their actions and cooperating so that rescued persons are disembarked from the assisting ship and delivered to a place of safety.⁷⁴ Economic pressure on the captain is to be neutralized, because the master’s sole duty in such circumstances is to render assistance to persons in danger at sea.⁷⁵ The enactment of Resolution A.920(22) and the 2006 changes to the IMO constitute a significant milestone in applying basic humanitarian standards at sea.

Under point 3.1 of the IMO Guidelines on the Treatment of Persons Rescued at Sea, flag states and coastal states are required to “have effective arrangements in place for timely assistance to shipmasters in relieving them of persons recovered by ships at sea.”⁷⁶ The idea is that the master of a ship should not have to worry about his or her vessel’s capacity to feed and shelter a large number of rescued people for a longer period of time. Ship owners should not have to be concerned that their vessel will be out of business for an extended period, and hence running a loss, if the captain rescues persons in distress. There remain some differences in interpretation, but these ambiguities can be resolved if coastal states are willing to accept a greater balance between their security interests and the need to assist ships’ masters that have fulfilled

70. *Id.*

71. *Id.*

72. I.M.O. Res. MSC.153, 78th Sess., at art. 34.1 (May 20, 2004).

73. *Id.*

74. *Id.*

75. *Id.*

76. I.M.O. Res. MSC.167, 78th Sess., at § 3.1 (May 20, 2004), [http://www.imo.org/en/OurWork/Facilitation/IllegalMigrants/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/IllegalMigrants/Documents/MSC.167(78).pdf) (last visited June 18, 2015).

their humanitarian obligation to assist and rescue persons in distress at sea. This should lead to a decrease in the pressure felt by the master of the ship. Essentially, the IMO's aim is to make it as easy as possible for the master to decide in favor of a rescue operation and to comply with his or her obligation under the international law of the sea.⁷⁷ The larger issue of refugees at sea, however, remains unresolved.

The IMO framework is by far the best implementation of the duty to assist and has been improved significantly since the *Tampa* affair. The IMO's reaction to *Tampa* shows that a coordinated effort involving several UN agencies can be effective. It highlighted the need for a more proactive, multi-dimensional approach underpinned by a human rights framework and the important role that sanctions can play in preventing regulatory breaches.

V. EUROPEAN HUMAN RIGHTS LAW

Although the aforementioned international legal documents provide refugees some legal protections, the IMO Guidelines do not provide a private right of action for individual refugees against states—that is, the rescuing ship's flag state and the coastal state to which the rescued refugee is brought—should they fail to provide the refugee with the protection envisaged by the IMO. This raises the question, at least with regard to European states, of whether the ECHR⁷⁸ provides legal recourse for refugees.⁷⁹ After all, the ECHR is binding upon the states that have ratified it, it can be claimed in court, and if necessary, the persons concerned can bring their case to the European Court of Human Rights in Strasbourg.⁸⁰

A. Asylum and the ECHR

Over the years, there have been a large number of asylum cases before the European Court of Human Rights. Of particular interest to asylum seekers is the fact that Article 6 (1) of the ECHR is often understood as not applying to asylum proceedings.⁸¹ Article 1 (1) of

77. *See id.* at § 1.2.

78. Council of Europe, *supra* note 14.

79. *See* Sophie Cacciaguidi-Fahy, *The Law of the Sea and Human Rights*, 9 PANOPTICA 1 (2007).

80. *See* Council of Europe, *supra* note 14.

81. *Maaouia v. France*, App. No. 39652/98, Eur. Ct. H.R. ¶ 41 (2000), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58847#{"itemid":\["001-58847"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58847#{).

Protocol 7 to the ECHR, which has not been ratified by all state parties to the ECHR, is not applicable in this regard because it only refers to persons who are “lawful[] resident[s] in the territory of a State,”⁸² thus excluding refugees from non-ECHR states. With regard to refugees from state parties to the ECHR, Article 1 (1) of Protocol 7 is an obligation of the state where the foreign citizen already resides and is therefore of limited value in asylum cases.

Judge Pinto de Albuquerque, in the style of Justice Blackmun’s dissenting opinion on the United State Supreme Court’s *Sale Case*,⁸³ phrases this issue as follows:

[r]efugees attempting to escape Africa do not claim a right of admission to Europe. They demand only that Europe, the cradle of human rights idealism and the birthplace of the rule of law, cease closing its doors to people in despair who have fled from arbitrariness and brutality. That is a very modest plea, vindicated by the European Convention on Human Rights. We should not close our ears to it.⁸⁴

While governments often have no interest in taking in more refugees, states do have some legal responsibility under the ECHR for what happens to refugees once they have been required to leave their jurisdiction.⁸⁵ The most famous case in this regard is still that of *Soering v. United Kingdom*,⁸⁶ which concerns the extradition of a murder suspect.⁸⁷ However, a residual or indirect responsibility also rests with states regarding refugees who have come under their jurisdiction. For example, Article 3 of the ECHR protects a refugee against being sent to a third country which has the known intention of sending the refugee back to his home country where he might face persecution.⁸⁸ While the ECHR does not require states to refrain from sending refugees back to countries in which lesser human rights standards apply,⁸⁹ a number of minimum

82. See ECHR, *supra* note 14, at Protocol 7, Art. 1 (1).

83. *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 173 (1993).

84. *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R. (2012) (Pinto de Albuquerque, J., concurring), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{"itemid":\["001-109231"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{).

85. See KAREN REID, *A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 401 (Sweet & Maxwell eds., 2011).

86. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), ¶ 22 (1989).

87. *Id.* at ¶ 11.

88. REID, *supra* note 85 at 402; *TI v. United Kingdom*, *supra* note 28.

89. *Id.* at 403; see also *F. v. United Kingdom*, App. No. 17341/03, Eur. Ct. H.R. (2004), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-24020#{"itemid":\["001-24020"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-24020#{).

standards have been identified by the ECHR⁹⁰: states are not permitted to send refugees back to states in which the fundamental rights, which are codified in Articles 2,⁹¹ 3,⁹² 5,⁹³ 6⁹⁴ and 9,⁹⁵ of the ECHR are not met. In such cases, the states have to obey the principle of *non-refoulement*.

The *Hirsi Jamaa* judgment is the European Court of Human Rights' long overdue reaction to Italy's practice of *refoulement* against refugees arriving in boats.⁹⁶ There, the Court held that Italy had violated human rights principles by spurning African migrants and asylum-seekers on the high seas and returning them to their native country where they faced threat of systematic human rights abuses.⁹⁷ This decision is significant because refugees from both Eritrea and Somalia, in enormous numbers, are still trying to reach Europe to escape from degrading treatment and the fear of persecution in their native countries. The office of the United Nations High Commissioner of Refugees (UNHCR) estimates that approximately 1,500 people drowned or went missing crossing the Mediterranean Sea in 2011.⁹⁸ The judgment of the Grand Chamber in *M.S.S.*⁹⁹ represents a fundamental decision in this area of the law. In *M.S.S.*, the judges saw a breach of Article 3 of the ECHR in the inhumane and degrading conditions of life and detention of refugees in Greece and a breach of Article 13 of the ECHR by the lack of an

90. See also REID, *supra* note 85, at 403.

91. Bader v. Sweden, App. No. 13284/04, Eur. Ct. H.R. ¶ 42 (2005), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70841#{"itemid":\["001-70841"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70841#{); Öcalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R. ¶ 165 (2005) [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022#{"itemid":\["001-69022"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022#{); REID, *supra* note 85, at 403.

92. *Id.*

93. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A), ¶ 85 (1989); Drozd v. France, App. No. 12747/87, Eur. Ct. H.R. ¶ 110 (1992), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57774#{"itemid":\["001-57774"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57774#{); REID, *supra* note 85, at 403.

94. *Id.*

95. *Id.*

96. Hirsi Jamaa v. Italy, App. No. 27765/09, Eur. Ct. H.R. (2012), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{"itemid":\["001-109231"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{).

97. *Id.*

98. *Mediterranean Takes Record as Most Deadly Stretch of Water for Refugees and Migrants in 2011*, U.N. HIGH COMM'R ON HUMAN RIGHTS (Jan. 31, 2012), <http://www.unhcr.org/4f27e01f9.html>.

99. *M.S.S. v. Belgium & Greece*, App. No. 30696/09, Eur. Ct. H.R. (2011), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050#{"itemid":\["001-103050"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050#{).

effective remedy against the asylum procedures.¹⁰⁰ The Court also allowed for an exception to the application of the Dublin II Regulation.¹⁰¹ Accordingly, *Hirsi Jamaa* and *M.S.S.* represent landmark decisions in the fight against asylum proceedings that violate international human rights standards.¹⁰²

Concerning the territorial scope of states under the Convention, the Grand Chamber reiterates that jurisdiction is generally governed by the principle of territoriality and only in exceptional cases may it be applied extraterritorially.¹⁰³ This is possible in cases of diplomatic or consular agents abroad or on board of vessels or aircraft flying the flag of the state.¹⁰⁴ Because of these circumstances and the fact that the military vessels receiving and transporting refugees to Tripoli were flying the Italian flag, and thus, were under effective control of Italy, Italy was exercising jurisdiction under Article 1 of the ECHR also on the high sea.¹⁰⁵ By comparison in *Medvedyev*, the Strasbourg judges pointed out that a vessel, even if flying the flag of a third state, but under French military control, was *de facto* under French effective control and thus jurisdiction existed.¹⁰⁶

B. Positive and Institutional Obligations

Human Rights obligations under the ECHR are often primarily understood from a negative perspective; that is, prohibiting a state from engaging in certain activities which violate human rights. But positive obligations, such as the duty of the state to prevent human rights violations, do not have to be spelled out explicitly in the text of Convention norms in order to exist.¹⁰⁷ Article 1 of the ECHR obligates states to “ensure” that human rights are protected, regardless of whether this requires states to refrain from an action or to take some kind of

100. *Id.*

101. *Id.*

102. Weber, *supra* note 15, at 266.

103. *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. at 131-32 (2011), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606#{"itemid":\["001-105606"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606#{).

104. *Id.* at 134.

105. Weber, *supra* note 15, at 266.

106. *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. (2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97979>; see also Matthias Lehnert & Nora Markard, *Mittelmeerroulette - Das Hirsi-Urteil des EGMR und die europäische Grenzschutzpolitik auf See*, ZAR 6/2012, 194, 195 (2012).

107. Keir Starmer, *Positive Obligations Under the Convention*, in UNDERSTANDING HUMAN RIGHTS PRINCIPLES 139, 139 (Jeffrey Jowell & Jonathan Cooper eds., 2001).

positive action. Beyond this, states have “[a] duty to put in place a legal framework which provides effective protection for Convention rights.”¹⁰⁸

In the cases outlined at the end of Section V.(A), where returning the refugees to their place of origin would likely subject them to human rights violations, the state has a negative obligation to refrain from sending those refugees back. This can be understood as a specific application of the principle of *non-refoulement* as viewed through the lens of the ECHR. Still, in order to identify these cases, there has to be some kind of process, however it need not be solely intentional and may be designed on the domestic level. This requires that the state enter into a legal relationship with the refugee, which at a minimum acknowledges the refugee’s legal personality and basic fundamental rights. As a consequence, states are not permitted to pretend that the presence of a refugee within their jurisdiction does not trigger some responsibilities on their part, as would be the case if islands off the coast of the mainland or the transit area of an international airport were permitted to be considered outside the jurisdiction of that state.

Which institutional consequences have to be drawn from this general obligation depends on how the term “secure,”¹⁰⁹ as used in Article 1 of the ECHR, is understood. While one might be forgiven for assuming that it is sufficient that ECHR-compliant solutions are found on a case-by-case basis, this is only the case as far as individual complaints are concerned. “Secur[ing]”¹¹⁰ human rights means that there are both negative and positive obligations. But the obligation under Article 1 of the ECHR also includes an objective element in that the states which have ratified the ECHR have to create a culture of respect for human rights.

Yet, the obligations under the ECHR also have an international, i.e. interstate, dimension because it is, after all, an international treaty, a fact that is easy to overlook in light of its function of providing victims of human rights violations with a way to bring suit against the violating state in international court. The fact that interstate complaints, such as earlier this year by *Ukraine v. Russia*,¹¹¹ are possible under Article 33 of the ECHR is a reminder of the legal nature of the ECHR. Article 1 of the ECHR not only requires that states “secure” human rights but the norm requires that states “secure [these rights] to everyone.”¹¹² Parties to the

108. *Id.* at 146.

109. ECHR, *supra* note 14 at art. 1.

110. *Id.*

111. Press Release, European Court of Human Rights, Interim Measure Granted in Inter-State Case Brought by Ukraine Against Russia (Mar. 13, 2014).

112. Council of Europe, *supra* note 14, at art. 1.

ECHR owe this obligation to everyone, not just individually but collectively to the totality of natural and legal persons within their jurisdiction.¹¹³ This obligation is not only owed to applicants in proceedings before the European Court of Human Rights, it is also an obligation the parties have towards the other states that have ratified the ECHR. The Brighton Declaration,¹¹⁴ in which states vowed to implement the ECHR as interpreted by the Court, and which is in line with the Court's judgments, (which are only binding *inter partes*¹¹⁵) even if the judgment in question was directed against another state,¹¹⁶ makes sense not only as a tool to improve the protection of human rights across Europe but also in its nature as an international agreement between the states which ratified the Convention. It follows from the word "secure" in Article 1 of the ECHR that the states having ratified the ECHR have the obligation to undertake every measure necessary to make sure that the rights which have been codified in the ECHR are given the fullest effect possible.¹¹⁷ While it can sometimes suffice for a state to not interfere with these rights, this is not always the case. Structural or institutional measures are necessary in situations equivalent to that of the *Tampa*, where the refugees on board found themselves falling through gaps in the laws with no place to go. Generally, this means that the state in question will have to engage its legislative organs in order to provide a solution that guarantees compliance with the Convention. This is because Article 1 of the ECHR requires that nobody be considered outside the law.¹¹⁸

C. Jurisdiction

Humanitarian considerations have long played a role in the rules governing the conduct at sea. Like universal jurisdiction, a universal duty to rescue is a practical response to protecting the right to life. Although

113. *But see* CHRISTOPH GRABENWARTER, EUROPEAN CONVENTION ON HUMAN RIGHTS: COMMENTARY, art. 1, n.3 (2013).

114. High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration, COUNCIL OF EUR. (April 20, 2012), <https://wcd.coe.int/ViewDoc.jsp?id=1934031>.

115. Council of Europe, *supra* note 14, at art. 46(1).

116. *Contra id.*

117. "[T]here is, on one hand, the negative obligation which requires Contracting Parties not to infringe the rights protected in the Convention. There is also, on the other hand, the positive obligation to ensure in that the rights protected by the Convention are guaranteed to those within the jurisdiction of Contracting Parties." CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 86 (2006).

118. Council of Europe, *supra* note 14, at art. 1.

the duty to rescue does not require masters to risk the lives of their crew, mere financial considerations do not justify the denial of the duty to rescue. To that degree, the Law of the Sea protects the human rights of those at sea. This duty to rescue can be traced back to the historical roots of maritime ethics, which are based on a fundamental respect for human life and human dignity. According to the International Tribunal for the Law of the Sea (ITLOS), “[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law.”¹¹⁹ Similarly, the International Court of Justice (ICJ) has reflected on the relevance of elementary considerations of humanity as a general principle of international law in *Corfu Channel* case, and this issue has been taken up by ITLOS in several other relevant cases.¹²⁰ While the ECHR does not make direct reference to its applicability at sea, it can be, and has been, used with regard to maritime matters.¹²¹

Article 311(2) of UNCLOS states that “[t]his Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”¹²² This does not mean that the ECHR has to be strictly interpreted in accordance with UNCLOS. Rather, it means that UNCLOS does not take away human rights granted under the ECHR. This also provides ECHR the discretion to take the law of the sea into account.

With regard to the question of jurisdiction, Article 1 of the ECHR connects the responsibility for human rights to jurisdiction, and in order for the ECHR to be applicable in the first place the applicant must be in

119. *M/V Saiga* (No.2) (St. Vincent v. Guinea), Case No. 2, Order of Jan. 20, 1998, 2 ITLOS Rep. ¶155.

120. *E.g.* *Camouco* (Pan. v. Fr.), Case No. 5, Order of Feb. 7, 2000, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_5/Judgment.07.02.00.E.pdf; *Monte Confurco* (Sey. v. Fr.), Case No. 6, Order of Dec. 18, 2000, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_6/Judgment.18.12.00.E.pdf; *Juno Trader* (St. Vincent and the Grenadines v. Guinea-Bissau), Case No. 13, Order of Dec. 18, 2004, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_13/13_judgment_181204_en.pdf; *Hoshinmaru* (Japan v. Russ.), Case No. 14, Order of Aug. 6, 2007, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_14/14_judgment_060807_en.pdf.

121. *Bendréus v. Sweden*, App. No. 31653/96, Eur. Ct. H.R. (1998), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-3886>; *Berglund v. Sweden*, App. No. 34825/97, Eur. Ct. H.R. (1998), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-4227>.

122. UNCLOS, *supra* note 35, at art. 311(2).

the jurisdiction of a state that has ratified the ECHR.¹²³ Here a differentiation must be recognized between the different maritime zones and the flag flown by the rescuing ship.

1. Maritime Zones

In the context of the international law of the sea, both under the rules codified in UNCLOS and under customary international law, states enjoy different types of jurisdiction in different parts of the sea.¹²⁴ The definitions employed in UNCLOS can provide some guidance as to whether a state actually has jurisdiction within the meaning of Article 1 of the ECHR but do not answer this question: particularly, can neighboring coastal states agree on the designation of specific response areas for maritime disasters? These response areas do not necessarily correspond to maritime zones as outlined in the UNCLOS but take into account practical considerations such as, for example, how fast coast guard or other rescue vessels can reach a particular location. The European Union's FRONTEX mission is a logical continuation of this practice, bringing together vessels from a number of European Union member states. This cooperation also serves to lessen individual state burdens, which are primarily carried by the European Union's southern states, which are often overwhelmed by an ever-growing number of refugees.

2. European Convention on Human Rights

The term "jurisdiction" in Article 1 of the ECHR is to be interpreted within the general framework of the ECHR. Hence, the term "jurisdiction" within the meaning of the ECHR can have a different meaning than the same term under UNCLOS. Under the ECHR, the issue of jurisdiction is of utmost importance, as states are responsible for safeguarding human rights for those who are under their jurisdiction, regardless of their nationality or how they came to be under the jurisdiction of the state in question. As far as refugees who attempt to reach Europe by sea are concerned, several alternatives are possible.

123. Council of Europe, *supra* note 14, at art. 1.

124. *E.g.* UNCLOS, *supra* note 35, at arts. 35, 86.

a. European flag states

A person who has come on board a vessel flying the flag of a state that has ratified the ECHR is within the jurisdiction of that state for the purpose of Article 1 of the ECHR. But the flag state's jurisdiction over the ships which fly its flag also requires that state to ensure that the masters of such ships actually fulfill their obligation to provide assistance to those in need. It can be argued that a state can be held to account, for example, for a violation of the right to life of a refugee in distress at sea who could be rescued by a ship which flies the flag of a state which has ratified the ECHR if the master of the ship is capable of saving that person's life without undue risk to the vessel or crew, is aware of the need to do so, and fails to rescue that person for lack of legal repercussions under the national laws of the flag state. The right to life, a human right of the most fundamental importance, requires states to ensure through legislative, administrative, and adjudicative measures that all efforts are undertaken to save human lives.

The flag state's jurisdiction extends to all ships which fly its flag. The pre-existence of an obligation which is incumbent on the master of the ship and on the flag state under the law of the sea means that, in the moment this obligation arises, the individual who would be a beneficiary of this obligation (which, as an obligation under general public international law, is an obligation between the flag state of the assisting ship and the flag state of the vessel which is in need of assistance) falls within the jurisdiction of the flag state for the purposes of this rescue. The person in distress also remains under the jurisdiction of the flag state of the vessel he is on, for the purposes for which that flag state has jurisdiction, and potentially, depending on the location, under the jurisdiction of a coastal state, in line with that coastal state's rights and obligations under the law of the sea. For the purposes of the rescue, the jurisdiction, within the meaning of Article 1 of the ECHR, of the flag state of a vessel which could provide assistance is triggered. This is not to say that the flag state has any other legal powers in this regard. Rather, for the specific relationship between the ship which could provide assistance and the person in distress, the flag state might be held accountable for failing to ensure that help which could be provided without risk to the ship which flies its flag is actually provided.

b. Other flag states

On board a ship flying a foreign flag—or no flag at all—the question whether the refugee is also under the jurisdiction of another state depends on the location of the ship on which the refugee is located.¹²⁵

i. Territorial Seas of European States

As all coastal states in the south of Europe, including Turkey and the island nations of Cyprus and Malta, are parties to the ECHR, the question has to be asked whether a refugee, who is on a ship which is flying a foreign flag or no flag, comes under the jurisdiction of such a state merely by entering that state's territorial sea. From the perspective of the law of the sea, this is not necessarily the case. While the territorial sea is part of the state's territory, foreign vessels enjoy a right of innocent passage¹²⁶ and usually states refrain from exercising their jurisdiction with regard to purely internal matters on board.¹²⁷ The right to innocent passage is based on the basic idea of the freedom of navigation, which is only fully realized on the high seas.¹²⁸ The flag state's right to innocent passage of the ships flying its flag impacts the coastal state's rights, but foreign ships' right to innocent passage does not free the coastal state from its obligations under the ECHR. In implementing their international legal obligations, states have to ensure that the rights which have been codified in the ECHR are given full effect. States therefore cannot 'hide' behind their obligations under the Law of the Sea Convention in order to justify an infringement of rights included in the ECHR. All limitations of rights under the ECHR have to be in accordance with the rules set on limitations under that Convention.

There is not yet an established hierarchy between the different legal norms in international law, but it is now recognized that international

125. UNCLOS, *supra* note 35, at art. 92(2); *see also* Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 YALE J. INT'L L. 433, 439-40 n.33 (2012).

126. UNCLOS, *supra* note 38, at art. 17.

127. U.N. Conference on the Law of the Sea, Geneva, Switz., Feb. 24 – Apr. 27, 1958, *Annex Text of Articles 1 to 25 and 66 Adopted by the International Law Committee at its Eighth Session*, art. 20, A/3159, available at http://legal.un.org/diplomaticconferences/lawofthesea-1958/docs/english/vol_III/19_ANNEXES_1st_Cttee_vol_III_e.pdf.

128. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 81 (Myron H. Nordquist ed., 1995); *see also* Florian H. Th. Wegelein, *Innocent Passage* (Feb. 1999), <http://www.seerecht.org/wegelein/iptext.htm>.

human rights laws also have a role to play in the law of the sea.¹²⁹ In a sense, human rights issues are increasingly becoming part of the constitutional dimension¹³⁰ of international law, such that states are no longer able to justify human rights violations by claiming that the violating measures were necessary to honor other obligations under international law. In the case of *jus cogens* norms, this can never be the case. If *non-refoulement* is indeed *jus cogens*, states are obliged to prevent *refoulement* from their territorial sea, even if the refugee in question has never set foot on the coastal state's land.

ii. Territorial Sea of non-ECHR states

The question as to whether the European coastal state has jurisdiction over a refugee is easily answered if that refugee is on board a foreign-flagged ship that is in the territorial sea of another state. Then, the refugee is under the jurisdiction of either the coastal state (from the perspective of the ECHR) or the flag state (from the perspective of both the ECHR and the law of the sea). For example, a refugee from Sudan, who is on a Tunisian-flagged vessel, within Libya's territorial sea, is not under Italy's jurisdiction pursuant to Article 1 of the ECHR.

iii. Contiguous Zone and Exclusive Economic Zone of an ECHR State

The question becomes significantly more complicated if, for example, the Tunisian-flagged vessel enters Italy's Exclusive Economic Zone,¹³¹ or Italy's Contiguous Zone,¹³² assuming that both have been claimed.¹³³ In both zones (the Contiguous Zone being a part of the Exclusive Economic Zone), the coastal state's powers are limited.¹³⁴

129. Tullio Treves, *Human Rights and the Law of the Sea*, 28 BERKLEY J. INT'L L. 1, 6 (2010).

130. Christian Walter, *Constitutionalizing (Inter)national Governance - Possibilities for and Limits to the Development of an International Constitutional Law*, 44 GERMAN Y.B. OF INT'L L. 170, 171 (2001); see also Stefan Kirchner, *Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?*, 5 GERMAN L. J. 1, 47, 56 (2004).

131. See generally UNCLOS, *supra* note 38, at Part V.

132. *Id.* at art. 33.

133. See ROBERT W. SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS: AN ANALYSIS AND PRIMARY DOCUMENTS 11 (1986).

134. See generally UNCLOS, *supra* note 35, at art. 56; William R. Ederson, *A Brief Introduction to the Principal Provisions of the International Legal Regime Governing Fisheries in the EEZ*, in A SEA CHANGE: THE EXCLUSIVE ECONOMIC ZONE AND

Hence, in these areas the state has some form of control. It is said that in order to have jurisdiction within the meaning of Article 1 of the ECHR, the states must have complete control over the area in question,¹³⁵ and this completeness ought to be understood in relation to competing claims of control over a specific area and with regard to the non-transient nature of this control. In the Exclusive Economic Zone and the Contiguous Zone, the coastal state's control is not as complete as it is on land or in the territorial sea, but it usually is also not challenged by another coastal state. The coastal state's control over an Exclusive Economic Zone or Contiguous Zone is limited with regard to certain subject matters. However, once a person falls within any of the categories in which the coastal state claims authority pursuant to UNCLOS,¹³⁶ that person is under the jurisdiction of the coastal state. For example, the Greenpeace protesters that were arrested by Russian authorities in Russia's Exclusive Economic Zone in 2013¹³⁷ were under Russia's jurisdiction within the meaning of Article 1 of the ECHR, both at the moment they were apprehended by Russian agents and from moment that they entered the exclusion zone around the oil rig, against which they were protesting. In this context, it is the exclusion zone which had actually been claimed and enforced by Russia, which is relevant, even though the size of that exclusion zone was incompatible with the UNCLOS. Likewise, if a coastal state enforces immigration legislation in the Contiguous or the Exclusive Economic Zone, regardless of the compatibility with UNCLOS or customary international law of the sea, a refugee would fall under its jurisdiction under Article 1 of the ECHR.

IV. CONCLUSION

If a refugee comes under the jurisdiction of a coastal state to any degree, that state has the obligation to take all measures which are necessary to ensure that the human rights of that person are fully protected. No state may deprive a person under its jurisdiction of the protections afforded by the law, including those provided by the ECHR. If necessary, the obligation to secure the rights codified in the

GOVERNANCE INSTITUTIONS FOR LIVING MARINE RESOURCES 17, 24 (Syma A. Ebbin et al. eds., 2005).

135. GRABENWARTER, *supra* note 113, at 8.

136. *See generally* UNCLOS, *supra* note 35, at art. 2.

137. Note that this eventually led to the decision of the International Tribunal for the Law of the Sea in the *The Arctic Sunrise Case* (No. 22) (Neth. v. Russ.), Order of Nov. 22, 2013, ¶¶ 59, 64, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf.

Convention¹³⁸ can include an obligation on the part of coastal states to enact domestic legislation to ensure that no foreigner within its territory falls outside its legal jurisdiction. A repetition of the *Tampa* incident in a state party to the European Convention on Human Rights would therefore result in a violation of the Convention.

138. In particular, those rights which the European Court of Human Rights has identified as being so important that a state which plans to expel a foreigner can have a residual responsibility to protect the foreigner against violations thereof.