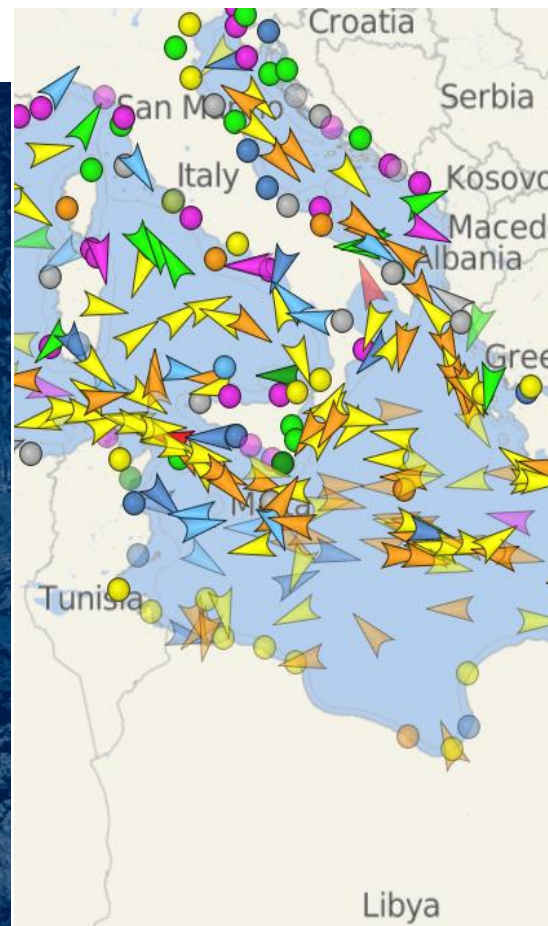


When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations

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Introduction: Setting the Context

On 7 September 2020, the *Maersk Etienne*, a tanker, was stranded in the Mediterranean. It had been held in position for over thirty days, having rescued, on 4 August 2020, a group of 27 persons from a vessel in distress at sea. The rescue was initiated by the Malta Search and Rescue Coordination Centre. The *Maersk Etienne* eventually transferred the rescued persons onboard the *Mediterranean*, an NGO-run rescue vessel that would eventually be disembarked in Sicily on 13 September 2020. The case struck a new record for the duration of time migrants were kept at sea and for how long a private vessel was delayed before disembarkation was allowed.¹ However, it is hardly a new reality faced by shipmasters and crews of commercial vessels who, having rescued persons in distress at sea, are not allowed disembarkation and are therefore left stranded for days and weeks at a time. A number of high-profile incidents can be traced over the past decades including the 2013 *MT Salamis* Incident in the Mediterranean² and the 2001 *MV Tampa* Incident in the Indian Ocean.³ A series of other incidents with such delays involved NGO rescue vessels.

Private vessels are often called to assist vessels in distress and sometimes the assisted vessels include persons fleeing persecution, war and other human rights violations. Of the 152,343 people rescued at sea in 2015, over 16,000 were rescued by merchant ships and over 20,000 were assisted by NGO rescue boats. In 2016, 381 merchant ships were diverted from their routes and 121 ships were involved in the rescue of 13,888 people. In recognition, the International Maritime Organisation, commended 'all merchant vessels and their crew participating in the rescue of mixed migrants at sea for their bravery, professionalism and compassion embodying the highest traditions of the sea'.⁴

Concerns over the role of private (merchant) vessels when rescuing migrants at sea have been raised by researchers and activists over recent years, with the *Lady Sham*⁵ and *MV Nivin*⁶ as just two recent examples. Despite their particularities, these cases raise similar questions as to the obligations and responsibilities of commercial vessels and of the States involved, whether as flag States, as search and rescue States or simply as States in the vicinity of the rescue.

The question of maritime migration is now widely researched with a significant analytical body of work developing in both academic and policy research.⁷ Much of the legal analysis has focused on the obligations of States and the questions of State responsibility, including for human rights violations. International and industry organisations have also developed guidelines on the rescue of migrants at sea, usually focusing on the public international law obligations.⁸ Practical guidance has been developed,

¹ Benjamin Bathke, 'Migrants on Cargo Ship Maersk Etienne Disembark in Italy after 39 Days at Sea' (*InfoMigrants*, 14 September 2020).

² Patricia Mallia and Jean-Pierre Gauci, 'Irregular Migration and the International Obligation of Non-Refoulement: The Case of the *MV Salamis* from a Maltese Perspective' (2014) 2014 *Journal of International Maritime Law*.

³ Donald Rothwell, 'The Law of the Sea and the *MV Tampa* Incident' (2002) 13 *Public Law Review* 87.

⁴ IMO, 'Special Recognition for Merchant Vessels and Their Crew Involved in the Rescue of Mixed Migrants at Sea (Resolution A.1093(29)).' (International Maritime Organisation 2015).

⁵ Watch the Med, '21/01: CM Push Back to Libya on Merchant Vessel *Lady Sham*' (*Watch the Med*, 22 January 2019) <<https://watchthemed.net/reports/view/11351>>.

⁶ Forensic Architecture, 'Privatised Push-Back of the *Nivin*' (*Forensic Architecture*, 18 December 2019) <<https://forensic-architecture.org/investigation/nivin>>.

⁷ Felicity Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (BRILL 2020); Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press 2018); Violeta Moreno-Lax and Efthymios Papastavridis, *Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill 2016).

⁸ IMO, ICS and UNHCR, 'Rescue at Sea: A Guide to Principles and Practice as Applied to Refugees and Migrants' (2015).

focusing on the logistical preparations that vessels are expected to undertake.⁹ Concurrently, a growing body of research is evolving in the business and human rights sphere,¹⁰ exploring the facets and impacts of the UN Guiding Principles on Business and Human Rights, amongst other issues. In research terms, with a few notable exceptions, discussion of the role of commercial vessels has been limited to their role as an extension of State function and thereby as extending State responsibility. Direct human rights responsibilities and commercial implications of such vessels has been missing from the discussion.¹¹

This report seeks to address these gaps in the current analysis. It seeks to map the legal issues that arise when private vessels rescue migrants and refugees at sea. Existing analysis shows that this is a complex and incomplete area of law, further complicated by the complex patterns and causes of migration, the variety of actors involved, and the political nature of the issues. The law of maritime rescue was not designed to cope with situations of mass migration or indeed to deal with the migration and human rights issues that have arisen of late. More accurately, whilst situations of migrants at sea may have been on the minds of the drafters, the regularity and scale of the issues today are unprecedented and not adequately planned for in the current legal framework.¹² As Attard notes, 'Whilst the 1982 United Nations Convention on the Law of the Sea provides the basis for the regulation of the shipmaster's duty to render assistance, it does not provide adequate guidance in the face of [these] problems'.¹³

The reasons why individuals take dangerous journeys that often end up in rescue scenarios are complex and varied. However, a number of key issues underpin most journeys. First, there are push factors that cause displacement which require people to move in order to secure safety. Second, visa restrictions, coupled with carrier sanctions and a lack of legal pathways to protection¹⁴ means that such journeys are often the only avenue people have to reach a place of safety. Third, migrant smugglers often take advantage of people's situations and push people onto unseaworthy vessels.¹⁵

Rescue at sea involves a range of actors including States, international organisations, NGO rescue vessels, and merchant vessels. States' involvement may take a number of forms – whether as coastal States, States closest to the point of rescue, as search and rescue coordination centres, as flag States of vessels, as home State for shipowners or as States from where people are departing or to where seeking are seeking to arrive. States will make the final determination as to disembarkation of individuals in their territory. International organisations such as FRONTEX increasingly find themselves involved in maritime patrols and, as a result, in rescue operations.¹⁶ NGO Rescue Vessels are a relatively new, but increasingly key, player in this field seeking to fill a gap left in the rescue framework by States reducing their search

⁹ International Chamber of Shipping, 'Large Scale Rescue Operations at Sea: Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons' (International Chamber of Shipping 2015). *ibid*.

¹⁰ See for instance: Business and Human Rights Journal published by Cambridge University Press <https://www.cambridge.org/core/journals/business-and-human-rights-journal>

¹¹ Notable exceptions include: Martin Davies, 'Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea' (2003) 12 *Pac. Rim L. & Pol'y J.* 109; Richard Kilpatrick and Adam Smith, 'The International Legal Obligation to Rescue During Mass Migration at Sea' [2015] *U.S.F. Maritime Law Journal* 141; Kathleen Goddard, 'Rescuing Refugees and Migrants at Sea: Some Commercial Shipping Implications' (2016) 21 *Journal of International Maritime Law* 352; Richard Kilpatrick, 'The 'Refugee Clause': Why Contractual Allocation of Rescue Costs Is Critical' (NUS Centre for Maritime Law Working Paper 2017) 2017/016; Attard (n 7).

¹² For a historical overview of the obligation to rescue see: Attard (n 7) 29–126.

¹³ *Ibid.* XII

¹⁴ For more on Legal Pathways to Protection see: Leonie Ansems de Vries, Jean-Pierre Gauci and Henry Redwood, 'Legal Pathways to Protection: Towards the Provision of Safe, Legal and Accessible Routes for Refugees and Vulnerable Migrants' (BIICL and KCL 2018) <<https://www.biicl.org/projects/legal-pathways-to-protection>> accessed 14 September 2020.

¹⁵ For more on migrant smuggling and its regulation see: Patricia Mallia, *Migrant Smuggling by Sea* (Brill | Nijhoff 2009) <<https://brill.com/view/title/18338>>; Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas' (2016) 47 *J. Mar. L. & Com.* 219; NY Long and Deadliest Year Yet, 'When Stopping the Smuggler Means Repelling the Refugee: International Human Rights Law and the European Union's Operation To Combat Smuggling in Libya's Territorial Sea' [2017] *NY TIMES*; Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014).

¹⁶ See in this regard: <https://frontex.europa.eu/operations/search-rescue/>

and rescue (SAR) capability. Merchant vessels include vessels of a wide array of sizes and types. Increasingly, it is worth noting, such vessels are equipped with smaller crews as a result of automation.

The legal framework at play is equally multi-layered. At the international law level, issues of maritime migration intersect at a minimum with law of the sea, human rights law, refugee law and transnational criminal law (maritime smuggling). Instruments within each of these arise from multiple sources and are subject to different forms of exercise of jurisdiction across maritime zones. Instruments and standards have also been adopted at the regional and sub-regional levels with the European Union, for example, adopting a number of instruments of relevance including the Facilitation Directive.¹⁷ At the private law level, a number of further legal relationships arise, including the relationship of a vessel to its flag State, the relationship between the shipowner and any charterer, the relationship with the protection and indemnity cover providers as well as relationships with cargo owners. It is at the intersection of this web of sometimes contradictory obligations that commercial vessels, through their Master, are required to rescue those in distress at sea and that States are required to regulate and implement their international obligations.

Politics plays a critical role. Decisions made and instructions given (or not given) are the result of myriad considerations that technical and political leaders make, of which legal obligations are only one. However, an awareness of the applicable legal standards and expectations of each of the parties involved is critical in understanding these situations and in thinking through solutions. There is indeed a combination of both well-established, long-standing law and tradition (in the form of the obligation to rescue people at sea) and an evolving body of law (in the form of the UN Guiding Principles on Business and Human Rights) that are necessary considerations when addressing these concerns.

Whilst the focus in this report is on merchant vessels, the role played by NGO rescue vessels is critically important. International law does not differentiate between merchant and non-merchant vessels but rather between State owned and private vessels, meaning that, for the purposes of the law of the sea, NGO rescue vessels are subject to the same requirements as all other private vessels. Critically, the obligation to rescue persons in distress at sea applies to all shipmasters at sea. In practice, NGO vessels adopt a more proactive stance to rescues at sea, monitoring for situations where assistance is needed whilst merchant vessels adopt a more reactive stance, engaging only when required to do so. The operational implications for merchant vessels will be different to those for NGOs. The involvement of NGOs also raises questions on whether there exists a right to provide assistance. More critically, such NGO rescue operations have been subjected to a range of manoeuvres by States aiming to criminalise the humanitarian rescue operations which, despite not being successful, have led to diminished rescue capability (for example as a result of detaining vessels and crew).¹⁸

This report was written over the course of 2020 and the realities of COVID-19 and its impacts in this field have been taken into account, even if they have not been prioritised in this analysis. These impacts have included the further restrictions imposed by States on the disembarkation of rescued persons, increased delays for disembarkation to take place and the closure of ports by States. Many of these restrictions, whilst building on pre-existing practice, have been explained on the pretext of responding to the COVID crisis. In the meantime, shipmasters and crews, as well as the shipping industry more broadly, have also been impacted by COVID-19 through delays in crew changeovers and the need to protect crew members

¹⁷ Most notably in the context of the European Union.

¹⁸ In this regard, it is worth noting that the new EU Pact on Migration makes specific reference to the non-criminalisation of NGO rescue operations. In the Communication from the Commission, Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, the Commission affirms that Article 1 of the Facilitation Directive: ‘cannot be construed as a way to allow humanitarian activity that is mandated by law to be criminalised, such as search and rescue operations at sea, regardless how the Facilitation Directive is applied under national law’. In the view of the Commission this means that ‘the criminalisation of NGOs or any other non-state actors that carry out search and rescue operations at sea, while complying with the relevant legal framework, amounts to a breach of international law, and therefore is not permitted by EU law’ 7.

from the risk of infection.¹⁹ Importantly, the prohibition of re foulment, as well as the right to life, both of which are at risk in this context, are non-derogable even in the context of a public health emergency.

This report is based on desk research as well as an expert group who provided peer review of an early draft of the report.²⁰ Desk research focused on primary and secondary legal sources, as well as on grey literature published in the field. Feedback was also received through presentation of the research at a number of workshops and conferences over the course of the research. These include a Business and Human Rights Workshop convened at the University of Nottingham, a SAROBMED Network Workshop in Brussels, the migration stream of the Society of Legal Scholars 2019 Conference and a meeting of the Extraterritoriality Working Group of the Refugee Law initiative. We are thankful for the insights received from all these interactions.

This report is organised as follows. Part 1 focuses on the obligation of shipmasters of private vessels to rescue persons in distress. It explores the obligation as it emanates from various sources in international law including relevant instruments notably the 1982 United Nations Convention on the Law of the Sea (UNCLOS),²¹ the 1974 Safety of Life at Sea Convention (SOLAS)²² and the 1979 Search and Rescue Convention (SAR Convention)²³ and customary international law. Part 2 turns to the human rights considerations for private vessels, and the way in which the UN Guiding Principles on Business and Human Rights apply to vessels rescuing migrants at sea. It explores the implications of the duty to rescue both from the perspective of the right to life and the prohibition of re foulment. Part 3 focuses on the commercial implications of situations where merchant vessels rescue migrants at sea. This will focus on impacts on the carriage of goods by sea, charterparty agreements, commercial arrangements to ship goods by sea and marine insurance. Part 4 explores the responsibilities of States including the due diligence obligations of flag States and the responsibility of coastal States for instructions in violation of international human rights law. Part 5 concludes by making a number of recommendations.

¹⁹ See generally: International Chamber of Shipping, 'COVID-19' (*International Chamber of Shipping*) <<https://www.ics-shipping.org/supporting-shipping/covid/>>.

²¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS)

²² International Convention for the Safety of Life at Sea (adopted November 1974, entered into force 1 May 1991) 1184 UNTS 2 (SOLAS)

²³ International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97

1. Obligation to Rescue Persons in Distress at Sea

'Whoever is in peril on the sea must be rescued and it is our duty as seafarers always to help,' *Capt Derennes, L'Association Française des Capitaines de Navires*²⁴

The obligation of commercial vessels to rescue people in distress at sea is established in domestic law, treaty law and customary international law as well as industry practice. This section briefly outlines the relevant legal obligations.²⁵ At the outset, it is worth noting that under Article 92 of UNCLOS, a ship is primarily bound by the law of its flag State which exercises exclusive jurisdiction of the vessel when on the high seas.²⁶ Flag States shall 'assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship'. As discussed in Part 4, flag States have a number of obligations under international law.

UNCLOS, which is universally considered to be the 'constitution for the oceans',²⁷ includes an obligation on States Party to require every master of a ship flying its flag to rescue people in distress at sea:

1. Every State shall require the master of a ship flying its flag (...):
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to 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.²⁸

The obligation is restated in the Safety of Life at Sea Convention,²⁹ which provides that:

- (a) The master of a ship at sea, on receiving a signal from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so.

The Salvage Convention includes a similar provision. Article 10(1) provides:

- Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.

The obligations above are directed towards the State through whose legislation it becomes binding on the shipmasters of vessels flagged in that jurisdiction, although the wording of both the SOLAS and Salvage Conventions refers directly to the shipmaster. Examples of domestic law provisions³⁰ include, for

²⁴ Nautilus Federation, 'Masters Face Greater Risk of Criminalisation in Mediterranean Migrant Rescue' (*Nautilus Federation*, 15 July 2019) <<https://www.nautilusfederation.org/en/news/masters-face-greater-risk-of-criminalisation-in-mediterranean-migrant-rescue/>>.

²⁵ For an analysis of the way in which the obligation has developed over time see: Attard (n 7); Richard Barnes, 'Refugee Law at Sea' (2004) 53 *International & Comparative Law Quarterly* 47.

²⁶ Richard A Barnes and DR Rothwell, 'The Operation of Flag State Jurisdiction' [2015] *The Oxford handbook of the law of the sea*, Oxford handbooks (Oxford: Oxford University Press, 2015).

²⁷ Richard Barnes and Jill Barrett, *Law of the Sea-UNCLOS as a Living Treaty* (BIICL 2016).

²⁸ Article 98. Notably, similar provisions were included in Law of the Sea instruments. See in this regard: Attard (n 7).

²⁹ 'Safety of Life at Sea Convention'.

³⁰ For an elaboration of these provisions and their adherence to international standards see: Attard (n 7).

example, Article 305 of the Maltese Merchant Shipping Act (1983),³¹ the Commercial Code of Panama (1916, 2008),³² the Greek Code of Public Maritime Law (1973),³³ Article 14 of Japan's Mariners' Law (1947),³⁴ Arts 489 ff of the Italian Code of Navigation (2017),³⁵ the Maritime Code of the People's Republic of China (1992),³⁶ USC 46 of the United States (1983),³⁷ the Singapore Maritime Conventions Act (2004),³⁸ the UK Merchant Shipping (Safety of Navigation) Regulations (2002)³⁹ and Liberian Maritime Law (1956).⁴⁰ Given its widespread acceptance, the obligation to rescue, at least at the general level, including the obligation of States to require vessels flying their flag to rescue people in distress customary international law and therefore binding on all States.⁴¹

The International Convention on Maritime Search and Rescue (SAR Convention) clearly provides that the obligation to rescue extends to 'any person in distress at sea (...) regardless of the nationality or status of such person or the circumstances in which that person is found'.⁴² A similar provision is included in the SOLAS Convention which provides that: 'This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found'.⁴³ Indeed, it should not be made the responsibility of the master to enquire into the status of rescued persons and, in particular, whether or not they are in need of international protection. Information gathered should be limited to what is required to allow the continuation and termination of the rescue operation and the preparation for meeting the needs of rescued persons after disembarkation.

The obligation to rescue, whilst broad, is not absolute. Indeed, limitations on the obligation have existed since the early days of its development. Under UNCLOS, the provision is limited by 'as far as it is reasonable for him to do so'.⁴⁴ Under SOLAS, a master is given the discretion to decline to provide assistance 'if he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance'.⁴⁵ The stricter limitation on the master's discretion is found in the Salvage Convention 1989 which provides that the obligation to rescue stands as long as the master can rescue 'without serious danger to his vessel and persons thereon'.⁴⁶ These limitations are relevant to the extent that in some situations, a rescue operation can raise safety concerns for vessels, especially in situations where the number of people rescued may well be considerably higher than the size of the crew of the vessel. Further security issues have also been raised in recent incidents such as with the *Nave Andromeda* in the English Channel.⁴⁷ The International Chamber of Shipping's guidance on mass rescue acknowledges this risk and makes recommendations on how to ensure the safety and security of the vessel and its crew.⁴⁸ None of the instruments provide further indication as to the meaning of 'serious danger' or indeed on the parameters of the limitations of the obligation to rescue. They leave the determination to the shipmaster, who may, however, be held liable under domestic criminal law if it is found that the situation did not merit an exception to the obligation to rescue. Through the indeterminacy

³¹ Chapter 234 of the Laws of Malta

³² Law No. 2 of August 1916; Maritime Commerce (Law No 55 of 2008)

³³ Legislative Decree 187/1973

³⁴ Law No 100 of 1 September 1947

³⁵ Legislative Decree No 148 of 16 October 2017

³⁶ Order No. 64 of 7 November 1992

³⁷ US Code Title 46 1983

³⁸ Cap IA3, Rev Ed 2004

³⁹ 2002 No. 673

⁴⁰ Title 21 of the Liberian Code of Laws 1956

⁴¹ See: Irimi Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War' *International Review of the Red Cross* (2016) 98 *International Review of the Red Cross* 491; Attard (n 7) 92–108.

⁴² Article 2.1.10

⁴³ Cap V Reg 33.1

⁴⁴ Article 98

⁴⁵ Cap V Reg 33.1

⁴⁶ Article 10(1)

⁴⁷ Helen Devereux, 'The Reality of Life for Seafarers like Those Crewing the "Hijacked" Tanker *Nave Andromeda*' (*The Conversation*, 27 October 2020) <<https://theconversation.com/the-reality-of-life-for-seafarers-like-those-crewing-the-hijacked-tanker-nave-andromeda-148852>>.

⁴⁸ International Chamber of Shipping (n 9) 8–9.

of this provision, the shipmaster is faced with the task of balancing his duty to rescue those in distress and his duty to ensure the safety of the ship, crew and passengers. Importantly, the shipowners are not, at least theoretically, allowed to interfere with the professional judgment of the Master in these circumstances.

The SOLAS convention provides that 'Masters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship'. Resolution MCS.167(78) of 2004 Guidelines on the Treatment of Persons Rescued at Sea⁴⁹ clearly outlines that, having rescued people, shipmasters should 'do everything possible, within the capabilities and limitations of the ship, to treat the survivors humanely and to meet their immediate needs'. Guidance on such measures, including preparations, can also be found in operational guidance such as that provided by the International Chamber of Shipping (ICS). Moreover, shipmasters should 'seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardised'.⁵⁰ These provisions make it clear however that a ship has serious limitations in its ability to care for rescued persons, making prompt disembarkation a consideration not only for the vessel but also for the rescued persons.

The general duty to rescue may, theoretically, give rise to criminal and civil liability in case of failure to abide by the obligation. The obligation to rescue is often incorporated into the criminal law provision of flag States and it often includes criminal penalties (fine or imprisonment) for Masters who ignore their duty to rescue.⁵¹ In practice however, incidents involving failure to rescue are unlikely to be investigated or prosecuted by flag States or indeed any other State that may exercise some form of jurisdiction.⁵² A second concern is potential civil liability. However, this is equally theoretical (if not more so) as a prospect given the procedural hurdles that must be overcome. As Davies summarises, 'to have standing in a civil action, those who claimed failure to assist must (a) survive the ship's failure to pick them up (b) identify the ship that could have but did not pick them up and (c) establish jurisdiction over the shipmaster and/or the ship itself in the court of suit'.⁵³ There are exceptions. For instance, dependants may in theory bring a claim on behalf of someone who may not have survived, however the possibility of meeting the second and third requirements will then be even more remote. This possibility of accessing justice is hindered further by the reality that family members often do not have the resources necessary to conduct such a complex investigation nor to pursue legal action. Arguably, the lack of criminal and civil accountability weakens the rescue imperative.⁵⁴

⁴⁹ International Maritime Organisation, Resolution MCS.167(78) of 2004 Guidelines on the Treatment of Persons Rescued at Sea, (IMO 2004). Whilst not binding, these guidelines have been adopted by the IMO for the purpose of guiding States in the implementation of binding obligations namely under the SAR and SOLAS Conventions.

⁵⁰ Ibid 5.1.6

⁵¹ Attard (n 7).

⁵² For an analysis of different possibilities of jurisdiction see: Davies (n 11) 115–133.

⁵³ Ibid 115. *ibid.*

⁵⁴ Davies (n 11).

2. Human Rights Responsibilities

Private vessels' engagement with human rights in the context of the rescue of migrants at sea are linked to both State obligations (including Flag and Coastal States) as well as their own direct responsibilities. There is a growing acknowledgement of the impact of corporate entities on human rights in different contexts. The discussion of the human rights impact in the shipping industry has tended to focus primarily, albeit not exclusively, on the conditions of employment for those working on vessels (see for example the work on fishing fleets).⁵⁵ Indeed, 'over the last seven years there has been little concerted and collaborative effort by the shipping industry to embed the concept, develop unified policies, drive effective remedy and demonstrate public accountability in the field of business and human rights'.⁵⁶ More broadly 'the maritime sector has been absent from the discussions and the spotlight'.⁵⁷ This happens despite the growing global engagement with corporate responsibility for human rights abuses generally, and the UN Guiding Principles on Business and Human Rights (UNGPs)⁵⁸ in particular. In addressing this analytical gap, this section examines how the UN Guiding Principles on Business and Human Rights (and developments in that regard) apply to vessels involved in the search and rescue of migrants at sea. The UNGPs are a soft law instrument and do not create new obligations under international law, but rather restate existing international law obligations on States and set out the responsibilities of business actors.⁵⁹ They are seen as the most influential and authoritative global standard in the area of business and human rights.⁶⁰ In addition, they constitute the basis for the current negotiations for a treaty on business and human rights,⁶¹ and have inspired various examples of domestic legislation (e.g. the French Law on Vigilance⁶² and the UK Modern Slavery Act⁶³).

The UNGPs set out State duties in Pillar I and corporate responsibilities in Pillar II.⁶⁴ The primary responsibility of business as set out in the UNGPs is that 'business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.⁶⁵ This responsibility 'refers to internationally-recognised human rights – understood, at a minimum, as those expressed in the International Bill of

⁵⁵ See generally: Sofia Galani, 'Assessing Maritime Security and Human Rights: The Role of the EU and Its Member States in the Protection of Human Rights in the Maritime Domain' (2020) 35 *The International Journal of Marine and Coastal Law* 325; Miriam Wilhelm and others, 'Private Governance of Human and Labor Rights in Seafood Supply Chains—The Case of the Modern Slavery Crisis in Thailand' [2020] *Marine Policy* 103833.

⁵⁶ Daphne Gulker and David Hammond, 'Are the 2011 UN Guiding Principles Working Effectively and Being Rigorously Applied in the Maritime Industry?' (Human Rights at Sea 2020) Briefing Note.

⁵⁷ Martins Davies, 'Obligations and Implications for Ships Encountering Persons in Need' (2003) 12 *Pacific Rim Law & Policy Journal Association* 109.

⁵⁸ OHCHR, 'Guiding Principles on Business and Human Rights (with Commentary)' (United Nations 2011).

⁵⁹ UNGP General Principles P1: 'nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights'.

⁶⁰ Francisca Torres-Cortes and others, 'Study on Due Diligence Requirements through the Supply Chain' 38. *ibid.*

⁶¹ See generally on this: Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) <<https://www.cambridge.org/core/books/building-a-treaty-on-business-and-human-rights/B9BB808E9CB33FD9427A8CD87CA90533>>; John G Ruggie, 'A UN Business and Human Rights Treaty Update' [2014] *HARVARD Kennedy School*; Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1 *Business and Human Rights Journal* 41; Claire METHVEN O'BRIEN, 'Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty' (2020) 5 *Business and Human Rights Journal* 150.

⁶² LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre

⁶³ Modern Slavery Act 2015 (2015 Ch. 30)

⁶⁴ The terminology used is deliberate. The drafter of the UNGPs used the word "responsibility" regarding business deliberately to distinguish from State duties, which exceed a responsibility and are grounded in pre-existing international law obligations.

⁶⁵ UNGP 11

Human Rights (...).⁶⁶ Critically, this responsibility ‘exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations’.⁶⁷ States and businesses have complementary but distinct roles and responsibilities to play. This section focuses on the responsibility of businesses under Pillar II of the UNGPs. In the context of the rescue of migrants at sea, the responsibility of private vessels to avoid infringing human rights of others includes, at a minimum, two manifestations.

The first relates to those obligations emanating from the right to life, and this includes an obligation to do one’s duty to prevent loss of life at sea. This, in turn, includes both responding to situations of distress and ensuring that the vessel (including its crew) is prepared to undertake the rescue so as to avoid death or injury during the course of a rescue operation. Whilst the extension of positive obligations in human rights law to corporate actors through the UNGPs is a matter of some debate, undertaking rescue operations is both a requirement of the law of the sea and a human rights obligation extending from the responsibility of business to respect the right to life. In addition, the duty to rescue applies both to States and to masters of ships.⁶⁸ Indeed, under international law, the duty to rescue is personally attributed to the master of the vessel and it may be argued that the shipmaster is the subject of the duty, for instance under SOLAS⁶⁹ and indeed under the Salvage Convention, the shipowner is not to be held liable for a breach of the duty to rescue.⁷⁰

This obligation is further imbued with other human rights requirements such as the principle of non-discrimination. Indeed, this duty applies to all persons in distress, without distinction. The nationality of the vessels or of the persons, their legal status and the activity in which they are engaged are irrelevant. Even the fact that the persons are engaged in an unlawful activity should not make any difference to the duty to rescue. The fact that the persons to be saved are migrants or are in the process of being smuggled should not in any way interfere with the right to be saved.⁷¹ This is clarified by both the SOLAS and SAR Conventions.⁷² The obligation to rescue also involves being prepared to rescue. Under the SOLAS Convention for instance, ‘All ships shall have ship-specific plans and procedures for recovery of persons from the water, taking into account the guidelines developed by the Organization’.⁷³ This is particularly relevant given that many commercial vessels will have high sides that make recovering persons from the water dangerous.

Second, the shipmaster should ensure that they are not party to violations of the principle of non-refoulement. The prohibition of refoulement emanates from multiple sources in both refugee law (notably Article 33 of the Geneva Refugee Convention) and human rights law (including the right to life and the prohibition of torture, cruel and inhuman treatment or punishment). Addressing the obligation of non-refoulement as applicable to States, UNHCR notes that they ‘are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment’.⁷⁴ *Non-refoulement*, as established in the refugee convention and complemented through human rights standards, is a principle of customary international law binding on all States.⁷⁵ It includes both direct and

⁶⁶ UNGP 12

⁶⁷ UN OHCHR, ‘Guiding Principles on Business and Human Rights’ (United Nations 2011) 19.

⁶⁸ See generally: Nadia Bernaz and Irene Pietropaoli, ‘Developing a Business and Human Rights Treaty: Lessons from the Deep Seabed Mining Regime Under the United Nations Convention on the Law of the Sea’ [2020] *Business and Human Rights Journal* 1.

⁶⁹ Cap V Reg 33.1

⁷⁰ Salvage Convention Article 10(3)

⁷¹ Papanicolopulu, *supra* at 11.

⁷² SOLAS Cap V Reg 33.1;

⁷³ SOLAS Cap III Reg 17-1

⁷⁴ 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’ 17.

⁷⁵ *ibid* 15.

indirect refoulement. The prohibition of torture is recognised as *jus cogens*.⁷⁶ The application of the principle of *non-refoulement*⁷⁷ in maritime operations, including relating to immigration control, is reiterated in other relevant instruments including Article 19 of the Smuggling Protocol which provides:

‘Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the status of refugees and the principle of non-refoulement as contained therein’.⁷⁸

The application of the principle has been elaborated by courts, including the European Court of Human Rights in *Hirsi Jamaa v Italy*.⁷⁹ Domestic courts have also determined that actions by rescued persons in pressuring Shipmasters not to return them to countries like Libya were justified under the principles of self-defence.

The 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea call on shipmasters to ensure that ‘survivors are not disembarked in a place where their safety would be further jeopardised’.⁸⁰ Whilst these guidelines are not directly binding, they are adopted with a view to supporting government in adhering to their binding legal obligations.

At the present time, a number of claims before the European Court of Human Rights and the Human Rights Committee are seeking to address these questions, particularly from the perspective of the responsibility of the State. Of particular relevance is the claim currently before the Human Rights Committee relating to the *MV Nivin* Incident. In that case, a merchant vessel was instructed by the Italian Search and Rescue Coordination Centre to return people to Libya. It did so, eventually allowing Libyan forces to board the vessel and reportedly injuring a number of the rescued migrants and returned them to detention centres where they faced degrading conditions, torture and other serious human rights violations. The claim was brought against Italy in that case; however, one could envisage a situation where a claim of this nature could be brought against the flag State for failing to take measures to prevent ships flying its flag, and on which it therefore exercises jurisdiction, from engaging in actions that render them complicit in the violation of human rights. One must read this obligation in line with the principle, provided by UNHCR/IMO guidance, that it is not the responsibility of the Master to determine the status of rescued persons. The Master has no authority to hear, consider or determine an asylum request.

Other human rights might also be impacted in the context of rescue operations. Depending on the conditions onboard the vessel, the treatment of rescued persons might be in violation of the prohibition of degrading treatment for instance. Here one should note that the obligation of the Master to treat rescued persons with respect is circumscribed by the limitations of the vessel and must be read in line with the rescue vessel not being a place of safety and the need to facilitate prompt disembarkation. Moreover, the right to physical and mental health of rescued persons may also be impacted, as frequent stories of individuals taking ill and attempting suicide have clearly highlighted.

In this regard, it is also worth noting that adequate planning, preparation, training and support is needed to ensure that the rights of crew members are also safeguarded. This includes, but is not limited to, the

⁷⁶ See ICJ, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal); International Court of Justice 20 July 2012

⁷⁷ Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ [2003] Refugee protection in international law: UNHCR’s global consultations on international protection 87.

⁷⁸ Patricia Mallia and Jean-Pierre Gauci, ‘Irregular Migration and the International Obligation of Non-Refoulement: The Case of the *MV Salamis* from a Maltese Perspective’ (2014) 2014 *Journal of International Maritime Law*; Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security Through the Creation of a Cooperative Framework* (Brill 2010); Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014).24/11/2020 13:30:00

⁷⁹ *Hirsi Jamaa v Italy* (European Court of Human Rights). See in this regard: Mallia and Gauci (n 12).

⁸⁰ IMO, ‘Guidelines on the Treatment of Persons Rescued at Sea MSC.167(78)’ (2004).

right to health. As the ICS recognises, 'seafarers may experience stress or psychological aftereffects following a rescue operation',⁸¹ whilst preventive measures must be taken as regards communicable diseases.

UNGP 13 addresses the ways business may be involved in human rights abuses. It identifies a continuum of three forms of involvement: causing, contributing, and being involved through business relationships. Business has a responsibility not only not to cause, but also not to contribute to human rights violations. They are also required to use leverage where directly linked to a human rights impact through their business relationships. In the current context, this is critically important as the situation is likely to be that it is the State which is the primary 'cause' of the impact. But this does not absolve the vessel of all responsibility, given its role and its contribution to that impact. Critically, whether a company is causing adverse human rights impacts, or contributing to harms caused by third parties, it has the responsibility to cease and to prevent those violations:

'Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible'.⁸²

Given the centrality of the obligation to rescue in the context of shipping (which is also reflected in the way in which rescue is considered in shipping arrangements), then a good faith reading requires that any adverse human rights impacts linked to that activity are considered within the parameters of UNGP 13. The responsibility is therefore to cease and prevent any action that has or may have adverse human rights impacts.

Whilst a significant proportion of maritime rescues are undertaken by larger vessels owned by larger corporations, a number of smaller enterprises, particularly fishing vessels, are also involved in the rescue of migrants at sea. UNGP 14 makes clear that whilst 'the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure (...) the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts'. Despite these differences, the responsibilities of all vessels, including smaller vessels owned by smaller enterprises, subsist. The realities, impacts and repercussions for such vessels should however be better understood.

UNGP 15 provides that 'in order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances'. In this regard, it could be argued that internal guidelines as to the standard of conduct expected by vessels and their crews in case of SAR operations could enhance the capacity of each company to deal with rescue operations in a way that is in compliance with international human rights and refugee law. A human rights policy is critical in this space. Not only is it a requirement of the UN Guiding Principles, but such a policy consolidates and highlights the commitments of a company and will facilitate shipmasters' decision-making where required.⁸³

Of relevance in this regard, some P&I clubs have drafted and published insights and guidelines on how to act in case of a SAR operation conducted by their members, acknowledging their duty to assist their members and clients during rescue operations. These provisions, however, focus on the rescue itself rather than on the responsibility of the vessel not to return people to a place of harm. The UNGPs expect companies to include human rights due diligence within their risk management systems in a way that goes 'beyond simply identifying and managing material risks to the company itself, to include risks to

⁸¹ International Chamber of Shipping (n 9) 10.

⁸² John Gerard Ruggie, 'Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context' [2017] Harvard Kennedy School 1.

⁸³ See for example: Maersk - <https://www.maersk.com/news/articles/2019/04/03/human-rights> and MSC - <http://viewer.zmags.com/publication/8586d72e#/8586d72e/108>

rights-holders'.⁸⁴ A risk assessment process that only looks at potential losses for the vessel would therefore fall short of this requirement.

This general obligation includes a Statement of Policy. Such a policy must, in line with UNGP 16, be approved at the most senior level, be informed by internal and external expertise, stipulate the enterprise's expectations of personnel, be publicly available and communicated internally and externally and be reflected in operational policies and procedures. A review of human rights policies of some of the largest shipping companies can be summarised as follows:

- There is usually a general commitment to adhere to human rights standards – this is usually in a general policy or code of conduct, and is subject to reporting, sometimes as a standalone report and sometimes as part of broader sustainability reporting.
- Commitments to human rights are often subsumed within broader policies around business ethics or sustainability.
- Whilst specific human rights issues (often relating to child and forced labour) are expressly discussed in many of these documents, questions relating to the rescue of persons at sea are not included in these policies or reports. It is not identified as a risk nor is any information provided about situations raising such questions.

This raises questions regarding whether these companies' due diligence processes are effectively mapping all of the human rights concerns, and specifically whether they are prepared for risks arising from possible infringements of the rights of refugees and migrants. Whilst the way in which these concerns may come up for companies is significantly different to other human rights considerations, given the severity of the human rights concerned, due diligence processes should be able to identify these risks and develop appropriate approaches to address them. Similarly, in accordance with UNGP 20, companies should track their impacts and the measures they took to mitigate them and, under UNGP 21, 'business enterprises should be prepared to communicate (...) externally' as a way to 'account for how they address their human rights impacts'.⁸⁵

Importantly, and reflecting on rescue as a human rights issue, the inclusion of adequate provisions to address deviation and return linked to rescue (in P&I provisions and charter parties) can be seen as a component of due diligence – recognising the need and putting in place measures to mitigate the risks associated with fulfilling the obligation to rescue and the ensuing delays.

The responsibility to undertake duty of due diligence requires vessels which are likely to find themselves in situations where they will be required to assist in migrant rescue to be prepared for that eventuality. This includes ensuring that the vessel's crew is briefed about the possibility of requiring rescue, that the ship's equipment and procedures for such rescues are adequate, as well as the availability of possibility to de-brief after such rescue situations. Guidance in this regard has been developed by the ICS in collaboration with the IMO and others.⁸⁶

According to UNGP 23, 'all business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognised human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard'. This issue becomes particularly fraught when a vessel is faced with instructions by rescue coordination centres to undertake an action that may result in human rights violations. Such instruction may involve disembarking individuals in a country where they face harm or indeed instructions to hand over control of the rescued persons to authorities from those countries. Such instructions place a Master

⁸⁴ OHCHR (n 57).

⁸⁵ *ibid* 17.

⁸⁶ International Chamber of Shipping (n 9).

in a particularly difficult position. Whilst rescue instructions by the Maritime Rescue Coordination Centre (MRCC) are not enforceable against a vessel on the high seas,⁸⁷ especially when the instruction relates to the disembarkation of rescued persons, the Coastal State may well be the next port of call for the vessel and will make it impossible for that vessel to sail into its ports. Indeed, we have seen situations where ports were closed for vessels who were not allowed to disembark rescued persons.

Put differently, whilst the instruction as to where to return people is not binding (or enforceable), a vessel will often come within the enforcement jurisdiction of a State if it sails into that State's contiguous zone waters or territorial sea. Entry into port for the purpose of disembarkation falls squarely within the remit of the Coastal State's decision. Indeed, 'under the Law of the Sea regime, a coastal State is therefore principally entitled to take measures against a vessel that is not authorised to enter its territorial sea. It is submitted that such measures may include an exchange of communications, requiring the vessel to leave, blocking passage by positioning ships in the vessel's way, and ultimately, the use of forceful means.'⁸⁸ In practice therefore, there is significant pressure on the Master to follow the instructions given. Moreover, when a vessel sails into the port of that coastal State, or even as soon as a vessel enters the contiguous zone of a State, 'the coastal State may exercise the control necessary to prevent and punish infringement of its immigration laws within its territory or territorial sea' (in line with UNCLOS).⁸⁹

In practice, the response to such instructions varies and will depend both on the decision of the Master and the broader organisational culture as reflected in its human rights statements (if they exist). Two examples stand in stark contrast. Facing relatively similar instructions, the *MV Salamis* in 2013 and the *MV Nivin* in 2019 adopted different approaches. The *MV Salamis* challenged the instruction and continued to sail towards Malta. It was blockaded outside Maltese waters and threatened with legal action. Eventually, after a standoff of four days, the migrants onboard were allowed disembarkation in Italy. The *MV Nivin*, on the other hand, sailed to Libya to disembark the migrants it had rescued.

These situations raise important questions and companies must equip the Master of the vessels to make decisions that comply with human rights obligations. Importantly, 'The owner, the charterer or 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'.⁹⁰ Previous Business and Human Rights work by BIICL⁹¹ has identified ways in which this situation may arise, as well as highlighted a range of approaches used by companies to address similar issues.⁹² Some of the suggestions of relevance to the present context include: internal approaches (such as limited compliance and taking the decision to high decision-making bodies in the company); approaches which involve external engagement (such as compliance plus leverage, collective engagement and communication) and alternative responses (such as compliance in alternative ways, taking legal action to challenge conflicting laws, and "responsible non-compliance"). These approaches may provide suggestions as to possible responses that can be undertaken by companies. At a minimum, vessels (and their representatives) should use their leverage with the relevant SAR and Coastal States, and with and through their flag State, to identify solutions that do not render the vessel de facto part of situations of reflagging.

⁸⁷ Erk Rosaeg, 'The Duty to Rescue Refugees and Migrants at Sea' (*Border Criminologies*, 25 March 2020) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/03/duty-rescue>>.

⁸⁸ Lisa-Marie Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?', *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill Nijhoff 2017).

⁸⁹ Article 33

⁹⁰ SOLAS Cap V Reg 34.1.

⁹¹ For more on BIICL's work on Business and Human Rights see: <https://www.biicl.org/categories/business-and-human-rights>

⁹² Lise Smit, Arianne Griffith and Robert McCorquodale, 'When National Law Conflicts with International Human Rights Standards: Recommendations for Business' (British Institute of International and Comparative Law 2018).

Moreover, under the UNGPs, ‘The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdiction’. In the context of boat migration, the relevant jurisdiction is often flag States which have, however, over time, proven unwilling, in the most part, to enforce the obligation of private vessels to rescue persons in distress at sea. Flag States have also often proven unwilling to address broader issues of human rights at sea.

Increasingly, companies are being challenged in court for their involvement in human rights violations whether directly or via broader claims (e.g. tort claims).⁹³ In the present context, some of the jurisdictional and practical hurdles involved in such claims are even more pronounced. As Davies argues, ‘the likelihood of all these conditions being satisfied is so small that the prospect of civil action is not likely to provide much of a deterrent’.⁹⁴ Cases addressing situations involving private vessels have been filed before international treaty-monitoring bodies; however, the complaints have been raised against the State.

In addition, the European Commission has announced that it will launch a legislative initiative on sustainable corporate governance during 2021 which may include mandatory human rights and environmental due diligence.⁹⁵ If there is a law requiring European-operating countries to undertake human rights due diligence, these duties will likely contrast with orders by Coastal States and may assist companies in pushing back against such orders especially when coastal States are also bound by the same legal obligations. Indeed, the BIICL-led study for the European Commission has shown that some of the main reasons why companies support the introduction of such a law is that it would provide them with more leverage over third parties through the introduction of a non-negotiable standard.⁹⁶

In conclusion, it is clear that the UN Guiding Principles offer significant guidance on the responsibility of private vessels to respect the human rights of migrants and refugees at sea. It is worth noting that the UNGPs do not stand alone in setting out responsibilities of business for human rights violations and should be read in line also with other applicable standards including, for instance, the OECD Guidelines for Multinational Enterprises.

⁹³ See for example: *Nevsun Resources Ltd. v. Gize Yebeyo Araya, et al.*, 28 February 2020, Supreme Court of Canada (2020 SCC 5) <https://www.scc-csc.ca/case-dossier/cb/2020/37919-eng.aspx>;

I’d cite some cases here. Unilever, Shell ATS cases – Doe v Nestle, Kiobel etc.

Might be worth making the point that often these cases aren’t explicitly human rights cases but concern what are in substance human rights violations frames as tort or whatever – ie KiK case which involved a factory collapse/health & safety.

⁹⁴ Davies (n 11) 115.

⁹⁵ See BIICL ‘BIICL-led due diligence study basis for European legislative initiative’ 30 April 2020, available at: <https://www.biicl.org/newsitems/16415/biicl-led-due-diligence-study-basis-for-european-legislative-initiative>.

⁹⁶ Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza-Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara and Camille Salinier and Héctor Tejero Tobed for the European Commission DG Justice and Consumers, Study on due diligence requirements through the supply chain, 24 February 2020, available at: <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> (EC study Final Report).

3. Commercial Implications

The costs of shipping are high in financial terms. Deviation and delay linked to rescue will entail significant financial ramifications. Migrant rescue operations tend to be complex and costly, with the allocation of costs involving the shipowner, the charterers, the cargo owners and insurers at a minimum. This section seeks to understand how commercial arrangements regularly in use reflect and respect the duty to rescue and the extent to which they create a disincentive to conduct rescue operations.

Whilst determination of exact costs is subject to the details of any particular situation, the costs can broadly be categorised as direct and indirect. Direct costs include humanitarian provisions, additional wages and stores, extra fuel consumed during and after the rescue, port charges assessed during disembarkation of rescued persons, repairing, restocking and cleaning the vessel itself.⁹⁷ Indirect costs include issues arising from deviation and delay, and implications on the commercial agreements underlying any given voyage and losses to the money-making potential of the vessel. As Attard notes, ‘providing assistance may entail loss of profit or damage due to, inter alia, deviation or delayed disembarkation’.⁹⁸ These are likely to be even more substantial than the direct costs. As the *MV Tampa*,⁹⁹ *MT Salamis*¹⁰⁰ and *Maersk Etienne* incidents clearly illustrate, these delays are likely to be exacerbated by States’ unwillingness to allow disembarkation. Whilst details of such losses have tended not to be published, stakeholders have reported losses of up to USD \$500,000 arising out of a single migrant vessel rescue causing the vessel to be delayed for one week.¹⁰¹ Whilst insurance may cover some of these expenses (as we will see below) significant costs will be borne by those having a direct financial interest in the voyage.

The determination of costs and, critically, who bears those costs, will depend on the underlying agreements. Identifying the parties responsible for specific costs will allow them to better prepare and to seek the relevant insurance and related coverage. An important distinction must be drawn here between contracts for the carriage of goods under a bill of lading (used primarily in the liner trade) on the one hand, and contracts for the carriage of goods under a charterparty (in the tramp trade) on the other. The particular contractual relationship raises different issues in terms of rescue costs and addresses different relationships. Charterparties deal with the relationship between the shipowner and the charterer and pertain to the use of the vessel or space thereon. Bills of lading, on the other hand, will cover risks of delay in respect of specific cargo and will address the relationship between the carrier (who may be both the shipowner or the charterer) and the shipper. Whilst this section refers to the standard terms developed as templates by industry bodies (e.g. BIMCO), parties are allowed to negotiate different terms and any claim must be analysed on the basis of the particular terms agreed.

This section starts by outlining some of the liability risks for private vessels involved in rescue situations. The rules on the carriage of goods by sea make some provision for saving life at sea. Importantly, the rules appear to build on the requirement that vessels rescue persons in distress at sea and make arrangements for when this happens. The Hague, Hague Visby, Rotterdam and Hamburg rules apply in the context of agreements for the carriage of goods under a bill of lading. The particular rules apply depending on the set of rules having been ratified by the jurisdiction under which the bill of lading was issued.¹⁰²

⁹⁷ This list is provided in P&I Coverage documentation.

⁹⁸ Attard (n 7) 14. *ibid.*

⁹⁹ Rothwell (n 3). *ibid.*

¹⁰⁰ Mallia and Gauci (n 2). *ibid.*

¹⁰¹ Richard L. Kilpatrick, Jr, ‘The “Refugee Clause” for commercial shipping contracts: why allocation of rescue costs is critical during periods of mass migration at sea’,

<https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2409&context=gjic>

¹⁰² The application of the Hamburg and Rotterdam rules is much more limited than the Hague and Hague Visby Rules.

Article IV of the Hague Rules¹⁰³ and of the Hague Visby Rules¹⁰⁴ provides that 'Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom'.¹⁰⁵ On the question of liability they provide that 'Neither the carrier nor the ship shall be responsible for loss or damage arising from (...) Saving or attempting to save life or property at sea'. In terms of loss of or damage to cargo therefore, it is the shipper or the owner of that cargo that would be left with the cost of the loss or damage, unless and to the extent that they are not insured for the same. This, however, does not address costs associated with delays for the vessel itself. Those costs will be borne by whoever is responsible for the vessel, which may be a shipowner or a charterer.

A similar provision is made under Article 17(3) of the Rotterdam Rules¹⁰⁶ which provides that 'the Carrier is (..) relieved of all or part of its liability for loss of or damage to goods as well as for delay in delivery if it proves that, inter alia, 'saving or attempting to save life at sea' caused or contributed to the loss, damage or delay'.¹⁰⁷ Article V(6) of the Hamburg Rules provides that 'the carrier is not liable, except in general average,¹⁰⁸ where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea'. The distinction between 'measures' in the context of saving life and 'reasonable measures' in the context of saving property is notable.¹⁰⁹ In contrast to the Hague Visby Rules, the Hamburg rules refer directly to 'general average'. The expenses which fall within this definition are borne by those parties in proportion to the value of their respective interests at the time when and place where the adventure ends.¹¹⁰ This implies a greater responsibility for the carrier than the provision of the Hague Visby rules, but it still absolves them of liability for such damage.

Interestingly, the rules refer to efforts to save life at sea and not to the question of disembarking rescued persons or, indeed, if there are delays associated with that disembarkation. However, in this regard, one must note that the definition of rescue includes delivery to a place of safety and therefore the exemption from liability (in the carrier and shipper relationship) associated with rescue ought to cover the full process including any delays associated with disembarkation. Questions arise if, for instance, the situation changes to one where the vessel is detained with persons onboard.

Beyond the international rules relating to Carriage of Goods by Sea, standard terms in Charter Party agreements are also worth examining. Indeed, charterparties are more likely to form the basis of a dispute in this regard. It is important to distinguish between the types of charterparties used, namely: time charters, voyage charters, and bareboat charters.¹¹¹ In both time and voyage charters, 'the ship remains in the possession of the owner who crews, maintains and insures the ship'.¹¹² Under a time charterparty 'the ship is placed at the disposal of the time-charterer for a period of time and the time charterer pays hire for every minute that it is so placed, unless the ship is "off hire"'. Under a Voyage Charterparty 'the contract is for a voyage and a charterer pays freight and, if the time allowed at either the load or discharge port is exceeded, usually demurrage'. Importantly, these model charterparties are exactly that – models – and the parties may agree to different terms, under freedom to contract principles, in line with their respective bargaining powers.

¹⁰³ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules")

¹⁰⁴ Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968.

¹⁰⁵ Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968.

¹⁰⁶ For a discussion of the value of the Rotterdam Rules in comparison with Hague and Hague Visby Rules see: Simon Baughen, *Shipping Law* (7th Edition, Routledge 2019) 133–166. For a discussion of the value of the Rotterdam Rules in comparison with Hague and Hague Visby Rules see: *ibid.*

¹⁰⁷ Rotterdam Rules - UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009. *ibid.*

¹⁰⁸ Yvonne Baatz, *Maritime Law* (CRC Press 2014) 255.

¹⁰⁹ Hamburg Rules - UN Convention on the Carriage of Goods by Sea 1978 1978. *ibid.*

¹¹⁰ Yvonne Baatz, *Maritime Law* (CRC Press 2014) 255. *ibid.*

¹¹¹ Yvonne Baatz and Ainhoa Campas Valesco, *Maritime Law* (Fourth, Routledge 2018) 123–184.

¹¹² *ibid.* 124.

First, it is notable that the standard terms common to charterparties allow liberty to deviate in the case of rescue of persons at sea. This applies to both time and voyage charterparties.¹¹³ Under Article 16 of the NYPE1946, 'the vessel shall have the liberty to sail with or without pilots, to tow or to be towed, to assist vessels in distress and to deviate for the purpose of saving life and property'. The same provision is included in the 1993 and 2015 versions of NYPE and 'is a common wording used in many time charterparties. Its application is in the context of a Master's obligation to proceed with due despatch and to comply with the charterers' employment orders.'¹¹⁴ Under Shelltime 3 and 4: 'Subject to the provisions of Clause 21, all loss of time and all expenses (excluding any damage or loss of the vessel or tortious liabilities to third parties) incurred in saving or attempting to save life (...) shall be borne equally by Owners and Charterers'.¹¹⁵

Similar liberty is allowed under the standard terms for voyage charterparties. For example: under Article 3 (Deviation Clause) of the GenCon1994 (Uniform General Charter), 'the vessel has liberty (...) to deviate for the purpose of saving life and/or property'. Under Article 21 (Liberty) of the ShellVoy 6: 'The vessel shall be at liberty (...) to deviate for the purpose of saving life or property'.¹¹⁶ Under Article 19 (General Exceptions Clause) of the ASBATANKVOY: 'the vessel, her Master and Owner shall not, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from saving or attempting to save life or property'.

What is therefore very clear is that most of the model charterparties include provisions to allow liberty to a master in the context of rescue of persons at sea. This is sensible given the legal requirement of the Master of a vessel to rescue people at sea. However, the liberty to deviate to rescue does not address the question of who bears the costs incurred. Put differently, there is a question of whether the Master is allowed (has liberty) to deviate and whether that creates liability for the shipowner and a second, more complex question of whether, when a vessel does indeed deviate under these conditions, the vessel remains 'on hire'. Here, the difference between voyage and time charters is notable.

In the context of time charters, if the vessel is considered to remain 'on-hire' then the charterer is required to continue to pay the daily fee, whilst if it is 'off hire' the financial burden is more directly borne by the shipowner. Model off hire clauses do not include deviation for the purpose of rescue as 'off-hire' situations. The NYPE 2015 maintains the liberty clause above, adds to the list of off-hire situations that the vessel is off-hire, 'should the vessel deviate or put back during a voyage contrary to the orders or directions of the charterers for any reason other than accident to the cargo or where permitted in Clause 22 (Liberties – including rescue) hereunder, the hire to be suspended from the time for fair deviating or putting back until it is again in the same or equidistant position from the destination and the voyage resumed therefrom'. These changes were brought in as part of the 2015 amendments and were in part in response to issue that arose under NYPE 1946 wording around the issue of whether the vessel was off hire when it was rendering rescue services.¹¹⁷ 'By tying together the liberties clause with the off-hire clause by reference, this NYPE 2015 language protects the Shipowner by excluding life-saving deviations as off-hire events'.¹¹⁸

Under Shelltime 3, rescue of persons at sea is not considered an 'off-hire' situation and indeed Article 26 makes specific provision on the sharing of costs: 'all loss of time and all expenses (excluding any damage to or loss of the vessel) incurred in saving or attempting to save life and in unsuccessful attempts at salvage shall be borne equally by Owners and Charterers (...)'. This provision is subject to the 'off hire' provisions. The same wording is carried in Article 25 of Shelltime 4.

¹¹³ Ibid.

¹¹⁴ Time Charter NYPE 2015 Explanatory Note 2015.

¹¹⁵ 'Shelltime4'.

¹¹⁶ 'Shellvoy6'.

¹¹⁷ This issue arose in the Roachbank case for example.

¹¹⁸ Kilpatrick (n 11) 35. *ibid.*

Beyond the impacts of the direct voyage, it is also worth noting that deviation and delays for rescue or due to disembarkation may also impact the next voyage planned for the vessel. This is particularly relevant in the context of voyage charterparties but could apply also to time charterparties. However, given that time charterparties are often concluded for a significant period of time, it is less likely that it will arise. Charterparties will often include allow the charterer the option of cancelling the charter if the vessel is not ready or at their disposal by the agreed date. Any losses linked to such cancellations will not be covered and must be borne by the Shipowner. For example: Shelltime 3 provides for a provision allowing the Charterers the option of cancelling the charter if the vessel is not ready or at their disposal by a given date.

It is with this in mind that various recommendations have been made for a so-called 'refugee clause' to be incorporated into relevant Charter agreements¹¹⁹ and that model clauses be developed on a similar plain to those developed for issues around piracy and stowaways.¹²⁰

Insurance

Private vessels will regularly carry two types of insurance, namely Hull and Machinery Insurance and Liability insurance.¹²¹ Both are usually procured by the shipowner. The latter, which is of relevance for the current discussion, are insured through Protection and Indemnity Associations (P&I Clubs). P&I covers some of the direct (out of pocket) costs associated with rescue but do not cover the costs related to the deviation and delay of the underlying journey.¹²² It is worth noting that P&I Clubs are mutual losses; costs and expenses in this context cover both any liability that the ship might incur to third parties but also include losses, costs and expenses to the member (ship) itself.

Under policies provided by Gard 2020 (and previous), the UK Mutual Steam Ship Assurance Association, and The North of England Protecting and Indemnity Association Limited, costs associated with deviation are covered and are listed as fuel, insurance, wages, stores, provisions and port charges. The cover is itemised, and it is only elements listed that are covered meaning that extra hire or freight or other losses arising as a consequence of delay caused by the diversion are not covered. Steamship Mutual P&I explicitly specifies that the costs relating to search and rescue operations will be covered even if the operation does not result in the rescue of persons. A similar understanding is implicit in other Club rules. In various cases, claims can only be made if the diversion was authorised in advance by the Club, although there are exceptions to this which, one could argue, include when the diversion is required by law (as is the case to rescue people in distress at sea).

Importantly, under these P&I rules, whilst 'liabilities, losses, costs or expenses arising out of salvage operations conducted by the ship or provided by the member' are excluded from cover, 'liabilities, costs and expenses arising out of salvage operations conducted by the ship for the purpose of saving or attempting to save life at sea are exempted from this exclusion and therefore can indeed be claimed'.¹²³

Under the Steamship Mutual P&I Rules, 'cover will be offered for port and deviation expenses when incurred for the purpose of landing (...) persons rescued at sea, provided that such expenses have in the opinion of the managers been reasonably incurred. Other Clubs rely on legal liability for costs or prior approval as the criterion for determining whether a particular expense is covered. This raises a number of questions such as, for instance, if the delay is extended because the master of the vessel refuses to abide by instructions that would be in violation of international law. Can this be considered by the Club to be 'unreasonable' and therefore exclude cover?

¹¹⁹ A convincing argument is made by Kilpatrick (n 11).

¹²⁰ Ibid.

¹²¹ See generally: Ozlem Gurses, *Marine Insurance* (2nd edn, Routledge 2017).

¹²² Davies (n 11).

¹²³ See for example: Rule 63 of Gard Rules (2017)

P&I Clubs can also cover fines imposed upon one of the members. This includes fines imposed due to breach of immigration regulations.¹²⁴ Gard guidance, however, notes that this does not extend to cover the confiscation by the authorities of the ship. Indeed, an analysis of P&I rules indicates that, with few exceptions, the confiscation of the ship is not covered by P&I. This might be relevant in situations where vessels are confiscated pending investigation, especially when migrant smuggling is suspected (or is used as a pretext for such confiscation).

P&I cover can also cover additional costs including liability in the case of injury, illness or death of persons onboard. This covers anyone onboard including both crew members and others although, in most cases, the authorization of the Club must be given for that individual to be onboard. This cover may be relevant in a situation where an individual is injured during a rescue operation.

There are also a number of specific provisions that are related tangentially to the current discussion, most notably cover relating to refugees and stowaways. Gard rules, for instance, cover expenses incurred in relation to guarding, custody, immigration, deportation or repatriation; however, these costs are only covered insofar as they are 'directly and reasonably incurred in consequence of having stowaways and refugees onboard'. Guidance to Masters also provides instructions on actions to be taken and evidence to be collected as this will be necessary to assess the existence and extent of costs incurred.¹²⁵ This is important not least because it helps the assessment of any losses incurred.

There may well be other insurance products available that could help cover some of the risks associated with the above including service disruption insurance. Understanding the risks and who bears responsibility for those risks is key to ensure that appropriate cover is procured.

¹²⁴ See for example: 19(9)C of North of England P&I Club.

¹²⁵ GARD, *Guidance to Masters* (2nd Edition, Gard P&I Club 2006). *ibid.*

4. The Obligations and Role of Flag and States

States remain the lynchpin of international law and this field is no exception. Whilst this report has identified a number of obligations and responsibilities for the shipowner and shipmaster, States still retain significant obligations. This section presents some of the responsibilities of States with regards to the coordination of rescue operations and the disembarkation of rescued persons. This section does not provide an overview of States' obligations in the context of maritime migration but merely touches on the provisions that are of direct relevance to situations where private vessels rescue people at sea.

Flag State Responsibility to Ensure Vessels Rescue Persons in Distress

The responsibility of the Flag State comes in part from Article 94 UNCLOS which provides that, 'Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'. This includes but is not limited to the duty to 'assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship'.

Flag States must ensure that they put in place measures that respect human rights. This includes the obligation to rescue under both the law of the sea (see part 1) and the positive obligations linked to the right to life. Under the UN Guiding Principles, and human rights law more broadly, 'States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'. This State duty to protect is binding under human rights law and is a standard of conduct (not of result). Given the parameters of the UNGPs, the question arises whether these obligations are also binding on the State where a vessel's parent company is based.

Flag States must incorporate within their domestic law the obligation of any Master flying their flag to go to the rescue of any person in distress at sea, and to do so irrespective of the nationality and status of the individuals concerned. This is a requirement under the right to life, but equally under the various law of the sea instruments including: Article 98 UNCLOS, and the SAR and SOLAS Conventions. As noted elsewhere, leading Flag States around the globe have such an obligation within their domestic legal frameworks.

This obligation also requires flag States to ensure that vessels are equipped to deal with rescue situations, including by having the relevant equipment onboard. This obligation derives from other international obligations including UNCLOS and the SAR and SOLAS Conventions which provide details as to what equipment and other resources should be made available. Guidance by the International Chamber of Shipping has further elaborated on these requirements through non-binding guidelines for preparation in situations of mass rescue.

A Flag State also has an obligation to investigate incidents where a Master of a vessel flying its flag does not assist persons in distress at sea. As noted elsewhere, the obligation to rescue is not absolute, but investigations must be undertaken as to whether the decision of the Master not to rescue people at sea was justified. Confusingly, the standards against which this determination may be made vary depending on the legal instrument. In practice, such investigations are extremely rare and difficult to implement.

Beyond the obligation to rescue, flag States should also require vessels flying their flag to respect other human rights including the principle of non-refoulement. Such a requirement should cover situations where vessels are given contradictory instructions. One can theoretically envisage a situation where a State can challenge another State's instructions to a vessel flying its flag on the basis of human rights violations.

Importantly, under Article 31(3)(C) of the Vienna Convention on the Law of Treaties, in interpreting a Treaty 'there shall be taken into account (...) any relevant rules of international law applicable in the relations between the parties'. In the context of maritime rescue, this will include provisions under the law of the sea and under international human rights law. Moreover, Article 293 UNCLOS provides, in the context of applicable law for the settlement of disputes that 'a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention'. Whilst the focus is on law of the sea disputes, this provision allows for a reading of international human rights law into the law of the sea obligations. One can envisage a situation where a claimant, such as was the case in previous cases before international bodies (e.g. Hirsi) can file such a claim. This raises questions of access to a remedy under the third component of the UNGPs.

The State cannot be held directly liable for the actions of vessels flying its flag unless the vessel in question is State owned and run. In its Advisory Opinion of 2 April 2015 on IUU Fishing, the Tribunal clarified the responsibility of the flag State in finding that:

The liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations (...), as the violation of such laws and regulations is not per se attributable to the flag State.¹²⁶

Instead, Flag State liability arises from its due diligence obligation. As the Tribunal continued:

The liability of the flag State arises from its failure to comply with its due diligence obligations concerning (...) activities conducted by vessels flying its flag.¹²⁷

The Tribunal made reference to the International Court of Justice decision in *Pulp Mills* in outlining the meaning of due diligence obligation, noting:

It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.

Coastal States Obligations to Minimise Delay in Disembarkations

As noted above, many of the commercial costs of private vessels arise from delays in the disembarkation of refugees and migrants rather than the rescue operation itself.

The Safety of Life at Sea Convention requires States to engage with masters who rescue people in distress in order to minimise deviation:

Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea.¹²⁸

The failure of States to co-operate in relieving the vessel from its responsibility can therefore be in violation of this obligation. The 2004 Guidelines on the Treatment of Persons Rescued at Sea sets 'relieving masters of obligations after assisting persons' as a priority and notes that 'flag and coastal States should have

¹²⁶ 'Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015' (ITLOS 2015) 146.

¹²⁷ *ibid.*

¹²⁸ SOLAS Reg 22 1.1

effective arrangements in place for timely assistance to shipmasters in relieving them of persons recovered by ships at sea'. The guidelines also require that:

A ship should not be subject to undue delay, financial burden or other related difficulties after assisting persons at sea; therefore coastal States should relieve the ship as soon as practicable.¹²⁹

The party within whose SAR Region rescue takes place shall:

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.

One question that is likely to arise is whether the reference to 'the Party responsible for the search and rescue region in which such assistance is rendered' is always the designated State, or whether if another State intervenes and manages SAR operations within that region, in particular due to an arrangement with or lack of response by that State party, that other State can be held responsible. The answer to this question is affirmative at least until such time as the State in whose SAR region the rescue takes place takes on responsibility for the rescue operation.

On a more practical level, of course, is the question of how such an obligation would be enforced in practice. However, one could at least theoretically envisage a situation where a Flag State, on behalf of a vessel that was unduly delayed after rescue, could challenge the delay in the SAR State and other Coastal States to determine disembarkation. Some have also questioned whether Flag States themselves, as the State exercising jurisdiction over the vessel, should not absorb some of the responsibility. The practicality of this has been raised as an explanation for not following up on this possibility with many arguing that it is not a feasible option because the shipmaster should not be expected to travel long distances with vulnerable persons on board. It is worth noting, however, that allowing access to the territory may take place indirectly, such as by facilitating transit through a coastal State and onward travel to the flag State.

The obligation to not delay disembarkation is also linked to other human rights violations including the right to life and the right to health. Vessels are not equipped to keep rescued persons onboard for long periods of time, and the conditions onboard may well deteriorate to the point where they become tantamount to degrading conditions. Equally, long delays have been reported to negatively affect the physical and mental health of rescued persons. It could thus be argued that a State which is under an obligation to allow disembarkation according to international law that however fails to do so in a timely manner, could be responsible for causing inhuman or degrading treatment and violations of the right to life (for example when suicide is threatened) and the right to health of the rescued by protracting the hardship onboard the vessel. It must be kept in mind that:

An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for the survivors. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made.¹³⁰

It is also worth noting that the COVID-19 pandemic has also been used as a pretext for further delay to disembarkation with States arguing that rescued persons should not be disembarked due to the public health risk. Some have gone as far as to close their ports for rescue vessels altogether, further exacerbating these concerns. It must be highlighted however that State emergency measures to limit the pace of contagion cannot derogate the obligation of *non-refoulement*.

¹²⁹ Para 6.3

¹³⁰ IMO, 'Guidelines on the Treatment of Persons Rescued at Sea MSC.167(78)' (2004). 6.13

Coastal States Responsibility for Instructions Given that Violate Human Rights Obligations

Under the Vienna Convention on the Law of Treaties and Customary International Law, States have an obligation to apply international law in good faith, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

This entails that States do not use the obligation of shipmasters to rescue persons in distress as a means of circumventing their other international obligations – including under human rights law. Article 27 of the Vienna Convention on the Law of Treaties provides that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty', whilst Article 3 of the ILC Articles on State Responsibility provides that: 'the characterisation of an act of a State as an international wrongful act is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law'. This principle has significant judicial backing, including by the PCIJ, the ICJ and numerous arbitral tribunals.¹³¹ Therefore, the fact that the State provides an instruction to return persons to a place in violation of the principle of non-refoulement does not diminish its responsibility for such action.

The responsibility of States for giving those instructions is clear from a reading of the ILC Articles on State Responsibility. First, the instruction itself, when a violation of the principle of non-refoulement is foreseeable, is a wrongful act and is attributable to the State by virtue of being given by a State organ (the Rescue Coordination Centre).

Moreover, under the Articles, the State is responsible if the internationally wrongful act is conducted by a private vessel upon instruction or direction of the State. Article 8 provides that:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

This question is currently pending in part before the Human Rights Committee. In the case of *SDG* against Italy, submitted for consideration under the Optional Protocol to the ICCPR, the claimant is seeking a finding against Italy for returns that took place by the *MV Nivin*, as well as for the various consequences of that return including the detention and risks of trafficking and slavery-like conditions.¹³²

The application of the Articles generally by the European Court of Human Rights is less obvious or direct¹³³ although there too, a case currently pending before the court must determine the extent to which the jurisdiction of the State (also Italy) extends in situations of no-contact return.

It is also worth noting that the criminalisation of rescue which has been raised primarily, but not exclusively, with regards to NGO rescue may constitute a violation of international law. In this regard, it is worth noting that the new EU Pact on Migration makes specific reference to the non-criminalisation of NGO rescue operations. In the Commission Guidance on the implementation of the Facilitation Directive, the Commission affirms that Article 1 of the Directive 'cannot be construed as a way to allow humanitarian activity that is mandated by law to be criminalised, such as search and rescue operations

¹³¹ 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (United Nations 2008). *ibid.*

¹³² 'Communication to the United Nations Human Rights Committee In the Case of *SDG* against Italy (Anonymized Version) Submitted for Consideration under the Optional Protocol to the International Covenant on Civil and Political Rights to The United Nations Human Rights Committee' (GLAN 2019). *ibid.*

¹³³ James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights', *The European Convention on Human Rights and General International Law* (Oxford University Press 2018). *ibid.*

at sea, regardless how the Facilitation Directive is applied under national law'. In the view of the Commission this means 'the criminalisation of NGOs or any other non-state actors that carry out search and rescue operations at sea, while complying with the relevant legal framework, amounts to a breach of international law, and therefore is not permitted by EU law.'

Conclusions and Recommendations

This report has sought to highlight the obligations and responsibilities, commercial and in terms of human rights, of private vessels when they rescue persons in distress at sea. The focus of this research has been on privately-owned merchant vessels and, whilst some of the considerations will apply to other vessels also – such as NGO rescue vessels – further research into the particularities of such situations is encouraged. The findings of this report are clear: there is an obligation to rescue persons in distress for all private vessels. The incomplete nature of this framework, including its failure to assign a default State of disembarkation and its difficulty in coping with current migration dynamics, raises a series of commercial and human rights implications. This report has sought to highlight how the responsibilities set out in Pillar II of the UN Guiding Principles on Business and Human Rights apply in the context of the rescue of migrants and refugees at sea, including under the right to life and the prohibition of refoulement. It also analysed the way in which rules relating to the carriage of goods and charterparties and coverage address deviation for the purpose of rescue and allocated costs associated with such deviation and delay.

- There is a clear need for an integrated approach to boat migration and rescue at sea. Such an approach requires genuine good faith efforts by States, all commercial players involved in shipping and other actors including NGOs and international organisations. An integrated approach involves adherence to human rights principles as well as law of the sea requirements.
- The international community should clarify and formalise rules for disembarkation and avoid using delayed disembarkation as a lobbying tactic for responsibility sharing. The rescue of people at sea, across all its stages, should not be used as a bargaining chip.
- States must take the responsibility for assisting masters having rescued persons in distress at sea. This can only be achieved if realistic, effective and efficient mechanisms for solidarity are developed between States.
- Shipping companies should use their individual and collective bargaining power to put pressure on States to better regulate rescue at sea and to ensure the swift and safe disembarkation of all rescued persons in a place of safety. For example, the current negotiations around the new EU Pact on Migration can be used as an opportunity for Shipping Companies to advocate for clearer guidance in this regard.
- Industry organisations should develop model clauses addressing the sharing of risk between different actors involved for easy adoption by Shipowners and Charterers into their agreements.
- States and industry bodies should consider developing international (public or private) mechanisms allowing shipping companies and any corporation engaged in maritime activities to share the financial costs of rescue of migrants at sea. The model of the International Convention on the Establishment of an International Fund for Compensation for Oil Damage could provide a basis for these discussions, allowing shipping companies to share the (financial) risks associated with rescue operations.
- In order to promote greater engagement with the commercial implications in this field, relevant parties should facilitate access to information on arbitration decisions (even if anonymised and summarized) relating to questions addressing (allocation of) costs relating to rescue at sea.
- Researchers and activists should ensure that the role of private vessels, especially in this field, is mainstreamed in literature addressing business and human rights and that business and human rights is mainstreamed in analysis of merchant vessels involved in maritime rescues.

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