



Maritime law and irregular migration in the Mediterranean area between EU legislation and international conventions

- International relevant organisations
- International conventions (UNCLOS, SOLAS, SAR)
 - EU agencies and regulation on migration
 - Search and Rescue in EU member States

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International organisations



- **IMO**

- UN specialized agency
- Standards for safety and security and environment protection in international shipping
- Create a regulatory framework for the shipping industry
- More than 40 Conventions
 - SAR 79 (Search and Rescue)
 - SOLAS 74 (Safety of Life at Sea)

- **UNHCR**

- UN Agency for Refugees
- UN 1951 Refugee Convention
 - 1967 Protocol
- Guardian of the Convention and duty of States for cooperation

- **IOM**

- UN intergovernmental organization in the field of migration
- Promoting safe, humane and orderly migration
- Action in
 - Migration management
 - Crisis response
 - International cooperation and partnership
 - Global approach for migration
- Declaration of UN General Assembly in 13 September 2016 in New York
 - An agenda for addressing movements of refugees and migrants



International organisations

II – EU migration and home affair policies

- European Union
 - Supranational organization
 - EU bodies
 - Council
 - Commission
 - Parliament
- Migration and asylum policies
 - Pact on migration and Asylum of 2020
 - Security in external frontier
 - Frontex agency
 - Legal basis in article 77-79 TFEU
- EU Treaty
 - Article 67-80 TFEU
- Common European Asylum System (CEAS)
 - Various directives and regulations
- An EU policy with third states regarding migration and asylum
 - International conventions
 - Declaration EU-Turkey of 18 March 2016
 - Political dialogue and agenda with other States





- United Nations Convention on the Law of the Sea 1982
 - Definition of territorial sea and contiguous zone, **innocent passage**, exclusive economic zone, continental shelf, high seas, etc.
 - Relevant provisions regarding refugees and migration
 - Asylum seekers
- Provisions of the UNCLOS
 - Article 17 – Right of innocent passage
 - Subject to this Convention, ships of all States, whether coastal or land-locked, **enjoy the right of innocent passage through the territorial sea.**
 - Article 19 – Meaning of innocent passage
 - 1. Passage is innocent so long as it is not **prejudicial to the peace, good order or security of the coastal State.** Such passage shall take place in conformity with this Convention and with other rules of international law.
 - 2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
 - (g) **the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;**
 - (l) any other activity not having a direct bearing on passage.
 - Article 21 – Law and regulations of the coastal State relating to innocent passage
 - Article 25 – Right of protection of the coastal State



- Provisions of the UNCLOS

- Article 92 – Status of ships

- 1. Ships shall **sail under the flag of one State only** and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to **its exclusive jurisdiction** on the **high seas**. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
- 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

- Article 98 – Duty to render assistance

- 1. Every **State** shall require the **master of a ship** flying its flag, in so far as he can do so **without serious danger to the ship, the crew or the passengers**:
 - (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;
 - (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
- 2. Every coastal State shall promote the **establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea** and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.



International Conventions – High Seas Conv 1958



- The UNCLOS 82 is more complete and successful
- Provisions
 - Article 12
 - 1. Every State shall require the master of a ship sailing under its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers,
 - (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;
 - (c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.
 - 2. Every coastal State shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and—where circumstances so require—by way of mutual regional arrangements co-operate with neighbouring States for this purpose.



International Conventions – Salvage '89



- Are defined the duties of the salvor, shipmaster or owner during the assistance of a ship or person in distress at sea
- Provisions
 - Article 10 – Duty to render assistance
 - 1. 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.**
 - 2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.
 - 3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.
 - Article 11 – Cooperation
 - A State Party shall, **whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress** or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to **ensure the efficient and successful performance of salvage operations** for the purpose of saving life or property in danger as well as **preventing damage to the environment in general.**



International Conventions – SOLAS '74



- The Convention is an important instrument regarding safety of navigation of merchant ships. Sets standards for the operation of a ship in safety.
- Search and rescue obligations for ships and contracting States
- Provisions
 - Chapter V Reg. 7 – Search and rescue services
 - 1. Each **Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for rescue of persons in distress at sea around its coast.** These arrangements shall include the establishment, operation and maintenance of such **search and rescue facilities** as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers, and **shall, so far as possible, provide adequate means of locating and rescuing such persons.**
 - 2. Each Contracting Government undertakes to make available information to the Organization concerning its existing search and rescue facilities and the plans for changes therein, if any.



- Provisions

- Chapter V Reg. 33 – Distress message: obligation and procedures

- 1. The **master** of a ship at sea which is in a position to be able to provide assistance, on **receiving a signal** from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must **enter the log-book the reason for failing to proceed to the assistance of the person in distress**, taking into account **the recommendation of the Organization to inform the appropriate search and rescue service accordingly**.
- 2. The **master of a ship in distress or the search and rescue service concerned**, after consultation, so far as may be possible, with the masters of ships which answer the distress alert, has the right to requisition one or more of those ships as the master of the ship in distress or the search and rescue service considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress.
- 3. Masters of ships shall be released from the obligation imposed by paragraph 1 on learning that their ships have not been requisitioned and that one or more other ships have been requisitioned and are complying with the requisition. The decision shall, if possible, be communicated to the other requisitioned ships and to search and rescue service.
- 4. The master of a ship shall be released from the obligation imposed by paragraph 1 and, if his ship has been requisitioned, from the obligation imposed by paragraph 2 on being informed by the person in distress or by the search and rescue service or by the master of another ship which has reached such person that assistance is no longer necessary.
- 5. The provision of this regulation do not prejudice the Convention for the Unification of Certain Rules of Law relating to the Assistance and Salvage at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by article 11 of that Convention.



- Provisions

- Chapter V Reg. 2 – Definitions

- 5. **Search and rescue service.** The performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircraft, ships, vessels and other craft and installations.
- Added new paragraph

- Chapter V Reg. 33 – Title “Distress situations: obligations and procedure”

- Replaced the word “signal” with “**information**” in paragraph 1
- Added a sentence “**This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found**”
- New paragraph 1-1
 - 1-1 **Contracting Governments 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 the obligations under the current regulation does not further endanger the safety of life at sea.** The Contracting Government responsible for the search and rescue region in which such assistance is rendered 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, taking into account the particular circumstances of the case and guidelines developed by the Organization.** In these cases the relevant Contracting Governments shall arrange for such disembarkation **to be effected as soon as reasonably practicable.**
- New paragraph 6 - “Masters of ships who have embarked persons in distress at sea shall treat them with **humanity, within the capabilities and limitations of the ship**”



- Provisions

- Chapter V Reg. 34 – Master's discretion

- Deleted paragraph 3

- Added a new Reg. 34-1 Master Discretion

- New paragraph 1-1

- The owner, the charterer, the company operating the ship as defined in regulation IX/1, 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 judgement, is necessary for safety of life at sea and protection of the marine environment.**

- Changed provisions and added new rules in order to better cope with the migrants in sea and to offer a better definition on search and rescue operations

- Better definition

- Clearer duties on master, shipowners and Government



- The Convention aim to develop an international search and rescue plan and a better coordination under SAR organisations
- Search and rescue operations coordinated under a common framework internationally
- Provisions
 - Chapter 1 – Terms and definition
 - 1.3.2. **Rescue.** An operation to retrieve persons in distress, provide for their initial medical treatment or other needs, and deliver them to a place of safety.
 - Chapter 2 – Organization and coordination
 - 2.1.1 **Parties** shall ensure that necessary arrangements are made for **the provision of adequate search and rescue services for persons in distress at sea round their coasts.**
 - 2.1.10 Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so **regardless of the nationality or status of such a person or the circumstances in which the person is found.**



International Conventions – SAR 79 II



- Contextual amendments with SOLAS Convention in 2004
- Better assistance for person in distress at sea and minimizing the problems for ship that offers assistance
- Provisions amended
 - Chapter 2 – Organisation and coordination
 - In 2.1.1 a sentence is added: **The notion of a person in distress at sea also includes persons in need of assistance who have found refuge on a coast in a remote location within an ocean area inaccessible to any rescue facility** other than as provided for in the annex
 - Chapter 3 – Cooperation between States
 - 3.1.6 subpar 4 added “4. to make the necessary arrangements in co-operation with other RCCs to **identify the most appropriate place(s) for disembarking persons** found in distress at sea.”
 - New par. 3.1.9 “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. The Party responsible for the search and rescue region in which such assistance is rendered 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, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.”



- Provisions amended
 - Chapter 4 – Operating procedures
 - 4.8 – Termination and suspension of research and rescue operations
 - New par. 4.8.5
 - “The **rescue co-ordination centre or rescue sub-centre concerned shall initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea.** It shall inform the ship or ships and other relevant parties concerned thereof.”
- Amendments to Conventions in order to deal with problems in practice
 - Ex. Tampa Case in Australia (2001)
- IMO guidelines – On the treatment of persons rescued at Sea



International Intervencion of MSC under IMO I



- IMO guidelines – On the treatment of persons rescued at Sea – Res. MSC 167(78)
 - 3. Priorities
 - **Lifesaving**
 - **Preservation of integrity and effectiveness of SAR services**
 - **Relieving masters of obligation** after assisting persons
 - 5. Shipmaster
 - 6. Government and Rescue Co-ordination Centres
 - **Indication of Place of safety** (6.12 and ss.)
 - Non-SAR considerations (6.19)



International Convention Status of Refugee 1951 and Protocol of 1967



- Article 1 defines the term of refugee
- Art. 31 – Refugees unlawfully in the country of refuge
- Art. 33 – Prohibition of expulsion or return (refoulement)
 - 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
 - 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.
- Art. 35 – Co-operation of the national authorities with the United Nations - with UNHCR or IOM



EU and irregular migration by sea



- SAR regions in Mediterranean area were **unilaterally** declared creating problems in coordination of ops
 - Sank boat on 11 October 2013 in Mediterranean area within RCC of Malta and Italy – try to avoid responsibility
- EU try to adopt an **uniform interpretation and regulation of rescue, disembarkation and distress**
 - 2014 Proposal of the “Sea Borders Regulation”
 - Regulation EU 656/2014
 - Regulation EU 2019/1896 European Border and Coast Guard
 - Repeal of Reg. EU 2016/1624
 - Yet problems regarding notions of **distress and disembarkation**
 - 2018 – German NGO Lifeline - prevented for disembarking in Lampedusa or Malta



EU and irregular migration by sea I



- ECtHR ruling in Hirsi decision
 - EU government vessels patrolling are obliged not to return irregular migrants
 - Independent assessment of **individual circumstances** (for no refoulement)
 - Extraterritorial jurisdiction beyond 12 miles
 - In other countries
 - Or in high seas
- Human smugglers 'know' the international and EU legislation
- EU response the Sea Borders Regulation and Frontex (now EBCG)



EU - Migration and Asylum and SAR obligation



- The Pact on Migration and Asylum
 - EU Agenda on Migration 2015-2020
 - Among other interventions proposes a Common European Approach to SAR
 - A **common disembarkation mechanism**
 - The Recommendation EC C(2020) 6468 final “SA Recommendation”
- EU
 - Not part of IMO
 - Not part of SOLAS and SAR conventions
 - SAR obligation in Regulation EU 656/2014 (Maritime Security Regulation)
 - the ‘**place of safety**’ under EU law must be a ‘**location where rescue operations are considered to terminate and where the survivors’ safety of life is not threatened**’, a place ‘where their basic human needs can be met’. In accordance with the fundamental rights acquis, it must also be a location where protection and compliance with the principle of non-refoulement is guaranteed (art. 2.12)



- SAR and Frontex operations
 - Frontex has no power of SAR
 - Duty of assistance and coordination
 - Operation: Triton, Themis, Poseidon
 - After Hirsi judgment of ECtHR
 - EUNAVFORMED
 - Military operation in Mediterranean
- SAR in Mediterranean
 - Offered by NGO in response to refugee crisis
 - SAR operations lacking by Member States
 - Cases condemned by UNHCR
 - Refoulement and pushbacks in Turkey or Lybia



EU – Common European Approach to SAR



- Basis founded on
 - Malta declaration of 2019
 - New Pact on Migration and Asylum
 - SAR Recommendation
- New process of **screening** prior to asylum request
 - If the person is clearly non eligible
- Disembarkation
 - Only dealt if the place is within EU member States
 - Solidarity relocation
 - Only if a member State faces a crisis
 - Creation of a relocation pool
 - Complex process
 - Relocation may be problematic in the light of the principle of non refoulement and discrimination against refugees
- Different problems arise from this proposal
 - With the European Law and EU law – right to life, asylum and non refoulement

EU – Common European Approach to SAR and migration – the way forward



- EU secondary legislation should take consideration
 - International obligations of EU member States
 - EU treaties
 - European legislation
 - ECHR
 - Art. 13 – Effective remedy
 - Art. 2 – Right to life
 - Art.3 – degrading treatment
 - Art. 4 – human trafficking
 - Art. 5 – unlawful or arbitrary detention
 - Prot.4 – prohibition of collective expulsion of aliens
 - **ECtHR rulings**
 - Charter of Fundamental Rights of EU
 - Art. 47 – effective remedy
 - Art. 41 – right to good administration



Contacts:

Thank you for your attention!
Any question ?

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