

Is there a right to be rescued at sea? A skeptical view

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1. *Introductory remarks*

The recent tragic and deadly sea incidents, including the sinking of a boat with 500 people off the coast of Lampedusa on 3 October 2013¹ and of another boat with more 200 people on 12 May 2014,² mark the significance and urgency of the problem of migration by sea. Indeed, thousands of people nowadays often undertake extremely perilous journeys, putting their lives into serious danger in order to flee their country of origin; and to do so by whatever means possible, including

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¹ It is reported that 'the boat – that had sailed from Misrata in Libya – carried mainly migrants from Eritrea, Somalia and Ghana. After a journey of two days, the vessel began taking on water when its motor stopped working. Some passengers set fire to a piece of material to try to attract the attention of passing ships. However, the fire spread to the rest of the boat, creating a panic. As the migrants all moved to one side, the boat capsized (...) Although an emergency response involving the Italian Coast Guard resulted in the rescue of 155 survivors, the total number of dead was reported as more than 360'; J Coppens, 'The Lampedusa Disaster: How to Prevent Further Loss of Life at Sea?', (2013) 7 Intl J on Marine Navigation and Safety of Sea Transportation 589.

² See further information at <www.bbc.com/news/world-europe-27379493> accessed 30 May 2014.



via overcrowded and unseaworthy vessels. Such vessels will often be at risk of sinking and indeed many do sink, with the result that thousands of lives are lost every year.

Such loss of life has been particularly noticeable in the period since January 2011, which has seen an increase in the departure of migrant boats from North Africa and, allegedly, more than 1,500 persons have lost their lives while trying to cross the Mediterranean.³ Currently, the majority of these 'boat people' come from Syria, due to the ongoing civil strife there.⁴ Italy is particularly affected by this influx of Syrian refugees, since they often use the Central Mediterranean route.⁵ In response, Italy has launched *Operation Mare Nostrum*, at the end of 2013 which has proved to be very successful in rescuing people at sea.⁶ Nevertheless, as evidenced by the aforementioned incident of 12 May 2014, lives continue to be lost in the Mediterranean.⁷

Operation Mare Nostrum aside, it is true that the response of many states has been more tailored towards averting the 'threat' posed by maritime migration to their 'territorial integrity' rather than to saving these people's lives.⁸ More worrisome, however, is that the need to save the lives of the contemporary 'boat people' is underestimated not only

³ See *inter alia* Report by T Hammarberg, Commissioner for Human Rights of the Council of Europe (Strasbourg, 7 September 2011) – CommDH (2011) 26, available at <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1826921>>. See also European Parliament, Directorate-General for External Policies, 'Mediterranean flows into Europe: Migration and the EU's foreign policy' (March 2014) 5 [hereinafter: EU Parliament Analysis].

⁴ According to UNHCR, 'Between January and the end of September [2013], at least 7,557 Syrians and Palestinians arrived on the coast of Italy, including 6,233 since August in 63 boats. This compares to about 350 Syrians in 2012. Most of the Syrian refugees that reach Italy continue on to other countries in Europe in search of asylum', 18 October 2013; available at <www.unhcr.org/526114299.html>.

⁵ EU Parliament Analysis, 6.

⁶ EU Parliament Analysis, 9. It is reported that as a result of this Operation, 12,000 people have been rescued by the Italian Navy; see at <www.ansamed.info/ansamed/en/news/sections/politics/2014/04/08/immigrationmogherini-12000-lives-saved-but-more-eu-needed_ed18bf5f-fff3-4080-9bd5-042a86b2bb31.html>. See also <<http://cir.ca/news/migrant-boats-heading-for-italy>> accessed 8 June 2014.

⁷ See n 2.

⁸ For recent interception practices see *inter alia* J Coppens, 'Migrants in the Mediterranean: Do's and Don'ts in Maritime Interdiction' (2012) 43 *Ocean Development & Intl L* 342, M Giuffrè, 'State responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 *Intl J of Refugee L* 692-734 and M Crock, 'Shadow Plays, Shifting Sands and International Refugee Law: Convergences in the Asia-Pacific' (2014) 63 *ICLQ* 247-280.



by States but also by the private stakeholders. And this is also due to the fact that although the master's duty to render assistance is clear, the law relating to their subsequent rights and responsibilities, including disembarkation of those who have been rescued, is sadly lacking in clarity. There is a noticeable gap in the law, namely that the master is required to provide assistance, yet neither the flag State nor the coastal State have any concomitant obligation to accept the rescued persons into their territory.⁹ This unwillingness of the coastal States to allow disembarkation, in conjunction with the costs incurred through uncertainty and delay has led many ships to ignore distress calls, with the result of significant loss of life.¹⁰

In light of the above, many questions arise as to the effectiveness of the legal regime governing rescue-at-sea and as to the possible solutions to the problem of maritime migration. However, taking into account the continuing loss of life at sea, it is apposite to ponder whether it is the time to recognise an 'individual right to be rescued at sea'.

Notwithstanding the urgent need to recognise such a right, this short paper will argue that it is difficult to hold that an individual 'right to be rescued' exists in the framework of both the law of the sea and of human rights law. Moreover, it will submit that no such right can be read in the rules of international law of the sea; and in any case, this right cannot easily be justiciable under these rules. A right to be rescued can be found only within the normative contours of the right to life and only under specific circumstances.

The paper will start by examining whether a 'right to be rescued' may be found or whether it can be extrapolated from the rules of the law of the sea as well as whether the latter affords any legal avenue for the judicial redress of the people in question. Then it will turn to the human rights law context and it will discuss whether such individual right exists in that context and if not, whether the right of life may afford any redress to the persons concerned. In concluding, it will underscore that, even though no such right may exist, this does not alleviate states from their duties to protect the right to life at sea.

⁹ In the words of J Pugash, 'the master of the ship is obliged to rescue those in peril on the sea, but no state is bound to accept those rescued', see 'The Dilemma of the Sea Refugee' (1977) 18 *Harvard J of Intl L* 577, 578.

¹⁰ See E Willheim, '*M.V. Tampa*: The Australian Response' (2003) 15 *Intl J of Refugee L* 159, 168.



2. *The 'right to be rescued' under the Law of the Sea*

As Seline Trevisanut rightly observes,

'the main aim of the law of the sea consists of allocating obligations and rights in different maritime zones to states. However, the multiplication of activities at sea and the increased human presence lead to the question of the protection of the human element, in particular of the application of human rights at sea'.

This was also explicitly acknowledged in the *Medvedyev and others v France* case, in which the European Court of Human Rights stated that 'the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction'.¹¹

It is one thing, however, to acknowledge that the high seas are not *legibus solutus* and another thing to read into the law of the sea human rights obligations. In spite of propositions to the contrary,¹² both bodies of law impose distinct obligations on States and hence, the scope *ratione materiae* of the obligations of States under the law of the sea and under human rights law is manifestly different. In other words, the flag States, which, in principle, are called to safeguard the legal order of the oceans, are under an obligation to protect human rights at sea, not be-

¹¹ *Medvedyev and Others v France* [Grand Chamber] App no 3394/03 (ECtHR, 29 March 2010), para 81. For commentary, see D Guilfoyle, 'Medvedyev and Others v France, European Court of Human Rights' 25 *Intl J of Marine & Coastal L* (2010) 437-42; E Papastavridis, 'European Court of Human Rights *Medvedyev et al. v France* (Grand Chamber, Application No. 3394/03) Judgment of 29 March 2010' (2010) 59 *ICLQ* 867-82.

¹² Professor Oxman has stressed that the UNCLOS seeks to pursue certain community interests and he associates these with human rights; see B H Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' in J Charney, D K Anton and M E O'Connell (eds.), *Politics, Values and Functions, International Law in the 21st Century, Essays in Honor of Professor Louis Henkin* (Martinus Nijhoff 1997) 377, 382. In the same vein, Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur speak of 'humanitarian law of the sea'; see 'Border Control at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *Intl J of Refugee L* 256, 291.



cause there is an obligation under international law of the sea to do so, but because they have to abide by their separate obligations under human rights law.¹³ Therefore, importing quite distinct types of obligations into the law of the sea *de novo* stands on tenuous legal grounds.¹⁴

This could not be truer in relation to rules governing the rescue-at-sea. The UN Convention on the Law of the Sea (1982)¹⁵ and the relevant IMO Conventions, namely the SOLAS Convention¹⁶ and the SAR Convention,¹⁷ solely allocate competences between States in respect of rescue-at-sea and call upon them to cooperate to this end, without any reference to rights of persons in distress.

According to the above instruments, on the one hand, every flag State must require the master of a ship, either State or private, flying its flag to proceed with all possible speed to the rescue of persons in distress when informed of their need of assistance.¹⁸ The obligation of the flag State is essentially an obligation of conduct, i.e. the flag State has to provide for the duty in question in its domestic legislation, and not an obligation of result, i.e. an obligation to guarantee that the people in distress will be saved.¹⁹ In addition, the flag State is under a ‘due diligence’ obligation to monitor whether the masters of vessels flying its

¹³ See also E Papastavridis, ‘European Convention of Human Rights and the Law of the Sea: the Strasbourg Court in Unchartered Waters?’, in M Fitzmaurice, P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff 2013) 117, 119-121.

¹⁴ In accord are R Barnes, ‘The International Law of the Sea and Migration Control’, in V Mitsilegas, B Ryan (eds), *Extraterritorial Immigration Control* (Brill 2010) 103, at 112 and K Wouters and M den Heijer, ‘The *Marine I* Case: A Comment’ (2010) 22 *Intl J of Refugee Law* 1, 6.

¹⁵ See United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 [hereinafter: LOSC].

¹⁶ See International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278, [hereinafter: SOLAS Convention].

¹⁷ See International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97, [hereinafter: SAR Convention].

¹⁸ *ibid* and SOLAS, Ch V, Reg 33.

¹⁹ The distinction between obligations of conduct and obligations of result can be traced back to Roberto Ago’s term as a Special Rapporteur of the International Law Commission, on the topic of State Responsibility, see Sixth Report on State Responsibility by Mr Ago, Special Rapporteur, (1967) II-1 *YB Intl L Comm* 4, 20. See also J Combacau, ‘Obligations de résultat et obligations de comportement: quelques questions et pas de réponse’ in *Mélanges offerts à Paul Reuter, Le droit international: unité et diversité* (Pedone 1981) 181.



flag discharge the duties under the LOSC and the SOLAS Convention.²⁰ These duties entail for the flag State an obligation not only to adopt appropriate national ‘rules and measures’ but also to exercise ‘a certain level of vigilance in their enforcement’, including exercising ‘administrative control’ over relevant ‘public and private operators’.²¹

On the other hand, the coastal State is under an obligation to maintain search and rescue services as well as cooperate with other States to this end.²² This will involve *inter alia* i) maintaining effective plans of operation and co-ordinating arrangements in order to respond to all types of search and rescue situations; ii) coordination and cooperation in order to deliver survivors to a place of safety (disembarkation).²³ Moreover, pursuant to the 2004 Amendments to the SOLAS and SAR Conventions, coastal States should exercise the primary responsibility, when the rescue operation takes place within their Search and Rescue Zone, to ensure cooperation and coordination such that ships’ masters are relieved as soon as practicable and are allowed to disembark rescued persons at a place of safety.²⁴ These obligations are also of the legal nature of obligations of means rather than of result, which have to be met in due diligence.²⁵

On the face of the above provisions, it is readily apparent that there is no individual ‘right to be rescued’ under the LOSC and other maritime conventions; the sole implicit reference within these instruments to the rights of the persons in distress may be that the latter should be disembarked in a ‘place of safety’. Interestingly enough, the term ‘place of safety’ is not defined in these conventions;²⁶ nor it is drafted in such a

²⁰ See art 98 (1) of the LOSC and SOLAS, ch V, reg 33.

²¹ See generally on ‘due diligence principle’, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 79, para 197.

²² Art 98 (2), UNCLOS and SOLAS, ch V, reg 7.

²³ SOLAS Convention, ch V, reg 7.

²⁴ Amendments to SOLAS ch V, reg 33: IMO, MSC Res 153 (78), MSC Doc. 78/26.add.1, Annex 5 (20 May 2004), para 3.1.9 of the rules annexed to the Search and Rescue Convention 1979.

²⁵ Such ‘obligations to ensure’ were assessed in the recent ITLOS Advisory Opinion, albeit in a different context, i.e. in the context the activities in the deep-sea bed. See ITLOS, ‘*Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*’, Case no 16, Advisory Opinion of 1 February 2011, para 110.

²⁶ The term is defined in the 2004 IMO *Guidelines on the Treatment of Persons Rescued at Sea* as a ‘place where the survivors’ safety of life is no longer threatened and



way as to afford the legal basis for an individual right. And this is due to the simple fact that the conventions under scrutiny do not concern human rights; as said, they just allocate competences between State parties.

One may, however, try to interpret the above-mentioned provisions to this end, i.e. as giving rise to a corresponding ‘right to be rescued’ at sea. I am afraid that neither the ‘subsequent practice’ nor any ‘subsequent treaty’ of the State parties to these conventions lends credence to such interpretation in accordance with Article 31 (3) (a) and (b) of the 1969 Vienna Convention on the Law of the Treaties;²⁷ quite to the contrary.²⁸ Of course, there is the famous provision of Article 31 (3) (c) of the VCLT, postulating that in interpreting a provision account must be taken of the ‘relevant rules of international law applicable in the relations between the parties’, which may be of relevance here.²⁹

Nonetheless, it is submitted that even if such ‘rules of international law’ were human rights rules and thus they were imported into the interpretation of the obligations of States under LOSC or SOLAS, it would not suffice so as to read a ‘right to be rescued’ in these provisions. It would rather be a *praeter legem* interpretation, which would lead to the creation of a novel rule without the consent of the parties concerned.

In any case, it is the view of the author that the law of the sea framework is inappropriate to provide redress to the persons concerned. Even though the LOSC provides for a compulsory dispute settlement mechanism, this is open mainly to State parties and international organizations, i.e. the European Union. Non-state entities, which may have direct access to these mechanisms, are solely private contractors

where their basic human needs (such as food, shelter and medical needs) can be met’; Res MSC. 167(78), adopted 20 May 2004.

²⁷ See art 31 (3) (a) and (b) of Vienna Convention on the Law of Treaties (1969) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [hereinafter referred to as VCLT]. See also H Fox, ‘Article 31(3)(A) and (B) of the Vienna Convention and the “Kasikili/Sedudu Island” case’, in M Fitzmaurice and others (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010), 59.

²⁸ See also E Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing 2010), 297-300.

²⁹ On art 31 (3) (c) of VCLT see P Merkouris, ‘Debating the Ouroboros of International Law: the Drafting History of Article 31 (3) (c)’ (2007) 9 Intl Community L Rev 1.



for disputes concerning the Area.³⁰ Consequently, only the State of nationality of a victim of mismanagement or negligence on the part of a flag or coastal State could put forth a claim under Part XV of LOSC. No such claim has ever been put forth; moreover, as already underscored, the obligations under the relevant provisions are formed as obligations of conduct, which makes the finding of a breach even more difficult.

In conclusion, the LOSC and the other related conventions set out only certain duties of States, which do not either explicitly or implicitly contain an individual 'right to be rescued'. This right can never find its basis on the law of the sea.

3. *The 'right to be rescued' under Human Rights Law*

Contrary to the law of the sea, human rights law is the place where a 'right to be rescued' can be found. Indeed, Seline Trevisanut discusses the 'right to be rescued' in this context, i.e. as arising from the positive obligation under the right to life. She contends in this regard that 'the duty to render assistance can be considered as the operational obligation deriving from the application of the human right to life at sea'.

However, it is the view of the present author that such 'operational obligation' derives only from the normative framework of human rights law and it cannot be transposed to the law of the sea context. In accordance with this framework, the application of this obligation would require that the persons in need of rescue are 'subject to the jurisdiction' of the States concerned. Should a violation of this obligation under human rights law occur, however, it is incontrovertible that the mechanisms provided under the relevant human rights treaties afford the only judicial avenue for redress for these persons on the international plane, that is the possibility for individual applications or communications before international courts or committees, such as the European Court of Human Rights or the Human Rights Committee. This avenue however,

³⁰ See art 187 of LOSC and art 20 of Annex VI to LOSC and also I Plakokefalos, 'Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention' (2013) 4 *J of Intl Dispute Settlement* 385.



would always presuppose prior recourse to domestic courts and the exhaustion of local remedies.³¹

In more detail, there is no doubt that the most relevant human right is the right to life, enshrined, amongst others, in Article 2 of the European Convention on Human Rights (ECHR)³² and Article 6 of the International Covenant on Civil and Political Rights (ICCPR).³³ As held by the European Court of Human Rights in *Osman case*, Article 2 requires states not only to refrain from causing death, but also to take measures to protect the lives of individuals within their jurisdiction.³⁴ Furthermore, the positive nature of the obligations under Article 2 dictates that the State should also put in place a proper official, independent and public investigation into any death which may have been caused by agents of the State or by other individuals.³⁵

Thus, the States, either flag or coastal States, involved in rescue operations have to take all necessary measures to protect the lives of individuals in distress, provided, of course, that they are within their jurisdiction. It is, however, this concept of 'jurisdiction' that has aroused considerable controversy in international legal discourse³⁶ and it is not

³¹ For example, under art 35 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law..' [hereinafter: ECHR].

³² 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.

³³ 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'; see art 6 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

³⁴ See *Osman v United Kingdom* [Grand Chamber] App no 87/1997/871/1083 (ECtHR, 28 October 1998). See also on the positive obligation dimension of this right *Furdík v Slovakia* (Admissibility decision) App no 42994/05 (ECtHR 2 December 2008) and *Kemaloglu v Turkey* App no 19986/06 (ECtHR, 10 April 2012).

³⁵ See the seminal case of *McCann and Others v United Kingdom* App no 18984/91 (ECtHR, 27 September 1995) 21 EHRR 97, at 161. As well as *Ergi v Turkey* App nos 66/1997/850/1057 (ECtHR, 28 July 1998), at 82. See also the relevant comments in J Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21 Eur J Intl L 701-721.

³⁶ For the very rich and recent case-law on extraterritorial jurisdiction and human rights see *inter alia* M Milanovic, *Extraterritorial Application of Human Rights Treaties:*



easy to establish in the present milieu. In other words, it should be established whether the master of the vessel rescuing migrants on the high seas or the coastal State that coordinates the rescue operation are bound by human rights obligations, even though these acts do not take place in their territory.

Without dwelling upon this issue, suffice it to say that human rights bodies mainly conceive jurisdiction as a question of fact, of actual authority and control that a state has over a given territory or person. 'Factivity' in this regard 'creates normativity',³⁷ or in the words of the European Court of Human Rights, 'de facto control gives rise to de jure responsibilities'.³⁸

In respect of the application of human rights at sea, the situation is rather unambiguous in light of the jurisprudence of the Strasbourg Court: the ECHR does apply on the high seas, in so far as control, and therefore, jurisdiction is exerted by organs of the States parties, usually warships or other duly authorised vessels. This assertion is supported by the *Xhavara case*,³⁹ involving the sinking of an Albanian vessel by an Italian warship on the high seas and by *Rigopoulos case*,⁴⁰ involving the arrest of a drug-trafficking vessel on the high seas, in which cases the jurisdiction *ratione loci* of the Court was never contested. Also, in the *Medvedyev case*, the Grand Chamber held that 'as this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention'.⁴¹

Law, Principles and Policy (OUP 2011) and M Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009).

³⁷ M Sheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F Coomans and others (eds.), *Extraterritorial Application of Human Rights* (Intersentia 2004) 73, at 81.

³⁸ *Al-Saadoon and Mufdhi v United Kingdom*, App no 61498/08 (ECtHR, Order, 30 June 2009), para 88.

³⁹ See *Xhavara and Others v Italy and Albania* App no 39473/98 (ECtHR, Admissibility Decision, 11 January 2001).

⁴⁰ See *Rigopoulos v Spain* App no 37388/97 (ECtHR, 12 January 1999).

⁴¹ See *Medvedyev* (n 11) para 67.



More recently, in the *Hirsi case* (2012), which concerned Somalian and Eritrean migrants who had been intercepted on the high seas by the Italian authorities and sent back to Libya, the Grand Chamber held that:

‘the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court’s opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities...’⁴²

It follows that human rights law applies, at least in principle, to the rescue of such persons on the high seas. Nevertheless, it is not so evident when these treaties start applying. In other words, at which point the persons in distress are considered as subject to the jurisdiction of the States concerned? Having in mind the prerequisite of ‘control’, it is doubtless that these persons would be under the jurisdiction of the flag State of a rescuing State vessel. On the contrary, the same conclusion cannot lightly be drawn in cases of rescue operations conducted by private vessels; it will be difficult to equate private vessels with State vessels and contend that these persons come under the jurisdiction of the flag State.⁴³

Also, it is questionable whether the coastal State, which receives a distress call and is aware of the location of persons in distress, exercises control over these persons with the result that those persons come under its jurisdiction. On the one hand, it is difficult to speak of a *de jure* control that the coastal State exercises *ipso facto* over all vessels and persons within its search and rescue zone. If such *de jure* control was accepted in principle, it would mean that every vessel or every person entering into an SAR zone—which sometimes is vast—, even without making distress calls, would automatically come under the jurisdiction of the coastal State concerned. This would, first and foremost, run counter to

⁴² See *Hirsi Jamaa and Others v Italy* [Grand Chamber] App no 27765/09 (ECtHR, 23 February 2012), paras 81 and 82. See also the *Vassis and Others. v France* App no 62736/09 (ECtHR, 27 June 2013).

⁴³ Nonetheless, the responsibility of the flag State can be based on other grounds as will be analysed later.



the nature of the SAR zone as such; the latter is not a maritime zone, in which coastal States exercise sovereignty or sovereign rights,⁴⁴ albeit only a functional zone, in which States have an obligation to ‘promote the establishment, operation and maintenance of an adequate and effective search and rescue service’ therein under Article 98 (2) of LOSC. Consequently, it is submitted that since coastal States do not have sovereignty over their SAR zones, vessels entering these zones do not *ipso facto* fall under their jurisdiction.

In a similar vein, it cannot be supported that even if coastal States do not exercise *de jure* control, they may have *de facto* control over all vessels within their SAR zone. To reiterate, according to the jurisprudence of the European Court of Human Rights, there is need for certain factual control over the persons concerned in order to be subjected to the jurisdiction of the States for human rights purposes. Such factual control would presuppose at least awareness of the location or of the situation of the vessels concerned; in the absence of such awareness, the presumption is that the coastal States would not exercise any kind of control over them.

This presumption of lack of control, however, may be rebutted in cases of distress calls that are received and acknowledged by the Rescue Coordination Centre of the coastal State; in these cases, arguably, a long distance *de facto* control between that State, which received the call and the persons who sent it, may be established. Indeed, the life of the persons in distress depends on the conduct of the recipient State, which, being aware of the location of the vessel in distress and being aware of their situation, exerts certain control over these persons. Hence, these persons may be considered within the jurisdiction of the coastal State concerned in this regard. This coastal State may not be the one that is primarily responsible for the SAR zone where the vessel in distress is located, since for human rights purposes, suffice it that there is control by State agents.

In conclusion, a jurisdictional link for the purpose of the application of the right to life is established only between vessels and persons that have requested assistance and the coastal State authorities, which have acknowledged the distress call and are aware of their location and their

⁴⁴ See in this regard S Trevisanut, ‘Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?’ (2010) 25 *Intl J of Marine and Coastal L* 523.



situation. In all other cases, the argument for an *a priori de jure* or *de facto* control by coastal States over vessels within their SAR zones cannot be sustained. It follows that only in the case that the prerequisite of ‘jurisdiction’ is met, we can speak of a ‘right to be rescued’, as inherent in the right of life. To find, though, States responsible for its violation in accordance with the rules on State Responsibility the wrongful conduct, in our case, the omission to rescue people in distress, must be attributable to the State and it must amount to a breach of the said obligation.⁴⁵ Such would be definitely the case in relation to State vessels that have spotted people in distress at sea and, nevertheless, opt not to save them. For example, this occurred, allegedly, in the incident of the ‘left-to-die boat people’ in April/May 2011.⁴⁶

On the other hand, it is argued that a flag State would not immediately incur responsibility for any failure of merchant vessels flying its flag to assist the persons in distress, since the latter persons hardly come under the ‘jurisdiction’ of the States involved. As said, the establishment of extraterritorial jurisdiction for human rights purposes requires the ‘spatial’ or ‘personal’ control of the State concerned, which, in turn, presupposes the conduct of *de jure* or *de facto* State organs.

Nevertheless, the responsibility of the flag State in this regard may be established twofold: firstly, in the exceptional case that the flag State was informed by the master of the private vessel about the boat in distress, yet it instructed the master not to render assistance. In this case, the master could be considered as a ‘*de facto* organ’ in accordance with Article 8 of ASR⁴⁷ and thus the failure to render assistance would be di-

⁴⁵ See art 2 of ILC Articles on Responsibility of States for Internationally Wrongful Acts, ‘Report of the International Law Commission on the Work of its 53rd Session (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, 68.

⁴⁶ See the Report of the Parliamentary Assembly of the Council of Europe (PACE), ‘Lives Lost in the Mediterranean Sea: Who Is Responsible?’, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), available at <assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>. See also the analysis of responsibility questions in E Papastavridis, ‘The ‘Left-to-Die Boat’ incident of March 2011: Questions of International Responsibility arising from the Failure to Save Refugees at Sea’ (2013) Refugee Law Initiative Working Paper No 10, <http://sas-space.sas.ac.uk/4957/1/RLI_Working_Paper_No.10.pdf>.

⁴⁷ According to art 8, ‘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’.



rectly attributed to the flag State as such. Consequently, the responsibility of the latter for the violation of the right to life might arise.

Secondly, the flag State may incur responsibility not for itself failing to prevent the loss of life at sea, such as when State vessels are involved or when the State directs or controls the conduct of private mariners, but for the breach of its positive obligations or due diligence obligations under the right to life. In more detail, there is a common understanding that 'a State is not just bound to abstain from committing internationally wrongful acts, but that it also has the duty, inherent to its capacity of being the sovereign power and thereby to constrain the actions of its subjects, to prevent them from committing international wrongful acts.'⁴⁸ Thus, the State which omits to prevent or punish the conduct of an individual that ought to have prevented or punished may incur responsibility.⁴⁹ The scope of such positive duties of States would be contingent upon the content of the primary obligation at issue.⁵⁰ *In casu*, it is evident that the right to life prescribes broadly both a duty to prevent and a duty to punish.⁵¹ Are these duties binding States only in respect of the conduct of individuals within their territory or are they also binding in relation to extraterritorial conduct, like, for instance, the failure of masters to save lives on the high seas?

Drawing valuable insights from the *Genocide Convention case*, it is submitted that States are also bound by such duties extraterritorially. In that case, the ICJ found the notion of 'due diligence' to be of critical importance for establishing the breach of the obligation to prevent the genocide in Bosnia on the part of the Former Republic of Yugoslavia (FRY).⁵² The 'due diligence' of FRY was founded on its 'capacity to influence effectively the action of persons likely to commit, or already committing, genocide',⁵³ which came into being the moment that 'the

⁴⁸ M den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2011) 84.

⁴⁹ See the proposed draft art 11 on the conduct of private individuals in the context of State responsibility, R Ago, Fourth Report on State Responsibility (1972) II YB Intl L Comm 126.

⁵⁰ See den Heijer (n 48) 85.

⁵¹ See Milanovic, Gondek and Sheinin (nn 36-7) for the relevant case-law.

⁵² See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43.

⁵³ *ibid* para 430.



State learned of, or should normally have learned of, the existence of a serious risk that genocide will be committed.’⁵⁴

In the present milieu, due to the fact that the master of the vessel has a duty to record any reason for failing to render assistance,⁵⁵ the flag State is informed or ‘should normally’ be informed about such incidents. At this point, the flag State is under a due diligence obligation to investigate the deaths that may have occurred in breach of the right to life. Importantly, the positive obligation under Article 2 of ECHR to carry out an effective investigation concerns not only deaths caused by State agents but also by individuals.⁵⁶ In addition, if a flag State learns of ‘the existence of a serious risk’ that persons in distress at sea will drown and even though they have the ‘capacity to influence effectively the action of persons’ in question, i.e. the masters of a vessel flying its flag in the vicinity of these persons, do nothing to prevent the loss of life at sea, it will be in violation of its due diligence obligation under the right to life. This said, it must be acknowledged that unfortunately it is not the usual practice for commercial shipping to inform flag State authorities in respect of such matters.

With respect to the responsibility of coastal States for violation of the right to life, it is obvious that the issue of attribution will not raise any problems, since any wrongful conduct will be attributed to its *de jure* organs, i.e. its Rescue and Coordination Centre. As regards the element of breach, however, first, it must be ascertained whether the persons in distress had been subject to the jurisdiction of the State concerned and then whether the State failed to abide by its positive obligation under the right of life. Establishing a breach of these obligations and thus of an internationally wrongful act will be subject to an assessment of each case separately.

⁵⁴ *ibid*, para 431. Cf. *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Merits) [1949] ICJ Rep 18-22;

⁵⁵ See ch V, reg 33 of SOLAS Convention.

⁵⁶ See, *inter alia*, *Gongadze v Ukraine*, App no 34056/02 (ECtHR, 8 November 2005) and *Dink v Turkey*, App no 2668/07 (ECtHR, 14 September 2010).



4. *Concluding Remarks*

The present author could not agree more with the argument of Selina Trevisanut that the right to life under the relevant treaties, such as the ECHR, provides a significant remedy for the victims of mismanagement of negligence in the rescue-at-sea operations. States cannot turn a blind eye to their obligations under human rights law and they should be always guided by them when they conduct such rescue activities. The relevant jurisprudence of the European Court of Human Rights certainly points in this direction, i.e. that States also have positive obligations to meet at sea. Thus, any 'right to be rescued' should be read in this context. However, even though *de lege ferenda*, such right should also inform the rules under the law of the sea, it is submitted that *de lege lata*, rules of the law of the sea are not meant to accommodate these human rights considerations.

