

The duty to rescue at sea, in peacetime and in war: A general overview

Irini Papanicolopulu*

Irini Papanicolopulu is Associate Professor of International Law at the University of Milano-Bicocca.

Abstract

The duty to rescue persons in distress at sea is a fundamental rule of international law. It has been incorporated in international treaties and forms the content of a norm of customary international law. It applies both during peacetime and during wartime, albeit with the necessary adjustments to take into account the different circumstances. States are also under the duty to provide search and rescue services. This article discusses the content and limitations of these provisions and assesses their potential to ensure the protection of human lives at sea. Furthermore, the article suggests that reference to the right to life, as protected in international human rights law, may be useful in further safeguarding human life and ensuring compliance by States with their duties.

Keywords: duty to rescue, right to life, shipwrecked, SOLAS, SAR.

: : : : : :

Introduction

The sea is inherently dangerous for human beings. Maritime incidents are still common, causing the loss of many lives despite the reduction in the number of

* Email: irini.papanicolopulu@unimib.it.

ship losses.¹ What is more, deaths and injuries concern all people at sea, be they seafarers, passengers, migrants or others. Not even modern seagoing vessels are immune from accidents, as the death of thirty-two people in the incident involving the cruise ship *Costa Concordia* has shown.² Even more dangerous are substandard vessels, often registered under flags of convenience and used by reckless owners to maximize commercial gain.³ These vessels become particularly dangerous if they are used to smuggle migrants, as numerous incidents that have happened in the Mediterranean Sea have demonstrated. Migrants have died on a daily basis in the Mediterranean Sea.⁴ In an instance that became famous, a small inflatable rubber dinghy, with seventy-two persons on board, was stranded for fifteen days in the Mediterranean before being washed ashore in Libya. During those days, the dinghy was approached by a military helicopter, a large military vessel and various other craft, none of which proceeded to rescue those on board.⁵ As a result of this lack of assistance, only ten people survived out of the six dozen initially on the dinghy.

In this context, the duty to rescue those in danger of being lost at sea is paramount. Part of the threat to human life is being addressed by measures aimed at ensuring the safety of vessels. However, their implementation is far from complete, and in any case, there will always be risks due to the elements or the human factor. People in distress at sea can only be saved by efforts undertaken by other people, be they State officials on board rescue vessels or masters and crews of private vessels. Solidarity towards fellow seafarers has therefore been transposed into legal norms and has constituted the basis of the duty to rescue.

There is no doubt that the duty to rescue is one of the best-established principles of the international law of the sea, maritime law and international humanitarian law (IHL). There are, however, still a number of open issues that need to be addressed, including the scope of the duty, the subjects bound by it and the still unresolved issue of disembarkation. This article proposes to analyze

- 1 International Chamber of Commerce, “Reduction in the Number of Ship Losses”, available at: www.ics-shipping.org/shipping-facts/safety-and-regulation/reduction-in-the-number-of-ship-losses (all internet references were accessed in March 2017).
- 2 BBC News, “Costa Concordia: What Happened”, 10 February 2015, available at: www.bbc.co.uk/news/world-europe-16563562.
- 3 On 30 March 2017, fifty-four substandard vessels were detained by member States of the Paris Memorandum of Understanding on Port State Control; see Paris MoU, “Current Detentions”, available at: www.parismou.org/detentions-banning/current-detentions.
- 4 The year 2016 has been one of the deadliest, with 5,096 persons dead and missing in the Mediterranean Sea, a significant increase compared to the 3,771 persons dead and missing in 2015. See UNHCR, *Mediterranean: Dead and Missing at Sea, January 2015 –31 December 2016*, available at: <https://data2.unhcr.org/en/documents/download/53632>.
- 5 The facts of the case are summarized in Tineke Strik, *Lives Lost in the Mediterranean Sea: Who Is Responsible?*, report prepared for the Parliamentary Assembly of the Council of Europe (PACE), 29 March 2013, available at: https://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf. An articulate discussion of the ships that came into contact with the dinghy can be found in Charles Heller, Lorenzo Pezzani and Situ Studio, *Report on the “Left-To-Die Boat”*, Forensic Architecture, May 2014, available at www.forensic-architecture.org/wp-content/uploads/2014/05/FO-report.pdf. Following the PACE inquiry, a number of cases were brought in front of European judges concerning the responsibility of the flag States of the vessels involved in the case. It remains to be seen whether national judges will have jurisdiction and will decide the cases in the merits.

the duty to rescue during peace and during war. It will first address this duty in the context of the laws of peace, in particular international treaties that apply to the maritime space. It will then turn to the applicability of the duty to rescue during armed conflict, devoting particular attention to the scope of the duty and exceptions to it. On the basis of this analysis, it will discuss the relationship between the duty to rescue, as it emerges from the law of the sea, maritime law and IHL, on the one hand, and the right to life, as deriving from human rights law, on the other, before concluding with some final observations and a call for better enforcement of existing duties concerning rescue of people at sea.

The duty to rescue in peacetime

Treaty and customary law

The duty to save life at sea is spelled out in Article 98 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),⁶ which provides as follows:

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.

This provision contains two separate obligations, addressed to two groups of States: the duty of flag States to oblige masters of vessels flying their flag to rescue people at risk of being lost at sea, and the duty of coastal States to establish and maintain search and rescue services.

The duty to rescue is further clarified in a number of international maritime law treaties, including the Convention for the Safety of Life at Sea (SOLAS

6 United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994). UNCLOS is currently ratified by 167 States and the European Union.

Convention),⁷ the International Convention on Maritime Search and Rescue (SAR Convention),⁸ and the International Convention on Salvage.⁹

The duty of flag States is based on the well-established duty to save life at sea. This duty dates back to past centuries¹⁰ and has been inserted into international treaties since the beginning of the twentieth century. Article 98(1) of UNCLOS repeats the content of Article 12(1) of the 1958 Convention on the High Seas,¹¹ which in turn was based on the draft articles prepared by the International Law Commission (ILC). The latter proposal drew upon¹² duties found under Article 11 of the 1910 International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea (1910 Salvage Convention)¹³ and Article 8 of the 1910 International Convention for the Unification of Certain Rules of Law related to Collision between Vessels.¹⁴

Already in 1956, the ILC considered that its draft articles codified custom,¹⁵ and it is today generally accepted that Article 98(1) of UNCLOS reflects customary international law.¹⁶ Its incorporation into many international and national legal instruments could also testify to its status as one of the general principles of law mentioned in Article 38(1)(c) of the Statute of the International Court of Justice.¹⁷

- 7 International Convention for the Safety of Life at Sea, 1184 UNTS 278, 1 November 1974 (entered into force 25 May 1980), as amended. The SOLAS Convention currently has 163 States Parties, the combined merchant fleets of which constitute approximately 99.14% of the gross tonnage of the world's merchant fleet. The 2004 amendments concerning provisions on rescue were not accepted by Finland, Malta and Norway. According to the provisions of Article VIII(b)(vi)(2)(bb) of the SOLAS Convention, the amendments came into force on 1 July 2006, but they do not bind the States that have not accepted them. However, Norway has successively withdrawn its objection to the amendments and is now bound by them.
- 8 International Convention on Maritime Search and Rescue, 1405 UNTS 118, 27 April 1979 (entered into force 22 June 1985), as amended. The SAR Convention currently has 109 States Parties, the combined merchant fleets of which constitute approximately 80.75% of the gross tonnage of the world's merchant fleet. The 2004 amendments were not accepted by Malta and Norway. According to the provisions of Article III(2)(b) of the SAR Convention, the amendments came into force on 1 July 2006, but they do not bind the States that have not accepted them. However, Norway has successively withdrawn its objection to the amendments and is now bound by them.
- 9 International Convention on Salvage, 1953 UNTS 165, 28 April 1989 (entered into force 14 July 1996).
- 10 Emer de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, Vol. 1, London, 1758, p. 170.
- 11 Convention on the High Seas, 450 UNTS 82, 29 April 1958 (entered into force 30 September 1962).
- 12 Second Report on the Regime of the High Seas by Mr. J. P. A. François, Special Rapporteur of the ILC.
- 13 International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, UKTS 4 (1913), Cd. 6677, 23 September 1910 (entered into force 1 March 2013).
- 14 International Convention for the Unification of Certain Rules of Law related to Collision between Vessels, [1930] ATS 14, 23 September 2010 (entered into force 1 March 1913).
- 15 ILC, Articles concerning the Law of the Sea with Commentaries, *Yearbook of the International Law Commission*, 1956, Vol. 2, p. 281.
- 16 Richard Barnes, "The International Law of the Sea and Migration Control", in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff, 2010, p. 134; Guy S. Goodwin-Gill, *The Refugee in International Law*, Oxford University Press, Oxford, 1996, p. 278; Bernard H. Oxman, "Human Rights and the United Nations Convention on the Law of the Sea", *Columbia Journal of Transnational Law*, Vol. 36, Nos 1–2, 1998, p. 415; Myron Nordquist, Satya N. Nandan and Shabtai Rosenne (eds), *The United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 3, Martinus Nijhoff, Leiden and Boston, MA, 1985.
- 17 Tullio Scovazzi, "Human Rights and Immigration at Sea", in Ruth Rubio-Marín (ed.), *Human Rights and Immigration*, Oxford University Press, Oxford, 2014, p. 225.

The scope of the duty and the actors bound by it

The territorial scope of the duty to assist people in distress at sea includes all maritime zones. Article 98 of UNCLOS is found in Part VII (High Seas), but also applies to the exclusive economic zone, on the basis of the cross-reference in Article 58(2). As for the territorial sea, while UNCLOS does not contain analogous wording, the duty to save life at sea can be inferred from the reference to assistance in the case of distress found in Article 18(2) of UNCLOS.¹⁸ Contrary to UNCLOS, the SOLAS Convention explicitly applies to vessels in all maritime zones.¹⁹

The duty to render assistance applies both in the case of collision between two vessels and in cases where a vessel receives information that one or more persons are in danger of being lost at sea because their vessel is endangered or has sunk. This duty applies to all persons in distress, without distinction.²⁰ The nationality of the vessels or of the persons, their legal status and the activity in which they are engaged are irrelevant.²¹ The fact that the persons are engaged in an unlawful activity should not make any difference to the duty to rescue. Also, the fact that the persons to be saved are migrants should not in any way hinder their right to be saved.²² Regrettably, it would seem that States and masters of ships have sometimes been less willing to proceed to the rescue of vessels transporting migrants and refugees. This distinction, however, is contrary to applicable law.

While UNCLOS refers only to the obligation of States, the duty to rescue applies both to States and to masters of ships. Under Article 10(1), of the International Convention on Salvage, “[e]very 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”. Regulation 33.1 of the SOLAS Convention, meanwhile, provides that:

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.

The duty to save life at sea applies both to military and other State-owned vessels and to private vessels. Article 98 of UNCLOS is a general provision that does not

18 *Ibid.*, p. 226; B. H. Oxman, above note 16, p. 414; John E. Noyes, “The Territorial Sea and Contiguous Zone”, in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, Oxford, 2015, p. 104; M. Nordquist, S. N. Nandan and S. Rosenne (eds), above note 16, pp. 176–177.

19 SOLAS Convention, Ch. 5, Regulation 1.1.

20 Chapter 2.1.10 of the SAR Convention provides that “[p]arties shall ensure that assistance is 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 that person is found.” See also SOLAS Convention, Regulation 33.1.

21 T. Scovazzi, above note 17, p. 225; R. Barnes, above note 16, p. 134.

22 Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, IMO Doc. MSC/Circ.896/Rev.1, 12 June 2001.

distinguish between warships and other State-owned vessels, on the one hand, and other vessels, on the other. As a consequence, the duties contained in Article 98 apply to all ships, including warships. Contrary to the general approach followed by UNCLOS, maritime law conventions providing for the duty to rescue, such as the 1910 Salvage Convention and the 1989 International Convention on Salvage, explicitly exclude warships from their scope.²³ It would, however, appear excessively restrictive to consider that the duty to rescue applies only to commercial vessels. In the first place, this is because of the duty's underlying purpose: ensuring that persons at risk of being lost at sea may be saved. Secondly, it is because States are also bound by the duty to save life at sea, as Article 98(2) of UNCLOS clarifies. In fact, it would be absurd, not to say counterproductive, to demand that States put in place search and rescue services having the aim of going to the rescue of ships in distress, and at the same time not to oblige their warships, who may be near the vessel in distress, to offer assistance. Nor does such an exception emerge from a reading of UNCLOS as a whole. While UNCLOS contains a number of rules providing for the immunity of warships from the jurisdiction of third States in the territorial sea,²⁴ exclusive economic zone²⁵ and high seas,²⁶ it does not contain any general exception applicable to warships, like those contained in the salvage treaties examined above. Furthermore, in cases where the drafters of UNCLOS desired to exclude the applicability of provisions to warships, they have done so expressly, as in the case of Article 236 of UNCLOS relating to the inapplicability to warships of the provisions of the Convention relating to the protection of the marine environment.

In light of the foregoing, instances in which warships and State vessels do not comply with their duty to save life at sea are to be particularly condemned,²⁷ and will give rise to international responsibility of the State. Furthermore, while during wartime a warship may be excused from complying with the duty to rescue if it is involved in an engagement,²⁸ during peacetime there is no such exception. If indeed an exception were applicable, it should have been included in the general provisions contained in Article 98 of UNCLOS, under the principle that exceptions to legal rules cannot be presumed. Finally, it should be noted that warships have to take special care, when engaged in law enforcement or other operations at sea, to avoid incidents and safeguard human life.²⁹ Lack of care,

23 1910 Salvage Convention, Art. 14; International Convention on Salvage, Art. 4.

24 UNCLOS, Art. 32.

25 *Ibid.*, Art. 95, as applicable to the exclusive economic zone according to Art. 58(2).

26 *Ibid.*, Art. 95.

27 An instance in which warships did not comply with their duty to save life at sea that received a lot of attention from media and from international institutions was the case of the so-called "left-to-die boat". See note 5 above.

28 See the section on "The Duty to Rescue in War", below.

29 A duty to ensure the safety of persons on board intercepted vessels is incorporated in, among others, Article 9(1)(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 UNTS 507, 15 November 2000 (entered into force 28 January 2004); and Article 8bis(10)(a)(i) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 UNTS 201, 10 March 1988 (entered into force 1 March 1992), as modified by the 2005 Protocol.

resulting in a maritime casualty, will generate responsibility for the State and the persons involved.³⁰

Exceptions

The only exception to the duty to rescue life at sea, as provided in UNCLOS, is the necessity not to endanger the rescuing vessel, its crew and its passengers.³¹ The SOLAS Convention, however, seems to admit other grounds for not going to the rescue of a ship in distress. Regulation 33.1 provides that:

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 in the log-book the reason for failing to proceed to the assistance of the persons in distress and, taking into account the recommendation of the Organization, to inform the appropriate search and rescue service accordingly.

The SOLAS Convention, in the text just quoted, therefore provides three exceptions to the duty to rescue, identified by the words “unable”, “unreasonable” and “unnecessary”. The first concerns cases in which a ship is unable. This may be due to the weather conditions, or the conditions of the vessel. The second concerns cases in which it is unreasonable to expect the vessel to proceed to the rescue. The difference between this and the first case resides in the degree to which the external or internal impediment affects compliance with the duty. While in the case of an “unable” vessel, the impossibility should be objective and total, in the case of “unreasonableness” it might be objectively possible to go to the rescue but, in light of the actual circumstances of the vessels involved and the weather conditions, it would be unreasonable to expect the master of the requested vessel to proceed to the rescue operation. This exception, therefore, comes very close to the one provided in UNCLOS, as a threat to the rescuing vessel, its crew and its passengers would render unreasonable the imposition of a duty to rescue. Finally, the third exception concerns cases in which it is unnecessary for a vessel to proceed to the rescue. This might be either because another vessel, which is closer, has already taken the duty to rescue, or because the distance between the rescuing vessel and the endangered vessel is such that the former would not reach the latter in time.

Commercial considerations should not play any role in the determination of the capacity of the vessel to rescue persons in distress at sea. In fact, a rescuing

30 This principle is illustrated by the case involving the *Kater I Rades*, which resulted in the condemnation of the master of an Italian warship that, through dangerous manoeuvres, had caused the sinking of the vessel *Kater I Rades*. See the decision of the Italian Court of Cassation of 10 June 2014, n. 24527. For a commentary on the case, see Tullio Scovazzi, “Il respingimento di un dramma umano collettivo e le sue conseguenze”, in Amedeo Antonucci, Irini Papanicolopulu and Tullio Scovazzi (eds), *L’immigrazione irregolare via mare nella giurisprudenza italiana e nell’esperienza europea*, Giappichelli Editore, Torino, 2016.

31 UNCLOS, Art. 98(1).

vessel may have to divert from its route to go to the rescue of another vessel. Furthermore, it may have to alter its route, once persons in distress have been saved, so as to disembark them in a place of safety, which may be different from the rescuing vessel's next port of call. In both cases, vessels may experience delays in their time schedule, which will have an economic cost for commercial vessels, or may be hindered from carrying out their activities, as in the case of fishing vessels. Indeed, it would appear that in some cases vessels have shrank away from their duties so as not to experience economic loss.³² This behaviour is unacceptable on both ethical and legal grounds and is contrary to duties deriving from the international legal instruments mentioned above.

Ensuing duties

Once persons in distress are saved, there are two duties incumbent upon the master of the ship which has saved them. The first is to treat these people humanely, in conformity with obligations arising under human rights treaties.³³ Humane treatment is mandated, taking into account the practical limitations encountered on board vessels, such as lack of space and the need to avoid the spreading of diseases.³⁴ The second is to deliver these people to a place of safety, an issue that will be discussed below in the context of search and rescue operations.

Search and rescue duties

The second duty incorporated in Article 98 of UNCLOS requires coastal States to establish, operate and maintain adequate and effective search and rescue services, if necessary collaborating with neighbouring States.³⁵ UNCLOS does not define these terms, but a definition is included in the SAR Convention, according to which "search" is "[a]n operation, normally co-ordinated by a rescue co-ordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress",³⁶ while "rescue" is "[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety".³⁷ The SOLAS Convention provides that:

32 Martin Davies, "Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea", *Pacific Rim Law & Policy Journal*, Vol. 12, No. 1, 2003.

33 Resolution 167(78) of the IMO Maritime Safety Committee's Guidelines on the Treatment of Persons Rescued at Sea, IMO Doc. MSC 78/26/Add.2, 20 May 2004 (IMO Rescue Guidelines), para. 5.1.2, provides that shipmasters should "do everything possible, within the capabilities and limitations of the ship, to treat the survivors humanely and to meet their immediate needs".

34 Regulation 33.6 of the SOLAS Convention provides that "[m]asters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship".

35 Article 98(2) of UNCLOS reflects Article 12 of the Convention on the High Seas. Interestingly, the draft articles produced by the ILC did not contain any reference to the duty of the coastal State to provide search and rescue services. The text of Article 12 of the Convention on the High Seas was based upon a Danish proposal during the First United Nations Conference on the Law of the Sea, UN Doc. A/CONF.13/C.2/L.36. See also Chapter 2.1.1 of the SAR Convention.

36 SAR Convention, Regulation 1.3.1.

37 *Ibid.*, Ch. 1.3.2.

Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around their coasts. 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.³⁸

Search and rescue services, therefore, aim at locating persons in distress at sea and ensuring that they are aided, either by State-owned vessels that go to sea for this purpose, such as those of the coast guard, or by other vessels navigating in the area and acting in compliance with Article 98(1) of UNCLOS. In this regard, Regulation 2.1.1 of the SAR Convention provides that “[o]n receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided”.

One of the main issues that arises with respect to the duty to provide search and rescue services concerns the identification of which State, among a number of neighbouring States, should provide such assistance in a given case. In more than one instance, States have disagreed on this point, thus causing unnecessary, and in some cases fatal, delays to rescue operations.³⁹ Clarification of the duty to coordinate with neighbouring States was therefore one of the main tasks of the negotiators of the SAR Convention. Under this treaty, States are requested to agree on SAR regions,⁴⁰ in order to provide “adequate shore-based communication infrastructure, efficient distress alert routing, and proper operational co-ordination to effectively support search and rescue services”.⁴¹ Furthermore, “[p]arties having accepted responsibility to provide search and rescue services for a specified area shall use search and rescue units and other available facilities for providing assistance to a person who is, or appears to be, in distress at sea”.⁴²

Disembarkation

Cooperation among States is particularly strained when it comes to the last phase of the rescue operation, disembarkation. “Rescue”, in fact, implies that the people assisted should be delivered “to a place of safety”.⁴³ While a ship may

38 SOLAS Convention, Ch. V, Regulation 7.1.

39 See, for example, the case of the Cap Anamur incident, described in Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, Cambridge, pp. 214–216.

40 SAR Convention, Ch. 2.1.4.

41 *Ibid.*, Ch. 2.1.3.

42 *Ibid.*, Ch. 2.1.9.

43 *Ibid.*, Ch. 1.3.2.

temporarily be considered a place of safety,⁴⁴ people saved will eventually have to be disembarked on dry land. Hypothetically, there are a number of options concerning disembarkation: this could happen in the next port of call of the rescuing ship, on the land nearest to the place where the rescue has occurred, at a destination indicated by the people rescued themselves, or at another place where these people could receive assistance. In practice, however, it may be difficult to find a State that will allow the rescuing vessel to disembark rescued people in its ports, in particular if these people are likely to apply for asylum within the State.

Two general principles regulate disembarkation. The first, deriving from the sovereignty exercised by States over their territory, provides that there is no right of entry into a State's ports. Accordingly, a vessel that wants to disembark people rescued at sea into the ports of a State must have the consent of that State for entering into the port.⁴⁵ The second principle, and an important limitation to disembarkation options, is the *non-refoulement* principle, which prohibits persons from being returned to the boundaries of States where their life or freedom would be threatened or where they might be subject to torture or other inhuman or degrading treatment. Initially developed with respect to refugees,⁴⁶ the principle now applies to any person who might suffer a violation of his or her right to life or freedom from torture.⁴⁷

When, following the rescue of people at sea, the rescuing vessel has to deliver them to a State, a dispute may arise concerning the State that should accept these people. This is particularly likely in the case of assistance to migrants by sea, as States are often unwilling to assume their responsibilities to rescue vis-à-vis migrants and asylum-seekers, and may prefer to close their ports to rescuing vessels, as the case of the *Tampa*⁴⁸ vessel has demonstrated.

The SAR Convention, as amended in 2004, purports to clarify the duties of States, providing that:

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'

44 According to Resolution 167(78) of the IMO Rescue Guidelines, above note 33, a "place of safety" is "a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination."

45 R. Barnes, above note 16, p. 118.

46 Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954), Art. 33.

47 European Court of Human Rights (ECtHR), *Chahal v. The United Kingdom*, Application No. 22414/93, Judgment (Grand Chamber), 15 November 1996, para. 74; ECtHR, *Hirsi Jamaa and Other v. Italy*, Application No. 27765/09, Judgment (Grand Chamber), 23 February 2012, para. 114.

48 Among the many scholarly writings on the *Tampa* case, see Cecilia Baillet, "The Tampa Case and Its Impact on Burden Sharing at Sea", *Human Rights Quarterly*, Vol. 25, No. 3, 2003; Matteo Fornari, "Soccorso di profughi in mare e diritto d'asilo: Questioni di diritto internazionale sollevate dalla vicenda della nave Tampa", *Comunità Internazionale*, Vol. 57, 2002; Penelope Mathew, "Australian Refugee Protection in the Wake of the Tampa", *American Journal of International Law*, Vol. 96, No. 3, 2002.

intended voyage, provided that releasing the master of the ship from the 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 [Inter-Governmental Maritime Consultative] Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effective as soon as reasonably practicable.⁴⁹

At close reading, however, the text does not answer the fundamental question: in which State should the people rescued at sea be disembarked? The provision assumes that relevant States will coordinate and, while the State responsible for the SAR zone has primary responsibility, this responsibility relates only to “ensuring such co-ordination and co-operation occurs”. However, the text is silent as to what criteria should apply in the case that no agreement is reached, and avoids clearly stating that, absent agreement, people saved should be disembarked in the State responsible for the SAR zone.⁵⁰

An assessment of the duty to rescue in peacetime

In concluding our examination of rules concerning rescue during peacetime, it emerges that the complex of rules pertaining to rescue of people in distress during peacetime represents a well-articulated whole, which tries to address the diverse phases of a rescue operation and the various actors – States, masters, crews – involved in them. The duty to rescue is certainly one of the oldest rules of the international law of the sea and one that undoubtedly constitutes part of customary law,⁵¹ and is thus applicable to all States, independently from their being parties to the treaties that spell it out.

All the same, the duty to rescue, as currently framed, presents three significant limitations: lack of enforcement of existing legal obligations; the legal uncertainty surrounding States’ and masters’ duties following rescue; and the possibility of facing criminal charges.

Lack of enforcement derives from a number of circumstances, which can in turn be grouped under three separate issues. In the first place, there is a generalized issue with the enforcement of international standards in the case of ships flying flags

49 SAR Convention, Ch. 3.1.9; similar text was inserted in the revised Regulation 4.1.1 of the SOLAS Convention. See Patricia Mallia, *Migrant Smuggling by Sea*, Martinus Nijhoff, Leiden and Boston, MA, 2010, pp. 100–101.

50 As mentioned in above note 8, the SAR Convention has currently 109 States Parties, the combined merchant fleets of which constitute approximately 80.75% of the gross tonnage of the world’s merchant fleet. This means that most vessels are bound by the SAR Convention. However, Malta has not accepted the 2004 amendments (*ibid.*).

51 See above notes 16 and 17 and accompanying text.

of convenience.⁵² While sailing on the high seas, these vessels are under the exclusive jurisdiction of the flag State.⁵³ If the flag State, as often happens, is unable or unwilling to enforce existing standards, then any violation of these standards will go unpunished.⁵⁴

Moreover, international law duties are not always translated into domestic law duties. While some States have incorporated the duties provided by UNCLOS, the SOLAS Convention and other treaties into their national laws,⁵⁵ others have not.⁵⁶ Incorporation is particularly important, as it is often accompanied by sanctions for non-compliance with the duty.⁵⁷ Lack of incorporation will therefore result in masters of vessels and other individuals concerned not being under the duty, as a matter of domestic law, to rescue people in distress at sea. Furthermore, given their dissuasive force, lack of sanctions for breach of the duty to rescue will frustrate the aim of the provisions on this duty. Eventually, lack of incorporation into the domestic legal system will result in lack of competence by domestic courts, thus leading to the inadmissibility of claims relating to the violation of the duty to rescue in front of these courts.

The lack of jurisdiction of domestic judges brings us to the third issue concerning enforcement: the lack of a competent judicial authority. As has been mentioned, national judges may not be competent to consider cases of breach of the duty to save life at sea. Furthermore, there does not seem to exist any international judge that would address these cases.⁵⁸ UNCLOS provides for a complex system of compulsory dispute settlement, but this envisages almost exclusively inter-State disputes.⁵⁹ Within this system, a claim for lack of assistance should be brought by one State, possibly the State of nationality of the persons requiring assistance, against another State, likely to be the flag State or the coastal State. Since international law provides duties for both the State and

52 “Flags of convenience” is a term that is not included in UNCLOS or other maritime law treaties, but is widely used in practice. It refers to cases in which ships are registered in, and fly the flag of, States with which they do not present any link (ownership etc.).

53 UNCLOS, Art. 92. The limited exceptions to the exclusivity of the jurisdiction of the flag State provided in UNCLOS and other treaties do not seem applicable in the case of non-compliance with the duty to rescue people in distress.

54 M. Davies, above note 32, pp. 125–126.

55 Italy has introduced rules on the duty to rescue in its Code of Navigation. According to Article 489 of the Code, it is compulsory to provide assistance to vessels in distress at sea, provided that assistance is possible without seriously endangering the rescuing vessel, its crew or its passengers. Masters are required to render assistance in all cases in which it may be reasonably expected that the operation will succeed and unless they have knowledge that assistance is being rendered by others, in conditions more appropriate or similar to those in which they would normally operate.

56 It should be mentioned here that this may be a duty under international instruments, such as Article 10(2) of the International Convention on Salvage, which requests States to “adopt the measures necessary to enforce” the duty to render assistance.

57 This is true, for example, in the case of Italy. Article 1185 of the Code of Navigation provides that the masters of national or foreign vessels, floating devices or aeroplanes who fail to render assistance shall be punished with reclusion for up to two years, which may rise to six years in the case of injury to persons and up to eight years in the case of death.

58 With the possible exception of human rights courts, as will be discussed in the section of this article on “The Relationship between the Duty to Rescue and the Right to Life”.

59 UNCLOS, Part XV.

the master of a vessel, this action could be based on one of two separate grounds. The first would be violation of the flag State's duty to oblige the master to save life, which might take the form of lack of enforcement against masters that have not complied with this duty. The second would be a violation of the coastal State's duty to have in place and operate search and rescue facilities. However, in a pragmatic light, it appears extremely unlikely that a State will risk jeopardizing its relationship with another State for the sake of prosecuting the master of a vessel that has not complied with the duty to save life at sea. Victims of maritime incidents will therefore not have any tool to dissuade shipmasters from not complying with their duty.

The second issue with the existing regime relates to the legal uncertainty surrounding States' and masters' duties following rescue, and is closely tied to the issue of disembarkation. The main difficulty faced by masters and States in search and rescue operations pertains not so much to the moment of the rescue, but rather to the time immediately afterwards, and concerns the fate of the persons who have been saved by a vessel. As has been seen, the SAR Convention requests that these people be delivered to "a place of safety". The disembarkation of rescued people is often a matter of urgency, because the vessel that has saved them may be overcrowded, may not have the necessary food and facilities to host them, and may also have an interest in not delaying its voyage any further. The uncertainty still left by international treaties concerning identification of the State that should accept disembarkation in its ports hinders the full applicability of the duty to rescue.

Finally, another issue that adversely affects rescue operations and may impinge upon the willingness of masters and crews to proceed to the rescue of migrants and asylum-seekers at sea is the possibility of facing criminal charges. In some instances, the master and crew of a vessel that has saved people at sea and has successively disembarked them in the port of a State other than the State of nationality of the people saved have been charged with violating Italian domestic law rules on the prohibition of illegal migration, as the case of the *Cap Anamur*⁶⁰ illustrates. Even if charges are eventually dropped or the master and crew are finally declared innocent, bringing charges against them is likely to affect their right to liberty and will most probably produce negative economic consequences, as their arrest and detention pending trial will most likely result in loss of wages and possibly the loss of the job. It would be desirable that States amend their criminal legislation so as to make sure that no criminal charges may be levied against people who have complied with one of the fundamental duties under the law of the sea.

60 The German vessel *Cap Anamur*, after having saved thirty-seven people in the Mediterranean, had to moor for twenty-one days on the high seas close to the outer limit of Italian territorial waters, before being allowed to call at an Italian port. The crew of the *Cap Anamur*, after being arrested for facilitating the illegal entry of migrants into Italian territory, were eventually released; see Tribunale di Agrigento, Judgment of 7 October 2009. On the case and the decisions by Italian judges, see Marco Cottone, "Alcune notazioni in materia di reati connessi all'immigrazione clandestina via mare", in Amedeo Antonucci, Irini Papanicolopulu and Tullio Scovazzi (eds), *L'immigrazione irregolare via mare nella giurisprudenza italiana e nell'esperienza europea*, Giappichelli Editore, Torino, 2016, p. 85.

The duty to rescue in war

Although UNCLOS regulates uses of the sea during peacetime, there is no reason to consider that the duty to save life at sea does not apply during wartime as well. On the contrary, a number of elements support the continued validity of the duty in war. Application of this duty during wartime, however, suffers some significant limitations, dictated by military necessity.

Treaty and customary law

The enduring duty to save life at sea during wartime is demonstrated, in the first place, by the fact that international treaties provide for the duty to rescue also during wartime. Article 11(1) of the 1910 Salvage Convention states that “[e]very master is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to everybody, *even though an enemy*, found at sea in danger of being lost”.⁶¹ Reference to “an enemy” in the article can only be construed as implying that the duty to rescue applies also in the case of war, as in peacetime there would be no enemies. While the reference to “enemies” was not kept in subsequent treaties, this was due to the fact that subsequent treaties were designed to regulate maritime activities during peacetime.⁶²

Humanitarian law also purports to protect those who are at risk of being lost at sea. The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II)⁶³ contains a number of provisions for the safety of the shipwrecked. Article 12 of GC II provides that the shipwrecked “shall be respected and protected in all circumstances”, thus entailing both the duty to spare them and the duty to ensure that the rights of protected persons are safeguarded.⁶⁴ *Inter alia*, it is

61 Emphasis added. While it is generally considered that the 1910 Salvage Convention has been superseded by the 1989 International Convention on Salvage, it can be argued that the 1910 Convention has still remained in force in the part that concerns the duty to rescue life at sea during wartime, since the 1989 Convention does not contain any provisions to this effect and therefore seems not to have addressed the issue. See Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 59(1)(b).

62 See the comments of Special Rapporteur Francois that “les mots ‘même ennemie’ paraissant dans le texte de la Convention de Bruxelles, ont été supprimés eu égard au fait que les règles élaborées par la Commission du droit international à ce sujet se réfèrent exclusivement au temps de paix”: Second Report on the Regime of the High Seas, UN Doc. A/CN.4/42, 10 April 1951, p. 81.

63 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, 12 August 1949 (entered into force 21 October 1950).

64 Jann K. Kleffner, “Protection of the Wounded, Sick and Shipwrecked”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 325; Natalino Ronzitti, *Diritto internazionale dei conflitti armati*, 5th ed., Giappichelli, Torino, 2014, p. 298. Recent State practice seems to support the customary character of this norm: see Steven Haines, “Who is Shipwrecked?”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 775.

prohibited to target the shipwrecked while they are at sea, unless they engage in hostile acts.⁶⁵ While GC II does not provide any definition of “shipwrecked”, Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I),⁶⁶ defines them as “persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility”.⁶⁷ This provision further adds that “[t]hese persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol”. Furthermore, GC II provides for the special protection of hospital ships,⁶⁸ as well as “small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations”, although, in the latter case, protection applies only to the extent that “operational requirements permit”.⁶⁹

Specific duties concerning search for the shipwrecked are contained in Article 18 of GC II, which provides that:

After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.⁷⁰

The duty to search for and collect the shipwrecked is addressed to all belligerents, without distinction, and applies to any person at sea, independent of whether the person is a belligerent, a civilian belonging to one of the parties to the conflict, or a citizen of a neutral State. It reflects a rule of customary international law.⁷¹

Limitations

Under Article 18 of GC II, the duty to rescue encounters two limitations. The first, introduced by the phrase “[a]fter each engagement”, limits temporally the

65 British Military Court for The Trial of War Criminals, *The Peleus Trial*, 17–20 October 1945, available at: <https://casebook.icrc.org/case-study/british-military-court-hamburg-peleus-trial>.

66 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978).

67 Article 12 of GC II further clarifies that “the term ‘shipwreck’ means shipwreck from any cause and includes forced landings at sea by or from aircraft”. A different issue, and one which is not addressed in this article, is the status of these people once they have been rescued, and the guarantees that they may enjoy under humanitarian law, for example as civilians or as prisoners of war.

68 GC II, Arts 22, 24.

69 *Ibid.*, Art. 27; Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, para. 47(b). The restriction is due to the special nature of these crafts: see Wolff Heintschel von Heinegg, “The Law of Armed Conflict at Sea”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edition, Oxford University Press, Oxford, 2013, p. 539.

70 This provision is based upon Article 16 of Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 18 October 1907 (entered into force 26 January 1910).

71 W. Heintschel von Heinegg, above note 69, p. 481.

applicability of the duty. This is at variance with the similar provision in Article 15 (1) of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) and is due to the special conditions of naval warfare.⁷²

The second limitation is implied by the phrase “all possible measures”. Rescue may become “impossible” due to the necessity to ensure the safety and security of the rescuing vessel. This limitation, as has been seen, applies also in time of peace. During wartime, however, this limitation acquires a broader significance, as it includes, apart from objective limitations (the space and provisions available on board), the need to safeguard the vessel against attack. This is especially true for submarines, which need to surface to engage in search and rescue activities, thus becoming particularly vulnerable to enemy attacks. The legal and ethical dilemmas posed by the duty to rescue and the opposed duty to safeguard the integrity of the ship are illustrated by two emblematic World War II cases.

The first involved an Italian submarine, the *Cappellini*, under the command of Commander Todaro. On 16 October 1940, the *Cappellini*, after having sunk the *Kabalo*, a Belgian vessel, proceeded to rescue survivors, even towing one of the launches and navigating on the surface for three days, until it reached Santa Maria in the Azores.⁷³ This is an emblematic case of compliance with the rules concerning search and rescue of the shipwrecked during wartime. It might even be considered that Commander Todaro went beyond what was required of him, since towing a launch implies sailing on the surface and being subject to attacks by enemy forces.⁷⁴

The second concerns the so-called Laconia Order given by Grand Admiral Karl Dönitz, which prohibited rescue measures. Although the wording of the Order was ambiguous, it was generally interpreted to require German commanders to abstain from rescue operations and, more arguably, to kill survivors after military engagements. During the Nuremberg trial, Dönitz, refusing to admit that the Order obliged members of the German Navy to kill survivors, defended the Order in the following terms:

For example, I had a report from a commander that, because he had remained too long with the lifeboats and thus had been pursued by the escorts perhaps – or probably – summoned by wireless, his boat had been severely attacked by depth charges and had been badly damaged by the escorts – something which would not have happened if he had left the scene in time – then naturally I pointed out to him that his action had been wrong from a military point of view. I am also convinced that I lost ships through rescue. Of course I cannot

72 Commentary on GC II, p. 132, according to which “the words ‘after each engagement’ were better suited to the special conditions prevailing at sea”.

73 Arturo Faraone, “Diritto umanitario e guerra navale”, in Irini Papanicolopulu and Tullio Scovazzi (eds), *Quale diritto nei conflitti armati?*, Giuffrè Editore, Milano, 2006, pp. 76–77.

74 When asked why he had risked being attacked to save the shipwrecked of the *Kabalo*, Commander Todaro explained that it was due to the “two thousand years of civilization” that he felt compelled him. *Ibid.*, p. 77.

prove that, since the boats are lost. But such is the whole mentality of the commander; and it is entirely natural, for every sailor retains from the days of peace the view that rescue is the noblest and most honorable act he can perform. And I believe there was no officer in the German Navy – it is no doubt true of all the other nations – who, for example, would not consider a medal for rescue, rescue at personal risk, as the highest peacetime decoration. In view of this basic attitude it is always very dangerous not to change to a wartime perspective and to the principle that the security of one’s own ship comes first, and that war is after all a serious thing.⁷⁵

This statement prompts a number of considerations. Firstly, the fact that Dönitz denied that the Order had any such content shows that any order to kill the shipwrecked would be unlawful under IHL. Secondly, this statement pays tribute to the customary character of the duty to save life at sea during peacetime. At the same time, it seems to reject the duty’s applicability during wartime, or at least to subordinate its applicability to military considerations, such as the desire not to endanger the safety of military vessels during wartime – particularly in the case of submarines, which, having to emerge to perform rescue operations, would be particularly vulnerable.

The circumstances in which the Order was given may partly support Dönitz’s view that performing rescue operations during wartime may endanger military vessels and submarines.⁷⁶ However, although countermeasures are allowed under international law, the violation of the rules that prohibit targeting of vessels engaged in the rescue of the shipwrecked could not have justified violation of the rules concerning the duty to rescue. Reprisals against “wounded, sick and shipwrecked persons [and] the personnel, the vessels or the equipment protected” by GC II are prohibited both under IHL⁷⁷ and under general international law.⁷⁸

As is well known, the Nuremberg Tribunal considered the Laconia Order ambiguous and refused to condemn Dönitz for having deliberately ordered the killing of survivors.⁷⁹ In addition, while the Tribunal considered that the Order “deserve[d] the strongest censure”, in light of the fact that the United Kingdom and the United States had also engaged in unrestricted submarine warfare, it concluded that “the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare”.⁸⁰ This conclusion is rather ambiguous and, to the modern reader, unsatisfactory. On one hand, in

75 *Trial of the Major War Criminals before the International Military Tribunal. Nuremberg 14 November 1945–1 October 1946*, Vol. 13, Nuremberg, 1948, republished by William Hein, Buffalo, New York, 1995, p. 276.

76 The Laconia Order was issued after German vessels attempting to rescue the survivors of the *RMS Laconia* were attacked by an American aircraft.

77 GC II, Art. 47.

78 Draft Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res. 56/83, 12 December 2001, Art. 50(1)(c).

79 International Military Tribunal, Judgment, 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal*, William S. Hein, Buffalo, NY, and New York, 1995, p. 313.

80 *Ibid.*

fact, the Nuremberg Tribunal seems to recognize that abstention from rescuing shipwrecked members of the armed forces of an enemy is a violation of IHL. On the other hand, lack of punishment for this violation is problematic, as it diminishes the value of the Tribunal's findings. The fact that punishment was withheld, most likely due to the *tu quoque* argument,⁸¹ does not help either, as it would seem to justify, in practice if not in law, behaviour that is contrary to the duties of navies during warfare.

Rescue by neutral vessels and rescue beyond the conduct of hostilities

While Article 18 of GC II applies to belligerents, it should be considered whether a similar duty may also apply to neutral vessels. In this respect, Article 21 of GC II provides as follows:

The Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.

Vessels of any kind responding to this appeal, and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection and facilities to carry out such assistance.

They may, in no case, be captured on account of any such transport; but, in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed.

This provision includes two separate aspects. On one hand, there is the appeal to neutral vessels to take care of the wounded, sick and shipwrecked. On the other, a special protection is granted to any vessel that engages in such activities, in line with the general protection enjoyed by means used for the treatment of the wounded, sick and shipwrecked under customary international law.⁸² The language used in this provision, which mentions the possibility of an “appeal to the charity of commanders” rather than a legal duty, might be considered as entailing that neutral vessels are under no duty to save the shipwrecked.⁸³ This conclusion would, however, run contrary to the existence of a general duty to rescue, which has been discussed in the previous section.⁸⁴ As a consequence, the

81 The Tribunal referred to “an order of the British Admiralty announced on the 8th May, 1940, according to which all vessels should be sunk at sight in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war”; *ibid.*

82 GC II, Art. 12.

83 In this sense see, the 1960 ICRC Commentary on GC II, p. 151 (“The provision is nevertheless optional. ... [S]uch vessels are not bound to give the assistance requested”).

84 In this sense, see the 2017 Commentary on GC II, para. 1872: “This is not to say that the response to an appeal to their charity is necessarily left entirely to the commanders’ discretion. Several sources of international law, outside international humanitarian law, contain obligations to rescue persons in distress at sea.”

duty to rescue the shipwrecked applies *both* to the parties to the conflict and to neutral vessels, in so far as this is mandated by the rules of peacetime international law discussed above. It is therefore preferable to understand the hortatory language of Article 21 of GC II as related to the limitations placed on the duty to rescue by the necessity to ensure the integrity and safety of the rescuing vessel. If there is an armed conflict at sea, in fact, the danger of being targeted or sunk may in extreme cases prevent the applicability of the duty to rescue, as codified in Article 98 of UNCLOS.

Articles 18 and 21 of GC II both seem to envision the need to rescue arising following an engagement in the context of an armed conflict. However, it may also happen that a warship which is on mission in the context of an armed conflict but which is not, at the critical moment, engaged in any armed action becomes aware of a ship that is in distress not due to an armed attack, but for any other reason. This has happened, for example, during fighting in Libya, when migrants and refugees continued taking to the sea to look for safety, and where more than once they encountered military vessels.⁸⁵ In these circumstances, it is submitted, the general duty to save life at sea applies, and the warship has to stop and rescue those in distress. Failure to do so, for example by claiming adherence to the mission, would run contrary to the general duty under UNCLOS and the SOLAS Convention, the continuing applicability of which has also been recalled by the Security Council,⁸⁶ and the “considerations of humanity” that must apply both during peace and during war.⁸⁷ Lack of assistance will entail the responsibility of the flag State of the warship.⁸⁸

In conclusion, it can be safely accepted that the duty to rescue applies during armed conflict. It applies both to belligerent States and their vessels, with respect to the vessels and members of the armed forces of an enemy, and to neutral States and vessels. The only exception to the rule would appear to be the necessity to safeguard the rescuing vessel and its crew. However, in light of the peculiar circumstances existing during wartime, this condition can be interpreted more broadly than during peacetime, to include not only cases in which the rescuing vessel would not be in a condition to rescue the survivors, but also those cases in which, were it to do so, it could be harmed by the enemy or, in the case of a neutral vessel, by one of the belligerents.

The relationship between the duty to rescue and the right to life

Having ascertained the existence and content of a duty to rescue during peace and during war, it is worth noting that the enforcement of this right may be problematic

85 See T. Strik, above note 5.

86 UNSC Res. 2240 (2015), 9 October 2015, preambular para. 10.

87 International Court of Justice (ICJ), *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, *ICJ Reports 1949*, p. 22.

88 Cour d’Appel de Paris, Arret, 24 June 2014, Dossier No. 2014/00670.

and that the best assistance towards such enforcement may come from the use of human rights norms and institutions, where they exist. Indeed, the duty to rescue people in distress at sea can be considered as another side of the right to life, which every individual enjoys under human rights law.⁸⁹ The right to life is codified in various human rights treaties – for example, Article 6 of the International Covenant on Civil and Political Rights (ICCPR)⁹⁰ and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁹¹

According to the relevant provisions of international instruments, States owe human rights duties, both negative and positive, to individuals under their “jurisdiction”.⁹² This expression has been interpreted to include individuals that are under the *de jure* or *de facto* jurisdiction of States.⁹³ On the one hand, *de jure* jurisdiction could be defined as the power, conferred upon a State by a legal rule, to legislate and enforce laws, and to adjudicate legal disputes. The customary or conventional origin of the rule and the basis of jurisdiction – territorial, personal or other – do not matter in this respect.⁹⁴ *De facto* jurisdiction, on the other hand, includes all those situations in which a State *acts* using its power, and is often linked to the extraterritorial exercise of jurisdiction.⁹⁵ Here, the relevant issue for determining the existence of “jurisdiction” is the actual exercise of legislative or enforcement power by a State, rather than an abstract right to do so. The exercise of power will usually take the form of control over a territory,⁹⁶ control over the premises or the vessel where an individual happens to be,⁹⁷ or control over the person itself, when the applicant is under the “continued and

89 For a discussion of different points of view on the relationship between the right to life and the duty to rescue, see Efthymios D. Papastavridis, “Is There a Right to Be Rescued at Sea? A Skeptical View”, *QIL – Questions in International Law*, Zoom-in 4, 2014, available at: www.qil-qdi.org/wp-content/uploads/2014/06/03_LOS_Papastavridis_FINAL.pdf; Seline Trevisanut, “Is There a Right to Be Rescued at Sea? A Constructive View”, *QIL – Questions in International Law*, Zoom-in 4, 2014, available at: www.qil-qdi.org/wp-content/uploads/2014/06/02_LOS_Trevisanut_FINAL.pdf.

90 International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976).

91 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, 4 November 1950 (entered into force 3 September 1953).

92 ICCPR, Art. 2(1); ECHR, Art. 1.

93 See ECtHR, *Al-Skeini and Others v. United Kingdom*, Application No. 55721/07, Judgment (Grand Chamber), 7 July 2011, para. 136; see also, for application of these principles at sea, ECtHR, *Hirsi Jamaa*, above note 47, para. 81. The Human Rights Committee (HRC) seems to have in mind the same distinction when it differentiates between “power” and “effective control”; see HRC General Comment 31, 2004, para. 10.

94 ECtHR, *Hirsi Jamaa*, above note 47, para. 75.

95 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004; ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order, 15 October 2008, para. 109.

96 Control over a territory, as applied by the ECtHR, includes military occupation (ECtHR, *Cyprus v. Turkey*, Application No. 25781/94, Judgment, 10 May 2001, para. 90; ECtHR, *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, Judgment (Grand Chamber), 23 March 1995, para. 62) and cases in which a State provides support to a separatist regime (ECtHR, *Ilaşcu and Others v. Moldova and the Russian Federation*, Application No. 48787/99, Judgment (Grand Chamber) 8 July 2004).

97 ECtHR, *Al-Skeini*, above note 93, para. 136.

uninterrupted control exercised by” the State’s agents.⁹⁸ If applied to the special circumstances of the sea, it can be maintained that States exercise *de jure* jurisdiction over persons on board vessels that fly their flag⁹⁹ and persons on structures that are located in their territorial sea, exclusive economic zone and continental shelf,¹⁰⁰ while they exercise *de facto* jurisdiction not only when the individuals are transferred to a vessel flying the flag of that State, but also when they undertake police enforcement measures against a foreign vessel and crew.¹⁰¹ In addition, it is important to note that it is not even necessary that the State vessel and the vessel on which the individuals find themselves enter into contact, as long as it can be maintained that the latter vessel is under the *de facto* control of the former vessel.¹⁰²

The text of international instruments such as the ICCPR and ECHR refers to “deprivation” of life. This could be interpreted to mean that the only duty of States is not to kill individuals wilfully. However, these instruments have been interpreted in a way that has broadened the duties of States vis-à-vis individuals to include not only negative duties, but also positive duties.¹⁰³ Negative obligations require the State to abstain from taking human life. Positive obligations include both substantial obligations and procedural obligations.¹⁰⁴ From a substantial point of view, the right to life requires the State to take measures to ensure that those at risk of losing their life be assisted, and to take all necessary measures towards this end.¹⁰⁵ From a procedural point of view, States are required to investigate instances in which an individual has lost his or her life, so as to punish the culprit and avoid similar instances occurring in the future.¹⁰⁶

98 ECtHR, *Hirsi Jamaa*, above note 47, para. 80.

99 See, among many other cases, ECtHR, *Banković and Others v. Belgium and 16 Other Contracting States*, Decision (Grand Chamber), 12 December 2001, para. 59; ECtHR, *Marković and Others v. Italy*, Decision (Grand Chamber), 14 December 2006, para. 49; ECtHR, *Assanidze v. Georgia*, Decision (Grand Chamber), 8 April 2004, para. 137; ECtHR, *Medvedyev and Others v. France*, Application No. 3394/03, Judgment (Grand Chamber), 29 March 2010, para. 65.

100 European Court of Justice, *Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Case No. C-347/10, Judgment, 2012, para. 35.

101 ECtHR, *Hirsi Jamaa*, above note 47, para. 80; ECtHR, *Medvedyev*, above note 99, paras 66–67.

102 For a more detailed discussion, see Urfan Khaliq, “Jurisdiction, Ships and Human Rights Treaties”, in Henrik Ringbom (ed.), *Jurisdiction over Ships*, Martinus Nijhoff, Leiden and Boston, MA, 2015, p. 324; Efthymios Papastavridis, “European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?”, in Malgosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications*, Martinus Nijhoff, Leiden, 2013, p. 117; Irini Papanicolopulu, “A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea”, in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction*, Martinus Nijhoff, The Hague, 2014, p. 387.

103 HRC, *Baboeram et al. v. Suriname*, Communications Nos 146/1983 and 148-154/1983, Decision, 1985; Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Judgment, 29 July 1988.

104 Silvia Borelli, “Positive Obligations of States and the Protection of Human Rights”, *INTERRIGHTS Bulletin*, Vol. 15, No. 4, 2006.

105 ECtHR, *Osman v. United Kingdom*, Application No. 87/1997/871/1083, Judgment (Grand Chamber), 28 October 1998.

106 ECtHR, *McCann and Others v. United Kingdom*, Application No. 18984/91, Judgment, 27 September 1995.

Positive duties, both substantial and procedural, are particularly relevant in the case of people at risk of losing their lives at sea. In the case of people taking to sea, in fact, loss of life is a real risk. States should take measures to at least minimize the phenomenon, if not avoid it. Measures may include legislative measures, requiring masters of ships flying the State's flag to proceed to the rescue of those in distress at sea¹⁰⁷ and providing for the creation and management of search and rescue facilities and their coordination with each other and with those of neighbouring States. They may also include operative measures for the implementation of search and rescue facilities and the disembarkation of people rescued. From a procedural point of view, States having jurisdiction over the individuals whose right to life is at issue are required to investigate allegations that vessels flying their flag or vessels that have been contacted by them and have been asked to go to the rescue of persons in danger of being lost at sea have not gone to the rescue of people in distress.

In all cases in which a State has omitted any of the above-mentioned actions, and provided that there is a court or tribunal that has jurisdiction, the State can be charged with having failed to comply with its obligations under human rights law. The consequence is that, in those instances in which there are international tribunals competent for determining compliance with a human rights treaty,¹⁰⁸ the State may also be sued in front of the competent tribunal. This possibility, which has not been used until today, has the potential to help enforce international duties of the States, with a positive repercussion on duties of individuals as well. Human rights litigation is therefore an option that should be made use of by individuals.

Recourse to human rights mechanisms presents some difficulties, however. Apart from procedural issues, including the need to previously exhaust domestic remedies,¹⁰⁹ two main problems may hinder individuals in getting access to international justice. The first issue is practical, and concerns the difficulties of providing evidence. When a vessel in distress is not rescued, the usual conclusion is that the vessel will sink, and that the people on board will die and will thus not be able to testify as to a lack of assistance from any other vessel.¹¹⁰

107 Duties of States concerning behaviour of vessels flying their flag are duties of due diligence, as has been recently clarified in International Tribunal for the Law of the Sea, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, paras 127–129.

108 International tribunals with jurisdiction to examine alleged violations of human rights exist only at the regional level in the European, American and African continents. These are the ECtHR, established under the ECHR; the Inter-American Court of Human Rights, established under the American Convention on Human Rights, 1144 UNTS 144, 22 November 1969 (entered into force 18 July 1978); and the African Court on Human and Peoples' Rights, established under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Doc. OAU/LEG/EXP/AFCHPR/PROT (III), 10 June 1998 (entered into force 25 January 2004). There is no similar tribunal for the Asian continent; furthermore, not all States belonging to America and Africa are parties to the treaties establishing the regional courts.

109 ECHR, Art. 35(1); African Charter on Human and Peoples' Rights, 1520 UNTS 245, 27 June 1981 (entered into force 21 October 1986), Art. 56(5).

110 Modern technologies may be of assistance here, as they may provide evidence, for example, of the location of the endangered vessel and that of other vessels nearby. See C. Heller, L. Pezzani and S. Studio, above note 5.

The second hurdle that must be overcome in human rights litigation is the need to establish that the individuals whose right to life was at issue were under the jurisdiction of the defendant State. While the concept of jurisdiction has been progressively expanded to include both *de jure* and *de facto* exercise of power over individuals, there is still the need to prove that individuals were, somehow, either under the *de jure* jurisdiction of a State or under the *de facto* control of State organs. In a case in which a vessel navigating on the high seas is not rescued by other passing vessels, it would be difficult to establish a sufficiently strong link between the vessel in need and the potentially rescuing vessel that would reach the threshold of jurisdiction under human rights law. Furthermore, if the vessel were a private vessel, it would still be necessary to establish the requisite jurisdictional link between it and the flag State. Finally, in cases where a coastal State does not intervene to rescue a vessel in distress off its coast, for example in its SAR zone, there is the need for an extensive application of the concept of jurisdiction.

Finally, it is worth noting that the duty to rescue, as provided for in the law of the sea and maritime law instruments, presents both advantages and disadvantages if compared to the right to life under human rights treaties. Starting from the latter, while human rights violations may be brought, at least in some cases, in front of international tribunals, this is not the case for the law of the sea and maritime law instruments. The only option to litigate a violation of the duty to rescue under UNCLOS or the SOLAS Convention, for individuals, is to make use of national tribunals. Turning to the advantages, the duty to rescue, imposed on States under the law of the sea and maritime law, goes beyond what is required by States under the right to life. While duties deriving from the right to life apply to States only when there is an individual within their jurisdiction, the duty to rescue applies also in cases in which there is no control – *de facto* or *de jure* – of the State over the individual. In conclusion, the best option would be to combine duties under the law of the sea and human rights law, so as to ensure maximum protection to people in distress.¹¹¹

Concluding remarks

The duty to rescue people in distress at sea, a time-honoured rule of international law, is as applicable today as ever, during both peacetime and wartime. People taking to the sea continue to be exposed to maritime perils, and these perils may increase exponentially when unsafe practices are taken up, as in the case of migrants and refugees taking to the sea to look for a brighter future. It is therefore still necessary to uphold the universal character of this duty and its applicability to all vessels who navigate at sea, and to all coastal States,

111 The point is made in Irini Papanicolopulu, “Human Rights and the Law of the Sea”, in David Attard, Malgosia Fitzmaurice and Norman Martinez (eds), *IMLI Manual on International Maritime Law*, Vol. 1: *The Law of the Sea*, Oxford University Press, Oxford, 2014.

independently of a vessel's flag or the legal condition or circumstances of the persons involved.

Nonetheless, compliance with the duty to rescue is far from complete and universal. A number of factors have been identified as leading to poor implementation of this duty. The principal factor is lack of enforcement by flag States over their vessels that do not provide rescue, as well as the practical difficulties facing anyone who wishes to bring a case concerning violation of the duty to rescue. In addition, particular strain has been put upon the duty to rescue by the number of sea migrants and refugees that take to the sea.

These circumstances, however, should not bring about a dilution of the principle. In order to enforce the duties of States, one option could be to make use of human rights tribunals, capitalizing on the close link between the duty to rescue under the law of the sea and maritime law, on the one hand, and the right to life under human rights treaties, on the other. In cases in which this is not possible, litigation in front of domestic courts remains the only option, albeit one that might be hard to pursue, particularly in cases involving warships and other State vessels. It remains to be seen whether national and international tribunals will take up the challenge and will promote adherence to the duty to rescue by States and masters of vessels.