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In the Name of Solidarity and Human Values: Rescue Operations at High Seas by NGOs vs. the International Legal Order

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Abstract: Rescue Operations by NGOs in Central Mediterranean are presently at stake. International Rules on the Law of the Sea (namely, UNCLOS) and IMO's Conventions on the matter are confident on the powers of the States to conduct —or survey— such operations, and State's public services have been conceived to develop such activities, but not owing special consideration to human rights questions behind. Then, rescue activities by NGOs are viewed with suspicion by States, and, usually, many legal obstacles hamper them. Insofar as present International regulation does not offer a clear answer, the proactive work by International Civil Society Actors in this domain and their pressure shows a new trend that presumably could be assumed in the future by States, reconciling Human Values and Legal Rules.

Keywords: Law of the Sea- High Seas- Rescue Operations- Migration flows- Human Rights

(A) THE INCREASING ROLE OF CIVIL SOCIETY ON MIGRATORY ISSUES: THE INVOLVEMENT OF NGOS IN SEA RESCUE OPERATIONS

Civil society was conceived originally in the context of liberal thinking – the anglo-american lockean tradition- as the citizens ensemble and the expression of the realm of citizens' liberty vis à vis the State, although the continental *hegelian* tradition gives a new dimension (*bürgerliche Gessellschaft*) to the concept, narrowly linking it —in fact, merging it- with the State[1]. Nowadays, however, the heterogeneity and complexity of actors involved, contributes to giving a totally new picture of the so-called civil society, insofar -as A. Appadurai said- this is just an image to describe:

> 'Social forms without the predatory mobility of capital that is not subject to regulations nor the predatory stability of many States. These social forms have scarcely been named by the current social sciences, and even when they are named, they are often forgotten of their dynamic qualities. Therefore, terms like 'international civil society' do not capture the mobility and malleability of those creative forms of social life that are localized transit points for the mobile global forms of civic and civil life'.[2]

Also, in this way, aware of the antagonistic meanings aroused by the figure, civil society has been better characterized as a 'sociological concept' that 'speaks of the liberation of social forces' and of 'their

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1 On the *hegelian* conception, See E. Olivas, 'The Hegel Theory of the Civil Society: The first contemporary critic of the liberal conception of the society, from the reading of the 'Principles of the Philosophy of the Right'', 33 *Nómadas* (2012).

2 A. Appadurai, 'Globalization and the Research Imagination', 160 *International Social Sciences Journal* (1999), at 238.

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interactions with the State sphere'.[3] Such blurred characterizations do not prevent its increasing role in public affairs, specially through their most relevant exponents, the NGOs.

In fact, civil society —and NGOs as their main actors— now shape the social basis of democratic States and reflects the permanent needs of individuals as members of the community in the pursuit, establishing and follow up of norms and values which should govern their behaviour on mutual coexistence and in their relations with democratic institutions[4], and, undoubtedly, nowadays, protection of refugees and migrants is now one of the most striking examples of the prominent role exerted by NGOs at international and domestic level[5].

Even in Spain, where civil society is less developed than in other western States, activities run by NGOs in the migratory field have been increasing over the last years[6]. The *Spanish Red Cross*, *CEAR*, *SOS racismo*, *ACCEM* or the *Jesuit Network on Migrations* are now relevant actors in the tasks related to the definition and implementation of migration policies both at national and regional level. Suffice it to mention the advice given by these organizations on migratory matters, and the assistance deployed -under the direction of central Government -namely, during the so called 'Syrian Refugees' Crisis in 2015.[7]

More precisely, in recent years activities deployed by NGOs have been extended to cover rescue operations at sea, as a way to provide protection for the so-called 'sea's refugees'.[8] In this sense, organizations such as the Catalonian *Proactiva Open Arms* or the Basque *Asociación Salvamento Marítimo Humanitario* are good examples of this new field. Moreover, the supposed 'criminalization' of their activities by Government authorities induced some of them to launch several cooperation projects as a way to enhance their activities in the Mediterranean[9].

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3 L. Pérez-Prat, *Sociedad civil y derecho internacional* (Tirant, Valencia, 2004), at. 27.

4 D. Bondía García, 'Garantías Sociales y Efectividad de los Derechos Civiles y Políticos frente a Medidas Regresivas en materia de Derechos Económicos, Sociales y Culturales: Una Perspectiva Española', in J. Bonet Pérez, R.A. Alija Fernández (eds), *La Exigibilidad de los Derechos Económicos, Sociales y Culturales en la Sociedad Internacional del Siglo XXI: Una Aproximación Jurídica desde el Derecho Internacional* (Marcial Pons, Madrid, 2016), at 193.

5 M. Abad Castelos, 'Las aportaciones de las organizaciones de la sociedad civil al Derecho internacional en un escenario en mutación', in J. Martín Pérez de Nanclares (ed.), *Estados y organizaciones internacionales ante las nuevas crisis globales* (Iustel, Madrid, 2010), at 166.

6 Certainly, there is precise date when significant sea rescue operations by NGOs started: it was at a time when EU funded operation *Mare Nostrum* was superseded by *Triton Frontex*-led operation in 2016 (K. Santer, 'Governing the Central Mediterranean through Indirect Rule: Tracing the Effects of the Recognition of Joint Rescue Coordination Centre Tripoli', 21 *European Journal of Migration and Law* (2019), at 146). However, the presumed non humanitarian aims of actual Frontex operations are refuted by S. Marinai, 'The interception and rescue at sea of asylum seekers in the light of the new EU legal framework', 33 *RDCE* (2016), 901-939.

7 On this subject see our contribution '*Crisis, What Crisis?* Some Views from Spain on the Recent Refugee Crisis in Europe', in *Verfassungsblog*, 21 September 2015).

8 Expression coined by the Special Rapporteur (UN) on the human rights of migrants, 25 February 2008, Doc. A/HRC/7/12. However, from a legal point of view such 'expressionistic' term is useless, as was the term 'boat people' employed during the Vietnam war.

9 On the 'humanitarian alliance' created by the NGOs Mediterranea (Italy), Sea-Watch (Germany) and *Proactiva* Open Arms (Spain), see 'Tres ONG se unen para rescatar inmigrantes en el Mediterráneo y denunciar 'la barbarie' de los Estados', RTVE, 23 November 2018. On other cooperation projects in progress see here.

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(B) THE INTERNATIONAL RULES GOVERNING MARINE OPERATIONS: A 'STATE ORIENTED' APPROACH

As has previously mentioned the International Law relating to marine activities is a *State-oriented sector*.[10] The most relevant rules -contained in the United Nations Convention on the Law of the Sea (hereinafter, UNCLOS)- are conceived by States and directed -almost exclusively- to them. In fact, as it was sustained by the *Cour d'Appel* of Rennes in the cases *Transarctic* and *Fast Independence,* UNCLOS' subjects are the States, not individuals.[11]

Even in the case of activities related to rescue operations -regulated by the International Maritime Organization (hereinafter, IMO) Conventions- the exclusive role is in the hands of the States. The definition of Marine areas of operation and the means at their disposal are attributed exclusively to the States.[12] Then, in Spain -as in other countries (e.g. Italy)- activities concerning rescue operations are a monopoly of the State, through the *Sociedad de Salvamento y Seguridad Marítima* (SASEMAR), an autonomous agency created by the Spain's Ministry of Infrastructures (*Fomento*).[13]

Certainly, the criteria governing the deployment and operation of such agencies have been defined by taking into account ordinary marine activities (commercial, fishing and even pleasure navigation). Issues related to human rights were initially clearly lacked such regulation, insofar as these rescue activities were conducted in an 'trouble-free' manner. In fact, the problems were mainly detected at an economic level, insofar as the rescue missions must be paid (taxes) by rescued people as a public service given by the State.[14]

In fact, as has been rightly stated, it is clear that a 'human dimension' is presently absent in the international marine legal regime, and 'undoubtedly more analysis is needed' about how the Law of the Sea and Human rights Law should intertwine and 'how gaps and ambiguities within existing legal regimes should be resolved'.[15]

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[10] See J. Abrisketa Uriarte, 'El derecho del mar y los derechos humanos', in G.A. Oanta (ed.), *El derecho del mar y las personas vulnerables* (J.M. Bosch, Barcelona, 2018), at 31.

[11] Judgments 27 September and 23 October 2007, cit. in P. Gautier, 'Applicabilité Directe et Droit de la Mer', in R. Casado Raigón and G. Cataldi (eds.), *L'Évolution et l'État Actuel de Droit International de la Mer: Mélanges de Droit de la Mer Offerts à Daniel Vignes* (Bruylant, Brussels, 2009), at 388. However, those decisions were annulled by the *Cour de Cassation* for procedural reasons (see Judgments 5 May 2009, 07-87.362 and 07-87931.

[12] See below, D).

[13] Art 263.b), Royal Legislative Decree 2/2011, 5 September, issuing the Consolidated Text of Law on State Ports and Merchant Marine (TRLPEMM), *Spain's Official Gazzette, BOE*, no. 253, 20 October 2011. According to SASEMAR sources since the summer 2018 -when there were reinforced through a special planning- there are now 55 ships (rapid boats, Salvamar and Guardamar) operating at rescue missions in the Canary Islands, the strait of Gibraltar and Alboran sea, with 840 members. The rescue operations are monitored by the Integrated System of Foreign Surveyance (SIVE) located at Sacratif Cape (Granada). (Informations provided by the Home Ministry (Interior) to MPs Pérez López and Rojas García (PP) in autumn 2018).

[14] The payments concern not the lifes but the vessels saved.

[15] N. Klein, 'Maritime Security', in D.R. Rothwell, A.G. Oude Elferink, K.N. Scott, and T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford UP, Oxford, 2017), at 396. In fact, the perverse connection between security and migration in EU policies is harshly denounced by J. De Lucas, 'Falacias y medias verdades en la política europea de refugiados', in J. Soroeta (dir.), 17 *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* (Aranzadi, Pamplona, 2017), at 107.

(c) THE HIGH SEAS LEGAL REGIME: QUESTIONS ON JURISDICTION

It is well known that high seas is an area outside the power of States. The older *Grotian* category of *Mare Liberum*—now superseded by its characterization as a 'Global Common'—has been conceived as an area where human activities can be conducted freely, but with the special *caveat* of its linkage with a certain State.[16]

Also, the 'Law of the Flag' is an essential precondition to develop any activity at high seas, insofar as, in the absence of such a relation, States (in fact, through warships, and, exceptionally, through other State vessels) are authorized to detain, inspect and, eventually, seize vessels and passengers therein, and divert them to their own ports.[17]

But on the other hand, actions in the high seas towards foreign vessels are prohibited unless such vessels are under the conditions of the so called 'hot pursuit' regime or are suspect of acts of piracy, slavery and illegal broadcasting. Neither drug trafficking nor migrant smuggling are included; hence, in those cases, any action by a public foreign vessel must be previously authorized by the State of the flag[18], or, exceptionally, by the UN Security Council.[19]

Anyway, the high seas are not 'a no-Law zone', as recalled by the ECHR in their *Medvedyev* decision in 2010[20]. In fact, the application of legal rules to any event developed therein are based precisely on the 'Law of the Flag' principle, according to which the legal order of the State of the flag must be applied to the people on board the ship, regardless of their nationality or condition (e.g. stowaways). And also, according to Safety of Life at Sea (SOLAS) Convention (Chapter V, Rule 7)[21], and the Search and Rescue (SAR)

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[16] A good example is provided by the Principalty of Sealand (really, a family settled in an old British platform dating from the Second World War), placed originally at high seas -and now inside the British marine areas- whose existence lies only in the 'large tolerance' of UK Government.

[17] In fact, one of the reasons behind the treatment of pirates as *hostis humani generis* (ennemies of mankind)-and the right of every State to prosecute and punish such activities lies in the fact of the 'unflagged' character of their ships; the 'Jolly Roger' (the pirate flag) not being connected with any State, and linked with the predatory activities developed. See Z. Bohrer, 'Jolly Roger (Pirate Flag)', in J. Hohmann, D. Joyce (eds.), *International Law Objects* (Oxford UP, Oxford, 2018), at 259.

[18] Through a single permission or by a treaty (bilateral or multilateral) general habilitation (e.g. Council of Europe convention on seizing drug smuggler vessels). In fact, even the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, done at New York in 15 November 2000 (2241 *UNTS* 507) recalls the same rule (art. 8, paras. 2 and 4), the only exception being the case when 'A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law' (art. 8, para. 7).

[19] There has been three times were, under exceptional circumstances, United Nations Security Council (thereinafter, SC) has adopted special measures suspending UNCLOS provisions related to the competences of Coastal States (Somalian territorial waters, S/RES/1816 (2008), paras. 7 and 9, and Flag States (Mediterranean Sea, S/RES/240 (2015), paras. 7 and 8, and S/RES/2292 (2016), paras. 3 and 4). In the last cases, the SC authorized under certain conditions the inspection of foreign flagged vessels on the high seas and their subsequent seizure when suspicious of migrant smuggling and illicit transfer of arms to Libya. (On this subject, see E. Papastavridis, 'EUNAVFOR MED Operation Sophia and the question of jurisdiction over transnational organized crime at sea', 30 *QIL, Zoom-in* (2016), 19-34).

[20] ECHR Judgment 29 March 2010, *Medvedyev and others v. France* (GCh), application no. 3394/03, (ECLI:CE:ECHR:2010:0329JUD000339403) on drug smuggling. On migrants, see further.

[21] 1974 International Convention for the Safety of Life at Sea (SOLAS Convention), 1184 UNTS 278.

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Convention (Chapter 1.2.3)[22], such obligations cover indisputably the specific case of illegal immigrants when they are rescued.[23]

In this sense, as was recalled in 2012, by the same Court in the case of *Hirsi Jama v. Italy* against the alleged limitations by Italian authorities about the State power over its vessels on the high seas when the rescue of immigrants was encouraged but at the same time excluded them from guarantees in the field of human rights protection[24], given the unequivocal nature of the international law on this matter, the Court said:

> 'by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognize, in cases concerning acts carried out on board vessels flying a State's flag, in the same way as registered aircraft, cases of extraterritorial exercise of the jurisdiction of that State. Where there is control over another, this is de jure control exercised by the State in question over the individuals concerned'[25].

(D) RESCUE OPERATIONS AT HIGH SEAS: LEGAL PROBLEMS

Rescue operations at sea have been regulated by the Law at sea, since their inception. Nowadays, in those cases, according to UNCLOS, every state must require the captain of a ship flying its flag to 'render assistance to any person found at sea in danger of being lost' and 'to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance[26]. Following such idea, in a more accurate way, SOLAS Convention provides:

> 'Distress situations: obligations and procedures
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> 1 The master of a ship at sea which is in a position to be able to provide assistance, on receiving information 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. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. 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, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly.

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[22] 1979 International Convention on Maritime Search and Rescue (SAR Convention), 1405 UNTS 119.

[23] I. Lirola Delgado, 'España y la lucha contra el tráfico ilícito de inmigrantes por mar', in J. Pueyo Losa, J.J. Urbina (eds.), *La cooperación internacional en la ordenación de los mares y océanos* (Iustel, Madrid, 2009), at. 425. Notwithstanding the fact, that the Protocol on illegal migration is silent about the application of such provisions (*ibid.*).

[24] See arguments of Italian Government in *Hirsi Jamaa v. Italy* (GCh), Application no. 27765/09, Judgment ECtHR (Great Chamber) 23 February 2012, para. 63 (ECLI:ECHR:2012:0223JUD002776509).

[25] *Ibid.*, para. 77. On this case, *per omnia*, see J.A. Carrillo Salcedo, 'Reflexiones a la luz de la Sentencia del Tribunal Europeo de Derechos Humanos en el caso *Hirsi Jamaa y otros contra Italia* (Sentencia de 23 de febrero de 2012). Derechos de los inmigrantes en situación irregular en España', 32 *Teoría y Realidad Constitucional* (2013), 285-291.

[26] Art. 98 (1) UNCLOS. See also the relevant provisions at the SAR Convention, Chapter 1, para. 1.3.2, and Chapter 2, para. 2.1.10. Those provisions entail a positive obligation of flag states to adopt domestic legislation that imposes penalties on shipmasters who ignore or fail to provide assistance; however, many states have failed to do so and enforcement often remains difficult (T.E. Aalberts, T. Gammeltoft-Hansen, 'Sovereignty at Sea: The law and politics of saving lives in mare liberum', 17 (4) *Journal of International Relations and Development* (2014), at 431.

1-1 Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.

2 The master of a ship in distress or the search and rescue service concerned, after consultation, so far as may be possible, with the masters of ships which answer the distress alert, has the right to requisition one or more of those ships as the master of the ship in distress or the search and rescue service considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress.

3 Masters of ships shall be released from the obligation imposed by paragraph 1 on learning that their ships have not been requisitioned and that one or more other ships have been requisitioned and are complying with the requisition. This decision shall, if possible, be communicated to the other requisitioned ships and to the search and rescue service.

4 The master of a ship shall be released from the obligation imposed by paragraph 1 and, if his ship has been requisitioned, from the obligation imposed by paragraph 2 on being informed by the persons in distress or by the search and rescue service or by the master of another ship which has reached such persons that assistance is no longer necessary.

5 The provisions of this regulation do not prejudice the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by article 11 of that Convention.

6 Masters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship'.[27]

However, in those cases the problems lie in the fact that a general control over such rescue activities on the high seas is practically impossible, then, that is the reason for the 'compartmentalization' of rescue operations according to the IMO Regulations, without overlooking the coordination between interested States to proceed with rescue missions.

Then, according to the existing Law, high seas are divided between States to develop the activities within maritime rescue: the Search and Rescue (SAR) zones[28]. Normally, such regions are linked with neighbor States, but there are few exceptions[29]. In the case of the Mediterranean Sea the SAR zones are as shown below (fig. 1).

[27] Regulation 33. See also Chapter V, Regulations 7.1, 10(a).

[28] Established under the SAR Convention, Annex, Chapter 1, 1.3.4 and Chapter 2, 2.1.3-2.1.9.

[29] As in the case of Western Sahara whose waters are a SAR zone under Spanish responsibility -not Moroccan- insofar as the area is until now a non-self-governing territory, under de jure administration by Spain. (On this question see, C. Ruiz Miguel, 'Las obligaciones legales de España como potencia administradora del Sahara Occidental', 26 *AEDI* (2010), 303-331).

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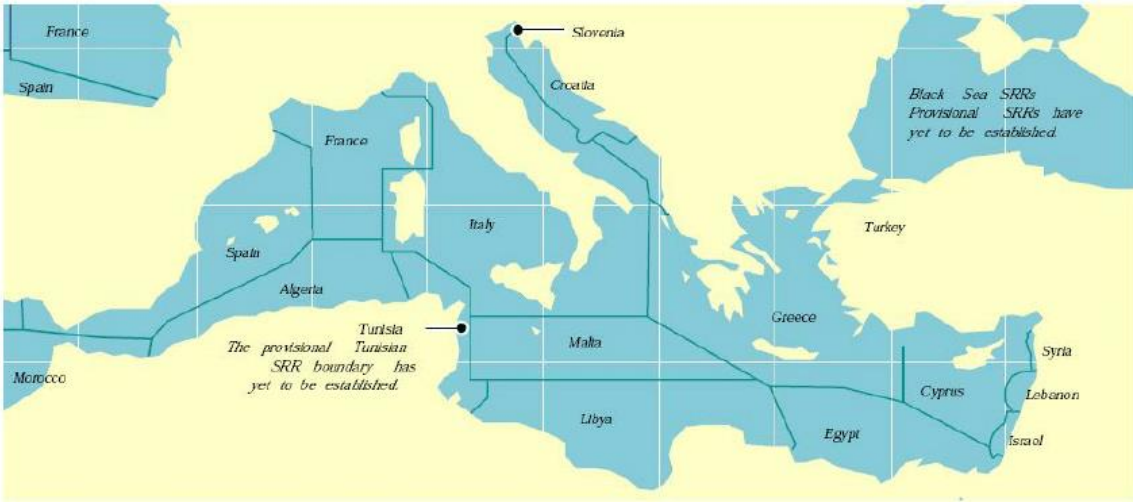

SAR marine zones in Mediterranean (fig. 1)[30]

In those situations, it concerns the State responsible for its SAR to deploy the activities related to rescue operations, usually through their public services. Despite this, the rules concerning disembark of rescued people are not clearly established. In fact, nowadays only a sparse soft law – mainly 'created' by the IMO[31]- regulates this issue: this is the case for the 'place of safety' where people rescued must be delivered.

The term referred to in regulation 13.2, Chapter 1, of the SAR Convention is not defined in any international convention. However, according to the IMO Guidelines on the Treatment of Persons Rescued at Sea it means a place where the life of a person rescued at sea is not endangered anymore and his/her basic human needs are met. In a place of safety, a rescue operation is considered to be terminated and from this place further arrangements regarding transportation/delivery to the final destination of a person rescued at sea can be made[32]. This is also the case for the IMO's Principles Relating to the Administrative Procedures for Disembarking Persons Rescued at Sea[33], when principle 3 states:

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[30] Figure extracted from Aalberts, Gammeltoft-Hansen, 'Sovereignty at Sea: The law and politics of saving lives...', *supra* n.26, at 451.

[31] In fact, as has been rightly stated, IMO uses soft law as one of their main tools in the long and winding process of law-making in the law of the sea sector (T. Fajardo del Castillo, 'Soft Law and the Law of the Sea: Its Presence in the UNCLOS', in J.M. Sobrino Heredia (ed.), *The Contribution of the United Nations Convention on the Law of the Sea to Good Governance of The Oceans and Seas* (Editoriale Scientifica, Naples, 2014), at 69). In spite of this, there are also studies on this matter issued by the UNHCR, although not mandatory for States; e.g. see Office of the United Nations High Commissioner for Refugees, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea*, November 2017.

[32] Resolution MSC.167(78) adopted on 20 May 2004. According to such guidelines, the conduction to a safe place under the responsibility of the Government of SAR Region where people were rescued releases the captain of any accountancy (Cf. para. 2.5).

[33] Adopted by the IMOs Facilitation Committee, FAL.3/Circ.194, 22 January 2009. On the subject see J. Coppens, E. Sommers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?', 25 *The International Journal of Marine and Coastal Law* (2010), at 379. A detailed analysis of these 'rules' on M. Ratcovich, 'The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?', 33 *Australian Yearbook of International Law* (2015), 81-129.

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> 'If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued'.[34]

However, even the attempts -promoted by the IMO in 2010- to conclude a MOU on ways to provide for coordination between Mediterranean coastal States on such issues failed[35]. Then, problems surrounding disembark of migrants in a safe place are far to be solved.[36]

Anyway, in the case of 'failed States'—such as Libya now—the observance of such duties concerning marine rescue seems at present to be very difficult[37]. Here lies the question to be discussed, because the failure of such States to deploy a rescue operation could be interpreted as a gap to be fulfilled by everyone: in the case of merchant vessels there is a clear obligation, as we have previously said. In fact, although not well publicized, commercial shipping is currently engaged in such operations. Then, according to the International Chamber of Shipping more than 1,000 commercial vessels participated in rescue operations of about 50,000 migrants.[38] This phenomenon, however, is particularly problematic. In fact, as has been rightly put:

> 'Such conduct, certainly very proper from the humanitarian perspective, has many consequences for vessels and what is of the most importance their crews. Enumerating only the main consequences for the shipping industry, one could say: delays and changes of course; late deliveries of cargo; deterioration of perishable cargo; consumption of additional bunker fuel; breach of contracts; violation of insurance contracts and many others. From the perspective of seafarers: the participation in dangerous rescue operations; delays resulting in prolonged work; life-threatening diseases; chaos resulting in safety and security accidents, etc. Seafarers' families cannot be also forgotten in this context. Quite often they are neglected in the discussion about maritime issues, but their lives, well-being, financial and emotional stability (and therefore their human rights) are heavily dependent on the situation on board of the vessels where their spouses, siblings, children or parents work. Therefore, there is a direct impact of maritime

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34 Italics added.

35 See N. Klein, 'A Maritime Security Framework of the Legal Dimensions of Irregular Migration at Sea', in V. Moreno-Lax, E. Papastravridis (eds.), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach*, (Brill/Nihoff, Dordrecht, 2016), at 46, and T. Scovazzi, 'The Particular Problems of Migrants and Asylum Seekers Arriving by Sea', in L. Westra, J. Satvinder, T. Scovazzi (eds.), *Towards a Refugee Oriented Right of Asylum* (Routledge, London-New York, 2016), at 215. For a deeper insight into this failed initiative, see M. Di Filippo, 'Irregular Migration and Safeguard of Life at Sea. International Rules and Recent Developmens in the Mediterranean Sea', in A. Del Vecchio (ed.), International law of the sea: current trends and controversial issues (Eleven International Publishing, The Hague, 2014), at 1.

36 J. Juste Ruiz, 'International Migration Law: Between Crisis and Renewal', 33 *AEDI* (2019), at 540, n. 6 (in Spanish with English summary). Moreover, it takes into account the views on T. Scovazzi on such issues (Cf. T. Scovazzi, 'Il respingimento di un drama umano collettivo e le sue conseguenze', in A. Antoniucci, I. Papanicolopulu, T. Scovazzi (eds.), *L'immigrazione irregolare via mare nella giurisprudenza italiana e nell'esperienza europea*, (Giapichelli, Torino, 2016), at. 66).

37 The Home Minister of the Italian Government, Mr. Gentiloni signed on February 2017 a MOU with the Libyan Government internationally recognized (National Libyan Agrement), providing for the Italian funding of Libyan regions more affected by irregular migration, and instructing frontier patrols and coastguards, and imposing on such authorities the duty to reinforce the control over land and marine frontiers and better conditions on foreigners internment camps (See A. Cocchini, 'Migrants smuggling and Operation Sophia: Could the Responsibility to Protect return to Libya?', 35 *REEI* (2018), at 9; A. Palm, 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?', *EU Immigration and Asylum Law and Policy Blog*, 2 October 2017. As you can presume, at present, insofar as the Libyan civil war persists, the effectivity of this agreement is equal to zero.

38 B. Stepien, 'A Tale of Non-State Actors and Human Rights at Sea: Maritime Migration Crisis and Commercial Vessels' Obligations', 18 *Anuario Mexicano de Derecho Internacional* (2018), 35-64.

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migration on seafarers, commercial vessels and the whole shipping industry, being the forefront of the migration crisis'.[39]

The risks involved in such situations are ever growing. Just, suffice it to remember the recent incident last March in the 'El Hiblu 1' cargo, where a mutiny erupted on board, when the captain decided the disembark at a Libyan port, which was obviously not suitable for migrants.[40]

(E) RESCUE OPERATIONS BY NGOS: SOME CASES

And, in the case of NGOs? Such a possibility is neither accepted in principle by the States[41], nor by FRONTEX[42]. Suffice it to mention some examples -Spain was involved in many of them- showing how these activities are commonly perceived by the States, with a mixture of reticence and hostility.

The first example is provided by the incident of *Professional Emergency Aid* (2017), an NGO whose members were arrested in Greece under the charges of 'migrant smuggling', although they were finally released by the Greek authorities[43].

The second was the preemptive seizure of *Open Arms* ship by Italian authorities in Catania in March 2018[44].

The third, the disembark of ship *Aquarius* in the port of Valencia in June 2018 —an overpublicized operation by the Spanish Government dictated for political ends— followed by other events, finally leading it to a halt in their rescue operations[45]. However, the gesture by the Spanish government was presented as an accomplishment of an international duty for humanitarian reasons[46].

The fourth was the denial by the maritime authority (*Capitanía marítima*) of Barcelona of the ship *Open Arms* to sail in the Mediterranean to resume its rescue operations in January 2019[47].

The fifth involves the Dutch Government, through the new policy imposed recently by its Ministry of Infrastructure and Water Management which blocks the feasibility of NGOs operating ships under the Dutch flag. It argues 'safety reasons' to restrain such operations[48].

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[39] *Ibid*, at 40-41.

[40] See Sea-Watch communiqué, 'Not piracy; but self-defense against deadly European border policy', 28 March 2019.

[41] On the conflict, from an Italian perspective see E. Bottini, 'Immigration Illégale et Secours en Mer: Analyse d'un conflit juridique', 15 *Annuaire du Droit de la Mer* (2010), 248-261. A more recent and general approach is provided in M.A. Acosta Sánchez, 'Inmigración marítima en el Mediterráneo. Las iniciativas de la UE y la protección de los Derechos Humanos', in J. Soroeta (dir.), 17 *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián*, (Aranzadi, Pamplona, 2017), 23-60.

[42] On its position see European Border and Coast Guard Agency, *Risk Analysis for 2017*, 2017, at. 33. On statements by former authorities responsible on those issues see A. Sánchez Legido, A., '¿Héroes o villanos? Las ONG de rescate y las políticas europeas de lucha contra la inmigración irregular: (a propósito del caso *Open Arms*)', 46 *RGDE* (2018), at 13-14, n. 14.

[43] NGO volunteers were detained near the island of Lesbos on 15 January 2016, but the Greek judge accorded their release in May 2018 (cfr. El País, 7 May 2018).

[44] On this incident and the circumstances surrounding it see Sánchez Legido, '¿Héroes o villanos? Las ONG de rescate...', *supra* n. 41, at 10-15.

[45] See more information here.

[46] See Spain's Prime Minister communiqué, 11 July 2018.

[47] See Amnesty International communiqué, 18 January 2019.

[48] See 'Dutch government blocks Sea-Watch 3 and other NGO ships with a new policy, citing concerns for 'safety,' while people are left to drown', 2 April 2019. The NGO Sea Watch replied: 'We cannot be held accountable for the current state of inhumane standoffs at sea. Instead, this situation is a damning indictment of certain European states who are abusing their

At the same time, the refusal of coastal States to accept the disembark of migrants rescued by NGOs has significatively increased after the accession of a new Government in Italy in 2018, and Malta following it[49]. Even, the Italian Government expressed their intention to proceed against the NGOs involved in these incidents [50], and threatening to take retaliation measures against supposedly tolerant European governments[51]. At the same time, in June, the recognition of the Joint Rescue Coordination Centre (JRCC) for the Libyan Coast Guard by the IMO -then formalizing the Libyan SRR- provided a legal basis 'to expel civil rescue NGO boats from the zone'[52].

Finally, we must take into account the recent incidents -just the past summer- when the ship *Open Arms*, again, and *Aita Mari*, were involved on rescue operations, initially disapproved by the Spanish Government, that lead to exceptional measures of disembark finally assumed by Spain[53].

Further reactions by NGOs affected by these measures include judicial actions at both domestic and international level (ECHR), still in progress[54], but what will be the result of such judicial proceedings?[55]

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powers. In any next rescue, another long standoff may be likely, but still unacceptable. Blocking us for 'safety' concerns in a standoff is a fundamentally illogical argument when the alternative is that people are left to drown', says Bayer. Keeping shipwrecked people at sea for prolonged periods of time is in violation of international law and therefore will never be the responsibility of Sea-Watch or any vessel rendering assistance to a distress case. It is the legal obligation of maritime rescue coordination authorities to provide a safe port without delay (Ibid.). According to the recent Spanish practice, conceived in similar terms, vessels trying to develop such tasks must abide the limits of individuals embarked provided by the shipping certificates and would not be covered by the exception contained in Chapter V of the SOLAS Convention. The Spanish authorities also remembered that rescue activities developed by those vessels in foreign SAR areas could be an interference in public rescue services of the States concerned (Information provided to the author by the Spain's Ministry of Infrastructures, 29 April 2019).

49 On these questions see a deep analysis in V. Moreno-Lax, D. Ghezelbash, N. Klein 'Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia' 32 *Leiden JIL* (2019), at 722-726.

50 'Italy vows to sue NGO over migrant rescue boat', 27 January 2019.

51 'The Government of the Italian Republic invites the Government of the Kingdom of the Netherlands to urgently prepare what is necessary to organize the transfer into Dutch territory of the 47 migrants', a note issued on 26 January 2019 by the Italian Interior Ministry said. Further, he twitted 'If the Dutch government is not able to control vessels, which carry its country's flag there's a serious problem: The flag should be withdrawn immediately!' (ibid.). The reply by the Dutch Ministry rejected the request, with the Dutch Justice and Security Ministry saying it would 'not take part in ad hoc measures for disembarkation'. The Dutch government also said it was not responsible for the boat, claiming the vessel acted 'on its own initiative ... It was up to the captain of Sea Watch 3 to find a nearby port to disembark the 47 migrants he had on board'.

52 K. Santer, 'Governing the Central Mediterranean through Indirect Rule: Tracing the Effects of the Recognition of Joint Rescue Coordination Centre Tripoli', 21 *European Journal of Migration and Law* (2019), at 142. The author speaks of 'a technocratic decision', unable to cut the constant violations of human rights by Libyan Coast Guards (Ibid, at 165).

53 On those incidents see J. Abrisketa Uriarte, 'Rescates en el mar y puertos seguros', *El Correo Español*, Bilbao, 5 September 2019 (supplied by the author).

54 See the suit by the victims of mistreatment by Lybian authorities before the ECHR in 2018 against Italy, supported by Seawatch. Also, the same NGO filed on January 2019 a suit against Italy before ECHR asking for interim measures concerning migrants retained in a ship near the Italian coast. In the case of Spain, measures were taken by maritime authorities restricting rescue operations by the ships *Open Arms* and *Aita Mari* (see Dispatch 10 June 2019 and Resolution of Dispatch of 9 October 2019, respectively). *Aita Mari* suited against such a restriction before the maritime authorities (petition 23 November 2019). Documents gently provided by J. Abrisketa Uriarte to the author.

55 Judicial actions through domestic courts and human rights organs are undoubtedly the best way to improve the duties of the States concerned. On this subject see I. Papanicolopulu, 'The duty to rescue at sea, in peacetime and in war: A general overview', 98 *International Review of the Red Cross* (2016), at 512-513.

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In fact, the question remains about the lawfulness of the different measures adopted by concerned States. According to some authors such issues cannot be solved through the rules yet in force, specially EU Law[56]. Against this approach, for V. Moreno-Lax and others, the answer lies in the fact that UNCLOS and IMO's rules are not rightly applied, insofar as they do 'not create any new sovereign powers in favour of coastal States, but rather 'area[s] of responsibility' to be overseen in good faith to preserve the safety of human life at sea'[57], clearly breached when the States assume a 'closed ports policy' or try to restrict rescue operations by NGOs.[58]

From our point of view, at present a clear assessment cannot be offered, because facts and rules -as showed- give us a blurred picture, where *humanrightism* runs deep among the views expressed by some authors[59]. Anyway, as Professor T. Treves -former Judge of ITLOS- said some years ago 'it is clear that human rights concerns are now inextricably intertwined with the concerns of the Law of the Sea'. Then, prospects of change can be induced from the developments described, and probably the proactive role of NGOs engaged in rescue activities could pave the way to an alternative scheme of rescue operations yet in force, putting their role in the future as a complementary tool for the States activities on these issues[60].

(F) BY WAY OF CONCLUSION: BETWEEN HUMANITARIAN IMPERATIVES AND THE PRESENT LEGAL ORDER

[56] P. García Andrade, 'El Derecho del Mar frente al fenómeno migratorio: ¿Insuficiencia normativa o deficiente aplicación?', in J.M. Sobrino Heredia (ed.), *The Contribution of the United Nations Convention on the Law of the Sea to Good Governance of the Oceans and Seas* (Editoriale Scientifica, Naples, 2014), at 341; Sánchez Legido, '¿Héroes o villanos? Las ONG de rescate...', *supra* n. 42, at 24-25. In the same line, as has been putted, the existent gap could be solved through a clear definition of the issue of responsibility and the consequences of failed rescue scenarios by inactive SAR States, e.g. referring a question on 'distress' to the ITLOS, the EUCJ or the ECHR (E. Koka, D. Veshi, 'Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation', 21 *European Journal of Migration and Law* (2019), 26-32).

[57] T. Treves, 'Human Rights and the Law of the Sea', 28 *Berkeley Journal of International Law* (2010), at 13-14.

[58] Moreno-Lax, Ghezelbash, Klein, 'Between life, security and rights...', *supra* n. 48, at 729. There is no room here to discuss the relevance of the proposals submitted by those authors, mainly concerning the essential role to be played by the principle of systemic integration in their contribution (Ibid., at 716-717). Just a caveat about their controversial use on treaty interpretation (on these issues see P. Andrés Sáenz de Santa María, 'El principio de integración sistémica y la unidad del Derecho Internacional' in A. J. Rodrigo, C. García (eds.), *Unidad y pluralismo en el derecho internacional público y en la comunidad internacional* (Tecnos, Madrid, 2011), at 374; R.N. Gardiner, 'The Vienna Convention Rules on Treaty Interpretation', in D. B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford UP, Oxford, 2012), at 500, and our contribution 'The War of the Worlds: Reality vs. Legal Formalism or the Power of Interpretation (on the EUCJ ruling of 27 February 2018, Western Sahara Campaign UK, C-266/16)', 60 *REDI* (2018), at 341-342).

[59] On this way e.g. S. Trevisanut, 'Is there a right to be rescued at sea? A constructive view', 4 *QUIL Zoom-in* (2014), at 14-15. However, very recently the Human Rights Committee took an approach on the question very similar (Cf. General comment no. 36, Article 6: right to life, adopted by the Committee at its 124th session (8 October – 2 November 2018), CCPR/C/GC/36, 3 September 2019, at 13, para 63). On the concept of *humanrightism*, a neologism coined by Professor A. Pellet suggesting the influence of *pia desiderata* concerning human rights on Lawyers, see A. Pellet, 'La mise en oeuvre des normes relatives aux droits de l'homme' in CEDIN (H. Thierry and E. Decaux, eds.), *Droit international et droits de l'homme - La pratique juridique française dans le domaine de la protection internationale des droits de l'homme*, (Montchrestien, Paris, 1990), at 126; id., "Human rightism' and international law', United Nations, Gilberto Amado Memorial Lecture, 18 July 2000.

[60] See D. Irrera, 'Non-governmental Search and Rescue Operations in the Mediterranean: Challenge or Opportunity for the EU?', 24 *European Foreign Affairs Review* (2019), 265-286.

More than a century ago, in 1892, a resolution adopted at its Geneva session by the Institut de Droit International (IDI) on the 'Règles internationales sur l'admission et l'expulsion des étrangers' states in its preamble:

> 'Considérant que, pour chaque Etat, le droit d'admettre ou de ne pas admettre des étrangers sur son territoire, ou de ne les y admettre que conditionnellement, ou de les en expulser, est une conséquence logique et nécessaire de sa souveraineté et de son indépendance'[61]

However, the content of sovereignty is contingent upon normative developments in international society. In fact, thirty years later, the concept of 'domestic jurisdiction' (*domaine reservé*), which entails such an idea was characterized in an evolutive manner by the Permanent Court of International Justice (PCIJ), when in 1923 it stated in the *Nationality Decrees in Tunis and Morocco* case:

> 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.'[62]

But, when, in 2005 we were trying to draw some conclusions about the (a)legal international regime on migrations we were compelled to say that:

> 'the international legal system reveals, even now, a harshly ultraliberal character towards the migratory phenomenon, then, especially reticent to limit the States' freedom of action'.[63]

It remains to be seen how deep the changes produced at normative level have been in the past 15 years, but it seems that solidarity is not yet among the principles that drive migratory policies in Western States. Even between EU member States the solidarity principle, although proclaimed in the Treaty of the European Union (TEU) is not abided by them, specially concerning migratory issues, as has been showed during the so called 'Syrian refugees' crisis' of 2015[64]. Despite this, recently, E. Guild has said:

> 'The international human rights responsibilities of states when exercising their state sovereign entitlement to control their borders and the movement of persons across them includes an obligation to desist from applying measures which result in unsafe, disorderly and irregular movement. The New York Declaration affirms that 'States have rights and responsibilities to manage and control their borders' (para 24). That rights come with responsibilities is a generally accepted principle of law. States' right to control their borders is accompanied by the responsibility to ensure respect for the human rights of those crossing them: migrants...'.[65]

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[61] IDI, Session de Genève. As for foreign ships and their access to Coastal States' ports the sovereign right of States was remembered by the ICJ in his Judgment of 27 June 1986 in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, at 101, paras. 213-214.

[62] *Cfr. Nationality Decrees in Tunis and Morocco (Britain v. France)*, PCIJ, Series B, No. 4, 1923, at 24.

[63] J.A. González Vega, 'En torno a los otros europeos: Derecho Internacional y Derecho Europeo ante la inmigración', in A. Hidalgo Tuñón, R. García Fernández (eds.), *Ética, pluralismo y flujos migratorios* (Eikasia, Oviedo, 2005), at 104-105 (translation by the autor).

[64] On the weak impact of solidarity principle in the development of this crisis, see our contribution 'Myths and Mystifications: The European Union and International Protection (on the 'refugees' crisis')', 56 *RDCE* (2017), at 49-53 (in Spanish with English abstract).

[65] E. Guild, 'The UN's Search for a Global Compact on Safe, Orderly and Regular Migration', at 2.

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But, are such restrictions on sovereignty really assumed by States? When Guild speaks about the constraints on States' autonomy, she refers to a Compact that has been expressly deprived of legal content. The 'commitments' adopted by States assembled in Marrakech in December 2018 were clearly qualified as mere political engagements[66]. Then, such ideas are still 'in progress' in the mind of States, and that is the reason for the proactive work in the hands of civil society, and their heralds, the NGOs.

As a conclusion, I would like to quote a sound reflection expressed recently that links the developments described with other issues previously discussed: 'The efforts of the European Union towards a rigid migration control through third country cooperation in that sense can be read as attempts not only to avoid legal responsibilities but also to avoid encounters that would 'embarrass' the European public. The remarkable opinion delivered by Advocate General Paolo Mengozzi to the European Court of Justice in February 2017 may be read through this lens as responding to Europe's imaginary encounter. The opinion ends with the image that Mann's book begins with the picture of the body of Aylan Kurdi washed ashore on the Turkish coast, which stirred the conscience of people worldwide. Relating to it, Mengozzi writes: 'It is commendable and salutary to be outraged. In the present case, the Court nevertheless has the opportunity to go further, ... by enshrining the legal access route to international protection. ... Make no mistake: it is not because emotion dictates this, but because EU law demands it'. [67] But, as the author finally points out, even if the Court did not follow its Advocate General 'this does not end reflections about the rights of encounter and law's demands.'[68]

Then, at this point we are...

[66] In a further publication the same author expects that the future decision on the current dispute of the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) before the ICJ, could introduce a new treatment of such issues derived from the Migration Compact (See E. Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?', 30 *International Journal of Refugee Law* (2018), at 663).

[67] D. Schmalz, 'Book Reviews: Itamar Mann. Humanity at Sea: Maritime Migration and the Foundations of International Law' 28 *EJIL* (2017), at 652-653 (Italics added). Referring to the Opinion of AG P. Mengozzi in the case *X.X. v. État Belge*, C-638/16 PPU, delivered on 7 February 2017, ECLI:EU:C:2017:93, para. 175.

[68] Schmalz, *Ibid.* (Italics added). It is well known that the Judgment of 8 March 2017, *X.X. v. État Belge*, C-638/16 PPU, ECLI:EU:C:2017:173, denied the suggestion of P. Mengozzi. On this ruling see B. Delzangles, A. Louvaris, 'Visas humanitaires et Charte des droits fondamentaux: la confrontation n'a pas eu lieu', *Journal de Droit Européen* (2017), 170-176; M. Ovadek, 'Le champ d'application de la Charte des droits fondamentaux de l'Union Européenne et les États membres: la malédiction du critère matériel', *id. loc. cit.*, 388-390, A. Sánchez Legido, 'El arriesgado acceso a la protección internacional en la Europa fortaleza: la batalla por el visado humanitario europeo', 57 *RDCE* (2017), 433-472.

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