

BOOKLET ON SEA RESCUE

Legal Clinic The Lighthouse
2018-2019 & 2019-2020



THE LIGHTHOUSE
★ clinique juridique angevine ★

AUTHORS' NOTE

This booklet contains a more detailed analysis of the legal regime of rescue at sea, a topic already addressed in the **State Obligations relating to rescue at sea**. It addresses specific questions which the actors involved in rescue at sea have had to answer.

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ABRÉVIATIONS

FRONTEX	European Border and Coast Guard Agency
IAMSAR	International Aeronautical and Maritime Search and Rescue Manual
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
IHR	International Health Regulations
ILC	International Law Commission
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
NATO	North Atlantic Treaty Organization
NGO	Non Governmental Organization
PCIJ	Permanent Court of International Justice
PSC	Port State Control
RCC	Rescue Coordination Center
SAR	Search and Rescue
SOLAS	Safety of Life at the Sea
SRR	Search and Rescue Region
UE	European Union
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations Refugee Agency
UNTC	United Nations Treaty Collection
WHO	World Health Organization

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LEGAL CLINIC GENERAL PRESENTATION

Purpose: A “Win-Win” Experience

Created in 2018, the legal clinic of “The Lighthouse” at the University of Angers aims to strengthen the practical, methodological and theoretical knowledge of students in **the Master’s degree in international and European law at the University of Angers**. It also aims to develop interactions between the University and civil society by linking students and researchers in International and European law with partners in the field. Thus, our clinic offers students a

learning experience through applying practice and research to concrete situations. The students provide legal support to partner professionals, who benefit from the service free of charge, while contributing to the professionalization of the students. The clinic provides legal support in areas that are within the competence of the pedagogical team, not only in French law, but also in its understanding of international and European standards.

Methodology

Students work throughout the academic year in direct contact with a partner performing various tasks relating, but not limited to: legal and geopolitical research; drafting appeals; legal permanence; hearings, and legal support for files. The students are regularly monitored by partners on a weekly or monthly basis. Although the students are voluntarily placed in a situation of autonomy, the work is carried out under the direct supervision of the pedagogical team.

The clinic is the subject of a bimonthly seminar during which the students discuss their working methods and any difficulties they encounter. This allows the students to improve and develop reflexes and real efficiency that are necessary in practice. At the end of the program, the partners provide the students with feedback on their quality of the work, availability, professional posture, communication skills, and any other observation deemed relevant.

Pilot

From September to May, the Pilot is **the clinic’s key personnel**, responsible for implementing the clinic’s triple mission.

Relational

The pilot is in constant contact with the partners in the field and the responsibilities include: organizing meetings at the beginning of the academic year; collect questions that will be the subject of the work, as well as the partner’s opinions and comments of the student’s work; and organizing the closing conference of the clinic.

We praise the work provided by Emilie Lenain and Elise Rouillé who have carried out these functions with seriousness, efficiency and enthusiasm.

Pedagogical

The pilot reviews the student’s work by reading the notes on the form and substance within the Pilot’s field of competence. The Pilot organizes the seminars and ensures the quality of the notes for publication in the form of blog notes.

Communication

The pilot ensures the widest possible dissemination of clinical work, while keeping a strict confidentiality of the partner’s data. This ensures the supply of power to the clinic’s unit, and oversees the preparation and online publication of the final activity report booklet.

Genesis

Since 2015, "The Lighthouse" legal clinic has been participating in **the Alliance Europa Institute for European and Global Studies**, supported by the Pays de la Loire Region to develop a center of excellence in research, training and innovation (RFI) in the field of European studies. The clinic is structured on the dynamic of internationalization and European openness of the University of

Angers. Thanks to the support of the Alliance Europa programme, Bérangère Taxil is piloting a collective and multidisciplinary research project on the welcoming and resettlement of refugees in Europe (*ARRECO*). Alina Miron, is piloting projects on maritime borders and the grey areas of the Law of the Sea (*The Sea, the Last Frontier and Zomad*).

Between September 2017 and June 2018, Bérangère Taxil and Alina Miron organized the **Charles Rousseau International Moot Court Competition**, which has become the largest and oldest French-speaking "Moot Court" in International law. The Competition takes place in a different country each year with approximately 200 participants, comprised of the instructors and their teams of students; French and International judges; lawyers and other legal practitioners and academics from all over the world. Based on the research projects underway in Angers, the practical case submitted to the students dealt with the rescue of shipwrecked people at sea. The week of

pleadings, in May 2018, preceded by a few weeks the reality, with the important and increasing media coverage of the wanderings of NGO ships in the Mediterranean Sea. The legal situation of vessels carrying out mass rescues is very complex and difficult since such little is known.

The results of the research carried out by the students have been widely disseminated both to the general public and to experts in the Maritime and Migration sectors. The PhD students have produced a **booklet, in French and English, on rescue at sea**. Several articles were also published in the national press.

"The Lighthouse" legal clinic was selected by the European Commission as an innovative educational project and has received financial

support from the Erasmus+ programme as part of the **Jean Monnet Action** since September 2019.

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RIGHTS AND DUTIES AT SEA IN SAR OPERATIONS



PROCEEDINGS OF A SAR OPERATION

Duty to render assistance at sea

Article 98 UNCLOS establishes a **general duty to render assistance at sea** for States :

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 entails further obligations, more specific.

Shipmasters

According to Regulation 33 SOLAS Convention, a ship that identifies a situation of distress must either **deviate from its course to assist as soon as possible**, or **contact urgently an appropriate unit** if the shipmaster considers the ship and its crew as unable to render assistance.

A RCC must be contacted in order to coordinate a SAR operation. Therefore, the operations principles of the IAMSAR Manual provide that :

When a vessel or aircraft becomes aware of a SAR incident directly, it should alert the appropriate RCC or RSC as follows:

- the RCC or RSC responsible for the SRR where the incident occurred
- the nearest RCC or RSC
- any RCC or RSC which can be reached; or,
- any communications facility (e.g., alerting post)."³

¹ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, article 87

² International Convention for the Safety of Life at Sea (SOLAS), London, 1974, Regulation 33

³ IAMSAR Manual vol. III, Section 3 "On-scene co-ordination", 3.1 "Requirements for co-ordination"

SAR units

The main purpose of the implementation of maritime SAR activities and of a RCC is to provide assistance and first aid to person in distress at sea by coordinating the actors involved in a rescue operation which takes place in a SRR. In that sense, States parties to the SAR Convention⁴ pledge to create a SRR and one or more RCC. They “shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts”⁵.

The responsible SAR authorities must respond to an alert and coordinate the rescue operation urgently:

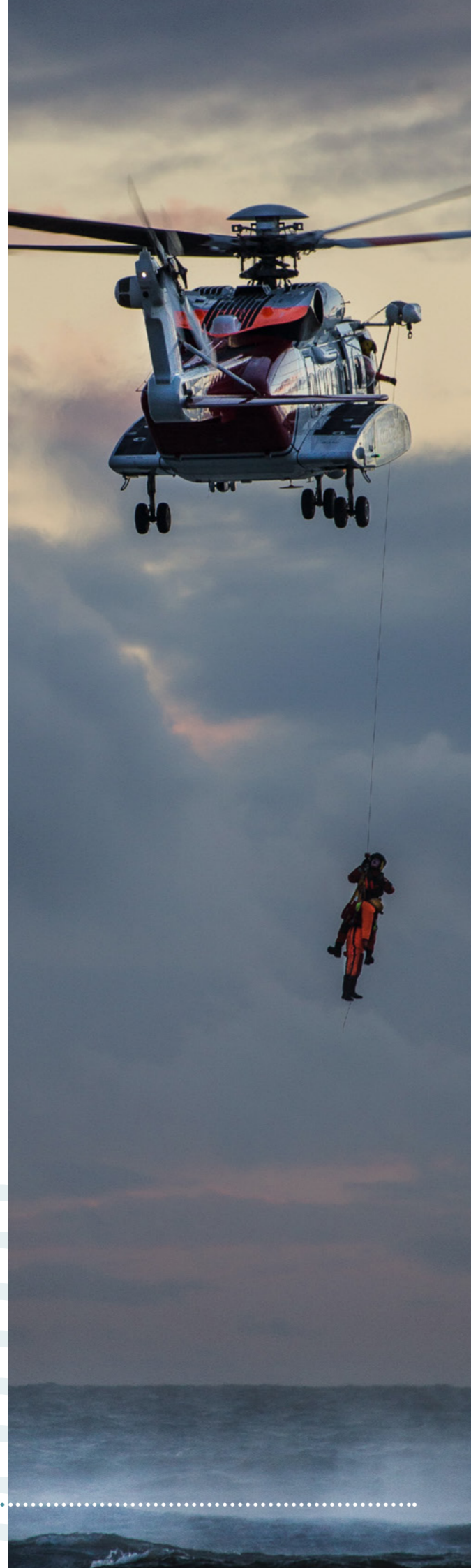
- *“Parties should arrange that their search and rescue services are able to give prompt response to distress calls.”*⁶
- *“On receiving information that a person is in distress at sea in an area within which a Party provides for the overall co-ordination of search and rescue operations, the responsible authorities of that Party shall take urgent steps to provide the most appropriate assistance available”*⁷

⁴ IMO, International Convention on Maritime Search and Rescue (SAR), adopted at Hamburg on 27 April 1979, entry into force on 22 June 1985, UNTC, vol. 1405

⁵ Ibid., Regulation 2.1.1 SAR Convention

⁶ Ibid., Regulation 2.1.8

⁷ Ibid., Regulation 2.1.9



Aircrafts

SAR AIRCRAFT

A SAR aircraft is “an aircraft provided with specialized equipment suitable for the efficient conduct of search and rescue missions”⁸. The procedure for the SAR operation is described in the chapter 5, point 5.6 of the annex 12 of the Chicago convention. The procedure doesn’t make any difference between the rescue of a boat or an aircraft in distress at the sea.

CIVIL AIRCRAFT

Article 25 of the Chicago Convention also provides for the duty to render assistance⁹:

- *“Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances. Each contracting State, when undertaking search for missing aircraft, will collaborate in coordinated measures which may be recommended from time to time pursuant to this Convention.”*

The article 5.6.2.1 of the annex 12 of the Chicago convention raises a solution if there a non-SAR aircraft reach the first a scene of an accident¹⁰:

- *“If the first aircraft to reach the scene of an accident is not a search and rescue aircraft, it shall take charge of on-scene activities of all other aircraft subsequently arriving until the first search and rescue aircraft reaches the scene of the accident.”*

It also provides that the non-SAR aircraft has to contact the RCC, or at least, ask another aircraft to contact it, if the first civil aircraft couldn’t do it. However, there is no specific obligation for a pilot of a civil aircraft if he is witness of a situation of distress at sea.

The IAMSAR manual mentions that civil aircraft “are required to carry an emergency locator transmitter”¹¹. That means that pilots are able to contact a RCC as soon as they are witness of a situation of distress at sea and they must do it. Moreover, the manual also mentions that “the general public should be encouraged to report any abnormal occurrence which they have heard about or witnessed”¹². Before being a civil pilot, a pilot of an aircraft answered to the definition of “general public” as it is mentioned in this manual.

Concomitantly, some domestic rules provide obligations of notification of an alert situation for aircraft pilots:

- **France:** the same obligations apply to masters of ships and pilots of aircrafts which witness a situation of distress at sea. (see Transport Code, , Article L. 5131-1¹³ for ships, and Article L. 6132-1 for aircrafts¹⁴).
- **Italy:** the navigation code states that when the situation of distress is qualified, the aircraft pilot is expected to rescue, or, when this is not possible, assist, persons, whether it’s for another plane or a ship¹⁵.

⁸ Chapter 1, Annex 12 to the Convention on International Civil Aviation “Search and Rescue”, Eighth Edition, July 2004

⁹ Convention on international civil aviation,

adopted in Chicago on the 7th of December 1944, article 25

¹⁰ Chapter 1, Annex 12 to the Convention on International Civil Aviation

“Search and Rescue”, Eighth Edition, July 2004

¹¹ IAMSAR Manual, Vol. II, Mission Coordination, Chapter 2 – System

Components, 5.2.2.5 (a), IMO/ICAO London/Montreal, 2010

¹² IAMSAR Manual, Vol. II, Mission Coordination, Chapter 1

– The Search and Rescue System, idem., 51.6.2

¹³ Article L5131-1 du Code des transports français : « Les dispositions du

présent chapitre s’appliquent à l’abordage survenu entre navires, y compris

les navires de guerre, ou entre de tels navires et bateaux. Dans ce dernier

cas, elles s’appliquent également au bateau »

¹⁴ Article L6132-1 du Code des transports français : « Les dispositions des

articles L. 5131-1 à L. 5131-7, L. 5132-1 à L. 5132-11 sont applicables aux

aéronefs en péril et aux pilotes des aéronefs

qui peuvent prêter assistance aux personnes en péril »

¹⁵ Codice della navigazione, Art. 982 - Obbligo di salvataggio e di assistenza

a persone in pericolo. Approvato con R.D. 30 marzo 1942, n. 327,

available online at: <http://www.fog.it/legislaz/cn-0981-0995.htm>

Drones

Drones, however, operate in a legal grey zone not covered by UNCLOS¹⁶. The use of drones for SAR operations is recent. The ICAO published a circular entitled “Unmanned Aircraft Systems (UAS)”¹⁷. However, there is no mention in this document of an obligation to provide assistance at sea. Regulation 5.42 resumes the article 25 of the Chicago Convention¹⁸:

- “Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances. Each contracting State, when undertaking search for missing aircraft, will collaborate in coordinated measures which may be recommended from time to time pursuant to this Convention”

The regulation 5.43 extends the applicability of this rule :

- “By definition, search and rescue (SAR) is based on the idea that the main purpose of “search” is to ensure that assistance is rendered to persons in distress. This is most often seen as rendering assistance to persons who were on board the aircraft, **but includes third parties as well**¹⁹”.

This could be understood as it: if a drone is witness of a situation of distress at sea, the person who controls the drone has an obligation to provide assistance. Even if, prima facie, the ICAO seems to extend the SAR obligations to drone pilots’ or users’. Add to that, the IAMSAR Manual doesn’t recommend the utilization of drones for SAR operations.²⁰:

Flag States

Flag States have obligations regarding shipmasters and ships flying under their flag.

Obligations of the flag State are recorded in article 94 of the UNCLOS. The first paragraph provides that a State “shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag²¹”. None of the following paragraphs (from 2 to 7), concerns the duty to render assistance at sea. Even if the third paragraph mentions that the list of measures which has to be taken is to consider “inter alia”, in other words “non-exhaustive”, there are no indications that flag State has particular obligations in favor of persons rescued at sea²².

According to article 98 of UNCLOS, flag States also have an obligation to ensure that the masters of their ships comply with their obligations “**to render assistance to any person found at sea in danger of being lost**”.

The first paragraph imposes upon the flag State an obligation to adopt a legal framework obliging the masters of their ships to render assistance at sea and to sanction its violations.

The captain of the ship who has the obligation to save persons in distress, as stated in the SAR convention, would only terminate his/her salvage operation when the shipwrecked persons are disembarked in a place of safety²³. Thus, the captain of the ship has only the obligation to save persons in distress, as stated in the SAR convention. Captain comply with this obligation when he finishes his/her salvage operation²⁴. On the contrary, the State fulfils its obligations only when the individuals are landed.

¹⁶ The Guardian, “Once Migrants on the Mediterranean were saved by naval patrols. Now they to watch as drones fly over”, 4 August 2019, available online at: <https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu>
¹⁷ International Civil Aviation Organization, Unmanned Aircraft Systems (UAS), Cir 328 AN/190, 2011.

¹⁸ Convention on international civil aviation, Doc. 7300/9, ninth edition, 2006, article 25
¹⁹ International Civil Aviation Organization, Unmanned Aircraft Systems (UAS), Cir 328 AN/190, 2011, 55.43

²⁰ “Remotely Piloted Aircraft (RPA) might have useful reconnaissance and communications capabilities and be able to remain on scene for long periods of time, but some RPA also have a limited radius of operations. In general, for safety reasons, aircraft flown by aircrew and RPA should be kept well apart”. IAMSAR Manual, Vol. I, Organization and Management, Chapter 2 – System Components, 52.2.5 (a), IMO/ICAO London/Montreal, 2016

A JOINT-OBLIGATION OF COASTAL STATES, SAR STATES AND ALL STATES CONCERNED: THE PROMPT DISEMBARKATION IN A PLACE OF SAFETY

WHOSE OBLIGATIONS ?

For the interested States, the obligation to provide assistance does end **when they are disembarked in a place of safety**.

The SAR State, through its SAR authorities, has a primary responsibility:

- “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.**”²⁵

Moreover, “the rescue co-ordination centre or rescue sub-centre concerned shall initiate the process of **identifying the most appropriate place(s) for disembarking persons found in distress at sea**²⁶[...]”.

However, the SAR State is not the sole to have obligations. Both SAR and SOLAS Conventions **impose an obligation on States to cooperate and coordinate** to ensure that shipmasters are allowed to disembark rescued persons to a place of safety. In order to fulfill this objective, **they impose inter-related obligations on 3 categories of States: coastal States, SAR States and all States concerned**. The SAR State where a rescue occurred takes the lead in ensuring coordination and cooperation among Contracting Parties, so that mariners who had provided assistance are promptly relieved. **The Conventions consequently placed an obligation on all Contracting Parties to coordinate and cooperate** to ensure that masters of ships providing assistance were released from their obligations with a minimum of deviation from the ship’s intended voyage.

²¹ United Nations Convention on the Law of the Sea (UNCLOS), adopted at Montego Bay on 10 December 1982, entry into force on 16 November 1994, UNTC, vol. 1834, p. 4
²² Nandan (S-N), Kraska (J), Nordquist (M-H.), United Nations Convention of the Law of the Sea 1982: A commentary, Vol. III, articles 86 to 132, Netherlands, Martinus Nijhoff, 1995, pp. 138-152

²³ and ²⁴ IMO, International Convention on Maritime Search and Rescue (SAR), adopted at Hamburg on 27 April 1979, entry into force on 22 June 1985, UNTC, vol. 1405

²⁵ International Convention on Maritime Search and Rescue (SAR Convention), Hamburg, 27th April 1979, point 3.1.9

²⁶ Ibid., point 4.8.5

²⁷ IMO resolution MSC.167 (78) of the Maritime security committee, Guidelines on the treatment of persons rescued at sea, Appendix, 53, 20 May 2004

²⁸ Ibid., point 5.1.6

²⁹ Ibid., point 5.1.7

³⁰ International Convention for the Safety of Life at Sea (SOLAS), op. cit., regulation 34.1

WHAT IS A PLACE OF SAFETY ?

To respect this obligation, a place of safety must be identified prior the disembarkation. According to the IMO²⁷, it is a place :

- “Where the survivors’ safety of life is no longer threatened”;
- “Where their basic human needs (...) can be met”;
- “Where the rescue operation is considered to terminate”;
- From where “transportation arrangements can be made for the survivors” next or final destination.”

THE ROLE OF THE SHIPMASTER

Shipmasters should “seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized²⁸” and should “comply with any relevant requirements of the Government responsible for the SAR region where the survivors were recovered, or of another responding coastal State, and **seek additional guidance from those authorities where difficulties arise in complying with such requirements**²⁹”. Thus, they may discuss with a RCC in order to find a place of safety.

In the same vein, the SOLAS Convention states that :

- “The owner, the charterer, the company operating the ship as defined in regulation IX/1, or any other person shall not prevent or restrict the master of the ship from taking or executing **any decision which, in the master’s professional judgement, is necessary for safety of life at sea and protection of the marine environment.**”³⁰”

The IMO also stresses that the shipmaster has a word to say:

- *All parties involved (...) should cooperate in order to ensure that disembarkation of the persons rescued is carried out swiftly, taking into account the master's preferred arrangements for disembarkation and the immediate basic needs of the rescued persons.*³¹

Consequently, a shipmaster who does not consider the designated place to be a place of safety **may take the decision to not follow this instruction if he/she considers that is necessary for safety of life at sea.**

DISTINCTION BETWEEN RESCUE AT SEA AND SMUGGLING OF MIGRANTS

The responsibility of flag State to fight against the smuggling of migrants is mentioned in the UN Convention against Transnational Crime and its Protocol against the smuggling of migrants by land, sea and air³². The Protocol of Palermo requires States to adopt legislative measures in order to incriminate and punish smuggling of migrants.

³¹ IMO, Principles relating to administrative procedures for disembarking persons rescued at sea (FAL.3/Circ.194), 2009, point 2.3

³²United Nations Convention against Transnational Crime, adopted in New York on the 15th November 2000, entered in force on 29th September 2003, UNTC, Vol. 2225, p 209; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted in New York on the 15th November 2000, entered in force on 28th January 2004, UNTC, Vol. 2241 p. 507

³³ITLOS, The M/V "NORSTAR" Case (Panama v. Italy), 10 April 2019, No. 25, 5216

³⁴Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 25 Lotus Case

³⁵United Nations Convention on the Law Of the Sea, Montego Bay, 10 December 1982, article 110

³⁶Arctic Sunrise Arbitration, Award on the merits (The Kingdom of The Netherlands v. The Russian Federation), 14 August 2015, PCA Case N° 2014-02, p.98, 5401

³⁷United Nations Convention on the Law Of the Sea, Montego Bay, 10 December 1982, article 110 "Except where acts of interference derive from powers conferred by treaty"

³⁸Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations convention against transnational organized crime, Palermo, 2000

³⁹Ibid., article 17(b)



The right of visit

According to the International Tribunal for the Law of the Sea, "no State may exercise jurisdiction over a foreign ship on the high seas. Freedom of navigation would be illusory if a ship – a principal means for the exercise of the freedom of navigation – could be subject to the jurisdiction of other States on the high seas."³³

Thus, from this concept stems the exclusive jurisdiction of the flag³⁴ State over the ships flying lawfully its flag, enshrined by article 92 UNCLOS.

Yet, even if the freedom of the high seas and the exclusive jurisdiction of the flag State are core principles, **they are limited by some exceptions** including the **right of visit**. Indeed, this right is seen as the fundamental exception to these concepts as it does not require the consent of the visited ship flag State to be exercised. It is stated by the article 110 UNCLOS³⁵.

MEASURES UNDER THE RIGHT OF VISIT

According to article 110, the right of visit is merely a right to verify the nationality of a ship and, if necessary, the nature and destination of its cargo, i.e. a **right of investigation**. Nothing is said in this provision about the ability to arrest or about the jurisdiction. **Even if an offence was committed**, it does not automatically permit the visiting ship crew to take any enforcement measure as the seizure of the visited ship for instance³⁶, **without the consent of the flag State**.

Thus, the right of visit under article 110 UNCLOS consists of **two operations** :

an examination of documents authorizing the ship to fly the flag of a State;

if doubts persist, a search, i.e. the review of the cargo.

A LIMITED RIGHT

All ships cannot exercise this right. Article 110 mentions not only the warships as essential actors of this right, but also **"any other duly authorized ships or aircraft clearly marked and identifiable as being on government service."**

This is a right limited *ratione materiae*. Indeed, it concerns five situations under article 110 UNCLOS :

- *activities of piracy*
- *slave trade*
- *the broadcast of unauthorized emissions*
- *a ship that does not have nationality*
- *a ship that flies a foreign flag or refuses to show its flag (although it has the same nationality that the ship which exercise the right of visit)*

To exercise the right of visit, the aforementioned activities do not have to be necessary established: the visit must be founded on **serious doubts**. A refusal by a ship to hoist its flag or not easily visible registry marks painted on its hulls are reasons for exercising the right of visit.

If a ship wants to apply this right outside of the cases mentioned by this provision, it must have **powers conferred by a treaty** or have **the consent of the flag State** to do so.

THE EXTENSION OF THE SCOPE OF THE RIGHT OF VISIT BY THE PALERMO PROTOCOL

In accordance with the beginning of article 110 UNCLOS³⁷, recent treaties and agreements attempt **to extend the *ratione materiae* field of the right of visit** to activities that are not foreseen by this provision. They aim to facilitate cooperation and joint operations between States, extending their jurisdiction to intercept suspect vessels **not only in high seas, but also in territorial waters**.

This is the case of the **Palermo Protocol concerning migrants smuggling**³⁸ which encourages States Parties **to conclude bilateral agreements** in order to ensure its application³⁹. In those agreements, a State could give its automatic consent to another State for visiting and searching a ship flying its flag, suspected of smuggling: the vessel which have doubts on the conduct of this ship would not have to ask the authorization of the flag State to apply the right of visit, provided that it is a ship of a State party to the agreement.

However the Palermo Protocol does not extend the right of visit. It establishes the measures that a State Party may take if it suspects that a vessel is engaged in the smuggling of migrants, in accordance with article 110 UNCLOS. Its article 8 distinguishes between two situations :

- If a suspected vessel **flies the flag or display the marks of registry of another State Party**, a State Party to the Protocol which has doubts **must request the authorization of the flag State** to take measures (including for the boarding and the search of the vessel). The consent of the flag State is here still required⁴⁰.
- If a suspected vessel **is without nationality or may be assimilated to a vessel without nationality**, a State Party to the Protocol which has doubts is **free to board and search the vessel**⁴¹. If the suspicion is found, it “shall take appropriate measures in accordance with relevant domestic and international law.”

Thus, the Palermo Protocol does not go further than the article 110 UNCLOS: the authorization of the flag State is still required when the suspected ship of smuggling flies its flag. Paragraph 5 of article 8 goes in this direction, stating that the flag State consent is not required when the flag State and the requesting State agreed on measures to be taken; though, measures that are not subject to an agreement still require the consent of the flag State⁴².

⁴⁰ Ibid., article 8.2
⁴¹ Ibid., article 8.7
⁴² Ibid., article 8.8



The requirement of a financial or other material benefit

The article 3 of the Protocol defines smuggling of migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”. So, to be considered as a smuggler, a person or an organization needs willingness to take a financial or material benefit from the action of procurement of the illegal entry. This condition shows how the definition has been created in order to punish malicious smuggling networks looking for money or human abuse.

Moreover, this intention of the Protocol can be seen in its Preamble, in which States parties affirm that they are “convinced of the need to provide migrants with human treatment and full protection of their rights”. It has been reaffirmed and detailed in the Report on the meeting of the Working Group on the Smuggling of Migrants held in Vienna on 4 and 5 July 2018⁴³.

The necessity of a financial or material benefit to characterize smuggling was stressed in a report by the Ad Hoc Committee on the Elaboration of the Convention against Transnational Organized Crime:

- *“The travaux préparatoires should also indicate that the reference to “a financial or other material benefit” (...) was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.”⁴⁴”*

This intention to define smugglers by considering the willingness to obtain a counterpart and avoid criminalizing assistance was confirmed on the occasion of the Conference of the parties to the UN Convention against Transnational Organized Crime:

- *“It is important to underline that criminalisation only covers those who profit from migrant smuggling and related conduct through financial or other material gain. The Protocol does not intend to criminalize persons such as family members or non-governmental or religious groups that facilitate the illegal entry of migrants for humanitarian or non-profit reasons.”⁴⁵”*

These four sources highlight the purpose of the Protocol which is to focus on smuggling networks, and certainly not at NGO ships, who are working for the respect of migrants’ rights.

⁴³ United Nations, CTOC/COP/WG.7/2018/3, Report on the meeting of the Working Group on the Smuggling of Migrants held in Vienna on 4 and 5 July 2018, adopted by Conference of the Parties to the United Nations Convention against Transnational Organized Crime on the 19th July 2018, §10

⁴⁴ Resolution A/55/383/Add.1, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, adopted by General Assembly of the United Nations on the 3rd November 2000, §92

⁴⁵ UNODC, Issue Paper: Corruption and the Smuggling of Migrants, 2013, available online at: https://www.unodc.org/documents/lpo-brazil/Topics_TIP/Publicacoes/The_Role_Of_Corruption_in_the_Smuggling_of_Migrants_Issue_Paper_UNODC_2013.pdf

⁴⁶ Council directive defining the facilitation of unauthorised entry, transit and residence, 28 November 2002, 2002/90/ECof.

⁴⁷ Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 2000

⁴⁸ Research Social Platform on Migration and Asylum, “Crackdown on NGOs and volunteers helping refugees and other migrants”, Final Synthetic Report, 2019, p.7; cf. also: European Union Agency for Fundamental Rights, “Criminalisation of migrants in an irregular situation and of persons engaging with them”, 2016, p.10

⁴⁹ European Commission, REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), Brussels, 22.3.2017 SWD (2017) 117 final

⁵⁰ Ibid., p.31 ⁵¹ Ibid., p.37 ⁵² Ibid., p.35 ⁵³ Ibid.

⁵⁴ European Commission, communication from the commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions, EU Action Plan against migrant smuggling (2015 -2020), COM(2015) 285 final, Brussels, 27.5.2015

⁵⁵ Ibid., p.3
⁵⁶ European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, “Fit for purpose? The facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update”, December 2018

A European issue: the criminalisation of humanitarian assistance and the Facilitation Directive

The 2002 Directive defining the facilitation of unauthorized entry, transit and residence⁴⁶ (hereinafter the Facilitation Directive) transposes at the European Union level the rules enshrined in the 2000 Protocol against smuggling of migrants⁴⁷, albeit with some notable differences. It requires EU Member States to adopt, in their legislation, sanctions to punish the facilitation of unauthorized entry, transit and residence of irregular migrants.

It does not impose upon Member States an obligation to exempt the humanitarian assistance from sanctions. According to Article 1.2 of the Directive:

- “Any Member State **may** decide not to impose sanctions with regard to the behavior defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behavior is to provide humanitarian assistance to the person concerned.”

Thus, States have an option, but not an obligation, to exclude the humanitarian assistance from the scope of their criminal legislation. Only seven Member States exclude explicitly punishment for this assistance from their legislation⁴⁸.

Consequently, the Facilitation Directive is criticized on this point, as it may constitute a basis for European governments to target NGOs' work.

Numerous claims are raising up at different levels to obtain a revision of this Directive: civil society, Council of Europe, European Agency for Fundamental Rights, United Nations.

At the EU level, the Commission conducted in 2017 a Refit Evaluation about this Directive⁴⁹, in order to know if its provisions were still adequate. It recognized that the scope of the Facilitation Directive⁴⁹ is different than the one of the Palermo Protocol; mainly because “the offence under EU law is (...) broader⁵⁰.” It

concluded however that “at this point in time the Facilitators Package should be maintained in its present form⁵¹”. It justified this position saying that “there is no sufficient evidence to draw firm conclusions about the need for a revision of the Facilitators Package at this point in time⁵²” and that the problem remains the lack of comprehension between authorities and those operating on the ground, not the Facilitation Directive itself⁵³.

To compensate the difficulties created by the Directive, the Commission adopted in 2015 the “Action Plan against Migrant Smuggling (2015-2020)”, aiming firstly to counter and prevent migrant smuggling in EU. At the same time, it “will seek to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalization of those who provide humanitarian assistance to migrants in distress⁵⁵”.

The EU Parliament adopted several non-binding instruments. In 2018, it issued a complete study⁵⁶ in which it criticized the Commission's position in the 2017 Refit Evaluation⁵⁷. It considered that the Facilitation Directive is “a bad law that is not fit for purpose” for two main reasons⁵⁸:

- “it does not insist on a requirement of ‘financial or other material benefits’ to punish the facilitation of transit, entry and stay of migrants;
- “it does not oblige Member States to exempt ‘humanitarian assistance’ from sanctions.

In light of these deficiencies, the Parliament recommended to review the Facilitation Directive on several points including a new definition of a base crime which insists on financial and other material benefits and an obligatory prohibition of the criminalization of humanitarian assistance actions⁵⁹.

In 2018, the EU Parliament adopted a resolution in which it asked to Member States to transpose the humanitarian assistance exemption and to the Commission to adopt guidelines specifying the kind of acts which should not be criminalized⁶⁰. It did so without mention any intent of revision of the Facilitation Directive.

Identification of a phase of distress

The notion of distress is difficult to define. In general international law, the notion of distress is used in cases where human life is at stake. In international law of the sea, a ship in distress is a ship in danger of being lost or which has suffered a grave accident. This entails a duty for States to grant it assistance.

DEFINITION OF DISTRESS UNDER INTERNATIONAL GENERAL LAW

In general international law, the concept of distress entails that the pre-eminent interests of individuals are at stake: most cases of “distress” refer to the real risks faced by persons⁶¹. In general international law, the situation of distress functions as an excuse which erases the wrongfulness of an act which otherwise would be illicit (unlawful) in international law. Article 24 of the Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries⁶² adopted by the International Law Commission in 2001 deals with the particular case where a person is in situation of danger.

- “The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care⁶³”.

Article 24 **is limited to cases where human life is at stake**. The protected interest here is human life, regardless of the nationality of the rescued people⁶⁴. In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.

However, **in general international law, the situation of distress is not limited to cases where human life is directly and imminently at stake**. Although a ship doesn't need to reach the brink of sinking in order to attain the urgency and necessity threshold, the facts should “produce,

in the mind of a skillful mariner, a well-grounded apprehension of the loss of the vessel and cargo, or of the lives of the crew”⁶⁵.

UNDER LAW OF THE SEA

International Law of the Sea distinguishes between the phase of distress and distress itself. The SAR Convention provides a definition of an “emergency phase”, a “phase of uncertainty”, a “phase of alert” and a “phase of distress”:

- “‘Emergency phase.’ A generic term meaning, as the case may be, uncertainty phase, alert phase or distress phase.
- ‘Uncertainty Phase.’ A situation wherein uncertainty exists as to the safety of a vessel and the persons on board.
- ‘Alert Phase.’ A situation wherein apprehension exists as to the safety of a vessel and of the persons on board.
- ‘Distress Phase’ A situation wherein there is a reasonable certainty that a vessel or a person is **threatened by grave and imminent danger and requires immediate assistance**⁶⁶”.

Moreover, in this Convention, rescue is defined as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”⁶⁷.

⁵⁷ Ibid., pp.27-48 ⁵⁸ Ibid., p.106 ⁵⁹ Ibid., p.109
⁶⁰ European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalized (2018/2769(RSP))
⁶¹ DAILLIER (P.), FORTEAU (M.), PELLET (A.), Droit international public, Paris, LGDJ, 8ème éd., 2009, p. 877
⁶² ILC, 53th session, 2001, submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). Commentaries on the draft articles, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, available online at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf
⁶³ ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook 2001, Article 24
⁶⁴ Ibid., Article 24, commentary 1)
⁶⁵ US Supreme Court, The New Yorker case (1818) Canadian Supreme Court, May v The King (1931)
⁶⁶ International Convention on Maritime Search and Rescue, 1979, as amended, Hamburg, Annex, Chap I, §1.3.8, 9, 10 and 11
⁶⁷ IMO, Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea, 20 May 2004

A phase of distress is thus characterized by a grave and imminent peril. **This peril may not be materialized yet, but it has to be certain.**

The Eleanor case uses the same characteristics to define the phase of distress :

- “Now it must be an urgent distress; it must be something of grave necessity ... It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man. **I do not mean to say that there must be an actual physical necessity existing at the moment;** a moral necessity would justify the act, where, for instance, the ship had sustained previous damage, so as to render it dangerous to the lives of the persons on board to prosecute the voyage⁶⁸ ...”.

The ‘MV Toledo Case’ of the Irish High Court of Admiralty also confirms the distinction between a materialized peril and a certain one, by using the criteria of a materialized peril to recognize distress. In fact, the Court requires an immediate danger to the life of a person⁶⁹. But, distress doesn’t require neither that the vessel had been ‘dashed against the rocks⁷⁰’ to be able to claim its distress.

In European law, Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014⁷¹ also uses a concept of distress in a situation where a person or a vessel are not immediately in danger. This document is important because it deals directly with rescue at sea :

- “1. **Member States shall observe their obligation to render assistance to any vessel or person in distress at sea** and, during a sea operation, they shall ensure that their participating units comply with that obligation, in accordance with international law and respect for fundamental rights. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

The Regulation 656/2014 defines three different phases of uncertainty, alert and distress in the following terms :

“(c) A vessel or the persons on board shall be considered to be in a **phase of uncertainty** in particular:

- (i) when a person has been reported as **missing** or a **vessel is overdue**; or
- (ii) when a person or a vessel has **failed to make an expected position** or safety report

(d) A vessel or the persons on board shall be considered to be in a phase of alert in particular:

- (i) when, following a phase of uncertainty, **attempts to establish contact with a person or a vessel have failed** and inquiries addressed to other appropriate sources have been unsuccessful; or
- (ii) when information has been received indicating that the operating efficiency of a vessel is impaired, but not to the extent that a distress situation is likely.

(e) A vessel or the persons on board shall be considered to be in a phase of distress in particular:

- (i) when positive information is received that a **person or a vessel is in danger and in need of immediate assistance**; or
- (ii) when, following a phase of alert, further unsuccessful attempts to establish contact with a person or a vessel and more **widespread unsuccessful inquiries point to the probability that a distress situation exists**; or
- (iii) when information is received which indicates that the operating efficiency of a vessel has been impaired to the extent that a distress situation is likely.”

The Regulation also extends the obligation to initiate search and rescue operation beyond the phase of distress stricto sensu to the phases of uncertainty and alert, which are generally precursory to distress.

Furthermore, the Regulation gives some practical indicia which are helpful to qualify a phase of distress like “(i) the **existence of a request of assistance**; (iii) the **number of persons on board in relation to the type and condition of the vessel**; (vii) the **presence of persons on board in urgent need of medical assistance**”.

Through these indicia, Regulation 656/2014 provides that a situation of distress is not only one where people’s lives are in immediate and grave danger. **At sea, the concept is larger and includes the situations when the health and safety of persons is in danger.** Additionally, the danger at sea needs not necessarily to be immediate. Indeed, some of the indicia identified above concern the seaworthiness of the ship or the capacities to sail of the peoples’ on-board. If they are unsuitable for navigation at sea, the danger and distress are likely, without being immediate⁷².

⁶⁸ *The Eleanor* 165 English Reports 1058 1068 (English High Court of Admiralty, 22 November 1809).

⁶⁹ *ACT Shipping (OTE) Ltd. v. Minister for the Marine, Ireland and the Attorney-General (The MV Toledo)*, [1995] 2 I.L.R.M. 30, at 48-49

⁷⁰ *General Claims Commission United States and Mexico, Opinion rendered 2 April 1929*; *Kate A. Hoff v The United Mexican States*, 4 UNRIAA 444, reprinted in 23 *American Journal of International Law* (1929), 860

⁷¹ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

⁷² Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, article 9



Rescue at sea in its practical aspects: the adequate preparation of the rescuing ship

THE ABILITY TO ASSIST

To participate to a SAR operation, a shipmaster must consider his ship and crew as able to assist. Article 33 of the SOLAS Convention states that:

- *“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. (...) 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”⁷³.*

On that basis, a ship may be able or not able to assist. In order to know if a ship is able to assist according to this provision, a **risk assessment** should be carried out.

THE IMPORTANCE OF THE RISK ASSESSMENT

IAMSAR Manual provides guidance for making this assessment⁷⁴ :

- *Is the distressed craft in immediate danger of causing harm or placing the rescue facility in jeopardy?*
- *Can the rescue facility handle the weather conditions?*

- *Has the distressed craft given enough information to prepare the assisting vessel to aid in the rescue? & can the assisting facility realistically be of assistance?*
- *If recovery of a large number of survivors is a factor:*
 - *Can the rescue facility accommodate them in regard to food, shelter, clothing, living space?*
 - *Will the craft performing the rescue be stable with the survivors on-board? (...)”.*

THE OBLIGATION TO NOTIFY

According to Article 33 of the SOLAS Convention, if a master of a ship witnesses a shipwreck and considers its ship and the crew are unable to assist and to rescue, **it has not the obligation to intervene by himself, but has the obligation to inform an appropriate unit.**

To comply with this obligation, the ship must have equipment to communicate and **to receive communications**. This obligation is all the more important that **the communication with a RCC must be maintained** during all the rescue operation. It is necessary that the rescuing vessel informs the RCC all along about conditions, assistance needed, and actions undertaken⁷⁵. Information about the survivors, the overall progress of the operation or any help that the rescuing ship may need are also important⁷⁶.

⁷³ International Convention for the Safety of Life at Sea (SOLAS), London, 1974, regulation 33

⁷⁴ IAMSAR Manual vol. III, On-scene coordination, SAR Operations risks, point 3.6

⁷⁵ IMO Resolution MSC.167(78), Guidelines on the treatment of rescued persons at sea, 20 May 2004, point 5.1.5

⁷⁶ Ibid., point 6.10

EQUIPMENT AND TRAINING

According to regulation 33 of the SOLAS Convention, a vessel must be **adequately equipped** and its crew must be **sufficiently trained**.

The IMO Guide to recovery techniques notes that “plans are of no use unless you know how to put them into effect. This requires training, and the testing of both plans and training by conducting drills”⁷⁷.

Concerning the equipment, The IAMSAR Manual vol. III establishes a list of equipment that a vessel going to render assistance to a distressed ship should carry⁷⁸. This list contains a very large range of specific equipment such as :

- **life-saving and rescue equipment** (lifeboat, lifejackets, radio equipment operator capable of communicating with the SAR Mission Coordinator and rescue facilities, rescue baskets, buoyant lifelines, hatchets, pilot ladders etc.)
- **signaling equipment** (lamps, searchlights, flare pistol, floating lights etc.)
- **preparations for medical assistance** (stretchers, blankets, medical supplies and medicines, food etc.)

THE SPECIFIC OPERATION OF SHIP-TO-SHIP TRANSFER

Equipment and training are particularly important in order to carry out a ship to ship transfer, which is a difficult exercise. When a ship participates to such operation, it must have specific equipment as lines, buoyant appliances, ladders, davits etc. The IMO Guide to recovery techniques adds that during a phase of approach “Maneuvering your ship at slow speed, judging its movement and that of the recovery object, is a skill. **Appropriate training should be encouraged by ship operators**”⁷⁹.

This Guide details both the approach that leads to bring people to the side of the ship and the factors to consider getting people aboard⁸⁰.

Concerning first **the phase of approach**⁸¹, there are two ways to bring people to the side of the ship according to the Guide:

- To launch a rescue craft (considered as easier). The risk assessment is here essential
- To pass lines (rocket lines, rescue throw lines, heaving lines, that should be ready for use) and buoyant appliances connected by a line may be used. Another option are streaming lines

Concerning then **the second phase of getting people aboard the rescuing ship**, there are several factors to consider as weather, sea conditions, size of the strip, condition of the people to rescue, ship’s design, available equipment, among others. It is a kind of assessment as already mentioned⁸².

⁷⁷ IMO, Guide to recovery techniques, 21 November 2014, point 4.5

⁷⁸ IAMSAR Manual vol. III, Mobile facilities, Point 2-5 “On board preparation”

⁷⁹ IMO, Guide to recovery techniques, 21 November 2014, point 7.7

⁸⁰ Ibid.

⁸¹ Ibid., point 7

⁸² Ibid., point 8

DISEMBARKATION AND ACCESS TO PORTS



CLASSIC SITUATION

The authorization to have access to ports

States' discretionary power

INTERNATIONAL LAW

There is no right for a ship to have access to have access to a foreign port in international law. Indeed, the UNCLOS provides in its article 11 :

- *“For to purpose of delimiting the territorial sea, the outermost permanent harbor works which form an integral part of the harbor system are regarded as forming part of the coast. Offshore installations and artificial islands shall not be considered as permanent harbor works.”*

Indeed, the port is considered as a part of a State's territory, alike internal waters, over which it exercises full and impaired sovereignty. This control can also be confirmed in the article 25 of the same Convention :

- *“2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also **has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.**”*

So, a State has an absolute control on the access to its ports and the discretionary right to deny its access for foreign ships⁸³.

There also is an interdiction of discrimination in denial of access to a port mentioned in the Convention and Statute on the International Regime of Maritime Ports and Protocol of signature (1923) which still in force. Prescribes more equality of access than freedom :

- *Article 2: “Subject to the principle of reciprocity and to the reservation set out in the first paragraph of Article 8 , **every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.**”*

This 2nd article regarding equality of treatment works on the basis of reciprocity. This means that the flag State and the port State must have also ratified the convention. Among the Mediterranean States likely to provide a port: France, Greece, Italy and Malta ratified the Convention⁸⁴.

⁸³ “It is also by virtue of its sovereignty that the coastal state may regulate access to its ports”, ICI, Case concerning Military and Paramilitary Activities in Nicaragua, 27th June 1986, 5213’

⁸⁴ States which have ratified the Convention: Austria, Belgium, British Empire , Malta, Australia, New Zealand, India, Denmark, Estonia, France, Germany, Greece, Hungary, Iraq, Italy, Japan, Mexico, The Netherlands, Norway, Sweden, Switzerland, Thailand, Yugoslavia, Czechoslovakia

According to Article 16 of the same Convention :

- “Measures of a general or particular character which a Contracting State is obliged to take **in case of an emergency affecting the safety of the State or the vital interests of the country may, in exceptional cases, and for as short a period as possible, involve a deviation from the provisions of Articles 2 to 7 inclusive; it being understood that the principles of the present Statute must be observed to the utmost possible extent.**”

INTERNAL LAWS RULES RELATING TO ACCESS TO PORTS:

Internal legislations developed similar rules to limit the access to ports for foreign ships in some cases. Most of the Mediterranean coastal states have adopted legislations to be able to deny access in order to protect public order, national safety and security, or any vital interests. These justifications to deny access to ports must respond to a vital need.

France : Article L 5241-4-5 du Code des transports⁸⁵ :

- “Subject to the provisions of Article L. 5331-3, the administrative authority shall refuse access to ports: 1° To any ship posing a high risk to **maritime safety, maritime security or the environment**, in cases fixed by decree in the Council of State.”

Italia : Article 83 of Navigation Code⁸⁶:

- “Ban on transit and parking: The Minister of Transport **may limit or prohibit, for reasons of public order**, the transit and the stop of merchant ships in the territorial sea, for reasons of public order, security of the ships and, in agreement with the Minister of the Environment and of the protection land and sea, for reasons of environmental protection, determining the areas to which the prohibition extends.”

Malta: Authority for Transport In Malta Act (Arrangement of Act), Article 43⁸⁷:

- 3) Without prejudice to the generality of sub-article (1) regulations under this article may, in particular with respect to maritime matters, provide for the **maintenance, control and management** of the territorial and inland waters of Malta, for the conveyance of passengers and transport of goods by sea, for the management of any port or yachting centre and the land and sea approaches to any port or yachting centre and for the maintenance of good order therein and in particular, but without prejudice to the generality of the foregoing, may provide for all or any one or more of the following purposes:

- (a) the **preservation of good order** in any part of the territorial and inland waters of Malta, in any port and the land and the sea approaches to any port, and on wharves, and for any other purpose in respect thereof; (...)
- (f) **regulating, controlling, and prohibiting the presence of any person any place or building in a port** or the use by any person of any such place or building.”

Spain: Article 8. Closure of ports of Law 14/2014 on Maritime Navigation⁸⁸:

- “2. The Maritime Administration may provisionally propose the prohibition of navigation in ports and their access channels, as well as the entry and exit of vessels, when the meteorological or hydrographic conditions so advise, there are obstacles to navigation or there are **reasons of protection, emergency, public safety or environmental or public order.**”

The most common reasons to deny access to ports are the protection of public order, environment, or national security or safety which are large enough to be widely interpreted by States. Despite this, they are rarely used. For examples, access to ports have been denied due to environmental reasons (in 1980 for Greek tanker in the Shetland Islands), or to avoid the entrance of dangerous substances (in 1971 for Dutch tanker Stella Maris denied from several European ports). Access to ports had also been denied to foreign nuclear ships (1985, New Zealand refused access to an American nuclear ship). Recently, as a consequence of the Covid-19 pandemic, many ships have been refused entry into ports because they were or could be carrying infected people. Perhaps, some uninfected ships have also been refused permission to dock.

⁸⁵ French Transport Code, Article L5241-4-5, available online at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000023086525&idArticle=LEGIARTI000024149322&dateTexte>

⁸⁶ Italian Navigation Code, article 83, available online at: <http://www.fog.it/legislaz/cn-0062-0112.htm..>

⁸⁷ Authority for Transport in Malta Act, 2009, Article 43, available online at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=20926&l>

⁸⁸ Closure of ports of Law 14/2014 on Maritime Navigation, 24 July 2014, available online at: <https://www.boe.es/buscar/act.php?id=BOE-A-2014-7877>.

⁸⁹ IMO, Resolution MSC.153(78), Adoption of Amendments to the International Convention for the Safety of Life At Sea, 1974, 20 May 2004

Is there an obligation to disembark shipwrecked people?

While States have an obligation to disembark the rescued people in a place of safety, international law falls short of identifying a specific State which would have the obligation to accept those people on its territory.

Thus **all States have an obligation to cooperate in order to identify a place of safety for disembarkation** :

- “Each Party should authorize its rescue co-ordination centres [...] to make the necessary arrangements in co-operation with other RCCs to identify the most appropriate place(s) for disembarking persons found in distress at sea” ; “the rescue co-ordination centre or rescue sub-centre concerned shall initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea [...]”. (Regulations 53.1.6 and 54.8.5 SAR Convention)

However, the SAR zone States have nonetheless special obligation to promptly find a place of safety for disembarkation :

- “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.” (Regulation 53.1.9 SAR Convention)⁸⁹

This provision for “coordination and cooperation” but does not impose upon the SAR State to accept rescued people on its territory.

This amendment also specified that “the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.”

States' prerogatives over ships in their ports: the example of the port state control

As the port state can decide which ships can anchor in its internal waters, it can also decide to proceed to a PSC of any ship.

WHAT IS A PORT STATE CONTROL ?

According to the IMO, a PSC is the inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules⁹⁰. The primary responsibility for ships' standards rests with the flag State - but port State control provides a "safety net" to catch substandard ships.

Paris Memorandum of Understanding (Paris MoU⁹¹): A number of maritime incidents have led to the development of more consistent and better coordinated port state controls. To deal with this situation, States adopted the Paris MoU which institutes a permanent cooperation between the maritime administrations of the States concerned with three main goals :

- Compliance with safety standards,
- Pollution prevention,
- respect for social and life standards on board.

The Paris MoU is the first harmonized regional ship control organization between States (1982). The 27 participating Maritime Authorities agree to implement a harmonized system of Port State Control.

Directive 95/21/CE (19th of June 1995)⁹²: This directive makes the provisions of the Memorandum binding on the Member States of the Union and prohibits access to Community ports for ships that would have wanted to avoid controls.

PSC CHARACTERISTICS⁹³

The decision to do a PSC by port authorities depends on different criteria. As example: the date of previous PSC or Flag State Control, the type of ship (and associated safety and environmental risks), her age and the quality of her class, the ranking of the vessel's flag in the Paris MoU, previous reported deficiencies or detentions of the ship (or of other ships from the same shipping company), a recent involvement in a navigational or security incident/accident, or any suspicion from the port authorities that the ship might not be complying with the above-mentioned regulations.

An inspection is a visit on board a ship to check both the validity of the relevant certificates and other documents, and the overall condition of the ship, its equipment and its crew⁹⁴. There are three levels of intensity for PSCs. The inspector must use professional judgement to determine the appropriate depth of examination or testing of each specifics⁹⁵:

- **Initial:** basic inspection will consist of a visit on board the ship in order to check the certificates and documents of the ship, check that the overall condition and hygiene of the ship meets generally accepted international rules and standards and verify, if it has not previously been done, whether any deficiencies found by an Authority at a previous inspection have been rectified in accordance with the time specified in the inspection report⁹⁶.

More detailed: an inspection conducted when there are clear grounds for believing that the condition of the ship, its equipment

- or its crew does not correspond substantially to the particulars of the certificates⁹⁷.
- **Expanded inspection:** this inspection includes the previous checks (initial + more detailed) and will also include a check of the overall condition, including the human element where relevant⁹⁸.

In certain cases, **an inspection can lead to a detention**. A detention is an intervention action taken by the port State when the condition of the ship or its crew does not correspond substantially with the applicable conventions to ensure that the ship will not sail until it can proceed to sea without presenting a danger to the ship or persons on board, or without presenting an unreasonable threat of harm to the marine environment, whether or not such action will affect the normal schedule of the departure of the ship.

IS IT POSSIBLE FOR A MASTER SHIP TO OBJECT TO A PSC ?

As the port state exercises full sovereignty over his port, the port authorities have the right to decide to do a PSC of any foreign ship. Even is the different conventions provide guidelines in order to avoid unnecessary PSC, if a port state officer wish to control every foreign ship anchored in his port, it's totally the port state right.

⁹⁰ IMO, "Port State Control", available online at: <http://www.imo.org/en/ourwork/msas/pages/portstatecontrol.aspx>

⁹¹ Paris Memorandum of Understanding on Port State Control adopted on 2 December 1980 by the Regional European Conference on Maritime Safety
⁹² Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control), OJ L 157, 7.7.1995, p. 1-19

⁹³ Annex 9 Inspection Type and Clear Grounds, Paris Memorandum of Understanding on Port State Control adopted on 2 December 1980 by the Regional European Conference on Maritime Safety

⁹⁴ IMO, Procedures for Port State Control, Resolution A.1052(27), Adopted on 30 November 2011

⁹⁵ Annex 9 Inspection Type and Clear Grounds, Paris Memorandum of Understanding on Port State Control, op. cit.

⁹⁶ Idem.

⁹⁷ IMO, Procedures for Port State Control, Resolution A.1052(27), op. cit.

⁹⁸ Idem



Exceptional circumstances

ACCESS TO THE PORT TO END THE DISTRESS

An important question concerns the moment when a situation of distress ends. It is important to know whether it ends for instance when the shipwrecked persons are rescued by another ship or when they are disembarked in a place of safety. The UNHCR recommended that Regulation 656/2014 specified that the duty of rescue “ends when passengers have been disembarked at a place of safety⁹⁹”. However, such proposal was not specifically incorporated in the Regulation. As such, the UNHCR’s proposals are not binding and have only the legal **value of a recommendation**.

- “UNHCR would therefore recommend the inclusion in Article 9 [of Regulation 656/2014] of a provision specifying that a **SAR operation concludes when survivors are disembarked to a place of safety**¹⁰⁰.”

This being said, there are arguments to consider that for States, in particular for States responsible of a SAR area in which an operation of rescue intervened, are bound not only to provide for assistance and coordination of search and rescue operations, but also for a place of disembarkation. Indeed, Chapter 53.1.9 of the Hamburg SAR Convention provides that:

- “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 cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.”

⁹⁹ UNHCR, *The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees: report of the Office of the United Nations High Commissioner for Refugees*, 11 April 2008, A/AC.259/17, para 21, available online at: <http://www.refworld.org/docid/49997aeb27.html>

Domestic decision of Italian Corte di Cassazione in the case of Carola Rackete, in which the Court considered that distress ends with disembarkation in a place of safety:

- “9. the customary obligation of rescue at sea, a generally recognized rule of international law and therefore directly applicable in the domestic legal order (...) are the regulatory parameter that guided the judge in assessing the work of the military in order to rule out the reasonableness of the arrest of the racketeer in a situation in which the aforementioned cause of justification was more than “probable”. Nor could it be assumed (...) that the salvage of the shipwrecked persons had been exhausted by their recovery on board the vessel. The obligation to provide rescue under the Hamburg SAR Convention is not limited to rescuing shipwrecked persons from the danger of being lost at sea, but includes the incidental and consequential obligation to land them in a place of safety (‘place of safety’)¹⁰¹.”

This means that for a shipmaster a situation of distress when it brought the rescued people out of danger. However, for States, this is different: a situation of distress ends when the people rescued are disembarked in a place of safety.

NOTIONS OF STATE OF EMERGENCY - STATE OF NECESSITY

Except distress, some masters of vessels, during SAR operations, may have had a somewhat awkward use of distress and talked about “state of emergency”. It mustn’t be forgot that normally a state of emergency can only be declared by national authorities or governments. This notion is a legal concept that refers to the granting of authorization for unlawful action to prevent the occurrence of more serious harm. As an example, the SAR vessel Sea Watch 3 used this concept in order to justify its entry into Italian waters after 17 days at the sea with 40 migrants on board¹⁰².

During a pandemic situation

Although this appears to be uncommon, what about access to ports during a pandemic crisis? On March 11th, 2020, the WHO declared that the Covid-19 reached pandemic stage¹⁰³, highlighting the virus spread at a global level. Its Director-General concluded his address reminding that “We’re in this together, to do the right things with calm and protect the citizens of the world”. A protection which stops however at the port entrance, in some cases.

Each day the Covid-19 pandemic brings its share of infected ships which are denied access to ports. The current time is reminiscent of older outbreaks whose spread was favored by maritime transport of people and goods. In 1720, the Italian authorities denied access to the Livorno port to the Grand-Saint-Antoine vessel due to several cases of fever onboard. The ship finally docked in Marseille, bringing the plague with it. More recently, measures restricting access to ports were taken during the Ebola outbreak in West Africa. For instance, the Ivory Coast had set up prior health inspections for ships arriving from Nigeria and Senegal. These events largely explain the current behavior of States and their reluctance to welcome ships in their ports.

States, fearing that several hundred passengers infected with the Covid-19 virus might disembark on their land, are taking measures limiting access to their ports, in particular with regard to cruise ships. On February 25th, the MSC Meraviglia¹⁰⁴ was denied permission to dock at both a Jamaican port and a Caymanian port due to a suspected Covid-19 case on board. The Westerdam was also denied entry to Japanese ports¹⁰⁵. After 10 days wandering at sea which contributed to the spread of the virus among the passengers, it was finally allowed to dock at the Cambodian port of Sihanoukville on February 13th. The Silver Explorer, the Azamara and the Celebrity Eclipse were similarly rejected by Chile and Peru in March.

¹⁰⁰ UNHCR comments on the Commission proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) COM 2013(197) final
¹⁰¹ Italia, Court of Cassation, section. III Penal, n° 6626, award on 16 January–20 February 2020, available online at: <http://www.lacostituzione.info/wp-content/uploads/2020/03/Corte-di-Cassazione.pdf>

Because they have full sovereignty over their ports, States may regulate access to them¹⁰⁶. While there is no general obligation for them to open their ports to foreign ships, States parties to the 1923 Convention on the International Regime of Maritime Ports have undertaken to treat the ships of all States, including their own, equally¹⁰⁷. Articles 16 and 17, of this Convention, allow States to derogate from the equal treatment principle, particularly in cases of public health risks. In the current health context, many States have emergency measures in place for this purpose, but they must ensure that these measures are not disproportionate to the actual risks. The emergency situation, although established, does not mean States have free rein to break the law.

In this regard, IMO and WHO, in a joint statement¹⁰⁸ issued on February 13th, stressed the balance to be struck between continuity of maritime activities and the protection of public health for coastal States. At the same time, the International Shipping Chamber requested port States to accept all ships in order to disembark both cargo and passengers, and thus facilitate their handling¹⁰⁹.

State measures are variable. For instance, Australia¹¹⁰ and Italy¹¹¹ deny port access only to all cruise ships. France has the same policy, unless an exemption is granted¹¹². Less strict measures are taken by Norway which makes access to ports subject to possible quarantine on a case-by-case basis¹¹³. Japan has similar measures for ships which have sailed through infected areas¹¹⁴. This information is subject to regulatory changes, which have been frequent in the past weeks.

¹⁰² Sea Watch, “Europe Can’t Handle Responsibilities - Sea-Watch 3 enters Italian Waters in State of Necessity”, available online at: <https://sea-watch.org/en/sea-watch-3-enters-italian-waters/>

¹⁰³ WHO Director-General’s opening remarks at the media briefing on COVID-19, 11 March 2020, available online at: <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>

¹⁰⁴ J. Puhak, “Cruise ship MSC Meraviglia turned away from two Caribbean ports amid coronavirus concerns”, available online at: <https://www.foxnews.com/travel/cruise-ship-msc-meraviglia-coronavirus-concerns>
¹⁰⁵ M. Voytenko, “Ghost Ship WESTERDAM latest: is to dock in Sihanoukville, Cambodia”, available online at: <https://www.maritimebulletin.net/2020/02/10/ghost-ship-westerdam-refused-entry-country-after-country-no-port-to-dock/>

¹⁰⁶ United Nations Convention on the Law of the Sea (UNCLOS), adopted at Montego Bay on 10 December 1982, entry into force on 16 November 1994, UNTC, vol. 1834, article 25

¹⁰⁷ Convention and Statute on the International Regime of Maritime Ports and Protocol of Signature, Signed at Geneva, December 9, 1923, article 2

Maritime transport freedoms and public health protection – which balance?

The port State must consider all the interests involved. In the case of the Covid-19, State overwhelming concerns relates to the preservation of public health. The State must ensure that the pandemic does not spread on its territory, while striving to meet its obligations to passengers and crew members.

However, there are international rules to guide the assessment by States of the interests at stake. The International Health Regulations (IHR 2005)¹¹⁵ are a legal instrument binding for all the WHO Member States. Its main purpose is to prevent the spread of diseases and some of its provisions apply to maritime transport.

The principle adopted by this text is that of free pratique which is understood to mean the “permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores” (art. 1st IHR). Thus, article 28.1 states that “a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry”.

Article 28.2 specifies that a ship shall not be denied the embarkation and disembarkation of passengers either. The free pratique principle is nevertheless relative as article 28.3 specifies that a State may authorize a ship to enter its port if it “is of the opinion that the arrival of the ship or aircraft will not result in the introduction or spread of disease”, thus giving it a margin of appreciation. In addition, this provision leaves room for more exceptions, in the case of “specific public health risks or public health emergencies of international concern” (art. 43.1). There is no doubt that Covid-19 is one of these. In such a situation, the State may prevent a ship from making a stopover in its ports and refuse the embarkation and disembarkation of passengers. But here again, the State does not have discretionary power of appreciation. On the contrary, it must comply with three requirements.

- Firstly, article 43.1 states that such measures “shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives”.
- Secondly, the State must rely on scientific studies or WHO recommendations to justify these measures (art.43.2).
- Thirdly, it must convey these justifications to the WHO (art 43.3) to allow the organization to check whether the measures do not disproportionately interfere with the international traffic. The organization may hence request the State to “reconsider the application of the measures” (art. 43.4).

States have used their power to assess circumstances by adopting variously restrictive measures, without it being clear why there is such a disparity. Measures range from indiscriminate prohibitions on access to ports for all passenger vessels (e.g. the Dominican Republic)¹¹⁶ to more detailed bans, especially if the ships have passed through infected areas (e.g. the Philippines)¹¹⁷. A less strict and more appropriate approach is specifically based on the health situation of the ship. Measures taken by the harbor authorities of the biggest European ports are in line with this approach. For instance, the Rotterdam Port Health Authority has systematised the prior submission of Maritime Declarations of Health¹¹⁸. The same method has been adopted by Belgium regarding the access to the port of Antwerp, combining the Maritime Declaration of Health with an onboard control by Saniport (Port Health Authority). Finally, some States allow disembarkation in the event of a medical emergency on board a ship. This is the Portuguese position in the Azores¹¹⁹.

THE DISTRESS THE ULTIMA RATIO TO ACCESS PORTS ?

In international general law, the “Rainbow Warrior” arbitration¹²⁰ accepted that a serious health risk would suffice to qualify the distress: “the existence of very **exceptional circumstances of extreme urgency** involving medical or other considerations of an elementary nature¹²¹”. In the absence of a consensual and universal definition of distress in international law of the sea, States take different approaches. Briefly, the first approach is to consider “distress” strictly, as the existence of a definite and already materialized danger¹²². A second, more flexible understanding of the “distress phase” in the SAR Convention specifies that it is a situation in which an individual is threatened by a “grave and imminent danger and requires immediate assistance¹²³”. The European Parliament adopts the second hypothesis since the immediacy of the danger is not necessary to describe a situation of distress¹²⁴.

Entry into the port would then be aimed at ending this distress situation. Since the duty to demonstrate distress is incumbent on the person claiming it, he or she will be able to use these practical elements. Even if infected vessels were to be in distress, a de facto right of entry into ports cannot be established.

The shipmaster has an additional justification for requesting access to the port State, which has an obligation to consider it, taking care to comply with “a balancing of the nature and immediacy of the threat to the ship’s safety against the risks to the port that such entry may pose¹²⁵”, as reminded by the IMO.

In the most extreme situations, shipmasters also have a role to play. Article 28.6 of the International Health Regulations¹²⁶ and Regulation 34.1 of the SOLAS Convention¹²⁷ provide that the master of the ship, in accordance with his/her professional ethics, is entitled to take “emergency measures

as may be necessary for the health and safety of travelers on board” during a distress situation. In addition, he/she is expected to cooperate by communicating in a transparent way about the health status of the ship (Article 28.4 of the IHR).

¹⁰⁸ IMO, WHO, Joint Statement on the Response to the Covid-19 Outbreak, 13 February 2020

¹⁰⁹ IMO (International Chamber of Shipping), ICS Coronavirus (Covid-19) Guidance for ships operators for the protection of the health of seafarers, Circular Letter No.4204/Add.4, 5 March 2020

¹¹⁰ Australia Government, Department of home affairs, “COVID-19 and the border”, available online at: <https://covid19.homeaffairs.gov.au>

¹¹¹ Decret from the Transport Minister and Health Minister, 19th March 2020, available online at: <http://www.mit.gov.it/sites/default/files/media/notizia/2020-03/decreto%20125%2019mar20.pdf>

¹¹² Décret n° 2020-370 du 30 mars 2020 complétant le décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, JORF n°0078 du 31 mars 2020 texte n° 15

¹¹³ https://www.kystverket.no/en/News/the-coronavirus-and-sea-going-traffic/?fbclid=IwAR2pZJ9ekBfV05oXpVdLaLZQtoVwckP63ZbHOaqY-4jEje-5_HLb3etVBsjdg

¹¹⁴ https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/newpage_00032.html?fbclid=IwAR3XGuwztM4KRpd7GctRKShungbJLgpkayyUXFgefB-Kvr963ejb0UNsc6g

¹¹⁵ WHO, International Health Regulations, Third edition, 2005
¹¹⁶ https://www.nepia.com/industry-news/coronavirus-outbreak-impact-on-shipping/?fbclid=IwAR01CZWEWmGbfZm_Sp2pgKSK_10t0G-KfRZ5yHj9WagN5oZ3D-w3xoWuEI

¹¹⁷ Republic of the Philippines, Department of finances, Guidelines at all seaports for prevention and spread of novel Coronavirus, 5th February 2020, available online at: http://customs.gov.ph/wp-content/uploads/2020/03/cmo-05-2020-Implementing_DOH_Dept_Circular_No_2020-0034_re_Guidelines_at_All_Seaports_for_Prevention_and_Spread_of_Novel_Corona_Virus.pdf

¹¹⁸ <http://s530024848.t.en25.com/e/es-?s=530024848&e=16855&elqTrackId=E98054711217181B30366D4E840B-1D74&elq=bb4c0ae7383f43b9b73321a7803c745e&elqaid=677&elqat=1>
¹¹⁹ https://www.nepia.com/industry-news/coronavirus-outbreak-impact-on-shipping/?fbclid=IwAR01CZWEWmGbfZm_Sp2pgKSK_10t0G-KfRZ5yHj9WagN5oZ3D-w3xoWuEI

¹²⁰ This arbitration concerned the bombing and sinking of the Rainbow Warrior ship of Greenpeace by two officers of the DGSI, while the ship was in a port in New Zealand. France was condemned, as were the two officers, which were supposed to stay in surveyed residence on the island of Hao

¹²¹ Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 255, 579

¹²² LawTeacher, “Refuge for ships in distress”, 2 February 2018. (<https://www.lawteacher.net/free-law-essays/transportation-law/refuge-for-ships-in-distress.php#citethis>)

¹²³ United Nations Convention on the law of the Sea (UNCLOS), adopted at Montego Bay on 10 December 1982, entry into force on 16 November 1994, UNTC, vol. 1834

¹²⁴ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189, 27.6.2014, p. 93-107

¹²⁵ Guidelines on the treatment of persons rescued at sea, Resolution MSC.167(78), adopted on 20 May 2004, Annex 34, MSC 78/26/Add.2

¹²⁶ WHO, International Health Regulations, Third edition, 2005.
¹²⁷ International Convention for the Safety of Life at Sea (SOLAS), adopted at London on 1st November 1974, entry into force on 25th May 1980, UNTC, Vol. 1226, A-1896

IMO encourages cooperation between flag State authorities, port State authorities and control regimes, companies and shipmasters in order to guarantee the highest level of protection and rights for everyone in this health crisis¹²⁸. In the event that the port State denies access to the port, other parties involved, including the flag State, should be approached. It may be called upon to provide medical equipment and prompt medical care on board the ship¹²⁹. Unfortunately, the flag States, especially the flags of convenience ones, demonstrate a guilty passivity. As an example, the Braemar, a cruise ship registered under the flag of the Bahamas, was refused access to Bahamian ports. It ended up in Cuba, which finally opened its ports to it.

Fortunately, some States have been more cooperative by repatriating their nationals stuck on board of infected ships. This has provided relief to port States with regard to the care of other infected passengers. Passengers on the Costa Magica (Spain and the United States) or the Costa Luminosa (Italy, for example) benefited from this support. Within the framework of the European Union, the cooperation of Member States to repatriate their nationals has been facilitated by the European External Action Service¹³⁰. This service made it possible to implement EU's Civil Protection Mechanism¹³¹, in particular for European passengers on the Diamond Princess.

Some shipowners or charterers have also acted to ensure the safety and health of persons on board their ships. For example, Holland America Line assisted the MS Zaandam while it was crossing the Panama Canal, in order to transfer uninfected passengers to the SS Rotterdam. Panama's maritime authorities supervised the operations.QA

However, even the virtuous States seem more concerned with repatriating tourists than with responding to calls for help from seafarers serving on ships who wish to return home,

whether for medical reasons or because they have overly exceeded the time of their contract or the maximum time of boarding. This situation is unanimously denounced by the seafarers' unions. On March, 17th 2020, the President of the International Transport Workers' Federation pointed out "the failure of flag states to protect seafarers' and passenger's health during this humanitarian crisis"¹³². However, the Maritime Labour Convention provides that the flag State "shall ensure that all seafarers on ships that fly its flag are covered by adequate measures for the protection of their health and that they have access to prompt and adequate medical care whilst working on board"¹³³.

Ultimately, the Covid-19 pandemic is a reminder that States have control over all decisions regarding port access. Even if other parties have a role to play in the resolution of this crisis, they have largely confirmed that their contribution remains as limited in practice as it is in the law. Their involvement is still subject to their good will. There is no doubt that ports can be an entry for the proliferation of Covid-19.

¹²⁸ IMO, COVID-19 – Implementation and enforcement of relevant IMO instruments, Circular Letter No.4204/Add.1, 19 February 2020

¹²⁹ Idem

¹³⁰ European Union External Action, "Good stories on consular support for EU citizens stranded abroad", 24 April 2020

[https://eeas.europa.eu/headquarters/headquarters-homepage/76203/covid-19-consular-support-eu-citizens-third-countries_en]

¹³¹ European Commission, EU Civil Protection Mechanism

[https://ec.europa.eu/echo/what/civil-protection/mec h anism_en]

¹³² International Transport Workers' Federation, "Flag States must protect seafarers and passengers' health during coronavirus crisis" 17 March 2020.

[<https://www.itfglobal.org/en/news/flag-states-must-protect-seafarers-and-passengers-health-during-coronavirus-crisis>]

¹³³ Maritime Labour Convention (MLC), adopted by the 94th (Maritime) Session of the International Labour Conference on 23rd February 2006, entry into force on 20 August 2013

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