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Shared Responsibility Aspects in Search and Rescue Operations at Sea

Seline Trevisanut[*]

1. Introduction: When is shared responsibility relevant in search and rescue operations at sea?

Flag states and coastal states have a duty to render assistance to persons found at sea in the danger of being lost and people in distress.[1] This core obligation under both treaty law and customary law applies in any maritime zone[2] and in relation to any activity performed there. While implementing this duty, states can either perform directly the search and rescue operations, namely through their own search and rescue (SAR) services, or ask a vessel, which is located in the proximity of the endangered persons, be it any merchant ship or the state vessel of another state, to perform the rescue operation. SAR operations might also be performed in the context of cooperation mechanisms, such as joint patrolling.[3]

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[1] Unlike people in distress, persons found at sea in danger of being lost have not yet sent a distress call; see R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd edn (Manchester University Press, 1999), 63.

[2] During the negotiation of the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3 (LOSC), the wording of Article 98 on the duty to render assistance was debated in the context of the provisions on the high seas (Part VII of the LOSC); see J.K. Gamble Jr., (ed.) *Law of the Sea: Neglected Issues: Proceedings Law of the Sea Institute Twelfth Annual Conference* (Law of the Sea Institute, University of Hawaii, 1979), 261. However, pursuant to its literal interpretation ('any person found at sea' and not 'any person found on the high seas') in the light of the object and the context, as required by Article 31 of the 1969 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331, it was noted that this duty could not become void because of the crossing of a maritime frontier; see M.H. Nordquist (ed.), *UNCLOS 1982: A Commentary*, Vol. III (Leiden: Martinus Nijhoff, 1993), 170.

[3] The expression 'joint patrolling' refers to a range of enforcement operations and inspection schemes, jointly performed at sea by the authorities of two or more states, with possible participation of an international organisation. The legal basis of these operations varies depending on the targeted activity (border management; drug trafficking; piracy; etc.), and the nature of the performed activity (wartime or peace time operations). For a critical analysis of joint patrolling and its legal basis, see inter alia D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), 23 ff.; E. Papastavridis, *The Interception of Vessels on the High Seas, Contemporary Challenges of the Legal Order of the Oceans* (Oxford: Hart Publishing, 2013), 41 ff.

Instances in which issues of shared responsibility may arise, in which 'multiple actors … contribute to harmful outcomes that international law seeks to prevent'[4] are many. In particular, in the light of recent state practice, we can flag three different scenarios: first, SAR operations performed on the basis of a SAR agreement in the SAR region created by that agreement;[5] SAR operations performed by a merchant/private ship in a portion of the high seas which is part of the SAR zone of a coastal state;[6] and SAR operations performed in the context of other joint activities at sea, such as joint patrolling, interdiction programmes to fight against illicit activities at sea etc., eventually under the seal of an international body.[7] In these three situations, a plurality of actors, states and non-state ones, contributes to the implementation of the duty to render assistance and, consequently, might share responsibility in the event of a wrongful act.

After briefly analysing the content and nature of the duty to render assistance in the relevant normative context (section 2), the present chapter focuses on the abovementioned three scenarios, first highlighting the difficulties related to the attribution of a wrongful act perpetrated in the context of such SAR operations (section 3), and second focusing on how to ascertain shared responsibility in the same context (section 4). This chapter strives to identify the potential benefits of shared responsibility in the effective implementation of the duty to render assistance (section 5).

2. Search and rescue international legal framework

The duty to render assistance has primarily developed in the legal framework of the law of the sea (section 2.1), in relation first to navigation and then to any other maritime activity. This

[4] P.A. Nollkaemper, D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, 360-361.

[5] See the practice of Australia and Indonesia after the conclusion of the 2004 SAR Agreement: International Maritime Organization (IMO), 'Notification of an Arrangement on Search and Rescue Regions and co-ordination of search and rescue services in accordance with paragraph 2.1.4 of the Annex to the International Convention on Maritime Search and Rescue, 1979, as amended', Notification by Australia and Indonesia, 13 April 2004, SAR.6/Circ.22.

[6] Many are the examples concerning merchant vessels. See inter alia the *Cap Anamur* case, S. Trevisanut, 'Le *Cap Anamur*: profiles de droit international et de droit de la mer' (2004) 9 ADM 49; and the *Tampa* case, M. White, 'Tampa incident: Shipping, international and maritime legal issues' (2004) 78 ALJ 101.

[7] Consider, for instance, the operations for the management of irregular migration by sea performed by member states of the European Union, often in cooperation with third countries, under the seal of the European Agency for the Management of the Operative Cooperation at the External Borders of the Member States of the European Union (Frontex), see Council Regulation 2007/2004, (2004) OJ L 349/1; see also www.frontex.europa.eu; or NATO's Operation *Unified Protector* off the shores of Libya in the wake of the Arab spring (2011).

rule is also closely connected with the principle of safety of life at sea, and might be considered as a corollary obligation to the right to life (section 2.2).

2.1 The duty to render assistance in the law of the sea

The duty to render assistance at sea is set out in Article 98 of the United Nations Convention on the Law of the Sea (LOSC),[8] as follows:

> 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
>
> (a) to render assistance to *any person found at sea* in danger of being lost;
>
> (b) to *proceed with all possible speed to the rescue of persons in distress*, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
>
> (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
>
> 2. Every coastal *shall promote* the establishment, operation and maintenance of an *adequate and effective* search and rescue service regarding safety in and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.[9]

The first attempt to codify this obligation however dates back to the 1910 Convention internationale pour l'unification de certaines règles en matière d'assistance et de sauvetage maritimes et protocole de signature,[10] then substituted by the 1989 International Convention on Salvage, which provides:

> 1. Every *master* is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
>
> 2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.[11]

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[8] See n. 2.

[9] Article 98 LOSC, ibid. (emphasis added).

[10] Convention internationale pour l'unification de certaines règles en matière d'assistance et de sauvetage maritimes et protocole de signature, Brussels, 23 September 1910, in force 1 March 1913, available at http://comitemaritime.org/Uploads/pdf/CMI-SRMC.pdf.

[11] International Convention on Salvage, London, 28 April 1989, in force 14 July 1996, 1953 UNTS 193, Article 10 (emphasis added).

This provision is of particular interest because it highlights the role of *shipmasters* in the implementation of the duty to render assistance. They are 'bound' to render assistance; states have to put in place the necessary measures in order to enable shipmasters to implement it.

Two other international treaties have to be mentioned here. First, the 1974 Convention for the Safety of Life at Sea (SOLAS Convention)[12] is the last of many texts on the safety of life at sea adopted after the tragedy of the *Titanic* in 1912.[13] Second, in the wake of instances of non-rescue at sea during the Indochinese crisis,[14] the need to identify the recipient of the duty to actually accomplish rescue operations and to clarify the consequences of this duty arose with new vigour and brought the adoption of the 1979 International Convention on Maritime Search and Rescue (SAR Convention).[15] Because of its repetition in treaty and domestic law, and in the light of state practice, even if not always uniform,[16] the duty to render assistance is today recognised as a principle of customary law.[17]

The SAR Convention aims to create an international system for coordinating rescue operations that guarantees their efficiency and safety. States parties are invited to conclude SAR agreements with neighbouring states to regulate and coordinate SAR operations and services in the agreed maritime zone.[18] Such agreements also implement the obligation set out in the

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[12] International Convention for the Safety of Life at Sea, London, 1 November 1974, in force 25 May 1980, 1184 UNTS 2 (SOLAS Convention).

[13] Churchill and Lowe, *The Law of the Sea*, n. 1, 265; see also P. Louis-Dreyfus, 'Sûreté du navire' (2003) 59 *Défense nationale* 54; B. Coloby, 'La sûreté des ports maritimes' (2003) 59 DN 69.

[14] As a result of the growing number of refugees coming from the former Indochina, the countries of the region which received the refugees decided to close their frontiers and did not accept any more disembarkation, see 'Opening Statement by Mr Poul Hartling, the United Nations High Commissioner for Refugees, at the Consultative Meeting with Interested Governments on Refugees and Displaced Persons in South East Asia', Geneva, 11 December 1978, HC Statements, 11 December 1978, available at www.unhcr.org. Merchant ships consequently did not perform any further rescue operation, as they did not know what to do afterwards. Many boat people were thus left at the mercy of the waves. This situation was one of the main points discussed during the Meeting on Refugees and Displaced Persons in South East Asia, held in Geneva, in July 1979 ('Meeting on Refugees and Displaced Persons in South East Asia' (21-30 July 1979), Geneva, see www.unhcr.org).

[15] International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979, in force 22 June 1985, 1405 UNTS 97 (SAR Convention).

[16] The content of the obligation is still debated. In particular, the disagreement focuses on the obligations of the coastal state in whose SAR zone the rescue operation took place and on the place where the rescued persons can disembark. See the debate between Mediterranean states (Italy, Malta and Spain) within the IMO; IMO, 'Measures to protect the safety of persons rescued at sea, Compulsory guideline for the treatment of persons rescued at sea', Submitted by Spain and Italy, Doc. FSI 17/15/1, 13 February 2009; IMO, 'Measures to protect the safety of persons rescued at sea, Comments on document FSI 17/15/1', Submitted by Malta, Doc. FSI 17/15/2, 27 February 2009, both available at http://docs.imo.org. For a comment, S. Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 IJMCL 523.

[17] UN Commission on International Law, 'Commentary on Draft Article 12 of the United Nations Convention on the High Seas' UN Doc. A/3179 (1956). Many have then supported the customary nature of the obligation; see C.J. Colombos, *International Law of the Sea* (London: Longman Green & Co., 1954), 304; D.P. O'Connell, *The International Law of the Sea* (Oxford: Clarendon Press, 1982), 813-814. See also R. Barnes, 'Refugee Law at Sea' (2004) 53 ICLQ 47, 49; Papastavridis, *The Interception of Vessels*, n. 3, 294; Trevisanut, ibid., 527.

[18] See SAR Convention, n. 15, Chapter 3.1.1: 'Parties shall co-ordinate their search and rescue organizations and

above reported Article 98(2) LOSC, which provides that, where needed, neighbouring states shall cooperate through regional agreements to promote and maintain adequate and effective SAR services.[19] Such agreements also diminish the risk of non-rescue incidents. Moreover, they represent an economic advantage for the contracting parties to the extent that they can share the costs arising from organising and carrying out SAR operations.[20]

Carrying out rescue operations, however, does not exhaust the duty to render assistance, which extends to the disembarkation of the rescued persons in a place of safety. The Maritime Safety Committee (MSC) of the International Maritime Organization (IMO) adopted two resolutions that amended both the SOLAS[21] and SAR Conventions,[22] which entered into force on 1 July 2006. Consequently, Article 4.1-1 of the SOLAS Convention now reads as follows:

> Contracting Governments shall co-ordinate and co-operate to *ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations* with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise *primary responsibility* for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and *delivered to a place of safety*, taking into account the particular circumstances of the case and guidelines developed by the Organisation. In these cases the relevant Contracting Governments *shall arrange for such disembarkation to be effective as soon as reasonably practicable*.[23]

Similarly, Article 3.1.9 of the SAR Convention now provides:

> Parties shall co-ordinate and co-operate to *ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations* with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise *primary responsibility* for ensuring such co-ordination

should, whenever necessary, co-ordinate search and rescue operations with those of neighbouring States'; and Chapter 3.1.8: 'Parties should enter into search and rescue agreements with neighbouring States regarding the pooling of facilities, establishment of common procedures, conduct of joint training and exercises, regular checks of inter-State communication channels, liaison visits by rescue co-ordination centre personnel and the exchange of search and rescue information.'

[19] Article 98(2) LOSC, n. 2, provides: '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.'

[20] See, for example, the agreement concluded in 2004 by Australia and Indonesia (see n. 5).

[21] Resolution MSC.153 (78), 20 May 2004, available at http://docs.imo.org.

[22] Resolution MSC.155 (78), 20 May 2004, available at http://docs.imo.org.

[23] Article 4.1-1 of the SOLAS Convention, n. 12 (emphasis added).

> and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and *delivered to a place of safety*, taking into account the particular circumstances of the case and guidelines developed by the Organisation. In these cases, the relevant Parties *shall arrange for such disembarkation to be effective as soon as reasonably practicable*.[24]

According to the MSC Guidelines on the Treatment of Persons Rescued at Sea,[25] a 'place of safety' means a location where the rescue operations can be considered as completed. In accordance with Principle 6.14 of the Guidelines, the rescue unit can be the place of safety, but only provisionally. In fact, the text insists on the role of the flag state and the coastal state which should substitute the master of the rescuing vessel as soon as possible, as they bear 'primary responsibility' according to the above-mentioned amended provisions. Principle 6.13 of the Guidelines provides:

> *An assisting ship should not be considered a place of safety* based solely on the fact that the survivors are no longer in immediate danger once aboard the ship … Even if the ship is capable of safely accommodating the survivors and *may serve as a temporary place of safety*, it *should be relieved* of this responsibility as soon as alternative arrangements can be made.[26]

Moreover, pursuant to the same Guidelines, the state in whose SAR zone the operation took place has the duty to secure a place of safety for the rescued persons (Principle 2.5). This Principle does not include either a right of entry into the territory of the interested state by the rescued persons, or a right of access to the ports of the coastal state. It simply requires that the coastal state carries out the SAR operations and brings them effectively to an end, i.e. that the rescued persons (whatever their status)[27] are not left at sea. In this sense, Principle 2.5 of the Guidelines suggests that the coastal state has a 'residual obligation' of allowing disembarkation on its own territory when it has not been possible to do so safely anywhere else.[28] This has been clarified by the IMO Facilitation Committee (FAL), which adopted 'Principles relating to

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[24] Article 3.1.9 of the SAR Convention, n. 15 (emphasis added).

[25] MSC Guidelines on the Treatment of Persons Rescued at Sea, Resolution MSC.167 (78), 20 May 2004 (MSC Guidelines or Guidelines), available at http://docs.imo.org.

[26] Principle 6.13, ibid. (emphasis added).

[27] The issue concerning the denial of disembarkation opposed by coastal states was mainly raised in instances where irregular migrants and asylum seekers were among the rescued persons. On the issue, see inter alia A. Fischer-Lescano, T. Löhr, and T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 IJRL 256; G.S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23 IJRL 443; J. C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 298; E. Papastavridis, '"Fortress Europe" and FRONTEX: Within or Without International Law?' (2010) 79 Nord JIL 75; S. Trevisanut, 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection' (2008) 12 MPYUNL 205.

[28] For a contrary opinion, see Papastavridis, *The Interception of Vessels*, n. 3, 299.

administrative procedures for disembarking persons rescued at sea'[29] in 2009. Principle 3 establishes that:

> If disembarkation from the rescuing ship *cannot be arranged swiftly elsewhere*, the Government responsible for the SAR area *should accept the disembarkation of the persons rescued* in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support.[30]

The fact that the FAL had to intervene indicates that the amendments of 2004 have been insufficient to enhance the safety of persons rescued at sea. The MSC Guidelines and the FAL Principles set out how these amendments should be implemented, but practice has not yet followed the suggested approach.

Besides the content of the obligation as far as the coastal state is concerned, many other issues are still debated and a possible agreement is still out of reach. For instance, it is not clear whether only states owe the obligation, or if international organisations possibly involved in maritime activities are also bound. The provisions here reported expressly refer to states, flag or coastal. Practice however offers more and more examples of police activities performed under the command of an international organisation or a supranational body. Should then those 'entities' also comply with the duty to render assistance? This might happen only if the duty to render assistance under customary international law extends its scope of application *ratione personae*, if compared with the same obligation under treaty law. The practice does not allow for such a conclusion yet.

Another issue might be to identify the beneficiary of the obligation. Is it a purely inter-state obligation or does it entail a right to be rescued for people in distress at sea? The law of the sea is a field of international law where individuals, or more generally private actors, are little considered.[31] The main aim of the law of the sea consists in allocating obligations and rights in different maritime zones among states. However, the multiplication of activities at sea and the increased human presence lead to the question of the protection of the human element, in particular of the application of human rights at sea. Many scholars have already discussed the application of the relevant human rights treaties at sea,[32] pointing out that the law of the sea,

[29] Principles relating to administrative procedures for disembarking persons rescued at sea, FAL.3/Circ.194, 22 January 2009, available at http://docs.imo.org.
[30] Principle 3, ibid. (emphasis added).
[31] I. Papanicolopulu, 'The law of the Sea Convention: No Place for Persons?' (2012) 27 IJMCL 867.
[32] S. Cacciaguidi-Fahy, 'The Law of the Sea and Human Rights' (2007) 19 SLJIL 85; B.H. Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea', in J. Charney, D.K. Anton, and M.E.

specifically the LOSC, pursues some community interests,[33] among which the protection of human rights.[34] Some authors have stressed the complementarity of these two fields of international law.[35] Building on this scholarship, the duty to render assistance can be considered as the corollary obligation of the right to life when applied at sea.

2.2 The duty to render assistance as a corollary obligation of the right to life

The duty to render assistance is closely connected with the principle of safety of life at sea. The safety of life at sea limits the exercise of any activity at sea,[36] it prevails over any other conflicting activity, even over the performance of the duty to render assistance when the life of the rescuing unit is at risk.[37] The safety of life at sea is the priority interest in case of conflicting exercises of the high seas' freedoms.[38]

O'Connell (eds.), *Politics, Values and Functions, International Law in the 21st Century, Essays in Honor of Professor Louis Henkin* (Leiden: Martinus Nijhoff, 1997), 377; I. Papanicolopulu, 'International Judges and the Protection of Human Rights at Sea', in N. Boschiero et al. (eds.), *International Courts and the Development of International Law, Essays in Honour of Tullio Treves* (The Hague: T.M.C Asser Press, 2013), 535; E. Papastavridis, 'European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?', in M. Fitzmaurice and P. Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Leiden: Martinus Nijhoff, 2012), 117; P. Tavernier, 'La Cour européenne des droits de l'homme et la mer', in *La Mer et son droit, Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, (Paris: Pedone, 2003), 575; T. Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berk JIL 1; B. Vukas, 'Droit de la mer et droits de l'homme', in G. Cataldi (ed.), *La Mediterranée et le droit de la mer à l'aube du 21e siècle* (Bruxelles: Bruylant, 2002), 85.

[33] The LOSC's Preamble announces the general aim of the convention towards the protection of some community interests: '*Conscious* that the problems of ocean space are closely interrelated and need to be considered as a whole; *Recognizing* the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment' (LOSC, n. 2, Preamble, paras. 2-3). Moreover, the LOSC has introduced in a binding instrument concepts such as the common heritage of mankind concerning the regime of the Deep Seabed Area (Part XI LOSC, n. 2), the sustainable management and exploitation of living marine resources (Articles 61-62, 117-119 LOSC), and the protection of the marine environment (Part XII LOSC).

[34] Oxman, 'Human Rights', n. 32, 382.

[35] M. Giuffrè, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 IJRL 692, 733; E. Papastravidis, 'Rescuing Migrants at Sea: The Responsibility of States under International Law' Academy of Athens paper, 27 September 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352.

[36] While performing enforcement activities allowed by international law, states have to conduct such activities in a way which 'ensure[s] that life is not endangered', *The M/V 'Saiga' (No. 2) Case* (*Saint Vincent and the Grenadines* v. *Guinea)*, Merits, ITLOS Case No. 2, (1999) 38 ILM 1357, para. 156. For a comment, see inter alia D.H. Anderson, 'Some Aspects of the Use of Force in Maritime Law Enforcement', in N. Boschiero et al. (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague: Asser Press, 2013), 233, 237.

[37] According to Article 98(1) LOSC, n. 2, the duty to render assistance must be implemented 'in so far as [the master of a ship] can do so without serious danger to the ship, the crew or the passengers'.

[38] '[D]ans la plupart des cas, l'élément décisif qui détermine les priorités entre les activités en mer que ces règles établissent est la sauvegarde de la vie humaine … [A]ucun rang de priorité n'est fixé entre les différentes libertés

The safety of life, physical individual integrity, is more generally guaranteed under international law by the right to life. This right is protected under a number of international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR),[39] the European Convention on Human Rights (ECHR),[40] the American Convention on Human Rights (ACHR)[41] and the African Charter on Human and Peoples' Rights (African Charter).[42] These instruments protect individuals who are within the jurisdiction of states parties. The main question is then: when are individuals within the jurisdiction of the flag/coastal state in the context of SAR operations at sea?

Only one case has so far been brought in front of international judicial bodies concerning human rights violations in the context of SAR operations: the *Hirsi Jamaa et al.* v. *Italy* case (*Hirsi*)[43] of the European Court of Human Rights (ECtHR or Court).[44] The applicants (eleven Somali nationals and thirteen Eritrean nationals) were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast. On 6

[de la haute mer]. Il faudra retenir la solution qui assure le mieux, dans chaque cas concret, le respect de tous les intérêts en cause, en adoptant, le cas échéant … la solution qui sauvegarde le mieux la vie humaine', T. Treves, 'La navigation', in R.-J. Dupuy and D. Vignes (eds.), *Traité du nouveau droit de la mer* (Bruxelles: Bruylant, 1985), 688, at 717, 719. Also M. Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 IJRL 329, 335: 'Explicit links have been drawn between the concept of distress and the preservation of human life'.

[39] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR).

[40] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights or ECHR).

[41] American Convention on Human Rights, 'Pact of San José, Costa Rica', 22 November 1969, in force 18 July 1978, 1144 UNTS 123 (AHCR).

[42] African (Banjul) Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, in force 21 October 1986, (1982) 21 ILM 58 (African Charter).

[43] *Hirsi Jamaa et al.* v. *Italy*, App. No. 27765/09 (ECtHR, 23 February 2012) (*Hirsi*). For comments, M. Giuffrè, 'Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others* v. *Italy* (2012)' (2012) 61 ICLQ 728; See also Giuffrè, 'State Responsibility Beyond Borders', n. 35; I. Papanicolopulu, 'European Court of Human Rights judgment on Italy's interdiction of migrants from Lubya on the high seas' (2013) 107 AJIL 417; M. Tondini, 'The Legality of Intercepting Boat People under Search and Rescue and Border Control Operations: with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the Hirsi Case' (2012) 18 JIML 59.

[44] The so called *Marine I* case (*J.H.A., on behalf of P.K. et al.* v. *Spain*, Communication No. 323/2007, UNCAT, UN Doc. CAT/C/41/D/323/2007 (2008), Decision 11 November 2008, reprinted in (2009) 22 IJRL 104) was submitted to the Committee Against Torture (UNCAT) in 2007. On 30 January 2007, the cargo vessel *Marine I* rescued about 370 people in the Senegalese SAR zone. Senegal authorities asked the Spanish ones to intervene in response to the distress call. Considering that the Mauritanian port of Nouadhibou was the closest one, Spain reached an agreement with Mauritania and the passengers of the cargo were disembarked on 12 February 2007. In exchange, Spain agreed to pay 650,000 euro to Mauritania to ensure that all passengers were repatriated from Mauritania within five days. The passengers were hold in an abandoned former fish processing plant, where they were under Spanish custody. Repatriation process took longer than expected; in particular a small group of them, the plaintiffs, remained in Mauritania for several months in precarious conditions. In the case at hand, the alleged violations did not concern the SAR operation, but the conditions in which the plaintiffs were 'detained' in Mauritania. In order to determine the exercise of jurisdiction by the Spanish authorities, the UNCAT however stated that Spain 'maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process' (para. 8.2).

May 2009, three ships from the Italian authorities intercepted them. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli on the basis of the 2008 Treaty of Friendship between Italy and Libya.[45] The applicants alleged a violation of Article 3 ECHR (prohibition of torture), Article 4 of Protocol No. 4 (prohibition of collective expulsion) and Article 13 ECHR (right to an effective remedy). On whether the applicants were under Italian jurisdiction,[46] the Grand Chamber held that:

> [From the boarding,] the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities … Accordingly, the events giving rise to the alleged violations fall within Italy's 'jurisdiction' within the meaning of Article 1 of the Convention.[47] (paras 81-82)

Consequently, when the SAR operation consists in taking on board of the rescuing vessels the persons in distress, the latter are within the jurisdiction of the flag state and the ECHR applies. This is consistent with general international law, as affirmed in Article 92 LOSC, which provides for the exclusive jurisdiction of the flag state on the high seas.[48] The determination of the exercise of jurisdiction might however prove more difficult when the rescued persons are not taken on board of the rescuing unit, or when the SAR services are not performed.

In the *Xhavara* case, which did not concern a SAR operation, the ECtHR recognised the exercise of jurisdiction by Italian authorities on two grounds: the activities were performed on the basis of a bilateral agreement; and the fact that there was a collision between the Italian navy vessel and the migrants' boat.[49] Extrapolating from the approach of the Court in this case, we can deduce in more general terms that the ECHR applies when the SAR operation is performed on the basis of an international agreement and there is contact between the rescuing unit and the vessel in distress.

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[45] Trattato di amicizia, partenariato e cooperazione, *Gazzetta Ufficiale della Repubblica Italiana*, No. 40 of 18 February 2009 (Treaty of Friendship between Italy and Libya).

[46] Before the *Hirsi* case, n. 43, the ECtHR had already recognised the application of the ECHR at sea, specifically on the high seas, in a few instances: *Rigopoulos* v. *Spain*, App. No. 37388/97 (ECtHR, 12 January 1999); *Xhavara and fifteen others* v. *Italy and Albania*, App. No. 39473/98 (ECtHR, 11 January 2001); *Medvedyev and others* v. *France*, App. No. 3394/03 (ECtHR, 29 March 2010). However, none of them concerned a violation perpetrated during a SAR operation.

[47] *Hirsi* case, n. 43, paras. 81-82.

[48] Warships and vessels used only on government non-commercial service moreover enjoy complete immunity from the jurisdiction of any state other than the flag state on the high seas (Article 95-96 LOSC). This reinforces the presumption that the flag state exercises jurisdiction on its naval units.

[49] E. Lagrange, 'L'application de la Convention de Rome à des actes accomplis par les Etats parties en dehors du territoire national' (2008) 112 RGDIP 521, at 544-545.

The non-performance of SAR services is a more difficult scenario. Take, for instance, a factual situation similar to the one of the *Hirsi* case and consider the hypothesis in which the Italian authorities did not intervene. The main question to be answered here is whether human rights instruments do apply in cases of SAR non-performance, i.e. whether the non-rescued persons did fall within the jurisdiction of a state while they were in distress at sea. Two hypotheses have to be distinguished. First, the people in distress were in a portion of the high seas not encompassed in a SAR zone. Under the current regime, it is unclear whether the state, which receives the distress call, has an obligation to ensure that the SAR operation takes place. Second, the distress situation occurs in a SAR area and the interested coastal state receives the call. Even if Article 98(2) LOSC does not oblige coastal states to directly perform the SAR services, its wording suggests, even if ambiguously, that the obligation contained therein does not consist in a mere obligation of means, but in an obligation to reach a certain level of services.[50]

In both hypotheses, it can then be argued that the distress call creates a factual 'relation' between the state which receives it and the persons who send it. The life of the persons in distress depends on the behaviour of the recipient state. The argument could go further and support the existence of an exclusive long distance *de facto* control that the state, which received the call, exercises on the lives of those people. Their lives are submitted to the discretion of that state. This *de facto* control becomes also *de jure* when the distress situation is located within the SAR zone of the recipient state, which has an obligation to '*promote* the establishment, operation and maintenance of an *adequate and effective* search and rescue service' (Article 98(2) LOSC, emphasis added). There is then an assumption of authority the coastal state exercises in its SAR zone.[51] The coastal state is then bound by an obligation of due diligence,[52] pursuant to which it has to make sure that *adequate and effective* SAR services are in place in its SAR zone. The loss of lives or the risk of loss in its SAR zone may entail, on the one hand, the violation of this obligation of due diligence, if the coastal state failed to guarantee the existence of adequate services. On the other hand, such a situation may consist of a violation of the right to life of the concerned persons, of their 'right to survival'. The duty to

[50] See A.E. Moen, 'For Those in Peril on the Sea: Search and Rescue under the Law of the Sea Convention' (2010) 24 OY 377, at 386, 389: 'Article 98(2) represents the imposition of a positive duty, with no clear understanding of its minimum threshold or its outer limit, and no clear indication of the relationship that gives rise to such an obligation … Search and rescue under Article 98(2) then cannot be the mere promotion of a service, but the promotion of a certain level of service.'
[51] See *Al-Skeini and others* v. *the United Kingdom*, App. No. 55721/07 (ECtHR, 7 July 2011), paras. 149-150.
[52] C. Pitea, 'Diritto alla vita', in L. Pineschi (ed.), *La tutela internazionale dei diritti umani, Norme, garanzia e prassi* (Milan: Giuffrè, 2006), 314, 318.

render assistance then becomes an operative tool for the implementation of the right to life at sea; it is the corollary obligation of the right to life at sea.

It follows from the above that the obligations in the framework of SAR services, which arise in part from other areas of international law, such as human rights law, encompass two situations. On the one hand, they encompass situations in which the same obligation binds two or more states, and these states can all breach that single obligation. For instance, the negligence of both the coastal state and the state which received the distress call; both are violating their obligation to render assistance. On the other hand, they encompass situations where different obligations bind individual states. It will appear from the next section that both situations trigger the responsibility of more than one state.

3. Attributing an international wrongful act perpetrated during search and rescue operations

To ascertain whether a state exercises jurisdiction in a specific situation contributes to determine the responsibility of that state for an alleged wrongful act perpetrated during a search and rescue operation. No special rules of attribution apply under the applicable treaties, and hence the question of attribution should be examined under the general principles of responsibility. Building on the arguments presented above, the general principles of international responsibility are now applied to the three different scenarios described in the introduction.

First, in the event of SAR operations performed on the basis of a SAR agreement in a jointly managed SAR region, the state parties to the agreement have the primary obligation to manage, coordinate and ensure SAR services. The SAR Convention is the primary international instrument that imputes multi-state coordination of SAR systems.[53] Sometimes a SAR agreement establishes some precise criteria in order to determine the party competent for a certain area and/or certain services. For example, Australia and Indonesia concluded such an agreement in 2004,[54] designating the national Regional Coordination Centres (RCCs) for the agreed SAR region, and defining the modalities by which the RCCs interact, exchange information, and execute cross-border SAR operations. In these cross-border operations, the

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[53] Moen, ‘For Those in Peril on the Sea’, n. 50, 383.
[54] IMO, ‘Notification by Australia and Indonesia’**Error! Hyperlink reference not valid.**, n. 5.

rescue unit of one state can enter the territorial sea of the other state without any authorisation. It should only notify the coastal RCC of its presence. To determine the RCC responsible for carrying out an operation, the general criterion is the area where the vessel in distress is located. The RCC competent for that area organises the operation. If the location of the vessel in distress is unknown, the RCC that received the distress call is competent.

In the context of such an agreement between state A and state B, many are the variables in which both states can be deemed responsible in case of a failure to ensure SAR services, or in case of mismanagement of the same services. Take, for instance, the case of a cross-border SAR operation performed by a vessel of state A in the territorial waters of state B, and vice versa. More complex would then be the scenario in which the SAR operation is performed by a merchant ship flying the flag of state C, in the SAR zone of state A, on the basis of the distress call communicated by the RCC of state B. In case of mismanagement, could the three states be responsible?

The attribution of the conduct of the merchant ship to state C is not easy as the merchant ship, i.e. her master, is not an organ of the state.[55] It could be argued that, as the master of a ship represents the authority on board, the flag state delegates the exercise of some powers to the master. However, this does not allow applying Article 5 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[56] Even if domestic laws, for instance navigation codes, delegate certain powers to shipmasters, such as the performance of search and rescue services, shipmasters are not empowered with elements of governmental authority. Consequently, their misbehaviour in the context of search and rescue operations cannot be attributed to state C.

The flag state however bears an obligation whose violation does not depend on the misconduct of the shipmaster. The flag state is bound to 'require the master of a ship flying its flag … to render assistance to *any person found at sea* in danger of being lost' (Article 98(1)(a) LOSC) and to 'adopt the measures necessary to enforce the duty [to render assistance]' (Article 10 International Convention on Salvage). The misconduct of the shipmaster may constitute a

[55] Pursuant to Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA): 'The conduct of any State organ shall be considered an act of that State under international law … An organ includes any person or entity which has that status in accordance with the internal law of the State.'

[56] Article 5 ARSIWA, ibid: 'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law'.

factual situation, which generates the possible violation of the flag state's own obligation.[57] But, as the obligation of the flag state is an obligation of conduct,[58] the loss of lives at sea does not necessarily trigger its international responsibility.

Concerning state A, in whose SAR zone the misconduct occurred, we have already argued above that, even if it does not have an obligation to render assistance, the coastal state is under an obligation of due diligence aimed at ensuring the adequacy and effectiveness of the SAR services. So, state A will share the responsibility with state C, if both were negligent. As for state B, it is less clear whether the state which received the call, but which is not the coastal state, has the same obligation of due diligence once it has alerted the competent authorities. The existing legal framework and practice do not allow such a conclusion. The only speculative hypothesis would be the one where the authorities alerted by state B explicitly deny to be competent and refuse to intervene. In this case, the state which received the distress call is again in charge, and therefore responsible of the coordination and management of the SAR services. The same state, together with the flag state of the vessel in distress, could then eventually act against the coastal state, which failed to comply with its duty to provide for SAR services to the level of 'adequate and effective'.[59]

The above arguments concerning the obligation of conduct owned by the coastal state, the flag state and the state which received the distress call, also apply to the second scenario mentioned in the introduction, i.e. SAR operations performed by a merchant/private ship in a portion of the high seas which is part of the SAR zone of a coastal state.

In the third and last scenario, SAR operations are performed in the context of other joint activities at sea, such as joint patrolling or interdiction programmes directed to fight against illicit activities at sea. This scenario encompasses cases in which the operations are managed or coordinated by an international organisation, e.g. the North Atlantic Treaty Organization (NATO) or the European Union (EU); and situations where the operations are purely

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[57] '[Q]ue l'objectif n'est pas été atteint [i.e. the loss of lifes at sea], c'est sans doute une condition nécessaire à la mise en œuvre de la responsabilité … parce que la réussite est censée révéler après coup que l'effort était adapté … mais l'illicéité … ne réside pas dans cet échec, puisque le réussite n'a pas été stipulée comme objet de l'obligation mais seulement comme référence téléologique permettant d'apprécier si les moyens disposes … étaient de nature à permettre l'exécution de [l'obligation]', see J. Combacau, 'Obligations de résultat et obligations de comportement: Quelques questions et pas de réponse', in *Mélanges offerts à Paul Reuter, Le droit international: unité et diversité* (Paris: Pedone, 1981), 181, 194. See also R. Wolfrum, 'Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations', in M. Arsanjani et al. (eds.), *Looking to the Future : Essays on International Law in Honor of W. Michael Reisman* (Leiden: Nijhoff, 2010), 363.

[58] Papastavridis, *The Interception of Vessels*, n. 3, 296.

[59] Moen, 'For Those in Peril on the Sea', n. 50, 395.

intergovernmental, and performed on the basis of a bilateral agreement, e.g. the Treaty of Friendship between Italy and Libya,[60] the Treaty of cooperation in the field of migration between Spain and Mauritania,[61] or the agreements concluded in the framework of the Proliferation Security Initiative.[62]

On 8 May 2011, the British newspaper *The Guardian* reported the story of a boat carrying 72 persons, among them asylum seekers, women and children, which left Tripoli (Libya) for the Italian island of Lampedusa at the end of March 2011.[63] After 16 days at sea, the boat was washed up on the Libyan shore with only 11 survivors. During the 16 days voyage, survivors told that they used their satellite phone, which later ran out of battery, to call an Eritrean priest in Rome for help. At that time, NATO's Operation Unified Protector was on-going along the shores of Libya. Pursuant to survivors' testimonies, on about the tenth day of their voyage, when half of the passengers were dead, a large aircraft carrier or helicopter-carrying vessel (probably involved in the NATO's operation) sailed near to the boat, close enough for the survivors to see the sailors on board looking at them with binoculars and taking photos. Despite obvious distress signals, the naval vessel sailed away. According to the survivors, they also encountered two fishing vessels, neither of which rendered assistance.

The Parliamentary Assembly of the Council of Europe launched its own investigation on the tragedy and further important factual elements emerged from it.[64] The Italian Maritime RCC (IMRCC) in Rome, alerted by the Eritrean priest, located the migrants' vessel and sent out many calls to the ships in the area, urging them to find the boat. However the IMRCC failed to make sure that someone intervened and the migrants were rescued.[65] Moreover, the area in question would have fallen into the Libyan SAR zone, but in that period Libyan authorities were unable to guarantee any service because of the internal turmoil. NATO had declared the same region as 'military region under its control',[66] however it failed to react and to duly alert

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[60] See n. 45.
[61] Acuerdo entre el Reino de España y la Republica Islamica de Mauritania en material de inmigración, Madrid, 1 July 2003, *Boletín Oficial del Estado*, No. 185, 4 August 2003, at 30050.
[62] In 2003, the United States launched the 'Proliferation Security Initiative' (PSI), aimed at fighting the proliferation of weapons of mass destruction through the creation of a network of ship-boarding bilateral agreements. On the issue, see inter alia Guilfoyle, *Shipping Interdiction*, n. 3, 246 ff.
[63] J. Shenker, 'Aircraft carrier left us to die, say migrants', *The Guardian*, 8 May 2011. For comments, see E. Papastavridis, 'Rescuing "Boat People" in the Mediterranean Sea: The Responsibility of States under the Law of the Sea', *EJIL Talk!*, 31 May 2011; S. Trevisanut, 'Aircraft carrier left us to die, say migrants', *EJIL Talk!*, 31 May 2011.
[64] Parliamentary Assembly of the Council of Europe, 'Lives lost in the Mediterranean Sea: Who is responsible?', Resolution 1872 (2012), final version, adopted on 24 April 2012.
[65] Ibid., para. 7.
[66] Ibid., para. 8.

the units in the area (presumably, the Spanish frigate *Mendez Núñez* and the Italian ship *ITS Borsini*).[67]

Without entering into details concerning the responsibility of international organisations,[68] it is worth recalling that NATO is not party to any of the above-mentioned instruments providing for the duty to render assistance. It is also debatable whether NATO is bound by the duty to render assistance under customary international law, as states (either flag or coastal states) are the primary recipients of the obligation, both under law of the sea and human rights law. Moreover, the possible attribution to NATO of the omission to rescue and the loss of lives will depend on the operative framework, namely on the rules of engagement and other relevant instruments the organisation adopted in relation to the on-going operation. An explicit delegation of powers to NATO concerning SAR services might be necessary in order to attribute any wrongdoing to the organisation. This does not absolve NATO member states, which continue to be bound by the obligation to render assistance, even while under NATO's command.[69] NATO member states have delegated, not transferred, powers to the organisation; they retain 'the right to exercise powers concurrent with, and independent of, the international organization's exercise of powers'.[70] Consequently, Spain and Italy, as flag states of the two units operating in the area, could be deemed co-responsible for the violation of their duty to render assistance, each for its own wrongdoing.

The flag states remain responsible, or co-responsible, also in the context of bilateral cooperation. The above mentioned *Hirsi* case[71] concerned push-back operations performed on the basis of the Treaty of Friendship between Italy and Libya.[72] In case of a failure of the duty to render assistance in the area covered by the joint operation, both states, in their capacity either as a flag state of the involved units or as coastal state, could be considered responsible for violating their obligation and, eventually, also the right to life of the victims.

At the EU level, maritime activities involving security and police activities still fall within the field of shared/parallel competences. In particular, the role of the EU in SAR activities is

[67] Ibid.
[68] See Chapter 25 in this volume, M. Zwanenburg, 'North Atlantic Treaty Organization-led Operations', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), ___.
[69] M. Tondini, 'The "Italian Job": How to Make International Organisations Compliant with Human Rights and Accountable for their Violation by Targeting Member States', in J. Wouters et al., *Accountability for Human Rights Violations by International Organizations* (Antwerp: Intersentia, 2010), 169, 180 ff.
[70] D. Sarroshi, 'International Organizations and States Responsibility', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden: Brill, 2013), 79, 80.
[71] See n. 43.
[72] See n. 45.

problematic, as the EU is not a member of the IMO and thus is not party to the relevant conventions. Even if the SAR activities are meant to be included in the Integrated Maritime Policy[73] and, in a certain manner, to be coordinated at the EU level, the existing institutional framework does not allow for such a development.[74] However, the EU is party to the LOSC and consequently would have to comply with the duty to render assistance set out in Article 98. Actually, this obligation falls on flag states and a unified 'EU flag' does not yet exist. However, the EU has shared competences in the field of transport,[75] and has shown interest in the safety of navigation. Aware that 'in most … States, each sectoral policy is pursued by its own administration',[76] the EU has created and managed different fora where stakeholders can exchange information and organise cooperation; one of these is the European Agency for the Management of the Operative Cooperation at the External Borders of the Member States of the European Union ('Frontex').[77]

Frontex is a regulatory agency[78] in charge of operational activities. It has been established with a view to improving the integrated management of the external borders of the EU member states (Article 1(1) Frontex Regulation).[79] As all European agencies, in order to achieve its tasks, Frontex has legal personality (Article 15). It can perform all acts legal persons are allowed to by member states and may cooperate with international organisations in the framework of working arrangements concluded with those bodies (Article 13). Frontex can also conclude working arrangements with authorities of third countries (Article 14).[80] These arrangements are the legal and technical basis for carrying out joint operations (JOs) under the Frontex umbrella.

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[73] Commission (EC), 'Towards the integration of maritime surveillance: A common information sharing environment for the EU maritime domain', (Communication) COM(2009) 538 final, 15 October 2009.

[74] See Trevisanut, 'Search and Rescue Operations', n. 16, 535-536.

[75] Title VI Treaty on the Functioning of the European Union, see consolidated version, (2012) OJ C 326/47 (TFEU).

[76] Commission (EC), 'Towards an Integrated Maritime Policy for a better governance of the Mediterranean', COM(2009) 466 final, 11 September 2009, at 3.

[77] See n. 7.

[78] A regulatory agency is set out in its own legal basis (its own sectoral regulation) and has a specific role assigned. Regulatory agencies are also called 'traditional agencies', because of their long standing, or 'decentralised agencies', because they spread across Europe. See Commission (EC), 'European agencies – The way forward', COM(2008) 135 final, 11 March 2008, at 3-4, 7.

[79] See n. 7.

[80] As of June 2012, Frontex had concluded working arrangements with the authorities of 17 states: the Russian Federation, Ukraine, Croatia, Moldova, Georgia, the Former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia and Turkey, as well as with the CIS Border Troop Commanders Council and the MARRI Regional Centre in the Western Balkans; information available at www.frontex.europa.eu.

Pursuant to Article 3 of the Frontex Regulation, Frontex 'shall evaluate, approve and coordinate proposals for joint operations and pilot projects made by Member States. The Frontex may itself, and in agreement with the Member State(s) concerned, launch initiatives for joint operations and pilot projects in cooperation with Member States'. The assistance of the Agency may also be requested by 'one or more Member States confronted with circumstances requiring increased technical and operational assistance when implementing their obligations with regard to control and surveillance of external borders' (Article 8 Frontex Regulation). Frontex has a staff of experts and technical equipment that are put at the disposal of member states in order to execute the different programmes (Article 3(3) Frontex Regulation). The patrols (i.e. the military/police staff), the vehicles, aircrafts, and vessels implied in the operational dimension of the programmes are made available by participating states on a voluntary basis and continue to be submitted to the jurisdiction of national states.[81] While involved in the operations, the staff, both of the Agency and of the participating member states, is also subject to the national law of the member state on which territory the operation is taking place (Article 10 Frontex Regulation).

Moreover, Article 1.2 of the 2011 amendments[82] clearly states that 'the responsibility for the control and surveillance of external borders lies with the Member States' and, in the context of operations coordinated by Frontex, the 'home Member State shall provide for appropriate disciplinary or other measures in accordance with its national law in case of violations of fundamental rights or international protection obligations' (Article 3.1a). The fact that the member state hosting the operation exercises its disciplinary jurisdiction does preclude the international responsibility of national states for the wrongdoings of their officials, perpetrated in the framework of Frontex JOs.

In this regard, Article 3a.1(a) of the 2011 amendments provides that '[the operational plan of a JO shall include] a description of the situation, with *modus operandi and objectives* of the deployment, including the operation aim' (emphasis added). Moreover, the operational plan shall also include information concerning 'command and control provisions, including the names and ranks of the host Member State's border guards responsible for cooperating with the guest officers and the Agency' (Article 3a.1(f) of the 2011 amendments); and 'regarding sea operations, specific information on the application of the relevant jurisdiction and legislation in

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[81] As mentioned above, there does not exist any EU flag or EU register for aircrafts and vessels. Consequently, flag EU member states continue to exercise their exclusive jurisdiction under international law over the crafts involved in Frontex JOs.

[82] European Parliament and Council Regulation 1168/2011, (2011) OJ L 304/1.

the geographical area where the joint operation or pilot project takes place, including references to international and Union law regarding interception, rescue at sea and disembarkation' (Article 3a.1(j) of the 2011 amendments). The same obligation also applies in the context of rapid interventions at sea (Article 8e.1(b)(j) of the 2011 amendments). It then clearly appears that member states bear the responsibility, individually and/or jointly, for any wrongful act perpetrated during a Frontex JO. The responsibility of states can be precluded by the operational plan of the specific operation if the operational plan provides that the home member state exclusively commands and controls all the activities, if the officials of the participating member states are placed at the disposal of the home state.[83] Such a hypothesis would however defeat the burden-sharing rationale of the EU external border policy and, in the opinion of the author, is unlikely to happen.

4. Ascertaining shared responsibility in search and rescue operations at sea

After having identified the recipient of the obligation in the different factual contexts, and highlighted how potential violations could generate the shared responsibility of the multiple actors, it is important to determine now which international body (judicial or not) is competent to ascertain the responsibility of the actors involved.

So far, no international judicial body competent to hear a case on the application and interpretation of the LOSC and related obligations, pursuant to Part XV LOSC,[84] has dealt with cases concerning alleged violations in the context of SAR operations. As mentioned before, in the context of SAR agreements, one of the parties could act against the other in case of a failure to perform, or mismanagement of the SAR services. The flag state of the involved merchant ship could also have a legitimate interest in acting against the parties to the SAR agreement, if the mismanagement of the SAR operation by those parties resulted in a violation

[83] Article 6 ARSIWA, n. 55: 'The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.'

[84] On the settlement of disputes under Part XV LOSC, see inter alia R. Churchill, 'Trends in Dispute Settlement in the Law of the Sea: Towards the Increasing Availability of Compulsory Means', in D. French et al. (eds.) *International Law and Dispute Settlement: New Problems and Techniques* (Oxford: Hart, 2010), 143; I. Karaman, *Dispute Resolution in the Law of the Sea* (Leiden: Nijhoff, 2012); N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005).

of its rights under the LOSC, such as the freedom of navigation of the vessel flying its flag or its right of innocent passage.[85]

Instances of shared responsibility are however more likely to be brought before human rights treaty bodies/courts, if we accept the above argued humanitarian nature of the duty to render assistance, and the existence of an individual right to be rescued, an individual right to survival. In the already analysed *Hirsi* case,[86] the ECtHR has ascertained the responsibility of Italian authorities for the modalities in which they performed their SAR operation and for the consequences on the applicants' fundamental rights. In the specific case, the Italian authorities acted alone in the framework of a bilateral treaty of cooperation with Libya. It is interesting to transpose the reasoning of the Court to multi-actors instances, such as joint patrolling under the control of an international organisation, e.g. the above reported loss of 61 lives in May 2011 off the coasts of Libya.

The survivors of this tragedy could bring a claim for violations of their right to life, resulting from the failure to render assistance, perpetrated by the flag states whose vessels were patrolling or navigating in the relevant area. The ECtHR would then be competent to hear the claims against Italy and Spain, and eventually against the flag states of the two reported fishing vessels if they were party to the ECHR.

At the EU level, the European Court of Justice (Court of Justice) has been empowered by the Treaty of Lisbon to review the legality of acts of bodies, offices and agencies of the Union intended to produce legal effects vis-à-vis third parties (Article 263 TFEU).[87] For the time being, Frontex's structure and powers do not imply any competence for adopting acts producing direct legal effects vis-à-vis third parties.[88] However, Article 263 TFEU does not specify if the legal effect has to be direct or indirect. According to certain commentators, this could mean that agencies like Frontex will not be exculpated from claims against their legal acts for, or in the name of, the EU.[89] But Article 276 TFEU restricts the jurisdiction of the Court of Justice 'to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities

[85] See Section 3 of Part II LOSC, n. 2.
[86] See n. 43.
[87] See n. 75.
[88] Frontex consists in a so called regulatory agency with operational tasks. For the notion of 'regulatory agency', see n. 78.
[89] A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operation at Sea', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial immigration control: legal challenges* (Leiden: Nijhoff, 2010) 229, 237; Fischer-Lescano, Löhr, and Tohidipur, 'Border Control at Sea', n. 27, 295.

incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. Moreover, according to Article 10(1) of Protocol No. 36 on Transitional Provisions attached to the Lisbon Treaty, during a transitional period of five years from its entry into force, the competences of the European Commission and the Court of Justice concerning the enactment and interpretation of legal acts on police cooperation shall remain the same as before.[90] The combined reading of these provisions suggests that Frontex operations would not be subject to any judicial review for quite some time. Moreover, the direct or indirect effect of Frontex acts, in particular of JOs' operational plans, still need to be assessed.

5. Concluding remarks

States cooperate in order to manage and perform SAR services, to share the related costs and responsibilities. The existing ambiguities concerning the content of the duty to render assistance create a veil, which blurs the ascertainment of violations and their attribution to the bearer of the obligation. For the time being, the existing disagreements concerning the interpretation of the relevant instruments are unlikely to be settled in the context of inter-state disputes, as debates are still on-going in the IMO framework. States have moreover shown to overcome their interpretative disagreements when they need to justify common failures, perpetrated in joint operations.[91]

This inter-state solidarity in the mischief might fall apart through the application of shared responsibility principles in multiple-actors situations. As mentioned above, these principles ought to produce effects in the ascertainment of human rights violations perpetrated during SAR operations. It is however doubtful that they may have the same impact concerning violations of law of the sea obligations. It is unlikely that states trigger one of the dispute settlement mechanisms under Part XV LOSC in relation to wrongful acts perpetrated in the context of SAR services. To discuss and highlight the possible application of shared responsibility principles is anyway an important step towards promoting and (hopefully) guaranteeing more 'adequate and effective' SAR services.

[90] Protocol No. 36 on Transitional Provisions attached to the Lisbon Treaty, (2012) OJ C 326/322. For a comment, see S. Carrera, *Towards a Common European Border Service?*, CEPS Working Document, No. 331, June 2010, at 12.

[91] See the above mentioned case (section 3) concerning the Libyan migrants who died in May 2011 of the coasts of Libya, in an area, which was at that time patrolled by NATO forces.