Is there a duty to rescue refugees and migrants in distress at sea? Where shall survivors be taken? Can they be returned to the state from which they sailed? What are the rights and obligations of states under international law? Do human rights apply at sea?

Following recent amendments, international maritime rescue law requires that everyone rescued at sea be disembarked and delivered to a place of safety. However, 'place of safety' is not clearly defined. This thesis examines the meaning of the concept of 'place of safety' against the background that many of those rescued at sea are refugees and migrants. Drawing on an explorative survey of the international legal framework for irregular maritime migration covering norms under the international law of the sea, international refugee law, international human rights law and international law against transnational organised crime and on a dedicated discussion of the applicable standard of interpretation, this thesis argues that the meaning of the concept of 'place of safety' is broader than it first may seem.
International Law and the Rescue of Refugees at Sea
Martin Ratcovich

Abstract
International law provides a duty to rescue everyone in distress at sea. Rescue at sea often entails recovering survivors and bringing them on board ships or other rescue units. While their subsequent delivery and disembarkation may not always be controversial, they frequently are if those assisted are refugees and migrants. Coastal states are especially likely to be reluctant to accept disembarkation within their territories if the distress situation and rescue operation occurred in the course of attempts to enter the coastal state in a clandestine or otherwise irregular way. The controversial but unavoidable question in such situations is where refugees and migrants rescued at sea shall be brought for disembarkation.

Until recently, international law was strikingly silent in this regard. However, following amendments to the two main treaties on maritime search and rescue — the International Convention for the Safety of Life at Sea and the International Convention on Maritime Search and Rescue — international maritime rescue law now requires that everyone rescued at sea be delivered to a 'place of safety'. The responsibility to provide such a place or to ensure that it is provided lies with the state party responsible for the search and rescue region in which the survivors were recovered. However, 'place of safety' is not defined in these or any other treaty. Instead, the application is guided by a set of guidelines from the International Maritime Organization (IMO). However, the guidelines are not legally binding and many questions remain unanswered.

This thesis examines the meaning of the concept of 'place of safety' against the background that many of those rescued at sea are refugees and migrants. Using a legal perspective, it asks how the meaning of this concept can be understood in the wider context of international law. The emphasis on the legal context links to the applicable standard of interpretation, which requires the meaning to be determined with reference to not only the text but also the context and the object and purpose of the treaty.

Drawing on an explorative survey of the international legal framework for irregular maritime migration covering norms under the international law of the sea, international refugee law, international human rights law and international law against transnational organised crime and on a dedicated discussion of the applicable standard of interpretation, this thesis analyses the interpretation of the concept of 'place of safety'. In keeping with the general legal framework of the interpretation of treaties, it explains that this concept cannot be understood with reference to the law of the sea exclusively, as it imports norms from other areas of international law. Due to the contribution of these other norms, including some of a primarily humanitarian character such as those dealing with non-refoulement, right to life and non-discrimination, this thesis argues that the meaning of the concept is broader than it first may seem. To conclude, this thesis summarises a 'place of safety' as a location where not only the maritime safety but also the basic security of survivors is no longer threatened.

Keywords: law of the sea, maritime law, refugee law, human rights, migration, asylum, law enforcement, smuggling, refugees, migrants, boat people, rescue, non-refoulement, legal theory, interpretation of treaties, systemic integration.

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INTERNATIONAL LAW AND THE RESCUE OF REFUGEES AT SEA
Martin Ratcovicch
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Last, I would like to say some words to those warmest to my heart: my family, relatives and close friends. Not many of you have been engaged in my research. To be honest, most of you have not even had the time to read what I have written. Instead, you have insistently tried to frustrate the progress of my work by drawing my attention to other things. However, this is precisely why you have been so important to my work and why I want to thank you. Without you filling my life with love and everyday joy, I would simply not have been able to finish this thesis. Thank you.

Martin Ratcovich

Stockholm, June 2019
# Overview

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<td>African Charter on Human and Peoples’ Rights</td>
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<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<td>ARSIWA</td>
<td>Responsibility of States for Internationally Wrongful Acts</td>
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<td>CAT</td>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>CERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>Chicago Convention</td>
<td>Convention on International Civil Aviation</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<td>ECHR</td>
<td>Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>EU Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>EXCOM</td>
<td>Executive Committee of the High Commissioner’s Programme</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRMW</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families</td>
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<td>ILC</td>
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IMO  International Maritime Organization
IOM  International Organization for Migration
ITLOS  International Tribunal for the Law of the Sea
LNTS  League of Nations Treaty Series
Refugee Convention  Convention Relating to the Status of Refugees, as amended by Protocol Relating to the Status of Refugees
Salvage Convention  International Convention on Salvage
SAR  Search and rescue
SAR Convention  International Convention on Maritime Search and Rescue
SOLAS Convention  International Convention for the Safety of Life at Sea
TEU  Treaty on European Union
UDHR  Universal Declaration of Human Rights
UKTS  United Kingdom Treaty Series
UNHCR  Office of the United Nations High Commissioner for Refugees
UNODC  United Nations Office on Drugs and Crime
UNTOC  United Nations Convention against Transnational Organized Crime
UNTS  United Nations Treaty Series
VCLT  Vienna Convention on the Law of Treaties
WTO  World Trade Organization
1 Introduction

1.1 Background

Maritime migration is hardly a new phenomenon. Many have turned to the sea, whether in search of better life opportunities or protection from persecution or other threats to their lives, rights and security.\(^1\) However, seafaring is inherently adventurous and can be dangerous. Given that the primary interest of refugees and asylum seekers is to leave a place rather than to reach any particular one, it is not surprising that many sea-borne flights are undertaken by unsafe means, including overcrowded and unseaworthy vessels. This danger is compounded by the general lack of safe and regular routes for refugees and migrants.

The perilous nature of maritime migration is evident from the regular reports of refugees and migrants lost at sea. Although refugees and migrants have undertaken dangerous sea-crossings in almost all parts of the world, the situations in the Mediterranean Sea and the waters surrounding Australia have gained particular notoriety. More than 17,000 refugees and migrants were reported dead or missing in the Mediterranean Sea in 2014–2018.\(^2\) In the South Pacific, more than 2000 deaths associated with Australia’s borders were recorded in 2000–2018.\(^3\)

International law provides a duty to rescue everyone in distress at sea. This duty applies regardless of the nationality or status of the persons in distress or the circumstances in which they are found. Accordingly, there is no doubt that not only regular seafarers but also refugees and migrants are covered by this obligation. Maritime rescue operations usually entail recovering survivors and bringing them on board ships or other rescue units. Following recovery,

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\(^1\) Well-known examples include the Indo-Chinese exodus to neighbouring Southeast Asian states in the 1970s and 1980s, Haitians and Cubans trying to reach the United States in the 1980s, Albanians crossing the Adriatic Sea and the Strait of Otranto towards Italy in the 1990s and refugees and migrants from the Horn of Africa crossing the Gulf of Aden and the Red Sea for Yemen. For a historical account of the term ‘boat people’, see Irial Glynn, *Asylum Policy, Boat People and Political Discourse* (Palgrave Macmillian, 2016) 17–22.


\(^3\) Monash University, Border Crossing Observatory, *Australian Border Deaths Database* (Web Page) <https://arts.monash.edu/>.
problems can arise with the delivery and disembarkation of the survivors. There are many reasons that shipowners and others try to minimise the time on board of persons rescued at sea. Most ships are not designed, equipped and manned to provide shelter, medical care and other basic human needs to large groups of survivors. On board security can also be a concern.

While it is usually not very complicated to deliver and disembark crewmembers of merchant ships and other regular seafarers rescued at sea, coastal states are generally more reluctant if the survivors are refugees and migrants. Such reluctance is especially likely if the distress situation and the ensuing rescue operation occurred in the course of attempts to enter the territory of the coastal state in a clandestine or otherwise irregular way. The controversial but unavoidable question that arises is where refugees and migrants rescued at sea shall be brought for disembarkation.

Until recently, international law was strikingly silent in this regard. This gap was highlighted in the so-called Tampa affair. On 26 August 2001, the Norwegian container ship Tampa was asked by Australian rescue authorities to assist in the search and rescue operation for an Indonesian ship in the waters between Indonesia and the Australian territory Christmas Island. The Tampa found the ship in a sinking condition about 75 nautical miles off Christmas Island. After having recovered and taken on board some 430 persons — most of whom were asylum seekers from Afghanistan — the Tampa resumed its voyage with a plan to disembark the survivors along its route in Indonesia about 250 nautical miles to the north. However, the course was changed and set for Christmas Island in response to pressure from some of the survivors. This led Australian authorities to inform the master of the Tampa that the Australian territorial sea had been closed to the ship, that the course should be changed for Indonesia, and that failure to do so would lead to prosecution for people smuggling. After waiting a couple of days offshore Christmas Island, the health condition of some of the survivors began to deteriorate, and the Tampa issued a distress signal and headed towards Christmas Island. The ship was soon boarded by Australian special military forces who took command of the ship and brought it into port at Christmas Island. However, the recovered asylum seekers were not allowed to disembark since the Government of Australia refused to let any maritime migrants set foot on Australian soil. The stalemate was eventually resolved when the asylum seekers were transferred to an Australian warship that would

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4 It may be noted that the Tampa affair occurred shortly before the terrorist attacks on 11 September 2001 in the United States. This may help to explain the relatively scarce political attention afforded to it outside Australia. For a similar note, see Marie Jacobsson, *Folkrätten, havet och den enskilda människan* (Liber, 2009) 50–1.
take them to Papua New Guinea, where they would then be transported to Nauru and New Zealand for further processing of their asylum claims.5

1.2 Legal Problem

A consequence of the Tampa affair was the development and adoption of amendments to the main treaties establishing the international legal framework for maritime search and rescue: the International Convention for the Safety of Life at Sea,6 and the International Convention on Maritime Search and Rescue.7 The key purpose of these amendments is that everyone rescued at sea shall be ‘disembarked … and delivered to a place of safety’.8 The general character of the terms is a reflection of the legal complexities and different interests that tend to arise in situations when refugees and migrants are rescued at sea.9 Indeed, ‘place of safety’ is not defined in either the SOLAS Convention or the SAR Convention or any other treaty. Instead, the application is guided by a set of non-binding recommendations from the International Maritime Organization (IMO): Guidelines on the Treatment of


7 International Convention on Maritime Search and Rescue, opened for signature 1 November 1979, 1405 UNTS 97 (entered into force 22 June 1985) (‘SAR Convention’).

8 SAR Convention annex rule 3.1.9 (emphasis added); SOLAS Convention annex ch V reg 33(1-1) (emphasis added).

9 Relevant examples include the interests in assisting survivors of distress incidents while minimising inconvenience to assisting ships and allowing states to manage their borders. The travaux préparatoires are further discussed below Section 6.2.3 Supplementary Means of Interpretation.
Persons Rescued at Sea.\textsuperscript{10} However, the \textit{Guidelines} leave many questions unanswered and the interpretation varies in practice.

The persisting uncertainty is evident from the regular reports of \textit{Tampa}-like situations in which refugees and migrants rescued at sea are denied disembarkation. For example, in June 2018, Italy and Malta refused disembarkation of some 600 refugees and migrants rescued off the coast of Libya by the volunteer rescue ship \textit{Aquarius}. The decisions not to allow disembarkation left the ship circling in international waters off Italy and Malta for several days while the conditions on board became increasingly difficult. This led the Office of the United Nations High Commissioner for Refugees (UNHCR) and the European Commission to urge the concerned states to cooperate with a view towards disembarkation.\textsuperscript{11} However, the interior minister of Italy had recently vowed to adopt tough policies on migration and the stalemate could not be resolved until Spain volunteered to allow disembarkation at a Spanish port.\textsuperscript{12}

A couple of months later, in August 2018, Italy forcibly kept more than 130 refugees and migrants on board a docked Italian coast guard ship. The situation began when the group was recovered from an overcrowded vessel off the Italian island of Lampedusa in the middle of the Mediterranean Sea. Malta did not allow disembarkation in any Maltese port, and the ship headed for and docked in an Italian port on Sicily. However, Italy did not allow the survivors to leave the ship until other European states promised to admit them. The standoff lasted some ten days until the survivors disembarked at the Sicilian port and the Government of Italy announced that Albania, Ireland and the Italian church agreed to take them in.\textsuperscript{13}

Some months later, in December 2018, civil society organisations announced that they could not continue their rescue activities on board the \textit{Aquarius} in the Mediterranean Sea. The reason, according to the organisations, was a ‘sustained campaign … by [Italy] and backed by other European states to …


\textsuperscript{11} See, eg, Office of the United Nations High Commissioner for Refugees, ‘Bring Aquarius Passengers to Land, Deal with Wider Issues Later’ (Press Release, 11 June 2018); Dimitris Avramopoulos, European Commissioner for Migration and Home Affairs, ‘Remarks by Commissioner Avramopoulos on the Commission’s Proposal for the EU’s Future Funding for Borders and Migration’ (Speech, Strasbourg, 12 June 2018).


obstruct … assistance to vulnerable people’ including by denying access to
safe ports.\textsuperscript{14} The end of operations would, the organisations claimed, lead to
‘more deaths at sea’.\textsuperscript{15} Given that rescues by civil society organisations
accounted for more than 30\% of all persons rescued and taken to Italy in the
first half of 2018, that claim did not seem unfounded.\textsuperscript{16}

\subsection*{1.3 Aim}

This study considers the concept of ‘place of safety’ against the background
that many of those rescued at sea are refugees and migrants. The principal aim
is to examine the meaning of this concept by analysing its interpretation and
application in the wider context of international law. This aim is addressed by
means of the following research question:

How can the meaning of the concept of ‘place of safety’, as found in the
\textit{SOLAS Convention} and the \textit{SAR Convention}, be understood in the wider context
of international law?

The reference to ‘the wider context of international law’ is not meant to limit
the inquiry by designating any unconventional or especially innovative way
of interpreting the concept. Instead, it merely serves to emphasise the
importance of this context because of the applicable standard of
interpretation.\textsuperscript{17}

The aim is met in three steps. \textit{First}, the legal context of the concept of
‘place of safety’ is explored and arranged for the purposes of the interpretation
of the concept. The survey encompasses norms under the international law of
the sea, international refugee law, international human rights law and
international law against transnational organised crime. Although some parts
of the discussion are of broader concern, the exploration of the legal context
is a necessary step towards understanding the concept. \textit{Second}, the standard
of interpretation relevant to the concept is identified and described. Because
of the diversity of the applicable law, this step requires discussions of cross-
regime interpretation and systemic integration in international law. Naturally,
it also entails considerations of the general legal framework of the
interpretation of treaties. Although these are matters of wider implication, the
examination of the applicable standard of interpretation is essential for

\textsuperscript{14} Médecins Sans Frontières, ‘Aquarius Forced to End Operations as Europe Condemns People
to Drown’ (Press Release, 6 December 2018).
\textsuperscript{15} Ibid.
\textsuperscript{16} See, eg, \textit{Implementation of Resolution 2380 (2017): Report of the Secretary-General},
UN Doc S/2018/807 (31 August 2018) 1–2 [4].
\textsuperscript{17} See below Chapter 6 Standard of Interpretation for the Concept of ‘Place of Safety’.
grasping the meaning of the concept and so cannot be left aside. The third step entails the application of the standard of interpretation to the concept, including taking into account relevant parts of the wider context of international law. The presentation is illustrated and synthesised by descriptions and discussions of examples of some relevant cases and events.

1.4 Basic Theoretical Framework

The concept of ‘place of safety’ is a legal concept and so calls for legal analysis. Indeed, it is only through the use of legal method that the legal meaning of the concept can be accurately appreciated. This point of departure calls for some brief explanations.

The definition of law — what is law? — is a classic question of legal theory. It is also a question of concrete significance to most legal studies. As an object-oriented discipline, most methodological questions in legal studies depend on the definition of its study object: the law. Accordingly, a plethora of answers is only to be expected. Even so, it may seem superfluous or even extravagant to open an in-depth study of a specific legal problem with such a general question. A natural expectation is that those writing on law share an agreed understanding of such a basic matter, but this is unlikely to be true. The frequent absence of designated discussions of methodological questions in legal theses is certainly not the result of consensus or agreement that such questions are unimportant.18

1.4.1 Legal Positivism

The findings put forward in this thesis are underpinned by a common approach to law that can be broadly conceptualised as legal positivism.19 Accordingly, the law is understood as a set of norms (eg, rules, principles, standards, maxims) formulated and established (posited) by humans in a legal way.20


Norms, in turn, are understood as statements indicating how something ought to be, or ought to be done. The law is then something concerned with *ought* (norms) rather than *is* (facts). The law, consisting of *ought*-statements, can therefore not be verified or falsified by reference to empirical facts (*is*-statements). This dualism of *ought* and *is* links to what is popularly known as Hume’s law, that is, the basic claim that moral conclusions cannot be deduced from factual conclusions or, in other words, that *ought*-statements cannot be derived from *is*-statements.\(^{21}\)

Hans Kelsen’s ‘Pure Theory of Law’ is one of the most famous accounts of legal positivism.\(^{22}\) This theory describes law as a system of norms existing on different levels.\(^{23}\) Kelsen referred to the structure of law as a *Stufenbau*, that is, a hierarchical structure where the validity of norms on a lower level is set by norms on a higher level.\(^{24}\) The decisive criterion for the existence of law is then not the political rationale or the normative content of the norms, but the way in which they came about, that is, if they were created in a legal way.\(^{25}\)

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\(^{23}\) See, eg, Kelsen, *Pure Theory of Law*, above n 20, 221: ‘The legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms’.

\(^{24}\) See, eg, ibid 223: ‘the legal order is a system of general and individual norms connected in such a way that the creation of each norm of this system is determined by another’. See also Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 123–7; Vinx, above n 22, 44: ‘the *Stufenbau* or hierarchical structure of legal order, a conception that emphasizes the genetic character of the validating relations between norms belonging to a legal system’ (emphasis in original); Spaak, above n 22, 402: ‘a structure of norms on different levels where norms on a higher level authorize the creation of norms on a lower level.’

\(^{25}\) See, eg, Kelsen, *Pure Theory of Law*, above n 20, 198: ‘A legal norm is not valid because it has a certain content … but because it is created in a certain way — ultimately in a way determined by a presupposed basic norm.’ See also Raz, above n 24, 150: ‘[Kelsen] identifies the validity of rules with their existence’; Vinx, above n 22, 30: ‘the validity of a legal norm, [Kelsen] claims, must be fully dissociated from any normative evaluation of the content of that norm’; Spaak, above n 22, 403: ‘[Kelsen] maintains … that the validity of a given legal norm can only be explained by reference to the validity of another and higher legal norm.’
Therefore, according to Kelsen, ‘any kind of content might be law’. Hence, the law should be studied in a way that involves neither moral nor empirical considerations. The chain of validity between norms goes on through the \textit{Stufenbau} in a continuing process until the ultimate norm: the basic norm (German: \textit{die Grundnorm}). Only norms that can be traced back to the basic norm qualify as legal norms: it is ‘the common source for the validity of all norms that belong to the same order — it is their common reason of validity.’ The natural question then is what establishes the basic norm. This is a question ultimately never answered by Kelsen. Instead, he merely described it as a ‘necessary presupposition.’ Although this non-answer clearly leaves a lot to ask, it should not be seen as a shortfall of explanatory power but rather as a logical expression of the view of the basic norm as a non-positive issue and the aim to free legal studies from other than legal questions. The idea is to

\begin{enumerate}
\item See, eg, ibid 1: ‘[The theory] only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis’. See also Raz, above n 22, 157–9; Vinx, above n 22, 30: ‘Theories of justice, or of the moral correctness of the content of law, [Kelsen] frequently suggests, are mere expressions of subjective interests’; Spaak, above n 22, 403; Tuori, above n 22, 8: ‘a strict line of demarcation is drawn … between the law and other normative orders, particularly morality.’
\item Kelsen, \textit{Pure Theory of Law}, above n 20, 8–9, 193–220. See also Raz, above n 22, 122–45; Vinx, above n 22, 39–45; Spaak, above n 22, 404.
\item Kelsen, \textit{Pure Theory of Law}, above n 20, 195.
\item In earlier works, Kelsen occasionally described the basic norm as a concept of international law. See, eg, Hans Kelsen, \textit{Pure Theory of Law}, tr Bonnie Litschewski Paulson and Stanley L Paulson (Clarendon, 1997) 108–9 [trans of: \textit{Reine Rechtslehre} (1st ed, 1934)]: ‘The basic norm of international law, then, and thus of state legal systems, too … must be a norm that establishes custom — the reciprocal behaviour of the states — as a law-creating material fact’ (emphasis added). Later, he took a less definitive view and referred to the basic norm as a necessary presupposition. See, eg, Kelsen, \textit{Pure Theory of Law}, above n 20, 194: ‘the search for the reason of a norm’s validity cannot go on indefinitely … It must end with a norm which, as the last and highest, is presupposed’ (emphasis added).
\item See, eg, Kelsen, \textit{Pure Theory of Law}, above n 20, 194–5: ‘It must be presupposed, because it cannot be “posited,” that is to say: created, by an authority whose competence would have to rest on a still higher norm’ (emphasis in original). See also Raz, above n 22, 126: ‘It must be a non-positive norm’; Vinx, above n 22, 40: ‘Kelsen argues that its objective validity must be assumed or presupposed’; Spaak, above n 22, 404: ‘[Kelsen] characterizes the basic norm as an epistemological device for conceiving of the legal materials as valid legal norms’ (emphasis in original).
\item See, eg, Kelsen, \textit{Pure Theory of Law}, above n 20, 1: ‘[the] aim is to free the science of law from alien elements.’ See also Raz, above n 22, 133: ‘With the aid of the … basic norm Kelsen claims he has established a value-free legal theory’; Spaak, above n 22, 405–6: ‘Kelsen concludes that the basic norm is best described as a genuine fiction … Kelsen’s aim … is to ground the normativity of the legal system, and … he can achieve this goal only by introducing a legal fiction, viz the basic norm’; Mauro Zamboni, \textit{The Policy of Law: A Legal Theoretical Framework} (PhD Thesis, Stockholm University, 2004) 42: ‘To Kelsen, the basic norm acts as a box upon which the entire legal system … is based … the value contents of the box are not
ground the normativity of law in a necessary presupposition, namely the idea that the original constitution is legally valid.\textsuperscript{33}

Kelsen’s Pure Theory is useful here because it helps make explicit a couple of basic assumptions underlying the study. The brief account given here is by no means intended as a comprehensive treatment of this theory or legal positivism in general. Rather, it merely seeks to draw attention to the specific scope of the study and the legal approach to the law. Meaningfully, this study does not purport to answer how the law relates to morality, justice or other normative orders or, in other terms, if and how the specific legal matter can be considered morally good or just or how the future law should be. Instead, it merely deals with legal aspects of existing law: the legal relationships and structure of a specific legal matter, namely the concept of ‘place of safety’. The social phenomena, empirical facts and political reasons on which this concept, like any portion of law, rely are accordingly beyond the scope.

Methodologically, this common approach to law corresponds to the legal-analytical character of the aim of the study: to consider a particular legal matter as it is. This approach also seems justified because of the practical significance of the aim and the plethora of political views surrounding it. While a more innovative and presumably broader approach encompassing other than legal factors could be intellectually stimulating and possibly useful to foster new ideas and perspectives, it would probably not be equally conducive to generating practically useful conclusions about the content of law that seem convincing to many. Moreover, even if it would generate such conclusions, a study based on such a more creative and unconventional approach would require more extensive and advanced explanations of the theoretical underpinnings, thus drawing attention away from the practical aim of the study.

By contrast, the chosen approach has the advantage of entailing a relatively clear basis for the identification of relevant material. This basis helps to limit the scope and thus leave room for an in-depth legal analysis of the subject matter of the study: the concept of ‘place of safety’. This specific focus permits the study to explore the legal meaning of this concept in a more relevant … That which is important to the legal actors is the presence of the box.’ But see Vinx, above n 22, 71–2: ‘Kelsen’s separation thesis does not … eliminate the link between legality and legitimacy. Rather, it tries to show that the link is … independent of assessments of the substantive moral quality of the content of the law in the light of meta-positive ideals of justice’.

\textsuperscript{33} See, eg, Vinx, above n 22, 44: ‘To presuppose a basic norm is to accept that the historically first constitution … has to be considered as objectively valid’. See also Raz, above n 22, 145: ‘There is … no legal sense of normativity, but there is a specifically legal way in which normativity can be considered. This is the core of Kelsen’s theory’; Spaak, above n 22, 407: ‘Kelsen was indeed concerned to account for the normativity of law in the strictly legal sense.’
detailed and legal-technical way than would otherwise be the case. The separation of law from morality and other normative orders, furthermore, seems particularly relevant given the many political, moral and other non-legal views surrounding the matter of study. This separation permits an analysis that is potentially relevant to many, irrespective of differing political or empirical conceptions of the relevant subject matter and irregular maritime migration in general. It also promotes the relevance of the study over time, notwithstanding possible shifts in such views.

1.4.2 Method and Material

This study deals with international law as understood in a classic sense as the body of legal norms that ‘governs relations between independent states.’

From a positivist viewpoint, international law consists of norms to which states have given their consent. Article 38(1) of the Statute of the International Court of Justice directs the International Court of Justice (ICJ), whose function is to decide disputes in accordance with international law, to apply:

- **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
- **international custom**, as evidence of a general practice accepted as law;
- the **general principles of law** recognized by civilised nations;
- **judicial decisions** and the **teachings** of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Even though decisions of the ICJ have ‘no binding force except between the parties’, this list is generally seen as an exhaustive restatement of the sources

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35 See, eg, SS ‘Lotus’ [1927] PCIJ (ser A) No 10, 18: ‘The rules of law binding upon states … emanate from their own free will’.

36 Emphasis added. See also below n 1093 and accompanying text.

37 Statute of the International Court of Justice art 59.
of international law. The sources are not listed in any given order and in practice they normally complement each other. However, if there is a clear conflict between norms fixed in different sources that requires a choice to be made between them, the reference to judicial decisions and teachings as ‘subsidiary means’ suggests that these are not actual sources of law, at least not in the same sense as the other sources, but rather aids or tools for determining the content of law. Although the Statute does not set any rigid hierarchy among the principal sources of law, it is clear that in practice international conventions and international custom are often more important than general principles of law. Furthermore, the capacity of states to modify their legal relations under international custom by concluding and entering into agreements suggests that international conventions and international custom are sources of equal authority, with the exception of jus cogens.

1.4.2.1 Treaties
Treaties have a central role in this study. Given that the principal aim concerns a specific feature of two treaties — the concept of ‘place of safety’ — treaty interpretation is an issue at the very heart of the analysis. The general legal framework governing such interpretation appears in the VCLT. Following the general rule of interpretation, as set out in article 31 of the VCLT, a ‘treaty shall be interpreted in good faith in accordance with the terms of the treaty in their context and in

38 See generally Oppenheim’s, above n 34, 24–5; Brownlie’s, above n 34, 21–3; Malanczuk, above n 34, 36; Hugh Thirlway, ‘The Sources of International Law’ in Malcolm D Evans (ed), International Law (Oxford University Press, 4th ed, 2014) 94–5; Aust, Handbook of International Law, above n 34, 5; Shaw, above n 34, 52; Klabbers, above n 34, 27–43; Bring, Mahmoudi and Wrange, above n 34, 27–33.
39 Statute of the International Court of Justice art 38(1)(d). Some refer to judicial decisions and legal writings as material sources (as opposed to formal sources), meaning sources that ‘provide evidence of the existence of rules which, when established, are binding and of general application’: Brownlie’s, above n 34, 20. See also Thirlway, above n 38, 105.
40 See, eg, Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 26, 43, 64 e contrario (‘VCLT’). See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14, 94 [176], in which the ICJ found that a particular portion of customary international law existed ‘alongside treaty law’ (emphasis added).
41 VCLT art 64: ‘If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’
42 Statute of the International Court of Justice art 38(1)(a) refers to ‘international conventions, whether general or particular, establishing rules expressly recognized by the contesting states’. This reference encompasses several types of international conventions, whether multilateral or bilateral. There is a shifting terminology for international conventions depending on their characteristics (agreements, protocols, etc). A broad term that covers most of the encompassed conventions is treaty. VCLT art 2(1)(a) defines a treaty as ‘an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’
the light of its object and purpose.’43 Supplementary means of interpretation may be used to confirm the meaning or to determine it if the general rule of interpretation leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.44

The general legal framework of the interpretation of treaties has a key role in the analysis of the concept of ‘place of safety’ and is therefore subject to special discussion as part of the examination of the standard of interpretation relevant to that concept in Chapter 6 Standard of Interpretation for the Concept of ‘Place of Safety’. While that chapter deals with the standard of interpretation specifically for the concept of ‘place of safety’, large parts of the discussion are relevant also to the interpretation of treaties in general. Therefore, to avoid repetition, it seems justified to simply refer here to the discussion included in that chapter.45

However, it also seems appropriate to note that the means of interpretation referred to in article 31(3)(c) of the VCLT — often called ‘systemic integration’ — is of particular importance to the concept of ‘place of safety’.46 This provision requires, ‘with deceptive simplicity’,47 the interpreter to take into account the wider context of international law or, more precisely, ‘any relevant rules of international law applicable in the relations between the parties’.48 This requirement has been referred to as an expression of the objective of ‘interpretation as integration in the system’ and the view that ‘treaties are a creation of the international legal system and their operation is predicated upon that fact’.49 Consequently, systemic integration has been seen as an instrument for dealing with complexities arising from the fragmentation of international law.50 In the present thesis, however, systemic integration is

43 VCLT art 31(1). See below Section 6.2.2 Primary Means of Interpretation.
44 VCLT art 32. See below Section 6.2.3 Supplementary Means of Interpretation.
45 See below Section 6.2 Rules of Interpretation.
48 VCLT art 31(3)(c).
50 The concern about fragmentation of international law can be summarised as ‘the rise of specialized rules and rule-systems that have no clear relationship to each other’. At an institutional level, the concern relates to the plurality of courts and other implementation organs, and the risk for conflicting jurisprudence and forum shopping. The substantive aspects relate to
relevant in a more concrete sense, namely because it requires parts of the wider context of international law to be taken into account in the interpretation of the concept of ‘place of safety’. The notion of systemic integration and a basic assumption that it seems to imply are subject to special discussion in Section 6.1 International Law as a Legal System.

1.4.2.2 Customary International Law

The next source of law listed in article 38(1)(b) of the *Statute of the International Court of Justice* is international custom. In international law, customary law designates ‘unwritten law deriving from practice accepted as law’.51 However, not all practices of states give rise to customary law;52 for a customary norm to evolve, the relevant state practice needs to meet certain requirements.53 For the present purposes, it suffices to note that the practice must be ‘extensive and virtually uniform’54 and accord with ‘constant and uniform usage’.55 However, the existence of general practice alone is not sufficient to give rise to customary international law. To separate customary law from mere usage, the *Statute* refers to ‘general practice accepted as law’.56

This qualification denotes the subjective element of customary international law, that is, the understanding by states that a certain custom is so established

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52 See, eg, ‘Draft Conclusions on Identification of Customary International Law’, *Report of the International Law Commission on the Work of Its Seventieth Session (30 April–1 June and 2 July–10 August 2018)*, UN Doc A/73/10, 119 conclusion 6.2 (‘ILC Draft Conclusions on Identification of Customary International Law’): ‘Forms of state practice include, but are not limited to: diplomatic acts …; conduct in connection with resolutions …; conduct in connection with treaties; executive conduct …; legislative and administrative acts; and decisions of national courts.’

53 See, eg, ibid conclusion 5: ‘State practice consists of conduct of the state, whether in the exercise of its executive, legislative, judicial or other functions.’

54 *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Merits)* [1969] ICJ Rep 3, 43 [74] (‘North Sea Continental Shelf’).

55 *Asylum (Colombia v Peru) (Judgment)* [1950] ICJ Rep 266, 277. See also *ILC Draft Conclusions on Identification of Customary International Law* conclusion 8: ‘The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.’

56 *Statute of the International Court of Justice* art 38(1)(b) (emphasis added). See also *ILC Draft Conclusions on Identification of Customary International Law* conclusion 9.1: ‘The requirement, as a constituent element of customary international law, that the general practice be accepted as law (opinio juris) means that the practice in question must be undertaken with a sense of legal right or obligation’ (emphasis added).
that it amounts to an international obligation (*opinio juris*).\(^{57}\) Accordingly, there are two constituent elements of customary international law: general practice and acceptance of that practice as law (*opinio juris*). Together, ‘they are the essential conditions for the existence of a rule of customary international law.’\(^{58}\)

Customary law is relevant to this study primarily as a complement to some of the treaties discussed. For example, the general legal framework of the interpretation of treaties set out in the *VCLT* is taken to reflect customary international law.\(^{59}\) Even though the concept of ‘place of safety’ may not itself reflect customary law, certain parts of its legal context are believed to. The general applicability of these parts is, for reasons further explained in Section 6.2 Rules of Interpretation, of key significance for their impact on the meaning of the relevant concept.

### 1.4.2.3 General Principles of Law

The reference to general principles of law or, more precisely, ‘the general principles of law recognized by civilised nations’\(^{60}\) was originally inserted in the *Statute of the Permanent Court of International Justice* as one of three principal sources of law to be applied by the predecessor of the ICJ: the Permanent Court of Justice (PCIJ).\(^{61}\) A central idea was that gaps in treaty law and customary international law could be filled through reference to general principles of municipal law.\(^{62}\) While general principles of law may still be important in some areas of international law,\(^{63}\) the significance of this source of law for this study seems small.\(^{64}\)

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\(^{57}\) *Opinio juris* is short for *opinio juris sive necessitates* (an opinion of law or necessity).


\(^{59}\) See below Section 6.2 Rules of Interpretation.

\(^{60}\) *Statute of the International Court of Justice* art 38(1)(c).

\(^{61}\) *Statute of the Permanent Court of International Justice* art 38(3).

\(^{62}\) For the historical development, see Marcelo Vázquez-Bermúdez, Special Rapporteur, *General Principles of Law* (Syllabus), UN Doc A/72/10 (1 May–2 June and 3 July–4 August 2017) annex A [2].


\(^{64}\) See, however, the discussion of a possible right to asylum in the form of a general principle of law below nn 598–603.
1.5 Previous Research

A fair number of articles, books and other scholarly texts have reflected upon the concept of ‘place of safety’. This is hardly surprising given the considerable political attention afforded, not least in Europe and Australia, to irregular maritime migration and rescue of refugees and migrants at sea.

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Also, many major works on the law of the sea include general descriptions of the legal framework for rescue at sea.69

However, most previous publications tend to deal with the concept of ‘place of safety’ in a relatively condensed way,70 often mainly in passing as part of more dedicated deliberations of broader issues such as international migration or maritime security.71 Not very many publications of similar length seem to have adopted a focus as equally specific albeit integrative as that of the present thesis, which approaches the concept of ‘place of safety’ as being enmeshed in the legal complexities surrounding irregular maritime migration. In doing so, this thesis is marked by its specific scope, technical character and attention to detail in the treatment of the relevant concept. As part of the analysis, some key issues of the legal framework for irregular maritime migration are also addressed. Notable examples include the obligations of states in relation to the interception and rescue of refugees and migrants at sea, including certain key concepts of international refugee law, human rights in relation to refugees and migrants at sea and international law against transnational organised crime as relevant to the rescue of refugees and migrants at sea.

Moreover, as an integral part of the legal analysis, this thesis pays special attention to the standard of interpretation relevant to the concept of ‘place of safety’. It thereby engages with broader issues including interpretation and the systemic nature of international law. While such matters are of natural


theoretical implication and thus have potential relevance to many, the meaning of the said concept remains the key focus. An explorative survey of the legal framework for irregular maritime migration guided by the specific focus on the concept of ‘place of safety’ is combined with dedicated considerations of the standard of interpretation specifically for the purposes of this concept, which will permit conclusions to be drawn about how this concept can be understood in the wider context of international law. In line with the principal aim of the study, the effort undertaken is not merely to list the various norms of international law that may require consideration in situations where refugees and migrants are rescued at sea. Rather, the study seeks to understand how these norms relate to and come together in the meaning of the concept of ‘place of safety’.

1.6 Limitations

At the centre of this study is the concept of ‘place of safety’, which is a feature of two international conventions of global scope. Accordingly, the perspective is mainly of global character with a focus on legal norms and concepts of global scope. Norms with a regional or otherwise limited geographical scope are considered only to the extent relevant for the analysis of those of global scope.

A more specific limitation concerns the law of naval warfare and international humanitarian law (jus in bello), that is, the area of international law that for humanitarian reasons seeks to limit the effects of armed conflict. While there are norms relevant to the treatment of persons in distress at sea in these bodies of law, this study does not consider them in any greater detail. This does not mean that the findings presented in this thesis are simply irrelevant to situations of armed conflicts. Rather, the norms specifically relevant to such situations are not dealt with in a comparatively extensive way as other norms.

Third, this study is not intended as a comprehensive treatment of the international law of the sea, international refugee law or any of the other principal areas of law dealt with. Although some of the issues considered are of broader implication, the concept of ‘place of safety’ remains the key focus.

Last, this study is based mainly on material available in English and, to some extent, French. It was completed, in substance, in December 2018, so it does not take into account later developments.

72 See above Section 1.3 Aim.
1.7 Outline of the Thesis

This thesis is arranged in two main parts and eight chapters. The present chapter provides an introduction and describes the basic design of the study. It explains what (legal problem, aim, limitations), why (background, previous research) and how (basic theoretical framework, outline of the thesis).

The body of the thesis comprises two main parts. The first of these (Part I Legal Framework for Rescue at Sea) considers the legal framework for the rescue of refugees and migrants at sea. It does so by identifying relevant norms and analysing the obligations resulting from them in situations involving the rescue of refugees and migrants at sea. The four chapters included in this part deal with the international law of the sea, international refugee law, international human rights law and international law against transnational organised crime. Accordingly, this part relates to the first of the three steps by which the principal aim is addressed. Consequently, it explores and arranges the legal context for the purposes of the interpretation of the concept of ‘place of safety’. This task calls for a relatively broad approach encompassing not only norms that actually contribute to the meaning of the relevant concept but also norms that have a reasonable potential of doing so. Otherwise, there would be a clear risk of overlooking possibly important aspects of the concept. The exploratory character of the survey, coupled with the diversity of the applicable law and the many intricacies of grasping the obligations resulting from it, account for most of Part I. However, it would be incorrect to view these chapters as merely preliminary and in that sense separate from the analysis of the concept of ‘place of safety’. Rather, the exploration of the legal context is an important step towards understanding the concept. However, due to its relatively broad scope and length and the fact that not all aspects of it may be equally significant to the ensuing interpretation of the relevant concept, it has been separated from the second main part of the thesis.

Relevant components of the first main part are recalled and considered in the second main part: Part II Interpretation of the Concept of ‘Place of Safety’. The first chapter of this part, Chapter 6 Standard of Interpretation for the Concept of ‘Place of Safety’, corresponds to the second of the three steps by which the principal aim is addressed and so seeks to identify and describe the standard of interpretation relevant to the concept of ‘place of safety’. The first part of this chapter contemplates the notion of systemic integration and a basic assumption that seems to underlie it: the idea of international law as a legal system. The chapter then moves on to consider the general legal framework of the interpretation of treaties. Even though both of these discussions deal

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73 See above Section 1.3 Aim.
with issues of essentially methodological character, they do so with a view specifically towards the standard of interpretation relevant to the concept in question. This explains why the examination of this particular standard is dealt with as part of the legal analysis and so logically appears in the body of the thesis. The alternative would have been to incorporate it with the presentation of the basic theoretical framework or earlier chapters of the thesis. However, because of the relatively narrow scope, technical character and function of the standard of interpretation, whereby only certain components of the legal context shall be reflected in the meaning of the concept being interpreted, the presentation benefits from being read dynamically and integrated with the legal analysis and in close proximity to the chapter devoted to the interpretation itself: Chapter 7 Meaning of the Concept of ‘Place of Safety’.

This chapter corresponds to the last of the three steps and so concerns the application of the standard of interpretation to the concept of ‘place of safety’. The structure of the chapter follows that of the general legal framework of the interpretation of treaties, as set out in the *VCLT*, and draws upon the findings presented in previous chapters as it considers the interpretation of the concept. The meaning of the concept is presented in a condensed manner towards the end of the chapter.

The last chapter, Chapter 8 General Conclusions, summarises some of the main findings and weaves them together in a broader perspective. It is noted that international law may not be wholly unrelated to the reasons for irregular maritime migration, that the concept of ‘place of safety’ is at the centre of the legal complexities surrounding such migration, that there is a duty to provide a place of safety, that the concept has broad meaning, that the standard of interpretation is evolving and that the complexity of the concept poses a risk to the safety of refugees and migrants at sea.

### 1.8 Terminology

The *concept of ‘place of safety’* is used as the central feature of the legal scheme for the disembarkation of persons rescued at sea established by the *SOLAS Convention* and the *SAR Convention*. It is the main multilateral legal concept designed to deal specifically with the delivery of persons rescued at sea. It appears in one provision of the *SOLAS Convention* and two provisions of the *SAR Convention*. For reasons to be further explained, the concept is dealt with as a single unit with the same meaning in both conventions. Unless otherwise indicated, the phrase ‘concept of “place of safety”’ is therefore short...
for ‘the concept of “place of safety” as found in the SOLAS Convention and the SAR Convention’.

*Ship* and *vessel* are used interchangeably and in a broad sense for any ship, vessel or floating craft irrespective of type and purpose. *Government ship* is used for ships owned or operated by a state and used only for non-commercial purposes. *Private ships* or *merchant ships* are used for other ships.

*Interception* is used as a broad term for practical measures taken by a state to stop, board and take command of a ship at sea.

*Migrants* is used for persons travelling to new places for more than temporary reasons. Accordingly, it covers both those who migrate voluntarily and those who have no alternative, such as refugees, asylum seekers and internally displaced persons. *Refugees* is used in its specific meaning under international refugee law. *Refugees and migrants* is used as an all-encompassing phrase for groups consisting of both refugees and other migrants. The explicit reference to refugees helps highlight the significance of refugee rights in such situations.

*Irregular maritime migration* is used for sea-borne migration that for some reason does not use ferry services or other regular transportation means and that takes place outside the regulatory norms of the destination state. *Irregular migrants* is used for those who use other than regular means for their migration. *Illegal entry* means ‘crossing borders without complying with the necessary requirements for legal entry into the receiving state’. The term *illegal migrants* is not used because no migrants are illegal by themselves.

*Systemic integration* is used for the means of interpretation provided for in article 31(3)(c) of the VCLT, whereby a treaty is interpreted in the wider context of international law. *Legal regime* is used for a set of legal norms that interrelate in such a way that they cannot properly be understood without reference to other norms of the same regime.

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78 See below Chapter 6 Standard of Interpretation for the Concept of ‘Place of Safety’.
Finally, a short note on the scholarly apparatus. Citations and bibliography are based on the *Australian Guide to Legal Citation*.

Any errors or omissions remain, of course, the author’s own.

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PART I

LEGAL FRAMEWORK FOR RESCUE AT SEA
Irregular maritime migration is a matter intersecting several areas of international law. Relevant and applicable norms exist under, inter alia, the international law of the sea, international refugee law and international human rights law. Depending on the characteristics of the case, other areas, such as international law against transnational organised crime, may also be relevant and require consideration.

The intersectional character of the matter calls for an open-minded approach but the international law of the sea represents a natural starting point. The encompassing nature of the modern law of the sea means that any responses to irregular migration taken at sea need to be consistent with it. Informed discussions about irregular maritime migration therefore implicate an at least basic understanding of the law of the sea.

In view of both the heterogeneous nature of the applicable law and the need for an integrative approach, it is difficult to prevent questions relating to the international law of the sea from arising throughout this thesis. Accordingly, the aim here is not to provide an all-encompassing treatment of the law of the sea but rather a basic presentation for the purposes of the concept of ‘place of safety’. Such a presentation is related to the first of the three steps through which the principal aim of the study is addressed, that is, exploring and arranging the legal context for the purposes of interpreting the relevant concept. The presentation is interwoven with an analysis of some key issues in the context of irregular maritime migration.

This chapter has two main parts. The first (Section 2.1 Introduction) introduces the area and pays special attention to a couple of main characteristics. The second consists of sub-chapters dealing with two issues of particular importance to irregular maritime migration:
- jurisdiction over ships
- international maritime rescue law

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80 See above Sections 1.3 Aim, 1.7 Outline of the Thesis.
While the first sub-chapter (Section 2.2 Jurisdiction over Ships) considers where, when and how states may exercise authority over ships used for irregular migration at sea, the second (Section 2.3 International Maritime Rescue Law) deals with the international legal framework for rescue at sea. The last sub-chapter recalls and highlights some main points (Section 2.4 Summary).

2.1 Introduction

The international law of the sea designates the branch of international law concerned with the rights and obligations of states in maritime matters. It addresses the determination and status of maritime areas and the regulation of human activities in the marine environment or, using another term, maritime activities. It is different from private maritime law, which mainly consists of national law concerning the relationships between private entities and corporate bodies as regards maritime activities, such as the carriage of goods at sea (shipping), marine insurance and the responsibility of shipowners and other persons. However, many aspects of private maritime law are implemented in national law because of international conventions and other instruments of international law. Some matters regulated by the law of the sea are in this way regulated also by private maritime law. However, even in such cases of overlap, the terms remain mostly distinct: whereas maritime law mainly concerns the rights and obligations of shipowners and other private entities, the law of the sea is part of international law and so concerns the rights and obligations of states and other subjects of international law.

2.1.1 Development

Similar to other classic branches of international law, the law of the sea is the result of historical processes of relations between states. The law of the sea

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82 Two relevant examples are the registration of ships and, notably, rescue at sea. See below Section 2.3 International Maritime Rescue Law.


84 See, eg, O’Connell, above n 69, 29: ‘the history of international law is the history of the law of the sea and vice versa, for the intellectual character of international law, its techniques, and its philosophy, have been largely determined by the accommodations reached among nations respecting the use of the sea’; Treves, ‘Law of the Sea’, above n 81, para 7: ‘The basic engine for the development of the law of the sea has been and still is the interests of states’.
has, furthermore, been said to be ‘as old as international law itself’.\(^8^5\) Accordingly, a basic knowledge of the historical background is usually considered helpful when discussing the law of the sea.\(^8^6\)

Jurists have long been engaged in matters relating to the sea. The Roman emperor Antoninus Pius is even believed to have said: ‘I am the master of the world, but custom [the law] is the master of the sea’.\(^8^7\) In such early times, the sea was invaluable for the effective transportation of goods and people as well as a source of resources. The typical interests of seafaring powers in free uses of the sea were likely in conflict with the typical interest of coastal peoples in protection from maritime invasions.\(^8^8\) Such conflicts of interests, together with a shortage of structural stability in the form of legal regulation, likely meant that the political positions changed rapidly depending on the prevailing interest at the time.\(^8^9\)

In the Middle-Ages, several European powers claimed exclusive jurisdiction over large maritime areas outside their coasts. Meanwhile, important maritime trade routes were established with distant nations. These developments naturally gave rise to conflicts. In 1609, a text by the influential jurist Hugo Grotius titled *Mare Liberum* was published. ‘[O]ccasioned by the

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\(^8^6\) See, eg, Andree Kirchner, ‘History of the Law of the Sea’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2007) para 1: ‘In order to understand the law of the sea, it is of fundamental importance to understand the roots and motives of the law of the sea.’


\(^8^8\) See, eg, Hugo Caminos, ‘Sources of the Law of the Sea’ in René-Jean Dupuy and Daniel Vignes (eds), *A Handbook on the New Law of the Sea* (Martinus Nijhoff, 1991) 29, 62: ‘Since time immemorial, mankind has viewed the sea with ambivalence, characterizing it as, at once, attractive and repellent, generous while vengeful, a protector potentially hostis’ (emphasis in original). See also Ruth Lapidoth, ‘Freedom of Navigation — Its Legal History and Its Normative Basis’ (1975) 6(2) *Journal of Maritime Law and Commerce* 259, 261: ‘It is generally acknowledged that during Antiquity and in the first half of the Middle Ages the high sea was open for navigation to everybody.’

\(^8^9\) See, eg, Philippe Vincent, *Droit de la Mer* (Larcier, 2008) 18.
defence of the Dutch East Indian Company’, Grotius compared the sea to the air, which could not be subject to occupation, and argued for the freedom of the seas:

The air … is not susceptible of occupation; and … its common use is destined for all men. For the same reasons the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.

Grotius’s text provoked a number of responses, notably by the Englishman John Selden, who in 1635 published *Mare Clausum*. Selden defended the claims of Britain over the North Sea and large parts of the Atlantic. However, the notion of freedom of the seas gained popularity rather rapidly. This idea corresponded well with the interests of maritime powers, including Britain, which valued freedom of commerce more than absolute maritime control. Yet, freedom of the seas was never absolute. Many coastal states had a strong interest in maintaining the ability to protect themselves from surprise naval invasions. This interest was particularly discernible in the course of the many European wars in the 17th and 18th centuries, during which several European
powers found it vital to secure sovereignty over a maritime belt around their coasts.96

While the modern law of the sea is closely linked to the UNCLOS, the law of the sea was for a long time mainly customary.97 While the customary form of the law relieved states from entering into complex treaty negotiations, the uncertain nature of such law also made it increasingly difficult to apply. Against the background of such difficulties, and the emergence of a certain degree of stability in the relevant customary law at the beginning of the 20th century, the idea of codifying the law of the sea was established.98

There have been at least four serious attempts to codify the law of the sea. The first had its background in the League of Nations. However, the Conference for the Codification of International Law, held in The Hague in 1930, was unable to adopt any convention on the main issue of the territorial sea, mainly because of disagreements as to its breadth.99 The International Law Commission (ILC) was more successful in its codifying efforts. At its first session, in 1949, the Commission selected the regime of the high seas and the regime of the territorial sea as topics for codification.100 Seven years later, it included in its report to the General Assembly of the United Nations some seventy draft articles concerning the law of the sea101 to constitute ‘a single co-ordinated and systematic body of rules’.102

Convened ‘to examine the law of the sea … and to embody the results of its work in one or more international conventions’,103 on the basis of the report by

96 See, eg, Kirchner, above n 86, para 15. See also Treves, ‘Historical Development of the Law of the Sea’, above n 85, 4–5.
the Commission, the first United Nations Conference on the Law of the Sea met in Geneva in 1958.\textsuperscript{104} It agreed to lay down the draft articles, some in amended form, in four conventions: the \textit{Convention on the Territorial Sea and the Contiguous Zone},\textsuperscript{105} the \textit{Convention on the High Seas},\textsuperscript{106} the \textit{Convention on Fishing and Conservation of the Living Resources of the High Seas},\textsuperscript{107} and the \textit{Convention on the Continental Shelf}.\textsuperscript{108} However, the question about the breadth of the territorial sea remained controversial and shortly after the conclusion of the conventions the General Assembly called for a second conference to consider ‘further the questions of the breadth of the territorial sea and fishery limits’.\textsuperscript{109}

The Second United Nations Conference on the Law of the Sea, held in 1960, adopted two resolutions but did not take any substantive decisions on the questions of the breadth of the territorial sea and fishery limits.\textsuperscript{110} Accordingly, following the work of a couple of preparatory committees, the General Assembly called, in 1970, for a third conference to deal with the establishment of an equitable international régime … for the area and the resources of the sea-bed … and a broad range of related issues including … the regimes of the high seas, the continental shelf, the territorial sea … and contiguous zone, fishing and conservation of the living resources of the high seas …, the preservation of the marine environment … and scientific research.\textsuperscript{111}

\textsuperscript{104} Ibid para 9: ‘Refers to the conference the report of the [ILC] as \textit{the basis for its consideration}’ (emphasis added).

\textsuperscript{105} \textit{Convention on the Territorial Sea and the Contiguous Zone}, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964) (‘\textit{Convention on the Territorial Sea and the Contiguous Zone}’).


\textsuperscript{108} \textit{Convention on the Continental Shelf}, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964) (‘\textit{Convention on the Continental Shelf}’).


Compared to the earlier conferences, the Third United Nations Conference on the Law of the Sea, convened for the first time in 1973, was more representative, pragmatic and innovative.\(^\text{112}\) It was also more successful and, after eleven sessions, adopted the \textit{UNCLOS} in 1982.

The \textit{UNCLOS} has the character of a framework convention that seeks to regulate ‘all issues relating to the law of the sea’.\(^\text{113}\) Consequently, it has been referred to as a ‘constitution of the oceans’.\(^\text{114}\) The \textit{Convention} comprises nine annexes and 320 articles, some of which are based on the four conventions from 1958. The \textit{Convention} remained open for signature for two years after its adoption and during that time was signed by nearly 160 states. Significant non-signatories include the United Kingdom, Germany and the United States, which were particularly opposed to the regulation of the deep sea-bed.\(^\text{115}\) The sixtieth ratification was deposited on 16 November 1993, which allowed the \textit{Convention} to enter into force on 16 November 1994.\(^\text{116}\) However, entry into force without the adherence of several major maritime and industrial powers was not considered feasible. Accordingly, in anticipation of the entry into force an agreement was adopted that modified the provisions on deep sea-bed mining and opened the door for ratification by more states.\(^\text{117}\)


\(^{113}\) \textit{UNCLOS} Preamble para 1 (emphasis added). See also the recurrent references to the \textit{Convention} as a framework, notably in the annual resolution on oceans and the law of the sea: eg, \textit{Oceans and the Law of the Sea}, GA Res 73/124, UN Doc A/RES/73/124 (31 December 2018, adopted 11 December 2018) Preamble para 6 (‘\textit{Omnibus Resolution on the Oceans and the Law of the Sea}’): ‘Emphasizing the universal and unified character of the \textit{Convention}, and reaffirming that the \textit{Convention} sets out the legal framework within which all activities in the oceans and seas must be carried out’ (emphasis added).


\(^{115}\) For a comprehensive study of the nature and development of this regulation, see Mahmoudi, \textit{The Law of Deep Sea-Bed Mining}, above n 112.

\(^{116}\) \textit{UNCLOS} art 308: ‘This \textit{Convention} shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession’.

The *UNCLOS* entered into force in 1994 and has, as of December 2018, 168 parties, including the EU,\(^{118}\) and, since 2015, Palestine.\(^{119}\) Notable non-parties include the Democratic People’s Republic of Korea, Iran, Israel, Libya, Turkey, the United States and Venezuela as well as some land-locked states such as Burundi, Liechtenstein and Rwanda.\(^{120}\) However, it is widely accepted that many provisions of the *Convention* carry the force of customary international law.\(^{121}\)

### 2.1.2 Special Features

The international law of the sea is characterised by a number of features. First, the modern international law of the sea is closely linked to the *UNCLOS*. Reflecting the objectives to ‘settle all issues relating to the law of the sea’ and to establish a ‘legal order for the seas and the oceans’,\(^{122}\) the ‘universal and unified character’\(^{123}\) of the *Convention* makes the law of the sea relatively resistant to normative developments beyond the framework established by the *Convention*.\(^{124}\) Second, the *Convention* is basically closed to amendments.\(^{125}\) Relatedly, it also has a ‘strong degree of pre-eminence over other treaties by

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118 The possibility for international organisations to sign, formally confirm and accede to the *Convention* is provided for in *UNCLOS* arts 305–7, annex IX.


120 Ibid.

121 See, eg, *Oceans and the Law of the Sea*, GA Res 72/73, UN Doc A/RES/72/73 (4 January 2018, adopted 5 December 2017) Preamble para 5: ‘the *Convention* sets out the legal framework within which all activities in the oceans and seas must be carried out’ (emphasis added). Among the supporters of the resolution was the United States that stated that ‘it was pleased to be a sponsor of [it]’: UN GAOR, 72nd sess, 64th plen mtg, UN Doc A/72/PV.64 (5 December 2017) 3. See also Treves, ‘Law of the Sea’, above n 81, para 59: ‘there is a presumption that the provisions of the *Convention* correspond to customary law’; Robin R Churchill, ‘The 1982 United Nations Convention on the Law of the Sea’ in Donald R Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 24, 37: ‘It is certainly true that many provisions of the [*UNCLOS*] have [customary] character … However, some parts … are simply not of a nature that can pass into customary law’.

122 *UNCLOS* Preamble paras 1, 4 (emphasis added).


124 See also ibid: ‘reaffirming that the *Convention* sets out the legal framework within which all activities in the oceans and seas must be carried out … and that its integrity needs to be maintained’ (emphasis added).

125 The amendment procedure is set out in *UNCLOS* arts 312–16, the essence of which is unanimous consent by all parties.
virtue of its integral status’. Third, the Convention consists of an integrated network of rules and principles, making it challenging to regulate specific issues without distorting the overall balance of interests under the Convention. As a result, changing the international law of the sea is inherently difficult. Yet, there is no doubt that the Convention is part of international law and as such is open for development through general mechanisms for the dynamic development of international law, including interpretation in the light of developments in international law.

2.2 Jurisdiction over Ships

A main problem for states as regards the sea has historically been the competing interests of other states. When one group of states has favoured free navigation, others have promoted protection from naval invasion. When some states have sought to reserve their coastal waters for fishing by their own populations, others have tried to exploit the same stocks by fishing further out at sea. Accordingly, a main interest of states in the international law of the sea has been to strike a balance between competing interests in the sea. This interest in the juridification of maritime power is explicitly reflected in the objective of the UNCLOS to establish a ‘legal order for the seas and oceans’.

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126 Boyle, above n 113. See also UNCLOS art 311(3): ‘States parties may conclude agreements … provided … that such agreements shall not affect the application of the basic principles embodied herein, and … do not affect the enjoyment by other states parties of their rights or the performance of their obligations under this Convention.’

127 A recent example concerns the delicate balance between, on the one hand, maintaining the integrity of the UNCLOS and, on the other hand, developing a new legally binding instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: see, eg, International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, GA Res 72/249, UN Doc A/RES/72/249 (19 January 2018, adopted 24 December 2017) paras 6–7: ‘the work and results … should be fully consistent with … the UNCLOS … that this process and its result should not undermine existing relevant legal instruments and frameworks’ (emphasis added).

128 See below Section 6.2 Rules of Interpretation. See, eg, Treves, ‘Law of the Sea’, above n 81, para 74: ‘While the [UNCLOS] … is … an almost unchangeable nucleus, the need for flexibility is satisfied in various ways as evidenced by practice subsequent to its adoption’; David Freestone, Richard Barnes and David Ong, ‘The Law of the Sea: Progress and Prospects’ in David Freestone, Richard Barnes and David Ong (eds), The Law of the Sea: Progress and Prospects (Oxford University Press, 2006) 1; Boyle, above n 113, 567.

129 The term juridification is used here for the process whereby an activity becomes increasingly governed by legal norms, or ‘the tendency towards an increase in formal (or positive, written) law’. Jürgen Habermas, The Theory of Communicative Action (Beacon Press, 1987) vol 2, 359.

130 UNCLOS Preamble para 4.
A most important effort in this regard is the international legal framework for allocation of states’ authority at sea established by the UNCLOS. This framework can be introduced as a two-step process. First, states are sorted into groups depending on activity and typical interest in the sea, principally coastal states and flag states. Second, the sea is divided into different zones where different categories of states have different authority. The main maritime zones are the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, and the high seas. Accordingly, to know where, when and how states may exercise authority at sea, including against ships in the context of irregular maritime migration, a basic understanding of the various maritime zones is needed.

2.2.1 Territorial Waters

The division of the sea into maritime zones seems to presuppose the idea of the land dominating the sea. Even though the exact phrase ‘the land dominates the sea’ is not found in the UNCLOS, this seems to be a concomitant idea in other provisions included in it. Coastal states may, for example, establish

131 Archipelagic waters may also be added to this list. See ibid arts 46–54.
133 See, eg, Henrik Ringbom, ‘Introduction’ in Henrik Ringbom (ed), Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea (Brill Nijhoff, 2015) 1, 11: ‘UNCLOS ... represents the undisputed authority and the obvious starting point when looking for answers to any question on states’ jurisdiction over activities at sea’ (emphasis added).
134 See, eg, Prosper Weil, ‘Geographic Considerations in Maritime Delimitation’ in Jonathan I Charney and Lewis M Alexander (eds), International Maritime Boundaries (Martinus Nijhoff, 1993) vol 1, 115. But see David Caron, ‘Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict’ in Seoung-Yong Hong and Jon M Van Dyke (eds), Maritime Boundary Disputes, Settlement Processes and the Law of the Sea (Brill, 2009) 1, 14, referring to the idea as a ‘vestigial remnant of the naturalist position that the existence of land is the source of authority over the ocean’. See also International Law Association, Committee on International Law and Sea Level
maritime zones because they have coasts, and the breadths of these zones are measured by reference to land.\textsuperscript{135} Land-locked states have no maritime zones but may use international waters and enjoy navigational and other rights.\textsuperscript{136}

\subsection{2.2.1.1 Internal Waters}
Starting from land, the first maritime zone is internal waters. Internal waters are waters on the landward side of the baseline.\textsuperscript{137} Baselines are the lines from which the breadths of the territorial sea and other maritime zones are measured. There are two types of baselines: normal and straight.\textsuperscript{138} Because of straight baselines, sometimes relatively large sea areas can be internal waters. Significant examples relate to bays and coastlines that are ‘deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity’.\textsuperscript{139} The sovereignty of a state over its internal waters is essentially equivalent to that over its land territory.\textsuperscript{140}

\subsection{2.2.1.2 Territorial Sea}
On the seaward side of the baseline lies the territorial sea. Although the \textit{UNCLOS} appears to assume that every coastal state has a territorial sea,\textsuperscript{141} states are not required but merely entitled to claim a territorial sea up to a limit not exceeding 12 nautical miles from the baselines.\textsuperscript{142} The outer limit is ‘the
line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea’.  

The sovereignty of the coastal state extends beyond its land territory and its internal waters to the territorial sea, including the air space over the territorial sea as well as its bed and subsoil.144 The sovereignty over the territorial sea is, however, not without exception but ‘is exercised subject to [the UNCLOS] and to other rules of international law’.145 The latter reference makes it clear that the limitations set out in the Convention are not exhaustive.146 However, the most significant limitation is clearly provided for in the Convention: the right of innocent passage through the territorial sea enjoyed by ships of all states.147

2.2.1.2.1 Innocent passage

The basic meaning of innocent passage follows from articles 18–19 of the UNCLOS. Passage means ‘navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a … port … or proceeding to or from internal waters or a call at … port’.148 Passage shall be continuous and expeditious. However, ‘passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of providing assistance to persons, ships or aircraft in danger or distress’.149 Accordingly, ships under innocent passage that stop for the purpose of rescue at sea remain under innocent passage.

Pursuant to article 19(1) of the UNCLOS, ‘passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal state’.150 Article 19(2) provides a list of activities that, if engaged in by a foreign ship during passage in the territorial sea, renders the passage non-innocent. This list includes, inter alia, ‘any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state’, ‘any

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143 UNCLOS art 4; Convention on the Territorial Sea and the Contiguous Zone art 6.
144 UNCLOS arts 2(1)–(2); Convention on the Territorial Sea and the Contiguous Zone arts 1(1), 2.
145 UNCLOS art 2(3). See also Convention on the Territorial Sea and the Contiguous Zone art 1(2).
146 For a few examples of limitations not expressly set out in the UNCLOS, see below Sections 3.4 Non-Refoulement, 4.5 Right to Return, 4.8 Collective Expulsions.
147 UNCLOS art 17. See also Convention on the Territorial Sea and the Contiguous Zone art 14.
148 UNCLOS art 18(1). See also Convention on the Territorial Sea and the Contiguous Zone art 14(2).
149 UNCLOS art 18 (emphasis in original). See also Convention on the Territorial Sea and the Contiguous Zone art 14(3).
150 See also Convention on the Territorial Sea and the Contiguous Zone art 14(4).
exercise or practice with weapons of any kind’, ‘the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state’, ‘any act of wilful and serious pollution contrary to the [UNCLOS]’, ‘fishing’, and ‘any other act not having a direct bearing on passage’.  

A coastal state is under an obligation not to hamper the innocent passage of foreign ships through its territorial sea. Yet, it remains entitled to adopt certain laws and regulations relating to innocent passage. Such laws and regulations may concern, inter alia, the safety of navigation and the regulation of maritime traffic, the preservation of the environment and the prevention of infringement of customs, fiscal, immigration or sanitary laws of the coastal state. Foreign ships exercising the right of innocent passage are to comply with such laws and regulations.

Ships within the territorial sea are subject to the sovereignty of the coastal state with the exception of innocent passage. Accordingly, the coastal state may prevent non-innocent passages. The UNCLOS does not specify the means the coastal state may use to prevent such passage. However, because of the character of innocent passage as an exception to the sovereignty of the coastal state over its territory it seems that a ship that for some reason forfeits its right to such passage is subject to the jurisdiction of the coastal state within its territory. This jurisdiction is, however, not unlimited but only extends to ‘necessary steps to prevent passage which is not innocent’. On the other hand, this limitation to ‘necessary steps’ does not apply to all ships in the territorial sea but only to those whose ‘passage … is not innocent’. Ships that are hovering or whose presence for some other reason does not qualify as ‘passage’, as expressly defined in article 18 of the UNCLOS, seem therefore to enjoy no protection by the limitation to ‘necessary steps’ but are instead subject to the full jurisdiction of the coastal state.

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151 UNCLOS art 19(2). See also Convention on the Territorial Sea and the Contiguous Zone art 14(5).
152 UNCLOS art 21(1); Convention on the Territorial Sea and the Contiguous Zone art 15(1).
153 UNCLOS art 21(2). See also Convention on the Territorial Sea and the Contiguous Zone art 17.
154 UNCLOS art 21(4); Convention on the Territorial Sea and the Contiguous Zone art 17.
155 UNCLOS arts 2(1), 17; Convention on the Territorial Sea and the Contiguous Zone arts 1(1), 14(1).
156 UNCLOS art 25(1); Convention on the Territorial Sea and the Contiguous Zone art 16(1).
157 UNCLOS art 25(1); Convention on the Territorial Sea and the Contiguous Zone art 16(1).
See also UNCLOS art 27(1): ‘The criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial sea’ (emphasis added).
158 See, eg, Churchill and Lowe, above n 69, 87: ‘ships that have stepped outside the right of innocent passage are subject to the full jurisdiction of the coastal state’; Richard Barnes, ‘Article 25: Rights of Protection of the Coastal State’ in Alexander Proelss (ed), United Nations
The right of innocent passage is reciprocal in the sense that it limits the sovereignty of the coastal state to the benefit of other states’ navigational rights. Accordingly, ships of the same nationality as the coastal state cannot exercise innocent passage through the territorial sea.

Another category of ships that are not entitled to innocent passage is those that do not have any nationality, that is, stateless ships. Pursuant to article 92(1) of the **UNCLOS**, ‘ships have the nationality of the state whose flag they are entitled to fly’.\(^{159}\) This means, in brief, that the nationality or flag of a ship depends on where it is registered. A ship may sail under only one flag and may not change its flag unless there is ‘a real transfer of ownership or change of registry’.\(^{160}\) Ships that sail under several flags or change their flags out of convenience may not claim the nationality of any of the states and may therefore be assimilated to stateless ships.\(^{161}\) It seems reasonable to assume that many ships used for irregular migration are stateless or can be assimilated to such.\(^{162}\) In view of the reciprocal character of the right of innocent passage, it follows logically that such ships do not enjoy the right of innocent passage.\(^{163}\)

Ships used for irregular migration are generally in a similar position as stateless ships in the territorial sea. This is clear from the reference to ‘loading or unloading of any … person contrary to … immigration … laws and regulations of the coastal state’ in the list of activities considered prejudicial

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\(^{159}\) See also **Convention on the High Seas** art 5(1).

\(^{160}\) **UNCLOS** art 92(1); **Convention on the High Seas** art 6(1). Registrations of bareboat charters, that is, ‘a contractual lease of a “naked ship” without … crew by which the lessee has complete possession of and control over the ship’, in both the registry of the owner and the registry of the bareboat charterer may sometimes trigger special considerations: Rainer Lagoni, ‘Merchant Ships’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) para 29.

\(^{161}\) **UNCLOS** art 92(2); **Convention on the High Seas** art 6(2).

\(^{162}\) See, eg, Papastavridis, *The Interception of Vessels*, above n 66, 263–4; Moreno-Lax, ‘Seeking Asylum in the Mediterranean’, above n 65. See below Section 2.2.3.2 International Waters.

\(^{163}\) **UNCLOS** art 17 assigns the right of innocent passage to ‘ships of all states’ (emphasis added). Ships of no state, that is, stateless ships, are accordingly not covered, and do not enjoy the right of innocent passage. See also **Convention on the Territorial Sea and the Contiguous Zone** art 14(1). See, eg, Hugo Tiberg and Johan Schelin, *On Maritime & Transport Law* (Axel Ax:son Johnson Institute for Maritime and Other Transport Law, 4th ed, 2014) 45: ‘[Nationality] is [the] lien … that allows … every state … to sail its vessels not only on the high seas but also … in innocent … passage through territorial waters’ (emphasis added) (citations omitted).
to the peace, good order or security of the coastal state.\textsuperscript{164} Ships used for facilitating the entry of persons into a coastal state contrary to its immigration laws are, therefore, generally subject to the sovereignty of the coastal state in the territorial sea.

A more complex question is whether the same exception (‘loading or unloading of any person contrary to … immigration laws’) extends to ships used merely for the purpose of transporting irregular migrants through the territorial sea of a state without any intention to unload any of them in that state. If the answer is affirmative, the coastal state may take necessary measures to prevent passage.\textsuperscript{165} If, on the other hand, the exception does not apply, the coastal state must not hamper the innocent passage of the ship.\textsuperscript{166} Given that several major routes for irregular migration in the Mediterranean Sea pass through the territorial seas of states other than the likely destination state, this is a question of more than academic interest. Relevant examples include the so-called Central Mediterranean Route from Northern Africa to Italy, which may pass through the territorial sea of Malta, the so-called Apulia and Calabria Route from Turkey and Egypt to Italy, which may pass through the territorial sea of Greece, and the Eastern Mediterranean Route, which may pass through the territorial seas of Greece, Turkey and/or Cyprus.\textsuperscript{167}

It follows directly from the text of article 19(1)(g) of the \textit{UNCLOS} that the relevant exception does not cover ships that do not engage in the loading or unloading of persons. The mere transportation of irregular migrants is thus not sufficient to render the passage non-innocent.\textsuperscript{168} However, in determining the scope of the exception, it needs to be noted that the text of the relevant provision is not ‘unloading … [in the coastal state]’ but ‘unloading … contrary to [its] … laws and regulations’.\textsuperscript{169} Therefore, it seems, passages can be non-innocent if the coastal state has domestic legislation prohibiting the transportation of persons for the purpose of unauthorised loading or unloading of persons in other states.

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\textsuperscript{164} \textit{UNCLOS} art 19(1)(g). See also \textit{Convention on the Territorial Sea and the Contiguous Zone} art 14(1): ‘Passage … not prejudicial to the peace, good order or security of the coastal state.’

\textsuperscript{165} \textit{UNCLOS} art 25(1); \textit{Convention on the Territorial Sea and the Contiguous Zone} art 16(1).

\textsuperscript{166} \textit{UNCLOS} art 24(1); \textit{Convention on the Territorial Sea and the Contiguous Zone} art 15(1).


\textsuperscript{169} \textit{UNCLOS} art 19(1)(g) (emphasis added).
This observation links closely to the Smuggling of Migrants Protocol, which requires its states parties to criminalise not only the procurement of illegal entry into the state party itself but also the procurement of illegal entry into any state party of which the person is not a national or a permanent resident. States that are parties to the Protocol can then be expected to have national legislation prohibiting the smuggling of migrants into other states parties to the Protocol. Member states of the EU, furthermore, seem to be in a similar position since EU law requires them to adopt legislation that criminalises ‘any person who intentionally assists a person who is not a national of a member state to enter, or transit across, the territory of a member state in breach of the laws of the state concerned on the entry or transit of aliens’.

Accordingly, it seems likely that many coastal states have national legislation prohibiting the unauthorised unloading of persons not only within their own territories but also in other states. Passages of ships used for such purposes through the territorial sea of a state having adopted such legislation are therefore likely to be non-innocent, which allows the coastal state to take ‘necessary steps … to prevent [the] passage’. This indicates, in more concrete terms, that many so-called transit states are likely to be entitled, under the international law of the sea, to prevent the passage of foreign ships through their territorial seas for facilitating unauthorised entry of persons into other states.

2.2.2 International Waters
If territorial sovereignty is the starting point in internal waters and the territorial sea, the freedom of the seas is the starting point in waters beyond territorial sovereignty. However, the authority of the coastal state does not end immediately at the outer limit of its territorial sea. Instead, it continues in some aspects further out into international waters. The relevant maritime zones to

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170 See below Chapter 5 International Law against Transnational Organised Crime: Law Enforcement and Protection of Victims.
171 Smuggling of Migrants Protocol arts 3, 6.
172 The definition of smuggling of migrants is significantly narrower than that of unauthorised unloading of persons. Thus not all unauthorised entries into the territory of a state act as smuggling of migrants. See below Section 5.2 Smuggling of Migrants.
174 UNCLOS art 25(1).
consider here are the contiguous zone, the exclusive economic zone and the high seas.\footnote{Archipelagic waters are subject to similar considerations as the territorial sea: Cf ibid arts 49, 52.}

### 2.2.2.1 Contiguous Zone

The contiguous zone is a band of water at a maximum distance of 24 nautical miles from the baselines on the seaward side of the outer limit of the territorial sea.\footnote{Ibid art 33(2). See also Convention on the Territorial Sea and the Contiguous Zone art 24(2): ‘The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.’} While the main provision of the UNCLOS appears to assume that every coastal state has a contiguous zone,\footnote{UNCLOS art 33(1): ‘In a zone contiguous to its territorial sea … the coastal state may exercise the control necessary’ (emphasis added). See also Convention on the Territorial Sea and the Contiguous Zone art 24(1).} it is generally accepted that the establishment of this zone is optional and that coastal states may choose whether to claim one.\footnote{The optional character seems to be implicit in UNCLOS art 33(2): ‘The contiguous zone may not extend beyond 24 nautical miles’ (emphasis added). See also Convention on the Territorial Sea and the Contiguous Zone art 24(2); ‘Report of the International Law Commission Covering the Work of Its Eighth Session (23 April–4 July 1956)’ [1956] II Yearbook of the International Law Commission 253, 285: ‘a state which has established a contiguous zone’ (emphasis added); Nordquist et al, above n 69, 274: ‘there is no specific requirement for notice to be given of establishment of a contiguous zone’ (emphasis added). Almost three decades after the adoption of the UNCLOS, no more than 90 states had announced claims to contiguous zones. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, ‘Table of Claims to Maritime Jurisdiction’, Maritime Space: Maritime Zones and Maritime Delimitation (Web Page, 15 July 2011) <https://www.un.org/depts/los/>. This raises, according to one writer, questions about whether ‘states really consider the contiguous zone as an essential element of the modern law of the sea.’ Daniel-Erasmus Khan, ‘Article 33: Contiguous Zone’ in Alexander Proelss (ed), United Nations Convention on the Law of the Sea: A Commentary (CH Beck, 2017) 254, 262.}

The contiguous zone is ‘contiguous to [the] territorial sea’ and so comprises waters beyond the sovereignty of any state.\footnote{UNCLOS art 33(1); Convention on the Territorial Sea and the Contiguous Zone art 24(1).} Pursuant to article 33(1) of the UNCLOS, the coastal state may within the contiguous zone exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

\footnotesize{\textsuperscript{175}} Archipelagic waters are subject to similar considerations as the territorial sea: Cf ibid arts 49, 52.
\footnotesize{\textsuperscript{176}} Ibid art 33(2). See also Convention on the Territorial Sea and the Contiguous Zone art 24(2): ‘The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.’
\footnotesize{\textsuperscript{177}} UNCLOS art 33(1): ‘In a zone contiguous to its territorial sea … the coastal state may exercise the control necessary’ (emphasis added). See also Convention on the Territorial Sea and the Contiguous Zone art 24(1).
The coastal state is not required but merely allowed to exercise jurisdiction in the contiguous zone. The text of article 33(1) suggests that the special jurisdictional rights of the contiguous zone only cover enforcement jurisdiction and not prescriptive jurisdiction.

Within its contiguous zone, the coastal state is entitled to exercise control over ships heading towards the coastal state to prevent infringements of custom, fiscal, immigration or sanitary laws as well as over ships heading from the coastal state to punish such infringements. However, in light of the reference to ‘infringements … within its territory or territorial sea’, it seems that only infringements related to the territory of the coastal state come within the permissible control in the contiguous zone. Infringements without any prior or subsequent nexus to the territory of the coastal state, for example, because the ship is merely passing through the contiguous zone, seem for the same reason to be beyond the scope.

However, ships navigating in the contiguous zone for the purpose of unloading persons somewhere other than in the coastal state may trigger considerations similar to those previously discussed in relation to non-innocent passages through the territorial sea for the purpose of unloading persons in states other than the coastal state. To recapitulate, in that context it was considered that coastal states may, under certain conditions, be allowed to take necessary steps to prevent such passages even if the unlawful unloading takes place somewhere other than in the coastal state. However, the permissible control

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180 UNCLoS art 33(1): ‘In a zone contiguous to its territorial sea … the coastal state may exercise the control necessary’ (emphasis added). See also Convention on the Territorial Sea and the Contiguous Zone art 24(1).
181 For the terminology and various forms of jurisdiction, see below Section 2.2.2.2 Exclusive Economic Zone.
183 UNCLoS art 33(1); Convention on the Territorial Sea and the Contiguous Zone art 24(1). The phrase ‘territory or territorial sea’ may be somewhat inconsistent since the territorial sea is part of the territory of the coastal state (emphasis added).
184 See, eg, Daillier and Pellet, above n 133, 1312: ‘[l’Etat côtier] dispose seulement de compétences rigoureusement fonctionnelles de prévention ou de répression des infractions commises dans les espaces placés sous sa souveraineté’; Khan, above n 178, 264; Pancracio, above n 133, 218; Scovazzi, above n 168, 215.
185 See above nn 165–74 and accompanying text.
in the contiguous zone is notably smaller than in the territorial sea. The requirement of a nexus to the territory of the coastal state is key in this regard. Accordingly, in addition to the coastal state having national laws and regulations prohibiting such unloadings, that are applicable to both the territorial sea and the contiguous zone, there must also be some connection to its territory for the coastal state to be allowed to exercise control over such infringements in the contiguous zone. While most infringements relating to unlawful unloadings of persons may be expected to concern unloadings in the territory of the same state as the one exercising the control in the contiguous zone, it is not very difficult to imagine scenarios where unloadings somewhere else can be said to cause effects that extend to the territory of the coastal state. A relevant example in this regard may be that of the European Schengen area, where entry into one participating state normally makes it possible to freely cross internal borders into other participating states. What this suggests, in more concrete terms, is that EU member states may sometimes be entitled, under the law of the sea, to take measures against ships navigating in their contiguous zones for the purpose of preventing unlawful unloadings of persons in other member states.

Article 33 of the UNCLOS does not specify by which means a coastal state may exercise control in the contiguous zone. Although there may be a ‘presumption … in favour of the freedom of the seas and the non-existence of coastal state jurisdiction’, there is support for the understanding that the permissible control includes regular measures for interception, such as stopping, arresting and escorting the ship to port for further investigation.

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186 Cf UNCLOS arts 19(2)(g), 33(1)(a), which both refer to ‘customs, fiscal, immigration or sanitary laws and regulations’. See also Convention on the Territorial Sea and the Contiguous Zone art 24(1)(a).

187 UNCLOS art 33(1) refers to ‘infringements … within its territory or territorial sea’.


189 Khan, above n 178, 264; Pancracio, above n 133, 218. But see Churchill and Lowe, above n 69, 139, discussing whether the presumption against coastal state jurisdiction in the contiguous zone was removed when the contiguous zone became part of the exclusive economic zone (and not, as before, the high seas). Treves, ‘Navigation’, above n 182, 857, seems to take a middle position noting that ‘[a] criterion of proportionality should nonetheless be observed’.

190 For the term ‘interception’, see above Section 1.8 Terminology. In a different context, the UNHCR has defined interception as ‘all measures applied by a state, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.’ Office of the United Nations High Commissioner for Refugees, Executive Committee of the High Commissioner’s Program, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, UN Doc EC/50/SC/CRP.17 (9 June 2000) para 10.
Tanaka arrives at this conclusion from an analogy with the provisions on hot pursuit\textsuperscript{191} and the observation that such pursuit may commence in the contiguous zone.\textsuperscript{192} Daillier and Pellet seem to embrace a slightly broader view, permitting the coastal state to exercise control in the contiguous zone in the same way as in the territorial sea.\textsuperscript{193} Treves also appears to take a broad view.\textsuperscript{194} Klein notes that ‘there is international legal authority that would allow … necessary and proportionate force to effect law enforcement operations in this maritime zone.’\textsuperscript{195}

2.2.2.2 Exclusive Economic Zone

The exclusive economic zone is a zone in which the coastal state enjoys sovereign rights regarding natural resources and related jurisdictional rights, and where other states enjoy the freedoms of navigation and overflight and of the laying of submarine cables and pipelines.\textsuperscript{196} It is an ‘area beyond and adjacent to the territorial sea’,\textsuperscript{197} ranging up to 200 nautical miles from the baselines.\textsuperscript{198} Accordingly, the exclusive economic zone covers international

\textsuperscript{191} UNCLOS art 111; Convention on the High Seas art 23.

\textsuperscript{192} Tanaka, above n 99, 125.

\textsuperscript{193} Daillier and Pellet, above n 133, 1312: ‘Ces compétences peuvent être exercées de la même manière que celles lui appartenant — à des fins plus larges — dans sa mer territoriale’ (emphasis added).

\textsuperscript{194} Treves, ‘Navigation’, above n 182, 857: ‘this power can be exercised by means of all forms of constraint, such as arresting the ship, escorting it to the ports of coastal state, the carrying out of legal measures, seizure, etc’.


\textsuperscript{197} UNCLOS art 55.

\textsuperscript{198} Ibid art 57.
waters. The contiguous zone is similarly ‘contiguous to [the] … territorial sea’ and so usually forms part of the exclusive economic zone.\textsuperscript{199}

In addition to its sovereign rights, the coastal state also has certain jurisdictional rights in the exclusive economic zone.\textsuperscript{200} This jurisdiction is subject to careful limitation in the \textit{UNCLOS}.\textsuperscript{201} To grasp these limits, some general remarks about jurisdiction might be helpful.\textsuperscript{202}

In international law, the term \textit{jurisdiction} generally refers to the lawful power of a state to act.\textsuperscript{203} Although the PCIJ has famously held that a state’s ‘title to exercise jurisdiction rests in its sovereignty’, there are different views on the basis, or rather the need of a basis, for jurisdiction.\textsuperscript{204} While one strand of views claims that states have jurisdiction merely because of permissive norms in international law,\textsuperscript{205} others seem to accept that states have jurisdiction as long as international law does not provide otherwise.\textsuperscript{206} The latter approach is

\textsuperscript{199} See, eg, Dupuy, above n 196, 269: ‘the contiguous zone is spatially absorbed by the exclusive economic zone’.

\textsuperscript{200} \textit{UNCLOS} art 56(1)(b): ‘jurisdiction as provided for in … this \textit{Convention} with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment’. The coastal state also has other rights and duties provided for in the \textit{Convention}: at art 56(1)(c).

\textsuperscript{201} Tanaka, above n 99, 132 refers to the jurisdiction of the coastal state in the exclusive economic zone as ‘a limited spatial jurisdiction’.

\textsuperscript{202} A similar discussion appears in Martin Ratcovich, ‘Extraterritorial Criminalization and Non-Intervention: Sweden’s Criminal Measures against the Purchase of Sex Abroad’ (2019) 88 Nordic Journal of International Law (forthcoming).

\textsuperscript{203} See, eg, \textit{Oppenheim’s}, above n 34, 456: ‘the extent of each state’s right to regulate conduct or the consequences of events’; Shaw, above n 34, 483: ‘the power of the state under international law to regulate or otherwise impact upon people, property and circumstances’; \textit{Brownlie’s}, above n 34, 203–4, 456–86: ‘particular rights, or accumulations of rights quantitatively less than [sovereignty]’, at 204, and ‘a state’s competence under international law to regulate the conduct of natural and juridical persons’, at 456; Christopher Staker, ‘Jurisdiction’ in Malcolm D Evans (ed), \textit{International Law} (Oxford University Press, 4th ed, 2010) 309: ‘the limits of the legal competence of a state or other regulatory authority ... to make, apply, and enforce rules of conduct upon persons’; Daillier and Pellet, above n 133, 513: ‘un pouvoir juridique conféré ou reconnu par le droit international à un état … de connaître d’une affaire, de prendre une décision, de régler un différend’.

\textsuperscript{204} \textit{SS ‘Lotus’} [1927] PCIJ (ser A) No 10, 19.

\textsuperscript{205} See, eg, Staker, above n 203, 315: ‘The best view is that it is necessary for there to be some clear connecting factor, of a kind whose use is approved by international law, between the legislating state and the conduct that it seeks to regulate’; Bernard H Oxman, ‘Jurisdiction of States’ in Rüdiger Wolfrum (ed), \textit{Max Planck Encyclopedia of Public International Law} (Oxford University Press, 2007) para 10: ‘Whatever the underlying conceptual approach, a state must be able to identify a sufficient nexus between itself and the object of its assertion of jurisdiction.’

\textsuperscript{206} See, eg, Daillier and Pellet, above n 133, 513: ‘On ne saurait déduire … une quelconque antériorité du droit international par rapport à l’État: apparues en même temps, \textit{les deux notions sont indissociables}; parce qu’elle est un État, une entité donnée exerce certain compétences,
commonly associated with the judgment by the PCIJ in the landmark case *SS Lotus*. In that case, which concerned a collision of ships at sea and states’ criminal jurisdiction in relation thereto, the Court held that states are generally free to exercise certain jurisdiction. It stated:

a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory … is certainly not the case under international law … Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is *only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable*.207

The reading suggests that states are free to formulate, enact and pronounce on the meaning of legislation unless international law prohibits them from doing so. Although the so-called Lotus presumption — ‘that states have the right to do whatever is not prohibited by international law’208 — may be useful as a theoretical approach to jurisdiction, it does not seem precise as a summary of the judgment. In addition to the above, the Court stated:

the first and foremost restriction imposed by international law upon a state is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; *it cannot be exercised by a state outside its territory except by virtue of a permissive rule* derived from international custom or from a convention.209

In marked contrast to the previous passage, this statement suggests that the jurisdiction of a state is generally confined to its territory. One way of reconciling these two seemingly contradictory statements is to read them as if they refer to different types of jurisdiction. While the first (the Lotus presumption) concerns the powers to prescribe (prescriptive or legislative jurisdiction) and to make persons or things subject to the processes of its courts or other judicial institutions (adjudicative or judicial jurisdiction), the latter concerns the power to compel compliance (executive or enforcement

règlementées par le droit international’ (emphasis added). See also *Oppenheim’s*, above n 34, 457: ‘Although it is usual to consider the exercise of jurisdiction under one or other of more or less accepted categories, *this is more a matter of convenience than substance*’ (emphasis added).


jurisdiction). Understood in this way, it appears that the PCIJ made not one but two assertions: first, that states are generally free to legislate and adjudicate, including on matters beyond their own territories; second, that the power of a state to enforce its regulations and decisions is generally confined to its territory.

The first assertion (general prescriptive and adjudicative jurisdiction) implies that states can only legislate and adjudicate in the absence of norms to the contrary. Notably, international law entails many such prohibitive norms. A clear example may be the obligation of coastal states to not apply certain laws to foreign ships in the territorial sea.\(^{210}\) A less specific but often more significant example may be the duty not to intervene in matters within the domestic jurisdiction of other states.\(^{211}\) Another may be the primarily exclusive character of the jurisdiction of a flag state over ships flying its flag on the high seas.\(^{212}\)

Along the same lines, the meaning of the second assertion (territorial executive jurisdiction) is not that all extraterritorial enforcement measures are unlawful but rather that such measures need to be based on some permissive norm to be lawful. Importantly, there are several such permissive norms in international law. The contents of these are often grouped and referred to as bases or principles of jurisdiction. Important examples include territory,\(^{213}\) the nationality of the person committing the act (active personality), the nationality of the victim (passive personality), or the nature of the act (universal jurisdiction).\(^{214}\)

Irrespective of the view of the underlying question about the general need of a legal basis for lawful exercises of jurisdiction, it is reasonably clear that the special jurisdiction of the coastal state in the exclusive economic zone entails

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\(^{210}\) **UNCLOS** art 21(2): ‘[Laws and regulations of the coastal state relating to innocent passage] shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.’

\(^{211}\) For the principle of non-intervention, see below n 896.

\(^{212}\) **UNCLOS** arts 92(1); **Convention on the High Seas** art 6(1). See below Section 2.2.2.3 High Seas.

\(^{213}\) The logic of the view of territory as a basis for jurisdiction is naturally dependent upon one’s view of the need for permissive norms for the jurisdiction of a state within its own territory. In any case, it is well-established that states have jurisdiction within their own territories.

\(^{214}\) See generally the references above n 203. See also Klein, *Maritime Security and the Law of the Sea*, above n 71, 62–3.
certain measures of both legislative and enforcement character. For example, article 73(1) of the \textit{UNCLOS} provides:

\begin{quote}
The coastal state may … in the exclusive economic zone, take … measures … … \textit{to ensure compliance with the laws and regulations adopted by it in conformity with this Convention}.\textsuperscript{215}
\end{quote}

Even though this provision mainly concerns enforcement jurisdiction, the reference to \textit{‘laws and regulations adopted by [the coastal state]’} implies legislative jurisdiction.\textsuperscript{216} Similar references to legislative measures by the coastal state in the exclusive economic zone appear in several other provisions of the \textit{UNCLOS}.	extsuperscript{217}

Noting that the special jurisdiction of the coastal state in the exclusive economic zone is sufficiently broad to encompass both legislative and enforcement measures by no means implies that this jurisdiction is unlimited. Quite the contrary, the relevant jurisdictional rights are carefully limited and functional so that they only concern certain topics or issues. Article 56(1)(b) of the \textit{UNCLOS} points mainly to three such topics: the establishment and use of artificial islands, installations and structures; marine scientific research; the protection and preservation of the marine environment. Accordingly, despite the many legal complexities of both the concept of jurisdiction in general and the exclusive economic zone in particular, it seems reasonably clear that the special jurisdictional rights of the coastal state in the exclusive economic zone do not encompass matters related to migration. This means, in a nutshell, that the specific legal framework of the exclusive economic zone is of little relevance to irregular maritime migration. Interceptions and other migration management measures executed in the exclusive economic zone are instead subject to the same legal considerations as on the high seas.\textsuperscript{218}

\textsuperscript{215} Emphasis added.

\textsuperscript{216} \textit{UNCLOS} art 73(1).

\textsuperscript{217} See, eg, ibid arts 58(3) (‘comply with the laws and regulations adopted by the coastal state [in the exclusive economic zone]’), 60(1) (‘regulate … artificial islands, installations and structures’), 62(4) (‘conservation measures’), 111(2) (‘violations … of laws and regulations of the coastal state … applicable … to the exclusive economic zone’), 211(5) (‘adopt laws and regulations for the prevention … of pollution from vessels conforming to and giving effect to generally accepted international rules and standards’).

\textsuperscript{218} Cf ibid art 58(2): \textit{[The norms relating to the high seas] and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with [the specific legal framework of the exclusive economic zone]’}. For similar views, see, eg, Scovazzi, above n 168, 215; Gallagher and David, above n 71, 418. See below Section 2.2.2.3 High Seas.
However, this does not mean that it is appropriate to refer only to the high seas if meaning both the high seas and the exclusive economic zone. Because the exclusive economic zone is not part of the high seas but a zone *sui generis* different from both the territorial sea and the high seas, there are good reasons not to conflate the terms but to refer to the relevant area with precision — including in the context of migration. Accordingly, it appears somewhat inconsistent when the *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* refers only to the high seas and the contiguous zone. As a result, one could easily conclude that interception in the exclusive economic zone is not covered — which is clearly not the meaning.

2.2.2.3 High Seas

The high seas are negatively defined as ‘all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state’. The concept of the high seas is of truly international nature, ‘in sharp contrast to the powers of coastal states over their coastal waters’. The starting point is that the high seas are open to all states and that no state may extend its sovereignty to any part of the high seas.

The legal framework of the high seas rests on two basic principles: the principle of freedom and the principle of equality.

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219 See, eg, *UNCLOS* arts 55: ‘The exclusive economic zone is … subject to the *specific* legal regime established in [Part V of the *UNCLOS*]’ (emphasis added).


221 *UNCLOS* art 86; *Convention on the High Seas* art 1.

222 Churchill and Lowe, above n 69, 203.

223 *UNCLOS* arts 87(1), 89; *Convention on the High Seas* art 2.

The principle of freedom refers to the freedom of the high seas including, inter alia,
- freedom of navigation,
- freedom of overflight,
- freedom to lay submarine cables and pipelines,
- freedom to construct artificial islands and other installations,
- freedom of fishing,
- freedom of scientific research.225

The principle of equality has mainly two aspects: first, the access of all states, despite geographical position, to the high seas,226 and, second, the equality of use of the high seas for all states.227 The equality of use is embodied in article 87(2) of the UNCLOS: ‘[The freedoms of the high seas] shall be exercised … with due regard for the interests of other states in their exercise of the freedom of the high seas.’228

While it is true that the high seas are open to all states, it is also true that states acting on them are subject to the law. The absence of exclusive sovereignty thus does not imply absence of law. Still, there is no single international authority controlling and policing the high seas. The freedom of the high seas implies a prohibition of unilateral enforcement actions against foreign ships. Instead, the control over ships on the high seas is directed to the flag state.229 The main basis of this arrangement is the requirement that ships sail under a flag.230

Every state may fix the conditions for granting its nationality to ships, for the registration of ships in its territory and for the right to fly its flag, provided that a ‘genuine link’ exists between the state and the ship.231 Ships have the nationality of the state whose flag they are entitled to fly.232 In return for registration, ships on the high seas are subject to the exclusive jurisdiction of

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225 UNCLOS art 87(1). See also Convention on the High Seas arts 2, 26(1).
226 UNCLOS art 87(1): ‘The high seas are open to all states, whether coastal or land-locked’ (emphasis added). A land-locked state thus has the right to sail ships flying its flag on the high seas. See also at art 90: ‘Every state, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas’ (emphasis added); Convention on the High Seas arts 2–4.
227 See, eg, UNCLOS arts 90 (right of navigation for ‘every state’), 112 (right to lay submarine cables and pipelines for ‘all states’), 116 (right to fish for ‘all states’), 238 (right to conduct marine scientific research for ‘all states’). See also Convention on the High Seas arts 4, 26(1).
228 See also Convention on the High Seas art 2: ‘reasonable regard’. See generally Momtaz, above n 69, 384–400.
229 UNCLOS art 92(1); Convention on the High Seas art 6(1).
230 See, eg, Momtaz, above n 69, 400–1.
231 UNCLOS art 91(1); Convention on the High Seas art 5(1).
232 UNCLOS art 91(1); Convention on the High Seas art 5(1).
the flag state. Accordingly, states other than the flag state may generally not interfere with ships on the high seas. The exclusive character of flag state jurisdiction is, however, not without exceptions.

2.2.2.3.1 Right of Visit

The seemingly most important exception to the principle of exclusive flag state jurisdiction in the context of irregular maritime migration is the right of visit. Pursuant to this right, government ships may visit and search ships on the high seas. Exercises of the right of visit generally imply interference with the freedom of navigation. Accordingly, the right of visit is of exceptional nature and cautiously limited.

Visit is allowed if there is a reasonable ground for suspecting that the ship is
- engaged in piracy,
- engaged in slave trade,
- engaged in unauthorised broadcasting,
- without nationality,

233 UNCLOS art 92; Convention on the High Seas art 6(1).
235 While initially referring to warships only, the reference in UNCLOS art 110(5) to ‘any other duly authorized ships … clearly marked and identifiable as being on government service’ allows civilian coast guard ships, naval auxiliary ships and other government ships other than warships to be used for exercises of the right of visit. See, eg, Treves, ‘Navigation’, above n 182, 899–901; Nordquist et al, above n 69, vol 3, 246.
236 See, eg, Guilfoyle, ‘The High Seas’, above n 224, 220; Gallagher and David, above n 71, 421. Some commentators make a distinction between a right of visit (droit de visite) and a right of approach (droit de reconnaissance), which is limited to the right to approach a ship to identify her, and argue that the latter does not require any justification, as it does not impinge the freedom of navigation. See, eg, Oppenheim’s, above n 34, 736–7; Papastavridis, The Interception of Vessels, above n 66, 50–1 and further references there. See also Klein, Maritime Security and the Law of the Sea, above n 71, 114: ‘The right to approach … is generally recognized under customary international law. The more invasive right of visit … is usually viewed as permissible only by reference to specific instances under customary international law or under treaty.’
237 Ships can have nationality without physically displaying a flag and even without being registered. See, eg, Papastavridis, The Interception of Vessels, above n 66, 54; Guilfoyle, Shipping Interdiction, above n 66, 95; Douglas Guilfoyle, ‘Transnational Crime and the Rule
- ‘though flying a foreign flag or refusing to show its flag … in reality, of the same nationality as the warship’. 238

For the purpose of the visit, the government ship may proceed to verify the ship’s right to fly its flag by sending a boat under the command of an officer to the suspected ship. The officer may check the documents and, if suspicion remains thereafter, ‘proceed to a further examination on board the ship, which must be carried out with all possible consideration’. 239 If the suspicions prove to be unfounded and the visit was not lawful, the visited ship has a right to compensation for any loss or damage sustained. 240

The right of visit has its origin in the laws of war and the exceptional right of warships of belligerent states to stop, visit and search foreign merchant vessels in order to ensure that they are not transporting contraband to the enemy. 241 The ordinary (peacetime) right of visit entails a right to stop and board the ship and, if suspicion remains, to search the ship (‘further examination on board the ship’). 242

It is widely accepted that the right of visit may involve the exercise of necessary and proportionate force to stop a ship that attempts to escape boarding. 243 In addition, whether the right of visit also entails a right to divert

of Law at Sea: Responses to Maritime Migration and Piracy Compared’ in Violeta Moreno-Lax and Efthymios Papastavridis (eds), ‘Boat Refugees’ and Migrants at Sea: A Comprehensive Approach (Brill, 2016) 169, 185 n 83. UNCLOS art 91(1) allows states to fix the conditions for flying their flag irrespective of registration. A state may thus design its national legislation so that ships of a certain size, type, use, etc do not need to be registered but, for example, have the same nationality as the owners. The mere fact that a ship is not registered may therefore not necessarily mean that it is without nationality. See, eg, Maritime Code (Sweden) [tr Hugo Tiberg & Johan Schelin, Swedish Maritime Laws — Part I: Swedish Maritime Code (Poseidon Förlag, 6th ed, 2018)] ch 1 s 1 para 1: ‘A vessel shall be considered to be Swedish … if owned to the extent of more than one half by Swedish nationals or Swedish legal persons’; Tiberg and Schelin, above n 163, 46: ‘The Swedish nationality … extends also to “boats” in the Swedish sense, although as a rule no authority decisions need to be made for such vessels’.

238 UNCLOS art 110(1).

239 UNCLOS art 110(2) (emphasis added).

240 Ibid art 110(3).

241 See, eg, International Institute of Humanitarian Law, San Remo Manual on International Law Applicable to Armed Conflicts at Sea (12 June 1994) arts 118–134 (‘San Remo Manual’), which recognises the right to visit and search ships of belligerent states. The San Remo Manual is an authoritative restatement of the (mostly customary) international law applicable to armed conflicts at sea.

242 UNCLOS art 110(2).

243 See, eg, Vaughan Lowe and Antonios Tzanakopoulos, ‘Ships, Visit and Search’ in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford University Press, 2013) para 32; Efthymios Papastavridis, ‘Piracy’ in André Nollkaemper, Ilias Plakokefalos and Jessica Schechinger (eds), The Practice of Shared Responsibility in
the intercepted ship to port or another sea area if suspicion remains after the initial visit may be discussed. The right of visit and search in naval warfare is often taken to include such a right ‘if visit and search at sea is impossible or unsafe’. In the era of containers and large cargo ships, effective search operations may indeed be difficult or even impossible to conduct at sea. However, the right of diversion under the right of visit in naval warfare is hardly of general character but may be exercised only exceptionally depending on the specific circumstances of the case. This is likely also the case under the regular (peacetime) right of visit.

Bearing in mind the purposes for which a ship may be visited and inspected under the right of visit — to control its nationality and/or to confirm or remove a suspicion of piracy, slave trade or unauthorised broadcasting — and that any suspicion must be founded, it seems clear that most visits are not expected to involve comprehensive searches. The powers under the right of visit seem, instead, to be logically limited by the purpose of the visit, that is, to (i) verify the ship’s right to fly its flag and/or (ii) to confirm or remove a suspicion of piracy, slave trade or unauthorised broadcasting. It follows that the normal exercise of the right of visit on account of unclear nationality seems to be limited to an examination of the ship’s documents and, if necessary, a visit of the ship’s bridge. In other words, the right of visit involves ‘a right to approach and board the ship as to effect a verification du pavillon’.

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International Law (Cambridge University Press, 2017) 316, 334; Papastavridis, The Interception of Vessels, above n 66, 68–72; Guiffoyle, Shipping Interdiction, above n 66, 293–5. See also The M/V “Saiga” (No 2) (Judgment) 62 [156]: ‘The normal practice … is first to give an auditory or visual signal to stop … Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship … the pursuing vessel may, as a last resort, use force.’

244 San Remo Manual art 121.

245 See the references above n 243.

246 See, eg, Fink, above n 234, 163: ‘statelessness is … a very restrictive authority to check the nationality of the vessel’.

247 Cf UNCLOS art 110(1)(a)–(e). See also Fink, above n 234, 163–4: ‘Statelessness should … not be used to gain access on board a vessel for the purpose of stopping other illegal activities actions on board, but for which there is no legal ground to board at hand’; Robin Geiss and Anna Petrig, Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden (Oxford University Press, 2011) 57.

248 UNCLOS art 110(2): ‘the warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship.’

249 Papastavridis, The Interception of Vessels, above n 66, 52: ‘only circumstances of extreme suspicion … will justify the search of the vessel, which may include a detailed inspection of all parts of the ship and its cargo and the questioning of the crew’; Fink, above n 234, 163–4: ‘Statelessness should … not be used to gain access on board a vessel for the purpose of stopping other illegal activities actions on board, but for which there is no legal ground to board at hand.’

The right of visit arises when there is ‘reasonable ground’ for suspecting that a ship is engaged in piracy, slave trade or any of the other activities enumerated in article 110(1) of the UNCLOS. General suspicions and merely hypothetical evidence that cannot be linked to the specific ship are then not sufficient; there must be some real reason for the suspicion. The phrase ‘reasonable grounds’ suggests that not all grounds suffice but only those that are in fact reasonable.\(^{251}\) Moreover, the exceptional character of the right of visit implies that it should not be construed in an extensive way. On the other hand, the degree of suspicion required to justify a visit must not be set too high. It follows directly from the text of article 110(3) — ‘if the suspicions prove to be unfounded, and provided that the ship boarded has not committed any suspicious act’ — that applicability is not dependent on the commission of any suspicious act. Not only ships lacking nationality are then eligible for visit but also every ship reasonably suspected to be without nationality or engaged in piracy, slave trade or unauthorised broadcasting. Indicative criteria, such as the lack of an observable flag or a vessel type that normally is stateless, especially in a region where stateless ships are common, may suffice as a trigger for the right of visit.\(^{252}\) Naturally, the assessment of the triggering criterion cannot be done \textit{a priori} but needs to be done on a case-by-case basis.\(^{253}\)

The right of visit is not tantamount to a right of seizure.\(^{254}\) Therefore, any decision to make cargo or ships subject to seizure requires justification pursuant to a separate legal ground beyond the right of visit. The UNCLOS

\(^{251}\) Klein, \textit{Maritime Security and the Law of the Sea}, above n 71, 116: ‘the … reference to a “reasonable ground for suspicion” is to provide a standard for action … and … to minimize the instances where interference may occur.’

\(^{252}\) Cf Anna Petrig, ‘Piracy’ in Donald R Rothwell et al (eds), \textit{The Oxford Handbook of the Law of the Sea} (Oxford University Press, 2014) 843, 851–2 discussing the triggering criterion for the right of visit in relation to piracy.

\(^{253}\) See generally Papastavridis, \textit{The Interception of Vessels}, above n 66, 62–3.

\(^{254}\) Ibid 148–9: ‘the right to visit … does not \textit{ipso facto} entail the full extension of the jurisdictional powers of the boarding state’ (emphasis in original); Guilfoyle, \textit{Shipping Interdiction}, above n 66, 17–18; Churchill and Lowe, above n 69, 210, 214; Coppens, ‘Interception of Migrant Boats at Sea’, above n 132, 213–14; Guilfoyle, ‘The High Seas’, above n 224, 220; Moreno-Lax, ‘Seeking Asylum in the Mediterranean’, above n 65, 186–7. But see O’Connell, above n 69, 756. For a less categorical position, see, eg, Seungwhan Kim, ‘Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context’ (2017) 30(1) \textit{Leiden Journal of International Law} 49, 61 (‘it is not clear whether [the right of visit] authorizes the arrest of crew on board’).
recognises only two such grounds — piracy and unauthorised broadcasting — of which only the former is relevant here.

2.2.2.3.2 Piracy

States may seize pirate ships or aircrafts on the high seas or in any other place outside the jurisdiction of any state. Ships intended to be used, or that have already been used, for piracy by the persons in dominant control are pirate ships.

In short, piracy involves acts of violence or detention, or an act of depredation, committed for private ends by the crew or the passengers of a private ship directed against another ship on the high seas or outside the jurisdiction of any state. Piracy is different from hijacking because acts of violence committed on board a ship against persons or property on board the same ship do not constitute piracy. Instead, piracy always involves at least two ships or aircraft: pirate and victim ('the two vessels requirement'). Moreover, only acts committed for private ends can constitute piracy ('the private ends requirement'). Although the exact limits of the definition of piracy were

255 Naturally, rights of interference with ships on the high seas can also exist pursuant to other grounds under international law (eg, consent by the flag state, decisions by the Security Council of the United Nations). This possibility is explicitly reflected in the initial words of UNCLOS art 110(1): 'Except where acts of interference derive from powers conferred by treaty'.

256 Unauthorised broadcasting involves, in short, unlawful transmissions of radio or television broadcasts from ships or installation on the high seas intended for reception by the general public: ibid art 109(2). The relevance to irregular maritime migration seems, naturally, none. See generally Guilfoyle, Shipping Interdiction, above n 66, 170–9; Churchill and Lowe, above n 69, 211–2; Rothwell and Stephens, above n 112, 165–6; Brownlie’s, above n 34, 313.

257 UNCLOS art 105; Convention on the High Seas art 19.

258 UNCLOS art 103; Convention on the High Seas art 17.

259 UNCLOS art 101; Convention on the High Seas art 15.

260 Cf the definition of piracy in UNCLOS art 101(a): ‘Piracy consists of … any illegal acts of violence or detention … and directed … against another ship or aircraft, or against persons or property on board such ship or aircraft’ (emphasis added). The classic example is the so-called Achille Lauro affair in 1985, in which four members of a Palestinian group hijacked the Italian passenger ship Achille Lauro and demanded the release of a number of Palestinian prisoners. The acts were not piracy because the offenders had already boarded the ship. See, eg, Tanaka, above n 99, 381.

261 There are at least two different views on the meaning of the private ends requirement. According to the restrictive view, all acts for political reasons are excluded. According to the extensive view, all acts not sanctioned by a state are committed for private ends. The better view seems to lie somewhere in the middle. See, eg, Tanaka, above n 99, 380: ‘The private ends requirement should be examined by taking various factors into account, such as motives, ends, specific acts of offenders, the relationship between offenders and victims, the relationship between the offenders and the legitimate government, and reactions of third states’.

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long subject to debate, it is now usually accepted that the definition set forth by article 101 of the UNCLOS codifies existing customary law.²⁶²

Although violence may sometimes be a regular ingredient of smuggling of migrants and trafficking in persons, piracy is generally considered irrelevant in the context of irregular maritime migration.²⁶³ The main reason, it seems, is the two vessels requirement: offences committed by persons of the same ship as the victims fall outside the definition of piracy. Smugglers or traffickers using violence against persons on board their own ship are therefore normally not pirates and their ships are accordingly not pirate ships.

However, it seems that situations involving two or more ships can raise issues with respect to piracy. Thinkable scenarios include smugglers or traffickers using means of violence to control their victims at sea, such as by trying to abandon their victims at sea by themselves transferring to another ship,²⁶⁴ or forcing their victims to transfer to other, generally smaller, vessels that will proceed to the landing site.²⁶⁵ Another conceivable scenario is that smugglers or traffickers attempt to recapture vessels seized at sea. Any such situation may involve more than one ship. Moreover, because the definition of a pirate ship covers not only ships presently being used for piracy but also those intended to be used for such purposes or that have been used for such purposes and remain under the control of the persons guilty of those acts, it seems that the reference to piracy can justify not only preventive but also reactive enforcement actions.²⁶⁶ Possible examples include situations where vessels are first used for irregular maritime migration and then used for piracy, for


²⁶⁴ An example is the incident in early January 2015 when some 360 Syrian refugees arrived in Italy after having been left by smugglers on board the cargo ship Ezadeen drifting at sea. See, eg, International Organization for Migration, IOM Staff in Italy Report on “Ghost Ship” Trend, Meet with Rescued Migrants (Press Release, 1 June 2015).


²⁶⁶ UNCLOS art 103: ‘A ship … is considered a pirate ship … if it is intended by the persons in dominant control to be used for … [piracy]. The same applies if the ship … has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.’
example during the voyage back home from the landing site.\textsuperscript{267} Because of the protracted definition of pirate ships, it seems that such vessels may be pirate ships even before the commission of any attack or other act of piracy. The same applies after the ship ‘has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.’\textsuperscript{268} Accordingly, even though piracy may be mostly irrelevant, the special grounds for interceptions of pirate ships may in some exceptional circumstances be more significant to irregular maritime migration than what is often taken to be the case.

2.2.3 Interception of Ships Used for Irregular Maritime Migration

The significance of the legal framework for jurisdiction over ships can be illustrated with reference to considerations of the legal possibilities for coastal states to intercept ships used for irregular maritime migration.\textsuperscript{269} Drawing on the preceding sub-chapters, the discussion deals first with territorial waters and then with international waters.

2.2.3.1 Territorial Waters

With reference to its sovereignty over such waters, the coastal state may intercept foreign ships within its internal waters and the territorial sea with the exception of ships under innocent passage. However, ships used for irregular migration are unlikely to be under innocent passage. Stateless ships are not entitled to innocent passage, and ships used for ‘unloading of … person[s] contrary to the … laws and regulations of the coastal state’ are prejudicial to the peace, good order or security of the coastal state.\textsuperscript{270} As a result, coastal states are generally entitled to intercept ships used for irregular maritime migration in waters subject to their sovereignty.\textsuperscript{271}

\footnotesize
\textsuperscript{267} See, eg, Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1811 (2008), UN Doc S/2008/769 (10 December 2008) 32 [143]: ‘there appears to be an intersection between piracy and … human trafficking, both of which involve … small craft across the Gulf of Aden. One sub-group … uses the same boats employed for piracy to move refugees and … migrants from Somalia to Yemen’ (emphasis added); Julian Casal et al, Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa (Report, World Bank, 2013) 68 n 31, describing a situation where a ‘whaler-type vessel’ was first used to take migrants from Puntland, Somalia, to Yemen and then, during the voyage back to Somalia, to attack a merchant ship en route through the Gulf of Aden.

\textsuperscript{268} UNCLOS art 103.

\textsuperscript{269} See below Chapter 5 International Law against Transnational Organised Crime: Law Enforcement and Protection of Victims.

\textsuperscript{270} UNCLOS art 19(2)(g).

\textsuperscript{271} See above Section 2.2.1 Territorial Waters.
2.2.3.2 International Waters

The situation is different further out at sea. The starting point in such waters is that ships are subject to the exclusive jurisdiction of the flag state.

However, in the contiguous zone the coastal state may exercise control necessary to prevent or punish infringements of its immigration laws within its territory or territorial sea. Ships used for irregular migration are therefore generally subject to interception in the contiguous zone. The exclusive economic zone is mostly irrelevant to irregular maritime migration, and thus ships used for such purposes there are generally subject to the same legal considerations as on the high seas.

Ships on the high seas are subject to the exclusive jurisdiction of the flag state, and accordingly other states may not interfere with them. However, the exclusive jurisdiction of the flag state is not absolute but subject to a couple of exceptions. First, the right of visit entitles government ships to visit and search ships with unclear nationality or upon suspicion of piracy, slave trade or unauthorised broadcasting. The government ship may thereby position itself so as to be able to visibly register the flag of the ship and hail it by radio or signals. If the ship does not fly a flag or refuses to show it, the government ship may proceed to verify the ship’s nationality. It may send a boat to the suspected ship to check its documents, and if the documents are not presented or are incomplete, a further examination may be undertaken on board the ship. If it then becomes clear that the ship is in fact without nationality, that is, a stateless ship, or can be assimilated to such ships, the further question arises of whether the ship can be seized.\(^{272}\) The answer is that there is no clear legal basis for seizure of stateless ships under the \textit{UNCLOS}. This has provoked a fair amount of legal commentary, which calls for some discussion. Guilfoyle has described two main strands of views.\(^{273}\)

The first holds that stateless ships enjoy the protection of no state and so may be seized by any state.\(^{274}\) This view draws mainly upon findings that only states

\(^{272}\) Cf \textit{UNCLOS} art 92(2). See above Section 2.2.2 International Waters.

\(^{273}\) Guilfoyle, \textit{Shipping Interdiction}, above n 66, 17.

\(^{274}\) See, eg, Shaw, above n 34, 457; Malcolm D Evans, ‘The Law of the Sea’ in Malcolm D Evans (ed), \textit{International Law} (Oxford University Press, 4\textsuperscript{th} ed, 2014) 651, 665; Coppens, ‘Interception of Migrant Boats at Sea’, above n 132, 214: ‘a boarding state may take enforcement measures based on its own legal provisions as there is no rule of international law that forbids this’; John A C Cartner, Richard P Fiske and Tara L Leiter, \textit{The International Law of the Shipmaster} (Informa, 2009) 93: ‘any nation can exercise jurisdiction over a [stateless] vessel because she is protected by neither national nor international law’; Craig H Allen, \textit{International Law for Seagoing Officers} (6\textsuperscript{th} ed, 2014) [Current Understanding of the Right of Visit]: ‘If evidence supports a finding that the ship is indeed stateless … jurisdiction may be asserted on that basis’; Oppenheim’s, above n 34, 731; Arthur Watts, ‘The Protection of Merchant Vessels’ (1957) 33 \textit{British Yearbook of International Law} 52; Rosemary Rayfuse,
enjoy the freedom of the high seas and that no state would be entitled to invoke the responsibility of a state having wrongfully seized a stateless ship on the high seas. However, it seems that this view overlooks the possibility that diplomatic protection is exercised by some other concerned state, for example, the national state(s) of the people on board the ship or the owners of the ship.

The second view, which appears to be the better, is instead that some further jurisdictional nexus or legal ground is required for seizure and other measures beyond the right of visit. If there is no such further nexus, such as ‘constructive presence, active or passive nationality or universal jurisdiction over certain crimes’, the stateless ship would have to be surrendered without further actions. As a result, most stateless ships used for irregular maritime migration would not be subject to seizure on the high seas.

This latter view receives support from the fact that neither the Smuggling of Migrants Protocol, the Protocol to Prevent, Suppress and Punish Non-Flag State Enforcement in High Seas Fisheries (Brill, 2004) 57. For further references, see Guilfoyle, Shipping Interdiction, above n 66, 17; Papastavridis, The Interception of Vessels, above n 66, 264–5; Brownlie’s, above n 34, 308.


276 Churchill and Lowe, above n 69, 214. Diplomatic protection designates, in short, the right of a state to protect its nationals abroad. See, eg, ‘Draft Articles on Diplomatic Protection’ [2006] II(2) Yearbook of the International Law Commission 24, art 1, which defines diplomatic protection as ‘the invocation by a state … of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a … person that is a national of the former state with a view to the implementation of such responsibility’. See generally Shaw, above n 34, 612–20; Brownlie’s, above n 34, 610–12; Daillier and Pellet, above n 133, 902–11; Oppenheim’s, above n 34, 934–5.

277 Guilfoyle, Shipping Interdiction, above n 66, 17–18; Churchill and Lowe, above n 69, 213–14; Scovazzi, above n 168, 219–20; Mallia, above n 65, 69; Klein, Maritime Security and the Law of the Sea, above n 71, 136: ‘the situation is governed by customary international law so that the law enforcement vessel may approach and check nationality to determine what other steps may be permissible once nationality is verified’ (emphasis added). But see Gallagher and David, above n 71, 423: ‘International law has long held that nationality is a prerequisite for … protection of the law … There is no strong evidence available that this foundational assumption is under any kind of serious threat’; Pancracio, above n 133, 330: ‘le fait de ne pas arborer de pavillon place le navire sous la juridiction de tout navire de guerre … Le navire est traité alors comme s’il se trouvait en infraction dans les eaux territoriales du navire de guerre’ (emphasis added).

278 Guilfoyle, Shipping Interdiction, above n 66, 18.

279 Instead, it seems that the Smuggling of Migrants Protocol art 8(7) merely ‘perpetuates the ambiguity regarding the exercise of … jurisdiction over stateless vessels’ by giving an intercepting state that, after boarding and searching, has found evidence confirming that a stateless ship is engaged in migrant smuggling the capacity to take ‘appropriate measures in accordance with relevant international and municipal law’ (emphasis added). Brownlie’s, above n 34, 315. See also Klein, Maritime Security and the Law of the Sea, above n 71, 127:
Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, nor any other global treaty allows for unconditional seizure of stateless ships on the high seas. It also corresponds to decisions by the Security Council of the United Nations authorising the inspection and seizure of stateless vessels on the high seas. Finally, it also seems to correspond to EU law. For these reasons:

‘the Smuggling of Migrants Protocol has gone some way … It has, however, still been accepted within the confines of an existing agreement and therefore also reinforces the longstanding deference to exclusive flag state authority and the freedom of navigation.’ But see Coppens, ‘Interception of Migrant Boats at Sea’, above n 132, 214: ‘“appropriate measures” … could include the seizure of the ship and/or the apprehension of persons on board.’ See below Section 5.2 Smuggling of Migrants.


See, eg, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990) which explicitly deals with enforcement measures against stateless vessels without expressing any general right to seize ships without nationality. Guilfoyle, Shipping Interdiction, above n 66, 17–18.

But see Jean-Pierre Gauci and Patricia Mallia, ‘The Migrant Smuggling Protocol and the Need for a Multi-Faceted Approach: Inter-Sectionality and Multi-Actor Cooperation’ in Violeta Moreno-Lax and Efthymios Papastavridis (eds), Boat Refugees and Migrants at Sea: A Comprehensive Approach (Brill, 2016) 119, 133, concluding that Smuggling of Migrants Protocol art 8(7) ‘provides a stronger legal basis for action against stateless vessels’. This conclusion seems unconvincing mainly for two reasons. First, it appears to overlook the explicit reference to other international law (‘in accordance with relevant … international law’), seemingly limiting the permissibility of further enforcement measures to only those that are otherwise permitted under international law. Second, it does not explain how the parties to the Protocol, which is not universally accepted, could be competent to modify the general legal framework for jurisdiction over ships provided for in UNCLOS.

See especially SC Res 2240, UN Doc S/RES/2240 (9 October 2015) paras 5, 7–8, by which the Council both called upon member states to inspect, ‘as permitted under international law’, certain ‘unflagged vessels’ on the high seas off the coast of Libya and authorised the inspection and seizure of ships used for migrant smuggling or human trafficking from Libya on the high seas. The rationale for the authorisation of the seizure of stateless vessels on the high seas, it seems, is the non-existence of a general right under international law to seize such vessels on the high seas. The authorisations have been renewed annually: SC Res 2437, UN Doc S/RES/2437 (3 October 2018); SC Res 2380, UN Doc S/RES/2380 (5 October 2017); SC Res 2292, UN Doc S/RES/2292 (14 June 2016).

Pursuant to Sea Borders Regulation [2014] OJ L 189/93, art 7(11), a participating unit that has verified that a stateless vessel is engaged in the smuggling of migrants by sea shall inform the host member state, which may take ‘further appropriate measures as laid down in [arts 7(1)–(2)] in accordance with national and international law’. However, arts 7(1)–(2) consistently require ‘authorization of the flag state, in accordance with the [Smuggling of Migrants Protocol], and where relevant, national and international law’. A similar view is repeated in the motifs of a decision by the EU Council to conduct a military operation to prevent smuggling of migrants and trafficking in the south central Mediterranean Sea, which relates
reasons, it appears that the mere statelessness of a ship is not sufficient as a basis for seizure — irrespective of whether the ship is being used for irregular maritime migration or not.

The second potentially relevant exception to the exclusive jurisdiction of the flag state over ships on the high seas in the present context relates to piracy. Although it is not impossible to imagine situations in which ships used for irregular maritime migration are in fact pirate ships, it seems reasonably clear that most situations of irregular maritime migration are beyond the scope of piracy. The practical significance of the special jurisdictional rights with respect to piracy thus seems small in the context of irregular maritime migration.285

2.2.3.2.1 Hot Pursuit

Another possible legal avenue that may be important to consider here concerns hot pursuit, which allows a coastal state ‘to pursue outside of territorial waters, and take enforcement action against, a foreign ship that has violated the laws and regulations of that state.’286 The central provision in this regard is article 111 of the UNCLOS.287

Hot pursuit may be undertaken when the coastal state has good reason to believe that a foreign ship has committed an offence against the laws and

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285 See above Section 2.2.2.3.2 Piracy.
286 Arctic Sunrise (Netherlands v Russia) (Merits) (UNCLOS Arbitral Tribunal, 14 August 2015) 45 [245].
287 See also Convention on the High Seas art 23. It is commonly accepted that the basic right of hot pursuit is of customary status: see, eg, Robert C Reuland, ‘The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention’ (1993) 33(3) Virginia Journal of International Law 557. See generally Nordquist et al, above n 69, vol 3, 247–60; Treves, ‘Navigation’, above n 182, 860–2; O’Connell, above n 69, 1075–92; Churchill and Lowe, above n 69, 214–16; Guilfoyle, Shipping Interdiction, above n 66, 18–19, 58–9; Klein, Maritime Security and the Law of the Sea, above n 71, 109–14; Rothwell and Stephens, above n 112, 415–18; Tanaka, above n 99, 168–72; Pancracio, above n 133, 161–2; Oppenheim’s, above n 34, 739–41; Daillier and Pellet, above n 133, 1341–2; Shaw, above n 34, 460–1; Brownlie’s, above n 34, 310–11.
regulations of the coastal state.\textsuperscript{288} The pursuit must not be interrupted and may only be commenced after a visual or auditory signal to stop has been given.\textsuperscript{289} Hot pursuit can be undertaken from the internal waters, territorial sea, archipelagic waters, contiguous zone, exclusive economic zone and continental shelf of the pursuing state.\textsuperscript{290}

Strictly speaking, the right of hot pursuit is not a stand-alone exception to the exclusive jurisdiction of the flag state over ships on the high seas in the same way as those previously discussed. Although it clearly encroaches upon the exclusive jurisdiction of the flag state, hot pursuit functions as an ad hoc extension of the coastal state’s jurisdiction to a place outside of territorial waters. Notably, article 111 of the \textit{UNCLOS} does not explain which measures a state may take after a completed pursuit. However, the view of hot pursuit as a temporary extension of coastal state jurisdiction may be helpful in this regard because it suggests that the pursuing state may take the same measures it would be entitled to within the maritime zone where the suspected offence was committed. Accordingly, if the pursuit was commenced when ‘the foreign ship or one of its boats’\textsuperscript{291} was within, for example, the exclusive economic zone, the coastal state may take such measures as it would be entitled to within that zone.\textsuperscript{292}

Furthermore, in the same way that the scope of the jurisdiction upon completion of pursuit is informed by the jurisdictional regime of the maritime zone in which the pursuit commenced, so are, it seems, the reasons for which pursuits may be undertaken. Accordingly, hot pursuit may only be commenced from, for example, the exclusive economic zone for suspected violations of the rights for which the zone was established.\textsuperscript{293}

Even though the right of hot pursuit may at times be relevant as an instrument for coastal states to prevent foreign ships from evading responsibility by fleeing towards the high seas, its practical significance in the context of irregular maritime migration seems generally small. Naturally, the normal situation for intercepting ships suspected of being used for such purposes is when approaching land and not when heading away from it. Even so, it is not

\begin{itemize}
  \item \textsuperscript{288} \textit{UNCLOS} art 111(1).
  \item \textsuperscript{289} Ibid arts 111(1), (4).
  \item \textsuperscript{290} Ibid art 111(2).
  \item \textsuperscript{291} Ibid art 111(1).
  \item \textsuperscript{292} See, eg, \textit{Arctic Sunrise Arbitration} 58 [244], in which ‘boarding, seizure, and detention’ were seen as possible measures for the exercise of hot pursuit of a vessel suspected of violations of laws and regulations in a safety zone established around a fixed platform in the exclusive economic zone.
  \item \textsuperscript{293} See, eg, ibid 60 [247]: ‘The laws and regulations in question are those applicable under the \textit{UNCLOS} in the area at hand.’
\end{itemize}
impossible to imagine situations when hot pursuit may be important as a legal basis for the interception of ships that have violated the immigration laws and regulations of a coastal state. Thinkable scenarios involve ships that try to escape interception in the territorial waters or contiguous zone of a coastal state by fleeing towards the high seas. Another example is if a suspected ship tries to avoid interception by fleeing not towards the high seas but to a contiguous zone or exclusive economic zone of a neighbouring coastal state. In assessing the permissibility of hot pursuit in such situations, it needs to be noted that the UNCLOS does not prevent pursuits from continuing into such zones but merely to the territorial waters of other states.  

2.2.3.2.2 As Countermeasures?
The last possible legal basis for interception to consider here relates to countermeasures. Such measures are, in brief, acts that are wrongful prima facie but are excused if taken as a countermeasure. The basic legal framework for such measures is set out in articles 49–54 of the ARSIWA. These provisions allow an injured state to take countermeasures against a state that is responsible for an internationally wrongful act in order to induce that state to comply with its obligations to cease and make reparation for the injury caused by that act.

The international law of the sea requires flag states to effectively exercise their jurisdiction and control in administrative, technical and social matters over ships flying their flags. This includes measures necessary to ensure safety at sea with regard to, inter alia, the construction, equipment and seaworthiness of the ship, the manning of the ship, labour conditions and the training of the crew, the use of signals, the maintenance of communication and the prevention of collisions. Such measures shall also include those necessary to ensure that the master and the crew of the ship are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

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294 UNCLOS art 111(3): ‘The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state.’ This limitation seems to be a logical reflection of the principle of non-intervention: see below n 896.
295 See generally James Crawford, State Responsibility (Cambridge University Press, 2013); Brownlie’s, above n 34, 539–89; Shaw, above n 34, 589–622; Daillier and Pellet, above n 133, 848–902; Oppenheim’s, above n 34, 499–554.
296 ARSIWA art 49(1).
297 UNCLOS art 94(1); Convention on the High Seas art 5(1).
298 UNCLOS art 94(3); Convention on the High Seas art 10(1).
299 UNCLOS art 94(4)(c). See also Convention on the High Seas art 10(2).
The requirements imposed on the flag state relate to the general duty of all states to exercise the freedom of the high seas ‘with due regard for the interests of other states in their exercise of the freedom of the high seas’.\textsuperscript{300} States that knowingly allow their flags to be used by ships for, say, smuggling of migrants into the territory of other states in contravention of their laws and regulations can therefore be expected to be in breach not only of their duties as flag states but also of their obligations to exercise their freedom of navigation with due regard. States that suspect that a flag state has failed to exercise proper jurisdiction and control over ships flying its flag may report the facts to that flag state, which shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.\textsuperscript{301}

But what happens if a flag state, having received such reports, does not take any actions to remedy the situation or takes actions that are clearly insufficient? The \textit{UNCLOS} is basically silent on this point.\textsuperscript{302} In any case, it seems that a flag state that fails to exercise jurisdiction over ships flying its flag, contrary to article 94(1) of the \textit{Convention}, and that does not investigate flag state reports and refrains from taking appropriate actions to remedy the situation, contrary to article 94(6), would be in breach of its obligations under the \textit{Convention}. Such wrongful acts also entail the responsibility of the flag state, exposing it to countermeasures by other states.\textsuperscript{303}

But what countermeasures can be taken against a flag state that fails to exercise its flag state jurisdiction? Can ships flying its flag be subject to boarding and seizure, which is possibly relevant in the context of irregular maritime migration? First, countermeasures are limited to the non-performance of international obligations of the state taking the measures towards the responsible state.\textsuperscript{304} Accordingly, countermeasures may not affect the rights of states other than the one responsible for the internationally wrongful act. Measures affecting the rights of not only the flag state but also other states are therefore beyond the scope. Second, the countermeasures must be proportionate, that is, ‘commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question’.\textsuperscript{305} Third, the countermeasures must not affect the obligation to refrain from the threat or use of force, obligations for the protection of

\textsuperscript{300} \textit{UNCLOS} art 87(2). See also \textit{Convention on the High Seas} arts 2, 26(2).
\textsuperscript{301} \textit{UNCLOS} art 94(6).
\textsuperscript{302} Cf ibid art 94. See generally Henrik Ringbom, \textit{The EU Maritime Safety Policy and International Law} (Brill, 2008) 169: ‘there are few remedies available against non-complying flag states.’
\textsuperscript{303} \textit{ARSIWA} art 1.
\textsuperscript{304} Ibid art 49(1).
\textsuperscript{305} Ibid art 51.
fundamental human rights, obligations of humanitarian character prohibiting reprisals, and other obligations under jus cogens.\textsuperscript{306} Bearing in mind that most seizures of ships imply arresting or at least temporarily detaining those on board, which are measures typically affecting their human rights, it is not very easy to imagine seizures as countermeasures.\textsuperscript{307} But what about abandoned or otherwise unmanned ships without passengers? The problem then is that seizures of ships normally involve deprivation of property. However, it is debatable whether property rights are so widely accepted as to involve ‘obligations for the protection of fundamental human rights’.\textsuperscript{308} If not, it could be argued that seizure of abandoned ships is a possible exercise of countermeasures, provided that the seizure is proportionate and fulfils the other requirements of countermeasures.

For these reasons, it may be that the reference to countermeasures provides an exceptional possibility for states that encounter abandoned ships at sea or have rescued everyone on board a ship to seize the empty ship even further out at sea than the territorial sea and the contiguous zone. Even though this possibility could in some situations be important for practical purposes, not least from an operative policing perspective or for reasons of maritime safety, it cannot be expected to be of any greater practical significance to migration management in general since it only applies to ships with no one on board. Consequently, it appears that the possible existence of an exceptional possibility to seize empty ships used for irregular maritime migration as a countermeasure does not change the main picture resulting from the analysis of the legal framework for jurisdiction over ships put forward above: coastal states are generally not entitled to intercept ships used for irregular maritime migration in international waters except for in the contiguous zone.

Having now considered the first issue dealt with by this chapter, jurisdiction over ships, it is time to shift focus to the second, rescue at sea.

\textsuperscript{306} Ibid art 50–1.
\textsuperscript{307} Arrests or detentions are, for example, likely to amount to deprivations of liberty and so affect the right to liberty, which is thought to qualify as ‘an obligation for the protection of fundamental human rights’: ibid art 50(1)(b). The right to liberty is recognised in, inter alia, \textit{Universal Declaration of Human Rights}, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 3 (‘UDHR’); \textit{International Covenant on Civil and Political Rights}, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1) (‘ICCPR’). See below Section 4.7 Liberty and Security.
\textsuperscript{308} \textit{ARSIWA} art 50(1)(b).
\textsuperscript{307} Ibid. The right to own property is recognised in UDHR art 17 but neither the ICCPR nor the \textit{International Covenant on Economic, Social and Cultural Rights}, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’).
2.3 International Maritime Rescue Law

International maritime rescue law denotes the international legal framework for rescue of persons at sea or, in other words, maritime search and rescue. It is predominantly a sub-system of the international law of the sea. Even so, it is not limited to provisions found in the UNCLoS but also encompasses certain aspects of maritime law as well as norms relating to humanitarian considerations, including international human rights law and international refugee law.

The heart of international maritime rescue law is the duty to render assistance at sea. Because this duty only seeks to protect human lives, not ships and their cargo, it follows logically that salvage law is mostly distinct from international maritime rescue law. Yet, it cannot be neglected that there are also expressions of the duty to render assistance at sea in international salvage law.\textsuperscript{309} However, these provisions differ in scope and do not establish operative duties comparable to those under international maritime rescue law.\textsuperscript{310}

International maritime rescue law is mainly treaty-based but comprises some customary norms. The centrepiece is the SAR Convention, which is complemented by the SOLAS Convention and the law of the sea more generally. While the UNCLoS establishes the basic framework, the SAR Convention and the SOLAS Convention provide the details. Moreover, certain norms of humanitarian character, such as the right to life, non-discrimination and the prohibition of refoulement, also come within the scope.\textsuperscript{311}

States are the main addressees of international maritime rescue law. Like many aspects of maritime law, international maritime rescue law often requires implementation in national law to apply to shipmasters and other non-subjects of international law.\textsuperscript{312} Important parts of international maritime rescue law are in this way directed to states but materialise first through the conduct of private entities.


\textsuperscript{310} See below n 434 and accompanying text.

\textsuperscript{311} See below Section 2.3.3 Duty to Render Assistance.

\textsuperscript{312} See above Section 2.1 Introduction.
There are several reasons to describe international maritime rescue law as a legal field. However, before setting out some of these reasons, it seems appropriate to briefly discuss what qualifies as a legal field. Asgaard, for example, defines a legal field as ‘a group of situations unified by a pattern or set or patterns that is both common and distinctive to the field’ and that can be conceptualised as

the interaction of four underlying constitutive dimensions of the field: (1) a factual context that gives rise to (2) certain policy trade-offs, which are in turn resolved by (3) the application of values and interests to produce (4) legal doctrine.313

The primary purpose of classifying a set of legal norms as a legal field — legal taxonomy — is to facilitate our understanding of the law.314 The idea is that such taxonomy helps us to understand how the law operates, what objectives a particular area of law embeds, how it is to be applied, and how it relates to other areas of the law. The basic idea is to bring ‘coherence to an otherwise undifferentiated mass’.315 However, not all exercises of legal taxonomy are useful. According to Asgaard, the explanatory power of a classification of a set of norms as a legal field depends on a number of factors. First, there is the strength of the pattern of the legal situations arising in the field. Second, there is the simplicity of this pattern: the simpler the pattern, the more useful the classification. Third, the explanatory power depends on the strength of the characteristics that signify the pattern. Fourth, it depends on the extent to which a pattern explains the various issues within the field. Fifth, there is the scope: the broader the field, the more useful the classification. In sum, ‘the perfect framework for a perfectly coherent field, therefore, would fully explain various issues that arise in a vast scope of situations with a simple organising framework.’316

Why is it appropriate to describe international maritime rescue law as a legal field? The factual context is set by the SAR Convention in conjunction with relevant parts of the SOLAS Convention and the UNCLOS. All of these address a specific issue: maritime search and rescue, which appears as a clear and distinct pattern. Moreover, this factual context calls for certain compromises or policy trade-offs. An example is the compromise between the sovereignty of the coastal state in territorial waters and the duty of shipmasters to render

314 Ibid 226: ‘We organize the law into distinct fields as a form of legal taxonomy, on the premise that classification will facilitate an improved understanding of the law’.
315 Ibid 227 and further references there.
316 Ibid 229.
assistance even during innocent passage. 317 Another is the compromise between the freedom of navigation and the duty of shipmasters to render assistance at sea. 318 These and other compromises are resolved by the application of certain values or objectives embedded in the field — in the case of international maritime rescue law, the interest of protecting human lives against the perils of the sea. As expected, this factual context, the necessary compromises and the embedded values give rise to legal doctrine. 319 For these reasons, it may be appropriate, according to Asgaard’s notion, to speak of international maritime rescue law as a legal field.

The main aim of the description of international maritime rescue law as a distinct legal field is to bring coherence and to facilitate our understanding of the law. Most importantly, international maritime rescue law and the law of the sea in general seem to be established for different political values and objectives. While the key concern for international maritime rescue law appears to be the protection of human life at sea, that of the law of the sea is likely to be of more general character. 320 The description of international maritime rescue law as a distinct field helps to draw attention to this difference. Moreover, the distinctive pattern of international maritime rescue law — the focus on maritime search and rescue — seems sufficiently clear and simple. The classification also helps to underline some important features of the field, including the significance of non-discrimination and the link to humanitarian considerations reflected in other areas of law, such as international human rights law and international refugee law. 321

International maritime rescue law consists of a number of elements and clusters of norms. The centrepiece is the duty to render assistance and the key clusters appear in the SAR Convention, the SOLAS Convention and the UNCLOS. Furthermore, international maritime rescue law builds on and embeds a number of rules and principles of humanitarian character. Accordingly, after brief introductions to the SAR Convention and the SOLAS Convention more detailed examinations of the duty to render assistance and humanitarian considerations follow. Last, some main points are briefly restated.

317 See below Section 2.3.3 Duty to Render Assistance.
318 See, eg, UNCLOS art 98(1).
319 See above Section 1.5 Previous Research.
320 See above n 129 and accompanying text.
321 See below Sections 2.3.3.1 Non-Discrimination, 4.2 Right to Life. As noted by Klein, ‘current concerns relating to rescue at sea are largely associated with irregular migration rather than with accidents or the malfunction of vessels at sea’: Klein, ‘International Migration by Sea and Air’, above n 5, 260, 275.
2.3.1 SAR Convention

The *SAR Convention* is the main treaty of international maritime rescue law. Prior to its adoption, there was no designated global legal system governing maritime search and rescue. As described by the IMO, ‘[i]n some areas there was a well-established organization able to provide assistance promptly and efficiently, in others there was nothing at all’.322

The *SAR Convention* was adopted in April 1979 and entered into force in June 1985, one year after the deposition of the fifteenth instrument of ratification.323 It remains open for accession.324 In December 2018, the *SAR Convention* had 111 parties, representing about 80% of the gross tonnage of the world’s merchant fleet.325

The *SAR Convention* comprises a preamble, eight articles and an annex. The material obligations are found in the annex, which forms an integral part of the *Convention*.326 Parties undertake to adopt all legislative or other appropriate measures necessary to give full effect to the *Convention* and its annex.327

The *SAR Convention* has been amended two times: in 1998 (the annex) and in 2004 (chapters II, III and IV of the annex).328 Both amendments were adopted after considerations within the IMO through its simplified amendment procedure. Pursuant to this procedure, amendments adopted within the IMO

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323 *SAR Convention* art V sets out the requirements for entry into force.

324 Ibid art IV(1).


326 *SAR Convention* art I.

327 Ibid art I. But see Spijkerboer, above n 65, 10, who, referring to a resolution by the conference that adopted the *SAR Convention*, states that ‘[t]he *SAR Convention* stops at this level; no binding rules are established on the basis of the *SAR Annex*’ (emphasis added). However, given that *SAR Convention* art I clearly requires its parties to give full effect not only to the *Convention* but also to its annex it is difficult to see how the annex could be anything other than binding.

are deemed to have been accepted unless more than one third of the parties object to the amendments within one year after they are communicated.\textsuperscript{329}

The amendments adopted in 1998 entailed a comprehensive revision of the annex. In short, the amendments clarified the responsibilities of the parties and strengthened both the regional approach and the coordination between maritime and aeronautical operations.\textsuperscript{330} The amendments entered into force in January 2000.\textsuperscript{331}

The \textit{2004 Amendments to the SAR Convention}, which are the most important for the present purposes, were adopted in May 2004 and entered into force in July 2006.\textsuperscript{332} They concerned the annex and entailed three main innovations: the definition of persons in distress; disembarkation and delivery of persons rescued at sea to a place of safety; and the role of rescue co-ordination centres for initiating the process of identifying the most appropriate places for disembarking persons found in distress at sea.\textsuperscript{333}

Like the amendments adopted in 1998, the \textit{2004 Amendments} were adopted after considerations within the IMO in accordance with the simplified amendment procedure. The amendments entered into force with respect to all parties, except for Malta, which objected to them.\textsuperscript{334}

The \textit{2004 Amendments to the SAR Convention} are of key interest to the present study since they concern the concept of ‘place of safety’. This phrase appears

\begin{footnotes}
\footnote{\textsuperscript{329} The procedure is specified in \textit{SAR Convention} art III(2). Cf \textit{VCLT} art 39, which sets forth the general requirement regarding amendments, that is, agreement among all the parties.}
\footnote{\textsuperscript{330} \textit{1998 Amendments to the SAR Convention}.}
\footnote{\textsuperscript{331} International Maritime Organization, \textit{Status of Multilateral Conventions} (Web Page) <http://www.imo.org/>.}
\footnote{\textsuperscript{332} Ibid.}
\footnote{\textsuperscript{333} International Maritime Organization, \textit{International Convention on Maritime Search and Rescue (SAR)} (Web Page) <http://www.imo.org/>.}
\footnote{\textsuperscript{334} Cf \textit{SAR Convention} art III(2)(h), which states that amendments in accordance with the procedure specified in art III(2)(f) ‘shall enter into force with respect to all parties, except those which have objected to the amendment … and which have not withdrawn such objections, six months after the date on which it is deemed to have been accepted the procedure for entry into force of amendments by the procedure specified in art III(2)(f)’. The depositary received, on 22 December 2005, the following communication from the Ministry of Foreign Affairs of Malta: ‘the Ministry wished to inform that, after careful consideration of the said amendments, in accordance with art III(2)(f) … Malta … declares that it is not yet in a position to accept these amendments.’ International Maritime Organization, \textit{Status of Multilateral Conventions} (Web Page) <http://www.imo.org/>. See also Spijkerboer, above n 65, 10.}
\end{footnotes}
in two provisions of the *SAR Convention*. First, it appears in the definition of rescue:

‘Rescue’. An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a *place of safety*.\(^\text{335}\)

Second, it appears in a provision dealing with co-operation for disembarkation of survivors:

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’ [sic] intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a *place of safety*, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.\(^\text{336}\)

Importantly, the preamble of the *2004 Amendments to the SAR Convention* adds:

the intent […] is to ensure that in every case a *place of safety* is provided within a reasonable time. It is further intended that the responsibility to provide a *place of safety*, or to ensure that a *place of safety* is provided, falls on the party responsible for the [search and rescue] region in which the survivors were recovered\(^\text{337}\)

The *2004 Amendments to the SAR Convention* were adopted together with corresponding amendments to the *SOLAS Convention* and a set of guidelines providing operative direction for the practical application of the rules: the *IMO Guidelines on the Treatment of Persons Rescued at Sea*.\(^\text{338}\) Although the *Guidelines* are not legally binding, they provide important material for the understanding of the obligations.\(^\text{339}\) The *SAR Convention* is subject to further considerations below in Section 2.3.3 Duty to Render Assistance.

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\(^\text{335}\) *SAR Convention* annex para 1.3.2 (emphasis added).
\(^\text{336}\) Ibid annex para 3.1.9 (emphasis added).
\(^\text{337}\) *2004 Amendments to the SAR Convention* Preamble para 8 (emphasis added).
\(^\text{338}\) See below Section 2.3.2 SOLAS Convention.
\(^\text{339}\) See below Chapter 7 Meaning of the Concept of ‘Place of Safety’.
2.3.2 SOLAS Convention

The *SOLAS Convention* is the principal legal source in the context of seaworthiness of ships. The main objective is to lay down standards for the safe construction, equipment and operation of ships. The first version of the *Convention* was adopted in 1914 as a response to the sinking of the *Titanic* in 1912. The second version was adopted in 1929, the third in 1948, the fourth in 1960, and the fifth and most recent in 1974. The main novelty of the 1974 version was the introduction of a tacit acceptance procedure that facilitates the adoption of amendments. Instead of requiring express consent of all parties, this procedure allows amendments to enter into force on a specified date unless, before that date, objections to the amendments are received from an agreed number of parties. Thanks to this simplified amendment procedure, which ‘has proven highly successful’, the *Convention* has been revised and amended numerous times, most extensively by the adoption of two protocols in 1978 and 1988.

In December 2018, the *SOLAS Convention* had 164 parties representing more than 99% of the gross tonnage of the world’s merchant fleet.

The *SOLAS Convention* contains numerous complex provisions of predominantly technical character. The structure is a short convention with only 13 articles concerning general issues such as general obligations, amendments and entry into force, followed by a single large annex comprising the material provisions. The annex, which forms an integral part of the

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345 *SOLAS Convention*.
346 Ibid art VIII.
treaty, was divided in December 2018 into the following chapters and sub-chapters:

I: General provisions
II-1: Construction — Subdivision and stability, machinery and electrical installations
II-2: Fire protection, fire detection and fire extinction
III: Life-saving appliances and arrangements
IV: Radiocommunications
V: Safety of navigation
VI: Carriage of cargoes
VII: Carriage of dangerous goods
VIII: Nuclear ships
IX: Management for the safe operation of ships
X: Safety measures for high-speed craft
XI-1: Special measures to enhance maritime safety
XI-2: Special measures to enhance maritime security
XII: Additional safety measures for bulk carriers
XIII: Verification of compliance
XIV: Safety measures for ships operating in polar waters.

The main obligation is that of flag states to ensure that ships flying their flag comply with the norms laid down in the SOLAS Convention, including by promulgating all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the … Convention full and complete effect, so as to ensure that, from the point of view of safety of life, a ship is fit for the service for which it is intended.

Flag states are required to survey ships flying their flag and issue certificates to this end. Coastal states also have a degree of control, as they are entitled to control that foreign ships in their ports have valid certificates (port state control). Certificates shall be accepted unless there are ‘clear grounds for believing that the condition of the ship or of its equipment does not correspond

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350 SOLAS Convention art I(a).
351 Ibid annex.
352 However, this does not mean that ‘the SOLAS Convention applies to ships’: Spijkerboer, above n 65, 22 (emphasis added). Although the SOLAS Convention surely has effects for shipowners and masters of ships after implementation at the national level this does not mean that the Convention itself applies to ships. See below Section 2.3.3.3.3 Shipmaster Duty?
353 SOLAS Convention art I(b) (emphasis added).
substantially with the particulars of any of the certificates’. If there are such grounds, or if the certificates are not valid, the coastal state shall take steps to ensure that the ship ‘does not sail until it can proceed to sea or leave the port for the purpose of proceeding to the appropriate repair yard without danger to the ship or persons on board’. The SOLAS Convention is monitored by the IMO, and amendments are normally adopted after consideration within the IMO.

Only those provisions of the SOLAS Convention that concern rescue at sea are understood to be part of international maritime rescue law. The central provisions in this regard are those that deal with obligations and procedures in distress situations. The provisions on the duty to render assistance at sea were complemented in 2004 by new ones concerning disembarkation of persons rescued at sea. Following these amendments, a provision identical to that as in the SAR Convention now appears in the SOLAS Convention:

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’ [sic] intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The contracting government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant contracting governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.

Like the corresponding amendments to the SAR Convention, the preamble of the amendments to the SOLAS Convention explains that

the intent … is to ensure that in every case a place of safety is provided within a reasonable time [and that it] … is further intended that the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the contracting government responsible for the search and rescue region in which the survivors were recovered.

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356 SOLAS Convention annex ch I reg 19(b).
357 Ibid annex ch I reg 19(c).
358 Cf ibid art VIII(b).
359 Ibid annex ch V reg 33. See also at annex ch V regs 19-1(12), 29, 35. See below Section 2.3.3 Duty to Render Assistance.
360 SOLAS Convention annex ch V reg 33(1-1) (emphasis added).
361 Adoption of Amendments to the International Convention on Safety of Lives at Sea, 1974, as amended, MSC Res 153(78), IMO Doc MSC 78/26/Add.1 annex 3 (adopted 20 May 2004,
As with the 2004 Amendments to the SAR Convention, the 2004 Amendments to the SOLAS Convention entered into force for all parties except for Malta, which objected to them.362

2.3.3 Duty to Render Assistance

The duty to render assistance at sea is the legal reflection of a deep-rooted moral tradition and general practice of seafarers: to help others at sea.363 This custom has developed into a legal duty ‘accepted from time immemorial’.364 Not surprisingly then, the duty to render assistance at sea is generally understood to be of customary status.365 It has been described as ‘an ancient and fundamental norm of the international law’,366 ‘one of the traditional hallmarks of the law of the sea’367 and ‘an essential constitutional element of the law of the sea’.368

362 International Maritime Organization, Status of Multilateral Conventions (Web Page) <http://www.imo.org/>. Finland also objected to the 2004 Amendments to the SOLAS Convention and has, as of December 2018, not withdrawn this objection. Finland also objected to the 2004 Amendments to the SAR Convention but later withdrew that objection.


364 Momtaz, above n 69, 416.

365 When drafting the Convention on the High Seas, the ILC considered the obligation to render assistance to be part of customary international law and ‘deemed it advisable to include a provision to the effect that ships must render assistance to all persons in danger on the high seas’. ‘Report of the International Law Commission Covering the Work of Its Eighth Session (23 April–4 July 1956)’ [1956] II Yearbook of the International Law Commission 253, 281. See also Nordquist et al, above n 69, vol 3, 172; O’Connell, above n 69, 814; Guilfoyle, Shipping Interdiction, above n 66, 203; Aldo Chircop, ‘Law of the Sea and International Environmental Law Considerations for Places of Refuge for Ships in Need of Assistance’ in Aldo Chircop and Olof Lindén (eds), Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom (Martinus Nijhoff, 2006) 163–229; Scovazzi, above n 168, 225, claiming that it can also be ‘included among the general principles of law, as recalled in [Statute of the International Court of Justice art 38(1)(c)].’

366 Proelss, ‘Rescue at Sea Revisited’, above n 65, 8; Barnes, ‘Refugee Law at Sea’, above n 5, 49.


The duty to render assistance was first codified in global treaty law in 1910 in the *Brussels Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea*. Corresponding provisions appear in the *International Convention for the Unification of Certain Rules of Law Respecting Collisions between Vessels* and the *International Convention on the Safety of Life at Sea* of 1948, which influenced the ILC when drafting the *Convention on the High Seas*. Several other international instruments providing for the duty to render assistance have been adopted since then. The most important are the *UNCLOS*, the *SOLAS Convention* and the *SAR Convention*.

Technically speaking, the duty to render assistance at sea comprises several obligations of international law. A simple distinction is between flag state obligations and coastal state obligations. However, a couple of features are of general character and so merit attention from the outset: the prohibition of discrimination and the notion of distress. Accordingly, after sub-sections designated to these issues, sub-sections on flag state obligations and coastal state obligations follow.

### 2.3.3.1 Non-Discrimination

The duty to render assistance at sea applies to everyone in distress at sea. States are accordingly not allowed to discriminate between different categories of persons in distress at sea: everyone is equally worthy of rescue. While article 98(1) of the *UNCLOS* refers to ‘any person found at sea in danger of being lost’, the *SOLAS Convention* and the *SAR Convention* contain identical and similarly explicit prohibitions of discrimination: ‘regardless of the nationality or status of such a person or the circumstances in which that person is found’. An even stronger wording appears in the

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369 *Brussels Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea* art XI.


372 *Convention on the High Seas* art 36.

373 See, eg, *UNCLOS*; *SAR Convention*; *SOLAS Convention*; *Salvage Convention*. See below Sections 2.3.3.3 Flag State Obligations, 2.3.3.4 Coastal State Obligations.

374 *UNCLOS* art 98; *SOLAS Convention* annex ch V reg 33(1); *SAR Convention* annex para 2.1.10.

375 See below Section 4.3 Non-Discrimination.

376 See, eg, Nordquist et al, above n 69, vol 3, 175; Rothwell and Stephens, above n 112, 162; Rothwell, above n 5, 119.

377 Emphasis added.

378 *SOLAS Convention* annex ch V reg 33(1) (emphasis added); *SAR Convention* annex para 2.1.10 (emphasis added).
Brussels Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, which requires assistance to be provided ‘to everybody, even though an enemy, found at sea in danger of being lost’.

There is no real reason to believe that the customary duty to render assistance at sea is any different in this regard.

The non-discrimination element of the duty to render assistance highlights the intimate link between the duty to render assistance at sea and international human rights law, in which non-discrimination is a key feature. Relevant examples include the general prohibition of discrimination, the prohibition of racial discrimination, the prohibition of discrimination against women, the prohibition of discrimination against children, and the prohibition of discrimination of persons with disabilities. Non-discrimination is also provided for more generally in the international law of the sea.

The practical meaning of the non-discrimination element of the duty to render assistance is that assistance shall be provided to everyone in distress at sea. No discrimination as to nationality, race, status or any other circumstance not related to the distress situation itself is permitted. Accordingly, there is no room for doubt as to whether the duty to render assistance at sea covers not

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380 See the references included above n 365.
382 See, eg, Charter of the United Nations arts 1(3), 55(c), 56; UDHR arts 1, 2, 7; ICCPR art 26. See below Section 4.3 Non-Discrimination.
388 However, considerations relating to the safety of the rescue ship, the crew or its passengers may in some situations warrant a less strict application. See below Section 2.3.3.3.4 Safety of Own Ship.
only regular seafarers, such as crewmembers and passengers of private ships, but also refugees and migrants in distress at sea.\(^\text{389}\)

Furthermore, the relevant provisions of the *SOLAS Convention* and *SAR Convention* — ‘regardless of … the circumstances in which that person is found’ — explicitly clarify that the reason or cause of the distress situation is irrelevant. Consequently, the duty to render assistance applies in the same way to a person in distress who took all reasonable precautions as to a person who did not take adequate or any precautions. It even covers persons who have contributed to or deliberately caused their own distress. Solo sailors, open-water swimmers and others readily challenging the perils of the sea are then equally covered as refugees and migrants that for strategic reasons put themselves in distress — the duty to render assistance covers them all.\(^\text{390}\) The personal scope of the duty to render assistance at sea may against this background rightly be described as ‘universal’.\(^\text{391}\)

### 2.3.3.2 Distress

Another key element of the duty to render assistance is the concept of distress.\(^\text{392}\) Notably, the duty only applies when there is distress. The material scope of the duty is thus directly linked to the meaning of this concept.

The concept of distress appears in slightly different formulations in the various treaties. While the *UNCLOS* refers to ‘any person found at sea in danger of being lost’ and ‘persons in distress’;\(^\text{393}\) the *SOLAS Convention* and the *SAR Convention* refer to ‘person in distress at sea’.\(^\text{394}\) Consequently, it cannot be precluded that the concept of distress under article 98(1) of the *UNCLOS* is different from the corresponding concepts under the *SOLAS Convention* and the *SAR Convention*. However, because most parties to the *UNCLOS* are

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389 See, eg, Rothwell and Stephens, above n 112, 162: ‘[t]he requirement in [art] 98 to rescue “any person” makes clear that there should be no distinction exercised in the rescue of persons at sea’.

390 The universal coverage of the duty to render assistance is specifically underlined in the recently adopted *Global Compact for Safe, Orderly and Regular Migration*, UN Doc A/CONF.231/3 (30 July 2018, adopted 10–11 December 2018) annex para 24: ‘We commit to cooperate internationally to save lives and prevent migrant deaths and injuries through individual or joint search and rescue operations … assuming collective responsibility to preserve the lives of all migrants’ (emphasis added).

391 Moreno-Lax, ‘Seeking Asylum in the Mediterranean’, above n 65, 195. For the universality of international human rights law, see below Section 4.1 Introduction.

392 There are several concepts of distress under international law, for example under the law of state responsibility (*ARSIWA* art 24) and the customary law on access to port for ships in distress. See below Section 2.3.5 Access to Port and Right of Refuge. The meanings of the concepts may not necessarily be the same.

393 *UNCLOS* art 98(1). Identical wording appears in *Convention on the High Seas* art 12. *Salvage Convention* art 10(1) refers to ‘any person in danger of being lost at sea’.

394 *SOLAS Convention* annex ch V reg 33; *SAR Convention* annex paras 2.1.1, 2.1.10.
parties also to the SOLAS Convention and/or the SAR Convention and because of the customary duty to render assistance at sea, the significance of this possible difference seems mainly theoretical.395

The ordinary meaning of ‘distress’ is something like ‘[t]he overpowering pressure of some adverse force, such as anger, hunger, bad weather’ or ‘when a ship requires immediate assistance from unlooked-for damage or danger’.396 While the UNCLOS does not define the term, the SAR Convention defines ‘distress phase’ as a ‘situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance’.397 Even though this definition seems more precise than its counterpart under the UNCLOS, it still leaves some room for states to determine when a situation amounts to distress. This discretionary power seems also to some extent essential. Because not all distress incidents are identical, the assessment of what amounts to distress seems feasible only on a case-by-case basis. To assist in determining the appropriate operating procedures, the SAR Convention distinguishes between three different phases:

.1 Uncertainty phase:
.1.1 when a person has been reported as missing, or a vessel or other craft is overdue; or
.1.2 when a person, a vessel or other craft has failed to make an expected position or safety report.

.2 Alert phase:
.2.1 when, following the uncertainty phase, attempts to establish contact with a person, a vessel or other craft have failed and inquiries addressed to other appropriate sources have been unsuccessful; or
.2.2 when information has been received indicating that the operating efficiency of a vessel or other craft is impaired, but not to the extent that a distress situation is likely.

395 Papastavridis, The Interception of Vessels, above n 66, 296 notes that the SOLAS Convention and the SAR Convention are not specifications of the UNCLOS but separate treaties and as such can be used as ‘an interpretative tool qua “subsequent agreements”, pursuant to art 31(3)(a) of VCLT’ (emphasis added). See also Coppens, ‘The Law of the Sea and Human Rights in the Hirsi’, above n 322, 191. However, because not all parties to the UNCLOS are parties to the SOLAS Convention and/or the SAR Convention it is not obvious how any of the latter could be used as a primary means of interpretation, within the meaning of VCLT art 31(3), for the interpretation of the former. For the meaning of ‘parties’ in VCLT art 31(3), see below Section 6.2.2 Primary Means of Interpretation.
397 SAR Convention annex para 1.3.13.
.3 Distress phase:

.3.1 when positive information is received that a person, a vessel or other craft is in danger and in need of immediate assistance; or
.3.2 when, following the alert phase, further unsuccessful attempts to establish contact with a person, a vessel or other craft and more widespread unsuccessful inquiries point to the probability that a distress situation exists; or
.3.3 when information is received which indicates that the operating efficiency of a vessel or other craft has been impaired to the extent that a distress situation is likely. 398

While this distinction between various phases does not seem unimportant, not least from an operative perspective, it uses ‘distress’ without providing a clear meaning of this term. Even so, it seems clear that the overarching objective of the duty to render assistance at sea is to reduce the loss of human life at sea. 399

The essentially humanitarian character of the duty supposedly warrants an extensive interpretation of the material scope. If not, the effectiveness of the duty would likely be at risk.

Furthermore, the interpretation also needs to take into account other relevant and applicable rules of international law. 400 The right to life is an essential norm of international human rights law that is applicable to the parties either in the form of custom or treaty. 401 It entails not only negative obligations of states, that is, to refrain from doing something, but also positive obligations,

398 Ibid annex para 4.4.
399 See, eg, ibid Preamble para 1; SOLAS Convention Preamble para 1. See also International Maritime Organization and International Civil Aviation Organization, International Aeronautical and Maritime Search and Rescue Manual (10th ed, 2016) vol 1, 1-1 (‘IAMSAR Manual’). The IAMSAR Manual serves to assist states in meeting their obligations under the SAR Convention, the SOLAS Convention and the Convention on International Civil Aviation, opened for signature 7 December 1944, 102 UNTS 295 (entered into force 4 April 1947) (‘Chicago Convention’). The IMO and the International Civil Aviation Organization publish it jointly and update it every three years. IAMSAR Manual vol 1, v–vi (‘Foreword’).
400 VCLT art 31(3)(c) requires the interpreter to take into account ‘any relevant rules of international law applicable in the relations between the parties’. See below Chapter 6 Standard of Interpretation for the Concept of ‘Place of Safety’.
that is, to take actions to prevent the loss of life.\textsuperscript{402} Therefore, it seems that the duty to render assistance at sea can be thought of as concomitant to the right to life.\textsuperscript{403} The relevance of the right to life further accentuates the broad meaning of the concept of distress.\textsuperscript{404} A restrictive interpretation would risk undermining not only the duty to render assistance at sea but also the right to life. A broad interpretation of the concept of distress seems, furthermore, to be confirmed by the \textit{IAMSAR Manual}, which sets forth something of a precautionary approach to the concept of distress.\textsuperscript{405} In addition, it also seems to be confirmed by the agreement and practice of EU member states under the \textit{Sea Borders Regulation},\textsuperscript{406} which, along the same lines as the \textit{IAMSAR Manual}, only requires ‘positive information … that a person or a vessel is in danger and in need of immediate assistance’ to amount to distress.\textsuperscript{407}

A broad interpretation of the concept of distress is further supported by relevant jurisprudence and commentary. Notably, in 2018, the Human Rights Committee adopted a new general comment on the right to life that replaced two earlier comments from the 1980s.\textsuperscript{408} The new comment makes clear that the obligation to respect and ensure the right to life ‘extends to reasonably foreseeable threats’.\textsuperscript{409} See, eg, Human Rights Committee, \textit{General Comment No 36: The Right to Life}, 124\textsuperscript{th} sess, UN Doc CCPR/C/GC/36 (30 October 2018) para 18: ‘The duty to protect the right to life … includes an obligation for states parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats’.

\textsuperscript{402} See, eg, Human Rights Committee, \textit{General Comment No 36: The Right to Life}, 124\textsuperscript{th} sess, UN Doc CCPR/C/GC/36 (30 October 2018) para 18: ‘The duty to protect the right to life … includes an obligation for states parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats’.

\textsuperscript{403} See, eg, ibid para 7: ‘The obligation of states parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.’

\textsuperscript{404} See, eg, ibid para 3: ‘The right to life is a right which should not be interpreted narrowly.’

\textsuperscript{405} \textit{IAMSAR Manual} vol 2, 3-3 [3.3.4–3.3.6]. By excluding the words ‘grave and imminent’ from the references to ‘danger’, it seems to set a lower threshold for distress. This appears, for natural reasons, understandable from an operative emergency response perspective.

\textsuperscript{406} \textit{Sea Borders Regulation} [2014] OJ L 189/93 is naturally not binding for all parties to the relevant treaties and thus cannot be used as a primary means of interpretation. However, it may still be used as a supplementary means of interpretation to confirm the interpretation resulting from the application of the general rule of interpretation. See below Section 6.2.3 Supplementary Means of Interpretation.

\textsuperscript{407} Ibid art 9(2)(e)(i). \textit{SAR Convention} annex para 1.3.13 which not only requires danger but ‘grave and imminent danger’ for a situation to amount to distress. \textit{Sea Borders Regulation} [2014] OJ L 189/93 also provides further specificity by listing factors to be taken into account when considering whether the vessel is in a phase of uncertainty, alert or distress. Examples of relevant factors include, inter alia, ‘the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination’, ‘the presence of qualified crew and command of the vessel’, and ‘the presence of persons on board in urgent need of medical assistance’: at art 9(2)(f).

\textsuperscript{408} \textit{General Comment No 36: The Right to Life}, UN Doc CCPR/C/GC/36.
foreseeable threats and life-threatening situations that can result in loss of life.’ The relevance to rescue at sea is explicitly recognised:

States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.

The European Court of Human Rights (ECtHR) has also developed a broad interpretation of the right to life and recognised the link to the provision of emergency services. Decisions by national courts may also be informative of the content of international law, even though without any formal authority. Two oft-mentioned cases in this regard are *The Eleanor*, in which it was held that distress always entails urgency but that ‘there need not be immediate physical necessity’, and *Kate A Hoff*, in which it was established that that a ship need not to ‘be dashed helplessly … against rocks before a claim of distress can properly be invoked on its behalf’.

For these and other reasons, it seems reasonably safe to assume that the concept of distress has a broad meaning under international maritime rescue law. Therefore, the duty to render assistance at sea appears to apply not only in situations where physical dangers are on the verge of materialising but also in situations where a vessel or person can reasonably be expected to end up in danger. Not only reactive but also preventive measures are then covered. The finer details are naturally context-specific and need to be determined on a case-by-case basis. However, because of the real risks involved, caution seems necessary.

Despite the essentially humanitarian character of the duty to render assistance, rescue operations are believed to sometimes be used as a means of justifying interception operations at sea. It therefore seems important to note that the broad meaning of the concept of distress may in practice not only serve life-saving purposes but also be welcomed by states that wish to invoke their

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409 Ibid para 7.
410 Ibid para 63.
411 See below nn 795–7 and accompanying text.
obligations pursuant to the duty to render assistance to justify otherwise controversial migration management measures at sea. However, before turning to such more intricate matters, the present sub-chapter continues the description of the duty to render assistance at sea by distinguishing between flag state obligations and coastal state obligations.

2.3.3.3 Flag State Obligations

The most authoritative expressions of flag state obligations pursuant to the duty to render assistance at sea are found in the SOLAS Convention, the SAR Convention, the Salvage Convention and the UNCLOS. The relevant provisions are similar and provide a coherent yet multifaceted picture.

While the SOLAS Convention requires shipmasters ‘on receiving information from any source that persons are in distress at sea … to proceed with all speed to their assistance’, the SAR Convention requires its parties to ensure ‘that assistance be provided to persons in distress at sea’. Similarly, the Salvage Convention requires ‘[e]very master …, 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’.

Finally, the UNCLOS provides:

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.

See below Section 2.3.4 Forcible Rescue?

SOLAS Convention annex ch V reg 33(1).

SAR Convention annex para 2.1.10.

Salvage Convention art 10(1).

UNCLOS art 98(1).
2.3.3.3.1 Geographical Scope

Although the relevant provision of the UNCLOS, article 98, is found in Part VII of the Convention, which deals with the high seas, it is well-understood that the duty to render assistance applies irrespective of maritime zone. The term ‘at sea’ in article 98(1)(a) shall thus be read as meaning ‘anywhere in the oceans’. Several arguments support this view.

First, the applicability to the exclusive economic zone seems reasonably straightforward since article 58(2) of the UNCLOS explicitly extends the applicability of the provisions on the high seas to the exclusive economic zone as far as they are not incompatible with the specific provisions of that zone. Because it is not easy to see how the duty to render assistance could be incompatible with any of those provisions, which mainly concern the allocation of rights and the utilisation of living resources, it seems clear that the duty applies to the exclusive economic zone.

More intriguing is that there is no provision similar to article 58(2) as regards the applicability of the duty to render assistance in the territorial sea. Therefore, it may be asked whether there is a duty to render assistance in the territorial sea. It seems that the better answer is affirmative and that such an obligation exists under both treaty law and customary international law. Even though article 98(1) of the UNCLOS does not explicitly refer to the territorial sea, this reading seems warranted by the text, context and object and purpose. First, by not referring to any particular maritime zone whatsoever, the text of article 98(1) does not preclude applicability to the territorial sea. Quite the contrary, the phrase ‘any person found at sea in danger of being lost’ suggests a broad interpretation that is geographically limited only by the terms ‘at sea’.

Accordingly, it seems that the only circumstance that indicates a geographically limited applicability of the duty to render assistance is the inclusion of article 98(1) in Part VII of the UNCLOS dealing with the high seas. However, another contextual element points in the opposite direction, indicating applicability to the territorial sea: article 18 of the UNCLOS. This

422 UNCLOS art 58(2): ‘Articles 88−115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with [Part V]’.
423 Ibid Part V.
424 Ibid art 98(1).
provision deals with innocent passage and seems to presuppose the existence of a duty to render assistance in the territorial sea when it provides that ‘innocent passage includes stopping and anchoring, but only in so far as the same are … rendered necessary … for the purpose of rendering assistance’. As result, it seems that the context includes arguments both for and against a limited geographical scope.

Moreover, in examining the geographical scope of the duty to render assistance it needs to be noted that both the SOLAS Convention and the SAR Convention impose obligations to render assistance within the territorial sea. Similarly, the Salvage Convention appears to presuppose the existence of such a duty within the territorial sea. Consequently, it would not be very surprising if the customary duty to render assistance at sea applied irrespective of maritime zone. Furthermore, the object and purpose of the duty to render assistance — the protection of human life at sea — also seems to support a broad geographical scope, irrespective of maritime zone.

Taken together, it appears reasonable to believe that the customary duty to render assistance at sea applies to the territorial sea. This also explains why article 18 of the UNCLOS assumes the existence of a duty to render assistance in the territorial sea. Others have reached the same conclusion.

425 Ibid art 18(2). A similar wording is found in art 39(1)(c), which deals with transit passage of international straits: ‘unless rendered necessary by force majeure or by distress’ (emphasis in original). Some hold that there may even be a right of unilateral ‘assistance entry’ for government ships into the territorial sea to provide help to those in distress at sea. See, eg, Noyes, ‘The Territorial Sea and Contiguous Zone’, above n 182, 103–4.

426 SOLAS Convention annex ch V reg 1(1) provides: ‘Unless expressly provided otherwise, this chapter shall apply to all ships on all voyages except [government ships]; and ships solely navigating the Great Lakes of North America’. SAR Convention annex para 2.1 does not refer to any geographical limitation when it provides: ‘On receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a party shall take urgent steps to ensure that the necessary assistance is provided’.

427 Salvage Convention art 10 provides, without any geographical limitation: ‘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’.

428 See, eg, Oxman, ‘Human Rights’, above n 367, 415: ‘[UNCLOS art 18] is not … a new right or the expansion of an existing right … [but] a recognition that a universal duty to rescue at sea has existed since time immemorial, that this duty has been respected without regard to changing views regarding the juridical status of the sea’; Nordquist et al, above n 69, vol 3, 177: ‘the duty to render assistance exists throughout the ocean, whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the exclusive economic zone or on the high seas’; Proelss, ‘Rescue at Sea Revisited’, above n 65, 13: ‘it seems unjustifiable to hold that the geographical scope of the obligation concerned does not extend to maritime zones under the coastal states’ respective sovereignty or jurisdiction’.
2.3.3.3.2 Implementation

The duty to render assistance applies to flag states. However, it does not require flag states to provide rescue themselves but merely to require masters of ships flying their flag to do so. States in their capacity as flag states are simply expected to impose the duty on masters of ships. While this is expressly set out in the UNCLOS and the Convention on the High Seas, the SOLAS Convention and the Salvage Convention are not as clear on this point. Even though the relevant provisions of these latter conventions refer directly to shipmasters, the contexts of these provisions suggest that the flag state is merely expected to impose the duty on shipmasters.

First, article 1 of the SOLAS Convention requires its states parties to give effect to the provisions of the Convention and to adopt legislation for this purpose. Similarly, article 10(2) of the Salvage Convention requires its states parties to adopt the measures necessary to enforce the duty. Moreover, the scope of application of the Salvage Convention is restricted to ‘whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a state party’. This would no doubt be a curious limitation of the duty to render assistance had it concerned real situations of distress at sea. Rather, it seems that the purpose of the provisions concerning the duty to render assistance under the Salvage Convention is not really to establish practical obligations to render assistance at sea in the same way as the corresponding provisions of the UNCLOS and the SOLAS Convention. Instead, it seems that the purpose of the relevant provision of the Salvage Convention is to ensure that the financial compensation that a salvor can be entitled under the Convention to for a salvage operation or for having prevented or minimised damage to the environment is not set down solely because the salvor has given priority to the rescue of persons.

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429 UNCLOS art 98(1); Convention on the High Seas art 12(1).
430 SOLAS Convention annex ch V art 33(1); Salvage Convention art 10.
431 See below Section 2.3.3.3 Shipmaster Duty?
432 SOLAS Convention art 1: ‘The contracting governments undertake to give effect to the provisions of the present Convention and the annex thereto ...[and] to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the present Convention full and complete effect’.
433 Salvage Convention art 2.
434 Ibid arts 12–14 set out the salvor’s right to reward or special compensation, and the criteria for fixing the reward. These provisions provide that only salvage operations that have had a useful result shall give right to a reward and that the promptness of the service rendered is a criterion for fixing the reward. Without the explicit reference to the duty to render assistance included in Salvage Convention art 10(2) there would be a clear risk that salvors would have an economic incentive to give priority to the salvage of ship and cargo before rescuing any persons in distress at sea.
The flag state duty to render assistance is expressly directed at states. This means that the flag state of a ship whose master fails to provide assistance to someone in distress at sea may not necessarily be in breach of its obligations pursuant to the duty to render assistance. Once the flag state has taken the necessary actions to require masters of ships flying its flag to render assistance to those in distress at sea, it has fulfilled its obligations pursuant to the duty to render assistance at sea. The decisive criterion for the fulfilment of the flag state duty to render assistance is accordingly not whether assistance actually is rendered but whether the flag state requires shipmasters to do so.

However, the obligations imposed upon flag states are not restricted to merely the adoption of national legislation but also cover measures necessary to ‘require’ shipmasters to render assistance. As a result, it may not be enough for a state to simply adopt legislation; it may also need to monitor compliance with it and, if necessary, to take enforcement measures in the event of violations. Furthermore, flag states may be required to refrain from acting in a way that jeopardises the effectiveness of the obligation of shipmasters to render assistance. States that criminalise rescue operations or that in some other way unreasonably undermine the effectiveness of their obligations pursuant to the duty to provide rescue at sea may therefore be in contravention of their obligations pursuant to the duty to render assistance at sea.

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435 See, eg, *UNCLOS* art 98(1): ‘Every state shall require the master of a ship flying its flag … to render assistance’ (emphasis added).

436 Papastavridis, ‘Rescuing Migrants at Sea and the Law of International Responsibility’, above n 66, 164, citing *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* (ITLOS Rep 2015) 4: ‘the flag state is under a “due diligence obligation” to monitor whether the masters of vessels flying its flag discharge these duties.’

437 It may be noted here that *VCLT* art 26 requires the parties to a treaty to fulfil it in good faith. Relatedly, *UNCLOS* art 300 requires its states parties to ‘fulfil in good faith the … Convention and … [to] exercise the rights, jurisdiction and freedoms recognized in … [it] in a manner which would not constitute an abuse of right’ (emphasis added).

438 Possible examples include criminal charges of facilitating illegal immigration when disembarking refugees and migrants rescued at sea. In 2007, it was reported that a group of Tunisian fishermen were prosecuted in Italy for having brought some 40 refugees and migrants rescued at sea to Italy. ‘Italy/Tunisia: Fishermen on Trial for Rescuing Migrants’, *Statewatch* (online, 7 September 2007) <http://www.statewatch.org/>. Another infamous case is the prosecution in Italy in 2004 of three crewmembers of the humanitarian organisation *Cap Anamur* for having violated Italian immigration laws when disembarking some 40 refugees and migrants rescued at sea. The crew was eventually acquitted. ‘Criminalising Solidarity — *Cap Anamur* Trial Underway’, *Statewatch* (online, 3 April 2007) <http://www.statewatch.org/>.

439 The risk that the effectiveness of search and rescue operations is undermined by the criminalisation of rescue operations is reflected in *Global Compact for Migration*, UN Doc A/CONF.231/3, para 24(a): ‘Develop procedures and agreements on search and rescue of migrants … and ensure that the provision of assistance of an exclusively humanitarian nature for migrants is not considered unlawful’ (emphasis added).
2.3.3.3 Shipmaster Duty?

There is general agreement that the duty to render assistance at sea applies to states. A different question is if it also, as based in international law, entails obligations of shipmasters or other private entities — or if such effects only arise after legislative or some other implementation measure on the national level? While some dispute the existence of such direct effects for private entities pursuant to the relevant duty, others assume that there are such obligations for shipmasters. This doctrinal divergence may be linked, at least in part, to different views on the relationship between international law and national law in general. A full and fair account of this orthodox debate would require too lengthy a digression. Instead, it is sufficient for the present purposes to note that the more comfortable position from a dualist perspective is to rely on some legislative or other implementation measure on a national level for norms set out in treaties to apply to private entities such as masters of private ships. However, even from a monist perspective, it is doubtful whether the duty to render assistance produces such effects for shipmasters. While the relevant provisions of the SAR Convention and the UNCLOS do not address shipmasters literally, the provisions of the Salvage Convention and the SOLAS Convention refer directly to the shipmaster. However, on closer inspection, it seems that neither of these provisions addresses shipmasters directly.

As for the Salvage Convention, it has already been noted that the duty to render assistance is not really of practical nature but merely concerns how salvors can be entitled to salvage rewards. As for the SOLAS Convention, the general provisions suggest that the duty to render assistance is not intended to

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441 See, eg, Bank, above n 363; Weinsierl and Lisson, above n 67, 38; Chircop, above n 365. Notably, the IMO seems to take the same view. See, eg, IAMSAR Manual vol 2, 2-22 [2.31.2]: ‘Under … various provisions of international law, ship masters are obligated’.

442 On the direct applicability of treaties in general, see generally Oppenheim’s, above n 34, 52–86; Shaw, above n 34, 96–138; Daillier and Pellet, above n 133, 106–9; Karen Kaiser, ‘Treaties Direct Applicability’ in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford University Press, 2013).

443 See, eg, SAR Convention annex para 2.1.10 (‘parties’); UNCLOS art 98(1) (‘every state’).

444 Salvage Convention art 10(1) (‘Every master is bound… to render assistance to any person in danger of being lost at sea’); SOLAS Convention annex ch V reg 33(1) (‘The master of a ship at sea … is bound to proceed with all speed to their assistance’).

445 See above nn 306–7 and accompanying text.
produce effects for private entities. Instead, it is expressly set forth that parties to the Convention shall take the necessary implementation measures:

(a). The contracting governments undertake to give effect to the provisions of the present Convention and the annex thereto …
(b). The contracting governments undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the present Convention full and complete effect

Accordingly, it appears that none of the relevant treaty-based expressions of the duty to render assistance at sea applies directly to shipmasters or other non-subjects of international law. Instead, the classic state-centred notion of international law seems to serve well as a model for the obligations pursuant to the duty to render assistance at sea under international law.

2.3.3.3.4 Safety of Own Ship

The requirements to render assistance that a flag state shall impose on shipmasters pursuant to the duty to render assistance at sea do not need to be absolute but may be subject to certain exceptions, including for the safety of the rescue ship itself. While the UNCLOS uses the terms ‘in so far as he can do so without serious danger to the ship, the crew or the passengers’ and ‘in so far as such action may reasonably be expected of him’ to allow for such exceptions, the SOLAS Convention refers to the master of a ship ‘which is in a position to be able to provide assistance’. As a result, flag states may leave some discretionary room for shipmasters to decide whether they are able to provide assistance. However, the threshold needs to be set high, as there must be ‘serious danger’ to the ship. Small or normal dangers are thus not sufficient reasons for failing to render assistance.

2.3.3.3.5 Miscellaneous

The duty to render assistance applies irrespective of ship type. Although the SOLAS Convention explicitly exempts warships and other government ships from the scope of application, neither the UNCLOS nor the SAR Convention

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446 SOLAS Convention art 1 (emphasis added).
447 UNCLOS art 98(1) (emphasis added).
448 SOLAS Convention annex ch V reg 33(1) (emphasis added).
449 UNCLOS art 98(1) (emphasis added).
450 See, eg, Papastavridis, ‘Rescuing Migrants at Sea and the Law of International Responsibility’, above n 66, 164: ‘The only exception is the extent to which it would be unreasonable to render assistance [for example] … if the vessel is too far away, the rescue vessel is ill-equipped … or other vessels are more readily available’.
451 Cf UNCLOS art 98(1).
452 SOLAS Convention annex ch V reg 1(1) excludes ‘warships, naval auxiliaries and other ships owned or operated by a contracting government and used only on government non-commercial
provides for such exceptions. As a result, the duty to render assistance at sea covers all ships, irrespective of type or operation. Masters of merchant ships as well as of warships and other government ships shall thus be equally required to render assistance. States failing to provide assistance to persons in distress at sea with their government ships are thus likely in contravention of their obligations under the duty to render assistance at sea.

Despite the reasonably clear character of the duty to render assistance, certain aspects such as the meanings of ‘assistance’ and ‘rescue’ remain rather vague. A variety of acts can constitute assistance, for example, recovering persons from the water, towing a ship to safety, providing food, medical aid and other supplies, or simply standing by to calm the sea. If the ship is not at the same position as the distressed persons, the master of the ship shall ‘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 be reasonably expected of him’. The master of a ship that receives a distress alert shall thus be required to head to the rescue site, regardless of the source of the information of the need of assistance. Normally, distress alerts emanate from the ship in distress itself, some other ship or unit, or from a rescue coordination centre. The duty to proceed to the rescue site relates to the right of the master of a ship in distress or the search and rescue service concerned to requisition ships for rescue. It also relates to the master’s discretion and the obligations of owners, charterers or other persons not to ‘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’. Masters of ships are released from their obligations to render assistance upon being informed that their ships have not been requisitioned or that assistance is no longer necessary. Embarked survivors shall be treated with humanity, within the capabilities of the ship.

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453 CF UNCLOS art 98(1); SAR Convention annex para 2.1.10.
454 CF UNCLOS art 98(1).
455 A variety of techniques are described in the IAMSAR Manual vol 3, s 2.
456 UNCLOS art 98(1)(b).
457 CF SOLAS Convention annex ch V reg 33(1), which refers to ‘information from any source that persons are in distress at sea’ (emphasis added).
458 The specifics are set out in ibid annex ch V regs 33(1)–(2).
459 Ibid annex ch V reg 34-1.
460 Ibid annex ch V regs 33(3)–(4).
461 Ibid annex ch V reg 33(6).
2.3.3.4 Coastal State Obligations

In addition to the flag state obligations discussed above, the duty to render assistance to persons in distress at sea also entails coastal state obligations. The key provisions are, once again, found in the UNCLoS, the SOLAS Convention and the SAR Convention. Article 98(2) of the UNCLoS reads:

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.462

The corresponding provision of the SOLAS Convention reads:

Each contracting government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers, and shall, so far as possible, provide adequate means of locating and rescuing such persons.463

Notwithstanding the relatively clear provisions of the UNCLoS and the SOLAS Convention, the SAR Convention stands as the main source of coastal state obligations for the duty to render assistance. Indeed, one of the very reasons for adopting it was to establish ‘adequate and effective arrangements for … search and rescue services’.464 The basic obligation to provide assistance is set out as follows:

Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.465

It is complemented by the following:

On receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a party shall take urgent steps to ensure that the necessary assistance is provided.466

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462 Emphasis added.
463 SOLAS Convention annex ch V reg 7(1) (emphasis added).
464 SAR Convention Preamble para 1.
465 Ibid annex para 2.1.10 (emphasis added).
466 Ibid annex para 2.1.1 (emphasis added).
Similar to the corresponding flag state obligations, several key aspects of the central coastal state obligations under the duty to render assistance at sea can be expected to be of customary status. This is inferred not only from the high levels of ratification of the relevant instruments but also from the widespread practice among coastal states to maintain maritime search and rescue organisations.

2.3.3.4.1 Geographical Scope

For the same reasons that were previously explained in relation to the geographical scope of flag state obligations pursuant to the duty to render assistance at sea, the relevant provision of the **UNCLOS** as regards coastal state obligations, article 98(2), appears in Part VII of the **UNCLOS**, which deals with the high seas but applies to the exclusive economic zone by virtue of article 58(2) of the **UNCLOS**. The applicability to the territorial sea is indicated, furthermore, by the reference to ‘the sea’ in the singular.

The geographical scope of the coastal state obligations under the **SOLAS Convention** is linked to the meaning of the phrase ‘around its coasts’. The more precise preceding term — ‘in their area of responsibility’ — does not seem to address the obligation to render assistance but the different, albeit related, obligation ‘to ensure that necessary arrangements are made for distress communication and co-ordination’. Instead, the general meaning of the phrase ‘around its coasts’ leaves the geographical limits of the coastal state obligations to render assistance under the **SOLAS Convention** essentially uncertain. The phrase ‘around its coasts’ is clearly not very precise but can

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467 As of December 2018, the **UNCLOS** has 168 parties, the **SOLAS Convention** 164 parties (representing more than 99% of world tonnage) and the **SAR Convention** 111 parties (representing more than 80% of world tonnage). Office of Legal Affairs, ‘Multilateral Treaties Deposited with the Secretary-General’, **United Nations Treaty Collection** (Web Page) <https://treaties.un.org/>; International Maritime Organization, **Status of Multilateral Conventions** (Web Page) <http://www.imo.org/>.

468 See, eg, the Global SAR Plan which, as of December 2018, contains information and contact details for the maritime search and rescue organisations of about 90 coastal states. The Global SAR Plan is provided by the IMO and contains information on the availability of search and rescue services, based on information provided by the member states of the IMO. International Maritime Organization, ‘Global SAR Plan’, **Global Integrated Shipping Information System (GISIS)** (Web Page, 2018) <https://gisis.imo.org>.

469 See above n 293 and accompanying text.

470 **UNCLOS** art 58(2). See also Coppens, ‘Interception of Migrant Boats at Sea’, above n 132, 202.

471 **SOLAS Convention** annex ch V reg 7(1). The corresponding expression in the earlier version of the Convention was ‘round its coasts’. **International Convention for the Safety of Life at Sea**, opened for signature 10 June 1948, 164 UNTS 113 (entered into force 19 November 1952) annex ch V reg 15(1).

472 **SOLAS Convention** annex ch V reg 7(1).
equally well be understood to encompass all maritime zones of a coastal state as just the territorial sea or some other specific area.

This uncertainty is specifically targeted by the SAR Convention, which requires its parties to ‘individually or in co-operation with other states, ensure that sufficient search and rescue regions are established within each sea area’.473 While the term ‘search and rescue region’ is not defined in the Convention itself, the IAMSAR Manual defines it as ‘[a]n area of defined dimensions, associated with a rescue co-ordination centre, within which search and rescue services are provided’.474 The basic purpose is to attain ‘effective arrangements for … search and rescue services’.475 Every search and rescue region shall be established by agreement among concerned parties, and the IMO shall be notified of such agreements.476 In case agreements on the exact limits of the search and rescue region cannot be reached, the concerned parties shall

use their best endeavours to reach agreement upon appropriate arrangements under which the equivalent overall co-ordination of search and rescue services is provided in the area.477

Even though the designation of search and rescue regions ‘is not related to and shall not prejudice the delimitation of any boundary between states’, it is clear that such delineation is not always uncontroversial.478 A telling and, for the present purposes, especially relevant example concerns the search and rescue region of Malta. Compared to the size of its land territory, the search and rescue region of Malta is very large, covering a maritime area of approximately 250,000 square kilometres across the central Mediterranean Sea from the coastal waters of Tunisia almost to the Greek island of Crete.479 Because of its geographical location in the central Mediterranean Sea, many refugees and migrants travelling on the so-called Central Mediterranean Route — mostly from Libya to Italy — cross the search and rescue region of Malta.480 Many of the Mediterranean distress at sea situations involving refugees and migrants have therefore occurred in the search and rescue region of Malta,

473 SAR Convention annex para 2.1.3.
474 IAMSAR Manual vol 1, xiv (‘Glossary’).
475 SAR Convention Preamble para 1.
476 Ibid annex para 2.1.4.
477 Ibid annex para 2.1.5.
478 Ibid annex para 2.1.7.
thus triggering Malta’s obligations as a coastal state to render assistance. This is most likely also the explanation for Malta’s objections to the 2004 Amendments to the SAR Convention and the 2004 Amendments to the SOLAS Convention.481 Acceptance of the amendments would require Malta to co-ordinate the disembarkation of many of the refugees and migrants rescued at sea who are now disembarked in Italy and elsewhere.482

But why does Malta maintain such a large maritime search and rescue region? In addition to historical and other factors, the income that Malta receives from air traffic passing through its flight information region is thought to be one part of the equation.483 The Chicago Convention defines flight information regions as ‘an airspace of defined dimensions within which flight information services and alerting services are provided.’484 Aeronautical search and rescue regions are, in turn, supposed to be ‘coincident with the boundaries of corresponding flight information regions’ and ‘the corresponding maritime search and rescue regions’.485 Similar expectations result from the SAR Convention.486 Accordingly, the limits of maritime search and rescue regions, flight information regions and aeronautical search and rescue regions are meant to harmonise. States that establish flight information regions undertake to provide flight information services, for which they may impose certain charges. As a result, there may in some areas be economic incentives for states to establish large flight information regions and, in turn, both aeronautical and maritime search and rescue regions. It is believed that Malta receives several million euros annually in revenues from air traffic passing through its flight information region/maritime search and rescue region.487

481 See above nn 334, 362 and accompanying text.
484 Chicago Convention annex 2 ch 1.
485 Ibid annex 12 paras 2.2.1.1–2 (‘Recommendation’).
486 SAR Convention annex para 2.1.8: ‘Parties should seek to promote consistency, where applicable, between their maritime and aeronautical search and rescue services while considering the establishment of maritime search and rescue regions’.
Notwithstanding the envisaged harmonisation of aeronautical and maritime search and rescue regions under the SAR Convention and the Chicago Convention, states remain largely free to shape and designate such regions separate from those maintained by others. Parties to the SAR Convention are merely required to establish ‘sufficient search and rescue regions … within each sea area’. At first glance, it seems that the only guidance given by the SAR Convention is that such regions ‘should be contiguous and, as far as practicable, not overlap’. However, the Convention also requires its parties to ‘as far as practicable, follow relevant minimum standards and guidelines developed by the Organization’. The main source of such standards and guidelines is the IAMSAR Manual, which lists a number of factors affecting the size and shape of search and rescue regions:

When establishing or amending [a search and rescue region], states should try to create the most efficient system possible, bearing in mind that each [region] is part of a global system. Leading factors to consider should include:

- size and shape of the area of responsibility;
- air and shipping traffic density and pattern;
- availability, distribution, readiness and mobility of SAR resources;
- reliability of the communications network, and
- which state is fully capable, qualified, and willing to assume responsibility.

Furthermore, the Manual explains that there are operational advantages in harmonizing aeronautical and maritime [search and rescue regions, since that] … minimizes confusion over which authority is to be alerted when a distress situation arises at and over a specific geographic position.

Importantly, it also provides that the limits of search and rescue regions ‘should, if possible, be straight lines running north to south or east to west between well-defined geographic points’, as this makes them easier to use.

State practice is not likely to be much clearer in this regard. In short, the open oceans of the world are divided into large square-shaped boxes of maritime search and rescue regions of the traditional maritime powers, such as the

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488 SAR Convention annex para 2.1.3.
489 Ibid (emphasis added).
490 Ibid annex para 2.1.2.
491 IAMSAR Manual vol 1, 2-8 [2.3.15(a)] (emphasis added).
492 Ibid vol 1, 2-8 [2.3.15(d)].
493 Ibid (emphasis added).
United States, the United Kingdom, France and Portugal.\(^{494}\) In narrower sea areas, the delineation of maritime search and rescue regions often follows the limits of the coastal states’ exclusive economic zones.\(^{495}\) Although many search and rescue regions are well-settled and defined, certain areas harbour disputes about the delineation, such as the Mediterranean Sea.\(^{496}\)

To summarise, the geographical scope of the coastal state obligation to rescue persons in distress at sea largely depends on the establishment of maritime search and rescue regions, which is subject to the discretion of the coastal states. All coastal states are, however, responsible for the rescue of persons around their coasts including at least territorial waters. The duty under the *UNCLOS* to ‘promote the establishment, operation and maintenance of a maritime search and rescue organization’ applies to both the high seas and the exclusive economic zone of a coastal state.\(^{497}\) To what extent the phrase ‘around its coasts’ covers international waters, so that the obligations under the *SOLAS Convention* apply there, remains, however, uncertain.

### 2.3.3.4.2 Maritime Search and Rescue Organisation

The *UNCLOS* requires coastal states to ‘promote … an adequate and effective search and rescue service’.\(^{498}\) The use of the word ‘promote’, as opposed to for example ‘provide’, effectively removes the responsibility of coastal states for failure to perform maritime search and rescue operations. It also explains that the state itself need not be the one providing the search and rescue service but that the state can trust others for this purpose.\(^{499}\) The terms ‘adequate and effective’ seem to offer some guidance on the minimum capacity required but clearly leave some degree of flexibility as to the level of preparedness. This flexibility is reinforced by the lack of definitions of the terms ‘rescue’ and

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497 *UNCLOS* art 98(2).


‘distress’ in the *UNCLOS*. As a result, the coastal state obligations for maritime search and rescue under the *UNCLOS* are not very clear.

Coastal states that are parties to the *SOLAS Convention* have at least two distinct material obligations: first, ‘to ensure that necessary arrangements are made for *distress communication and co-ordination in their area of responsibility*’, and second, ‘to ensure that necessary arrangements are made for … *the rescue of persons in distress at sea around its coasts*’. Coastal states that are parties to the *SOLAS Convention* thus cannot fulfil their obligations solely by providing for distress communication and co-ordination. To fulfil their obligations, they must also make arrangements for the rescue of persons. However, by simply requiring the arrangements ensured by the coastal state to be ‘necessary’, the *SOLAS Convention* leaves considerable room for discretion.

The *SAR Convention* is more detailed. To meet their obligations under the *Convention*, coastal states shall participate in the development of search and rescue services. They shall do so by establishing certain basic elements of such services, including

- legal framework,
- assignment of responsible authority,
- organization of available resources,
- communication facilities,
- co-ordination and operational functions, and
- processes to improve the service including planning, domestic and international co-operative relationships and training.

As previously discussed, parties shall ensure that sufficient search and rescue regions are established, and provide assistance to persons in distress at sea within such regions. Parties shall also establish appropriate national procedures for overall development, co-ordination, and improvement of search and rescue services. For this purpose, they shall establish search and rescue coordination centres and such rescue sub-centres as they deem appropriate. Rescue coordination centres shall be operational on a 24-hour basis and be staffed by trained personal. Rescue coordination centres

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500 *SOLAS Convention* annex ch V reg 7(1) (emphasis added).
501 *SAR Convention* annex para 2.1.1.
502 Ibid annex para 2.1.2.
503 See above nn 469–78 and accompanying text.
504 *SAR Convention* annex para 2.1.3.
505 Ibid annex para 2.1.9.
506 Ibid annex para 2.2.
507 Ibid annex para 2.3.1.
shall have arrangements for the receipt of distress alerts and communications with persons in distress, search and rescue facilities, and other rescue co-ordination centres or rescue sub-centres.\textsuperscript{508} Parties have the freedom to provide these services individually or jointly by establishing joint search and rescue organisations with one or more other states.

The definition of the term ‘rescue’ under the \textit{SAR Convention} as ‘[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety’\textsuperscript{509} shows that parties’ maritime search and rescue obligations do not end immediately with the recovery of the distressed persons. Instead, the rescue obligations extend until survivors are disembarked and delivered to a ‘place of safety’. The meaning of the concept of ‘place of safety’ is therefore a key factor for the determination of the extent of coastal states’ search and rescue obligations. Indeed, as specified in the \textit{IMO Guidelines on the Treatment of Persons Rescued at Sea}, a place of safety ‘is a location where rescue operations are considered to terminate’.\textsuperscript{510} This explicit link between the concept of rescue and disembarkation explains why the obligation to ensure that such a place is provided lies with the party responsible for the search and rescue region in which the assistance was provided. This is explicitly set out in a joint provision of the \textit{SOLAS Convention} and the \textit{SAR Convention}:

\begin{quote}
The contracting government responsible for the search and rescue region in which such assistance is rendered \textit{shall exercise primary responsibility} for ensuring such co-ordination and co-operation occurs, so \textit{that survivors assisted are disembarked} from the assisting ship \textit{and delivered to a place of safety}, taking into account the particular circumstances of the case and guidelines developed by the Organization.\textsuperscript{511}
\end{quote}

The concept of ‘place of safety’ is examined in detail in subsequent chapters.\textsuperscript{512}

\subsection*{2.3.4 Forcible Rescue?}

Most rescue operations are not expected to involve measures that amount to exercises of jurisdiction within the meaning of the international law of the sea.\textsuperscript{513} Normally, persons in distress at sea are pleased to see the arrival of rescue units and seek to cooperate as fully as possible. However, in some situations, effective rescue operations may call for the use of powerful or even

\begin{itemize}
\item\textsuperscript{508} Ibid annex para 2.3.2.
\item\textsuperscript{509} Ibid annex para 1.3.2.
\item\textsuperscript{510} \textit{IMO Guidelines on the Treatment of Persons Rescued at Sea} para 6.12 (emphasis added).
\item\textsuperscript{511} \textit{SOLAS Convention} annex ch V reg 33(1-1) (emphasis added); \textit{SAR Convention} annex para 3.1.9 (emphasis added).
\item\textsuperscript{512} See below Chapter 7 Meaning of the Concept of ‘Place of Safety’.
\item\textsuperscript{513} See above Section 2.2.2 International Waters.
\end{itemize}
forcible means.514 Thinkable scenarios include rescue teams having forcing stubborn crewmembers off a sinking ship or rescue swimmers assuming physical control over panicking survivors. Another scenario involves refugees and migrants who do not cooperate or even try to resist rescue.515 In addition to normal factors such as shock, confusion and other stress reactions, there can be group-specific reasons for non-cooperation. Rescue operations can be confused with interception operations and communication problems can lead to misperceptions of the practical outcome of recovery. There can even be strategic motives to avoid detection and recovery, including by rescue units. For example, this may be the case if rescue operations are used for interception purposes or if the rescue operation is conducted by authorities of the state that the refugees and migrants are trying to leave. Considerations of the legality of powerful or forcible rescue operations may therefore be of more than academic interest.516

514 See, eg, United States Department of Homeland Security, United States Coast Guard, ‘US Coast Guard Addendum to the United States National Search and Rescue Supplement (Nss) to the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR)’, Doc COMDTINST M16130.2F (January 2013) 4–19 [4.2.1]: ‘The Coast Guard is authorized to rescue and aid persons … This may include forcing or compelling mariners to abandon their vessels when a life threatening emergency exists’ (emphasis added).

515 The European Union (EU) has even adopted specific rules for such situations. Sea Borders Regulation [2014] OJ L 189/93 art 9(2)(h): ‘Where a vessel is considered to be in a situation of uncertainty, alert or distress but the persons on board refuse to accept assistance, the participating units shall inform the responsible rescue coordination centre … and continue to fulfil a duty of care by surveying the vessel and by taking any measure necessary for the safety of the persons concerned, while avoiding to take any action that might aggravate the situation or increase the chances of injury or loss of life’ (emphasis added).

516 See, eg, Guilfoyle, ‘The High Seas’, above n 224, 217: ‘[the] duty of “compulsory rescue” has proved an important tool for maritime migrant interdiction and appears more generally relied upon than ship-boarding provisions in treaties’; Ghezelbash et al, above n 68, 317: ‘the humanitarian purpose of [search and rescue] has become compromised in the name of border security’. See also Scovazzi, above n 168, 227–8; Matteo Tondini, ‘The Legality of Intercepting Boat People under Search and Rescue and Border Control Operations’ (2012) 18 Journal of International Maritime Law 59, 62: ‘whenever the Italian Navy has been requested to intercept boat people on the high seas … its approach has always been that of considering such operations as [SAR] interventions’; Filippo, above n 482, 18: ‘a [SAR] intervention and the subsequent transportation of migrants to a port may appear as an easy way to assert jurisdiction on persons and boats’; Coppens, ‘Interception of Migrant Boats at Sea’, above n 132, 199: ‘States sometimes even rely on the principles associated with search and rescue at sea as a means of intercept vessels that could otherwise not be intercepted’; Natalie Klein, ‘Maritime Security’ in Donald R Rothwell et al (eds), The Oxford Handbook of the Law of the Sea (Oxford University Press, 2014) 582, 596, in relation to search and rescue scenarios where migrants are retrieved: ‘There is undoubtedly more analysis needed on how [the law of the sea and obligations in relation to the treatment of asylum-seekers] should interact and how gaps and ambiguities within existing legal regimes should be resolved.’
Notably, neither the SOLAS Convention nor the SAR Convention contains special provisions on the use of forcible means in the course of rescue operations at sea. Instead, the general framework under the international law of the sea seems to apply. Starting with territorial waters, the answer seems relatively straightforward: the coastal state may, with reference to its sovereignty in such waters, take necessary rescue actions with the normal exception of ships under innocent passage. However, ships in distress that do not cooperate with rescue operations would generally not be under innocent passage. As previously explained, passages ‘shall be continuous and expeditious’ and must not be ‘prejudicial to the peace, good order or security of the coastal state’ to be innocent. Passages of ships used for immigration contrary to national laws and regulations of the coastal state are, as already noted, normally not innocent, nor are passages of ships engaged in ‘any other activity not having a direct bearing on passage.’

As a result, it seems that the problem of justifying forcible rescue actions arises mainly in international waters. Ships in such waters are generally subject only to the jurisdiction of the flag state. None of the conventional exceptions to flag state jurisdiction (eg, right of visit, piracy) seems to be relevant to rescue operations. As a result, it is principally difficult to see how rescue operations that include forcible means can be considered lawful beyond what is normally permissible under the law of the sea. There are, however, a couple of remarks to add to this view.

First, flag states may authorise measures against ships flying their flags. However, because of the typically urgent nature of rescue operations and the fact that many ships used for irregular maritime migration can be expected to be stateless, such authorisation is likely rarely a practical option. Second, there is, at least theoretically, the possibility that some rescue actions that are wrongful prima facie can be justified by reference to the law of state responsibility and, more specifically, circumstances precluding

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517 See above Section 2.2 Jurisdiction over Ships.
518 See above Section 2.2.1 Territorial Waters.
519 UNCLOS arts 18(2), 19(1). See generally above Section 2.2.1.2.1 Innocent passage.
520 UNCLOS art 19(2)(g): ‘the loading or unloading of any … person contrary to the … laws and regulations of the coastal state’. See generally above nn 164–73 and accompanying text.
521 UNCLOS art 19(2)(l).
522 See above Section 2.2.2.3 High Seas.
523 But see Filippo, above n 482, 17, seemingly arguing in favour of intervention against stateless ships in such situations: ‘freedom of navigation is not accorded to any vessel other than ships … registered under a state’s flag … Thus, absent such requirements, the rescuing unit should prefer an … assumption of responsibility’, and, at 18: ‘Asserting a situation of distress allows one to immediately intervene’.
wrongfulness. A number of such circumstances are generally recognised, the most important of which, in relation to the present discussion, appears to be necessity. To that end, article 25 of the ARSIWA precludes the wrongfulness of an act if it

is the only way for the state to safeguard an essential interest against a grave and imminent peril, and does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.

Accordingly, it seems that the wrongfulness of a normally unlawful forcible action taken in the course of a rescue operation involving a foreign ship can be precluded if

(i) there is no other way for the state to rescue the persons in distress,

(ii) the rescue of persons in distress at sea and thus the compliance with the duty to render assistance at sea can be considered an ‘essential interest’ of the state conducting the rescue operation, and

(iii) the rescue operation ‘does not seriously impair an essential interest’ of the flag state of the ship in distress, the national state of those on board, some other concerned state or of the international community as a whole.

Because of the non-discriminatory character of the duty to render assistance, and the fundamental nature of the interest in rescuing persons in distress at sea, the two latter requirements seem relatively uncomplicated in the context of distress at sea situations calling for forcible actions. The first requirement, which limits the use of coercive rescue actions to situations where there are

524 See generally above n 295 and accompanying text.
525 ARSIWA arts 20–5 concern consent, self-defence, countermeasures, force majeure, distress, and necessity.
526 But see Scovazzi, above n 168, 227–8, arguing that ‘every state can intervene … to rescue and assist the people in peril’. He means that such actions can be justified ‘as an application of the rule on distress’ or as lawful countermeasures. However, noting that distress, under ARSIWA art 24(1), concerns measures to save ‘the author’s life or the lives of other persons entrusted to the author’s care’, and that countermeasures, under ARSIWA art 50(1)(b), shall not affect ‘obligations for the protection of fundamental human rights’, it is not very easy to see how any of these grounds would be relevant. Persons in distress not on board the rescue unit can hardly be said to be under the ‘care’ of the master of the rescue unit, within the meaning of ARSIWA art 24(1), and even persons in distress have fundamental rights to liberty and security, thus precluding the legality of countermeasures pursuant to ARSIWA art 50(1)(b). Instead, necessity appears to be the more relevant circumstance precluding wrongfulness to consider.
527 Emphasis added.
no other lawful means available to rescue the persons in distress, is likely also
generally met in situations where the distress is so acute that the rescue action
is the only possible way to rescue those in distress. Accordingly, it seems that
the wrongfulness of forcible means used in the course of a rescue operation
may in some exceptional situations be precluded with reference to necessity.

There are, however, limits to this conclusion. As noted by the ICJ, ‘the state
of necessity can only be invoked under certain strictly defined conditions
which must be cumulatively satisfied; and the state concerned is not the sole
judge of whether those conditions have been met’.528 Accordingly, it is not
correct to think of necessity as a carte blanche for any and all forcible rescue
actions. Quite the contrary, it is only in those exceptional situations where
such actions are the only possible way to rescue those in distress at sea that
necessity may be invoked.

2.3.5 Access to Port and Right of Refuge

There is no general right under international law for foreign ships to access
ports. Most ports are in reality open to merchant traffic, but this does not
amount to a general right of access. Indeed, the UNCLOS does not state any
right for foreign ships to access ports. Because such a right would necessarily
impinge upon the authority of a state over its territory, the non-existence of
such a right is nothing but an aspect of the territorial sovereignty of the coastal
state over its internal waters, including ports.529 Accordingly, in Nicaragua,
the ICJ explained that ‘it is … by virtue of its sovereignty that the coastal state
may regulate access to its ports’.530 The statement by the ICJ is consonant with
the position taken by many authors.531 There is, however, at least one exception
relevant for the present purposes: ships in distress.

528 Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment) [1997] ICJ Rep 7, 40 [51].
529 See above Section 2.2.1.1 Internal Waters. See, eg, Churchill and Lowe, above n 69, 61;
states’ sovereignty over their territory, the presumption should be that that [sic] sovereignty
includes the right to determine access to ports.’
531 See, eg, Treves, ‘Navigation’, above n 182, 941–2; O’Connell, above n 69, 848; Churchill
and Lowe, above n 69, 61–3; Barnes, ‘The International Law of the Sea and Migration Control’,
above n 70, 118; Ringbom, The EU Maritime Safety Policy and International Law,
above n 302, 208; Chircop, above n 365, 237; Tanaka, above n 99, 80–1; Molenaar, ‘Port State
Jurisdiction’, above n 387, 194–6; Erik Jaap Molenaar, ‘Port and Coastal States’ in
Donald R Rothwell et al (eds), The Oxford Handbook of the Law of the Sea (Oxford University
Presss, 2015) 280, 282–7; Barnes, ‘Refugee Law at Sea’, above n 5, 57–61; Shaw,
above n 34, 412–13; Rothwell, above n 5, 123–4; John E Noyes, ‘Ships in Distress’ in
Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford
University Press, 2007). But see Aramco (Saudi Arabia v Arabian American Oil Company) (Award)
(1963) 27 ILR 117: ‘According to a great principle of public international law, the
Ships in distress are, under international law, entitled to proceed to port and immunity from local law.\(^{532}\) This exception to the sovereignty of the coastal state over its territorial waters is of historical origin and has been recognised by several classic writers.\(^{533}\) Even though such ships have in practice traditionally been granted certain immunity,\(^{534}\) there is also evidence of states having closed their ports to ships in distress that pose substantial marine pollution risks.\(^{535}\) Accordingly, it seems that coastal states may forbid ships to enter their ports or internal waters if there is a substantial risk of serious pollution except when there is risk for the lives of persons on board.\(^{536}\) Ships in need of assistance for the sole purpose of protecting economic interests (cargo, time schedule, etc) may therefore not enjoy the same right of refuge as ships in distress that for humanitarian reasons seek shelter in ports or internal waters.\(^{537}\) Accordingly, it appears that ‘humanitarian consideration is the primary basis of the right of vessels in distress’.\(^{538}\)

Although the right of access to ports for ships in distress is not unrelated to the question of disembarkation of refugees and migrants rescued at sea, it does not really provide a solution to it. There are several reasons for this view. First, a right of access does not necessarily entail a right of disembarkation. A ship in distress that is entitled to seek refuge in a port or the internal waters of a state may not automatically be entitled to disembark anyone. Second, most disembarkation situations do not involve such dangers that can correctly be
termed distress for the purposes of the right of access. Even if the survivors were in distress at the time of recovery, the ship that has taken them on board will typically not itself be in distress upon disembarkation. Third, the right of access arises in relation to a coastal state that denies access to a ship in distress — not in relation to a coastal state responsible for the coordination of a rescue operation involving disembarkation of persons rescued at sea.

For these reasons, the right of access appears to be mostly irrelevant to coastal states that are responsible for ensuring that a place of safety is provided but that do not allow disembarkation in their own territories. Even in the exceptional situation when the rescue ship itself is in distress and the place of safety is located within the territory of a state other than the coastal state responsible for the coordination of the rescue operation, it is difficult to see how the responsible coastal state could invoke the right of access on behalf of the ship in distress. Moreover, even if it could, the unwilling coastal state would in any event not have to allow disembarkation to comply with its obligations pursuant to that right. As a result, it seems that the right of access does not provide a solution to the legal problem of disembarkation of refugees and migrants rescued at sea.

2.4 Summary

There is no single portion of international law that provides full and conclusive answers to all questions surrounding the issue of irregular maritime migration. Instead, the applicable law is multifaceted and involves several different areas of international law. Yet, the international law of the sea appears as the natural starting point. The framework set forth by the UNCLOS has an encompassing nature and seeks to regulate ‘all issues relating to the law of the sea’. Any lawful response to irregular maritime migration therefore needs to take this framework into account.

2.4.1 Interception at Sea

Section 2.2 Jurisdiction over Ships considered the basic legal framework for allocation of state authority over ships at sea. This framework explains how states can intercept ships used for irregular maritime migration. Section 2.2.1 explained that the sovereignty of the coastal state extends to its internal waters and territorial sea and that the coastal state may intercept ships in such waters except for ships under innocent passage. Section 2.2.1.2 described the meaning of innocent passage and concluded that ships used for irregular maritime migration are not likely to be under innocent passage. Stateless ships

539 See above n 113 and accompanying text.
cannot exercise innocent passage and ships used for ‘unloading of ... person[s] contrary to the ... laws and regulations of the coastal state’ are prejudicial to the peace, good order or security of the coastal state.\footnote{UNCLOS art 19(2)(g).} Section 2.2.2 explained that ships in waters beyond territorial sovereignty are normally only subject to the jurisdiction of the flag state. Section 2.2.2.1 explained that the coastal state is nevertheless often permitted to intercept ships suspected of irregular migration in the contiguous zone. Section 2.2.2.2 concluded that the specific legal framework of the exclusive economic zone is essentially irrelevant to irregular maritime migration and that ships used for such purposes therefore are subject to the same legal considerations in the exclusive economic zone as on the high seas. Section 2.2.2.3 described the situation on the high seas, with emphasis on the legal possibilities for states other than the flag state to exercise jurisdiction over ships. In particular, the right of visit allows government ships to visit ships with unclear nationality or on suspicion of slave trade, piracy or unauthorised broadcasting. However, any further measures such as seizure require justification pursuant to a separate legal ground. The special grounds for interception of pirate ships are normally not relevant in the context of irregular maritime migration. Section 2.2.3 illustrated the significance of this framework with reference to the interception of ships used for irregular maritime migration. After discussions of two exceptional legal avenues for such interception — hot pursuit and countermeasures — it was concluded that states other than the flag state are generally not entitled to intercept ships used for irregular maritime migration in international waters except for the contiguous zone.

2.4.2 Rescue at Sea

Section 2.3 International Maritime Rescue Law introduced the body of international law that governs maritime search and rescue, proposing that it may be referred to as international maritime rescue law. Sections 2.3.1–2.3.2 presented the two treaties that complement the \textit{UNCLOS} in international maritime rescue law: the \textit{SAR Convention} and the \textit{SOLAS Convention}. Section 2.3.3 provided a detailed examination of the centrepiece of international maritime rescue law: the duty to render assistance at sea. After descriptions of two key elements — non-discrimination and the concept of distress — it examined the meaning of the duty to render assistance from the perspectives of flag states and coastal states.

While flag states shall require masters of ships flying their flag to render assistance at sea, coastal states shall establish adequate and effective maritime search and rescue services. Parties to the \textit{SOLAS Convention} and the
SAR Convention are under special obligations to cooperate to this end and to establish search and rescue regions in which they shall provide rescue.

Survivors recovered in the course of rescue operations at sea shall be disembarked and delivered to a place of safety. However, the concept of ‘place of safety’ is not clearly defined. Leaving the meaning of that concept aside temporarily, Section 2.3.4 discussed the legality of forcible means during rescue operations and suggested that there is prima facie no legal basis for such means, beyond what is otherwise permissible under the law of the sea. However, it was noted that the wrongfulness of forcible rescue actions may in some exceptional circumstances be precluded as a matter of necessity. Section 2.3.5 explained that the exceptional rights of ships in distress to seek refuge in a port or internal waters do not provide a solution to the question of disembarkation of refugees and migrants rescued at sea.

Despite its pivotal role as the natural starting point, and source of ‘the legal framework in which all activities at sea must take place’, it seems clear that the law of the sea does not provide final and conclusive answers to all legal questions surrounding the disembarkation of refugees and migrants rescued at sea.541 Hence, it would not be correct to understand the concept of ‘place of safety’ with reference only to the law of the sea. Instead, also other parts of international law require consideration. This is the quintessence of the basic understanding of the law of the sea necessary for the further examination of the concept of ‘place of safety’.

3 International Refugee Law: Refugee Protection at Sea

Like the international law of the sea, international refugee law is a body of law relevant to the issue of disembarkation of refugees and migrants rescued at sea. The purpose of this chapter is to describe and examine these norms to the extent relevant for this study. Consequently, this chapter relates to the first of the three steps through which the principal aim of the study is pursued, that is, exploring and arranging the legal context for the purposes of interpreting the concept of ‘place of safety’.

Because of the central role of this concept in the legal framework for irregular maritime migration, this chapter also provides an introduction to international refugee law as relevant to irregular maritime migration in general.

This chapter has the following structure. After a brief introduction to the field, paying particular attention to the definition of refugees (Section 3.1 Introduction), the focus turns to the legal foundation of a regular challenge for refugees and migrants: the authority of states to decide who enters and remains within their territories. After a basic description of this key concept of international law (Section 3.2 Territorial Sovereignty), possible exceptions to it are outlined. Section 3.3 No General Right to Asylum explains that there is no general right to asylum under international law. The following sub-chapter (Section 3.4 Non-Refoulement) considers the main protection mechanism of international refugee law: non-refoulement. The scope of this prohibition is analysed from three angles: *ratione materiae*, *ratione loci* and *ratione personae*. The last sections deal with two other key features of international refugee law: non-penalisation and non-discrimination. The chapter ends with a short summary.

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542 See above Sections 1.3 Aim, 1.7 Outline of the Thesis.
543 The notion of ‘safe place’ or even ‘place of safety’ is not exclusive to international maritime rescue law but appears also in other areas of law, including international refugee law. However, the phrase ‘concept of “place of safety”’ is used here and throughout this thesis for the sole purpose of its meaning in international maritime rescue law, that is, as found in the SOLAS Convention and the SAR Convention. See above Section 1.8 Terminology.
3.1 Introduction

International refugee law is dealt with here as the area of international law concerned with the status and rights of refugees.\(^{544}\) It is essentially dominated by the *Refugee Convention*,\(^{545}\) which technically consists of two treaties: the *Convention Relating to the Status of Refugees*\(^{546}\) and the *Protocol Relating to the Status of Refugees*.\(^{547}\)

The *Convention Relating to the Status of Refugees* was adopted in 1951 in the aftermath of the Second World War. It entered into force in 1954 and has, as of December 2018, 146 parties.\(^{548}\) The original definition of a refugee appears in article 1(A)(2) of the *Convention*, which provides that the term ‘refugee’ applies to any person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality

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and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The words ‘events occurring before 1 January 1951’ were, for the purposes of this definition, specified to mean:

(a) “events occurring in Europe before 1 January 1951”; or
(b) “events occurring in Europe or elsewhere before 1 January 1951”, and each contracting state shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.549

The original focus of the Convention was clearly Eurocentric — limited in scope to persons fleeing events occurring before 1951 and within Europe. The Protocol Relating to the Status of Refugees, which was adopted and entered into force in 1967, removed this limitation, giving the Convention ‘universal coverage’.550 All but two parties to the Convention are, as of December 2018, also parties to the Protocol.551 As a result, the original definition has lost much of its practical relevance. Instead, the current definition covers anyone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as, is unable or, owing to such fear, is unwilling to return to it.552

It follows that a person is a refugee not merely because of some formal decision to recognise him or her as such but because of the presence of certain facts, such as well-founded fear of persecution553 and alienage.554 In other

549 Convention Relating to the Status of Refugees art 1(B) (emphasis added).
551 Madagascar and Saint Kitts and Nevis were parties only to the Convention Relating to the Status of Refugees. Cabo Verde, United States and Venezuela were parties only to the Protocol Relating to the Status of Refugees. Office of Legal Affairs, ‘Multilateral Treaties Deposited with the Secretary-General’, United Nations Treaty Collection (Web Page) <https://treaties.un.org/>.
552 Refugee Convention art 1(A)(2).
553 ‘Persecution’ is, in brief, understood to mean ‘the sustained or systemic denial of basic human rights demonstrative of a failure of state protection’: Hathaway and Foster, above n 544, 185. The scope and prerequisites are, however, subject to discussion. See, eg, at 182–287; Goodwin-Gill and McAdam, above n 5, 63–134.
554 ‘Alienage’ is understood to mean the state of being an alien, that is, being outside one’s country of nationality. See, eg, Hathaway and Foster, above n 544, 17–90.
words, refugee status is not a constitutive issue that depends on an assessment and declaratory decision by some authority but an empirical issue that depends on the presence of certain facts. This means that persons claiming asylum, that is, asylum seekers, may be refugees without any state having assessed their claims and recognised them as such.555 Bearing in mind the general obligation under the law of treaties, and pursuant to the principle of pacta sunt servanda, of parties to perform treaties in good faith,556 it is clear why parties to the Refugee Convention have to afford the rights of refugees not only to those formally recognised as refugees but also to presumptive refugees.557 Otherwise, the party would consciously risk acting in a way that contravenes its obligations under the Convention. Such a cynical standard of application would hardly conform to the general obligation to perform treaties in good faith.

Together, the general terms of the refugee definition and the obligation to perform treaties in good faith require a standard of application that does not undermine the effectiveness of the Refugee Convention.558 In the case of mixed migration flows, involving both refugees and migrants, parties to the Convention are expected to treat everyone with a presumptive or prima facie claim to asylum in a manner consistent with the Convention. Consequently, it is not possible for parties to evade their obligations under the Convention merely by failing to evaluate and recognise claims for refugee status.559

555 See, eg, Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UN Doc HCR/1P/4/ENG/REV.3 (December 2011) 9 [28]: ‘A person is a refugee within the meaning of the ... Convention as soon as he fulfils the criteria contained in the definition. ... He does not become a refugee because of recognition, but is recognized because he is a refugee.’

556 VCLT art 26: ‘Every treaty is binding upon the parties to it and must be performed in good faith’ (emphasis added). See also Charter of the United Nations art 2(2): ‘All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them’ (emphasis added). See below Section 6.2.1 Initial Remarks. See generally Anthony Aust, Modern Treaty Law and Practice (Cambridge University Press, 3rd ed, 2013) 160–1; Mark E Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff, 2009) 363–8, 425–6; Oppenheim’s, above n 34, 38, 44.

557 See, eg, Jane McAdam, ‘Interpretation of the 1951 Convention’ in Andreas Zimmerman, Jonas Dörschner and Felix Machts (eds), The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary (Oxford University Press, 2011) 75, 93–5; Goodwin-Gill and McAdam, above n 5, 232–3, 387–90; Hathaway and Foster, above n 544, 1: ‘Because refugee status inheres by virtue of facts rather than formalities, the entitlement to these rights persists until and unless an individual is found not to be a refugee.’

558 See, eg, Hathaway and Foster, above n 544, 6: ‘those interpreting the Convention must seek to promote the Convention’s effectiveness.’

559 See, eg, Goodwin-Gill and McAdam, above n 5, 51, 232; Hathaway, above n 544, 158, 278: ‘since refugee rights are defined to inhere by virtue of refugee status alone, they must be
Another key feature of international refugee law is the central role of its principal institution, the UNHCR. The presumably most important legal impact of the Office is the conclusions on international protection issued by the Executive Committee of the High Commissioner’s Programme (EXCOM). A generally important but not entirely simple question concerns the legal significance of such conclusions.

In short, the conclusions are non-binding but still have considerable influence. First, the UNHCR may require parties to the Refugee Convention ‘to explain treatment of refugees that does not conform to the conclusions’. Second, the conclusions may have a role in the formation of customary norms. Third, the conclusions may also be used for the interpretation of the Convention. However, because decisions by the EXCOM cannot be ascribed respected by state parties until and unless a negative determination of the refugee’s claim to protection is rendered.’


561 As of December 2018, the EXCOM has adopted more than one hundred conclusions, covering a wide range of issues including non-refoulement, non-penalisation and non-discrimination. See generally Office of the United Nations High Commissioner for Refugees, A Thematic Compilation of Executive Committee Conclusions (7th ed, June 2014).


563 Hathaway, above n 544, 114. See also Kälin, ‘Supervising the 1951 Convention’, above n 560, 616–19. See also Lewis, above n 560, 85–90.
to all parties,\textsuperscript{565} it seems that it is mainly in a supplementary sense that conclusions may be used.\textsuperscript{566}

### 3.2 Territorial Sovereignty

The authority of a state to control and decide who may enter and remain within its territory is well-established in international law.\textsuperscript{567} This authority flows from the positive aspect of territorial sovereignty or ‘the exclusivity of the competence of the state regarding its own territory’.\textsuperscript{568} This basic feature of international law was recognised in \textit{SS Lotus}:

> the first and foremost restriction imposed by international law upon a state is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory: except by virtue of a permissive rule derived from international custom or from a convention.\textsuperscript{569}

However, the authority of states over their territories is not absolute but is exercised subject to international law. For example, the ICJ has held that a state may not allow uses of its territory for acts contrary to the rights of others.\textsuperscript{570} Territorial sovereignty is a ‘consequence of title and by no means

\textsuperscript{565} See, eg, Hathaway and Foster, above n 544, 10: ‘[EXCOM] conclusions are agreed by only a select number of states, including non-party states’; McAdam, ‘Interpretation of the 1951 Convention’, above n 557, 96. But see Hathaway, above n 544, 54: ‘the UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status, as well as many conclusions … issued by the [EXCOM] … are to be taken into account as evidence of “subsequent agreement between the parties”’.\textsuperscript{566} Cf \textit{VCLT} arts 31–2. For more on the necessity of consent and the meaning of ‘parties’, see below Section 6.2.2.2 Context.

\textsuperscript{567} See, eg, \textit{Vilvarajah and Others v United Kingdom (Judgment)} (1991) 215 Eur Court HR (ser A) 30 [102]: ‘states have the right, as a matter of well-established international law and subject to their treaty obligations … to control the entry, residence and expulsion of aliens’ (emphasis added). See generally \textit{Oppenheim}’s, above n 34, 563–4, 857–8, 901–3; Shaw, above n 34, 363–4; \textit{Brownlie}’s, above n 34, 203–14; Daillier and Pellet, above n 133, 513–15; Nathwani, above n 544, 115–40.


\textsuperscript{569} \textit{SS ‘Lotus’} [1927] PCIJ (ser A) No 10, 18–19.

\textsuperscript{570} Cf \textit{Corfu Channel (United Kingdom v Albania) (Judgment)} [1949] ICJ Rep 4, 22, in which the ICJ referred to ‘every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states’. See, eg, \textit{Oppenheim}’s, above n 34, 564.
conterminous with it’.\textsuperscript{571} It falls ‘essentially within the domestic jurisdiction of any state’\textsuperscript{572}

The relevant aspect of state sovereignty for the present purposes is the competence of every state to control who enters and remains within its territory. Territorial sovereignty is precisely what entitles states to regulate migration and control their borders.\textsuperscript{573} Generally, it is also what allows states to expel aliens from their territories. In the words of the ILC:

> the right of a state to expel an alien from its territory … is uncontested … The right to expel is not conferred on a state by some external rule; it is an inherent right of the state, \textit{flowing from its sovereignty}.\textsuperscript{574}

Accordingly, state sovereignty is the legal basis of a common challenge for refugees and migrants: the power of a state to stop them at its borders and to remove them from its territory. The norms of international law that occasionally allow individuals to enter into, pass and remain within the territories of states (eg, \textit{non-refoulement}, right to return) then run as exceptions to territorial sovereignty.\textsuperscript{575} To that end, refugees and migrants have been said to occupy something like a middle ground in international law, ‘characterized, on the one hand, by … state sovereignty … and, on the other hand, by competing humanitarian principles deriving from … international law.’\textsuperscript{576}

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\textsuperscript{571} Brownlie’s, above n 34, 212.


\textsuperscript{573} See, eg, Noll, \textit{Negotiating Asylum}, above n 544, 354; ‘As a corollary flowing from territorial and personal supremacy, states are entitled to control the composition of their population … Basically this right is part of customary international law’.


\textsuperscript{575} See below Sections 3.4 Non-Refoulement, 4.5 Right to Return.

\textsuperscript{576} Goodwin-Gill and McAdam, above n 5, 1.
3.3 No General Right to Asylum

A common question of refugees is where can I go to find protection? In clear terms, the UDHR answers you can go to any country: ‘Everyone has the right to seek and enjoy in other countries asylum from persecution.’ This answer has led to an everyday jargon assuming the existence of general rights both to asylum and to seek asylum. The basic problem with this assumption is that states have no general obligation, under international law, to allow refugees to enter their territories and remain there. This calls for some explanation.

To begin with, it is generally recognised that states are obliged to admit their own nationals, that is, to allow them to enter and remain within their territories. This obligation, which is closely linked to the notion of nationality, is provided for in both treaty law and customary international law. Furthermore, there is no doubt that states are allowed to grant asylum and that other states have a duty to respect it. In the words of the ICJ, the right of a state to grant asylum is nothing but ‘the normal exercise of the territorial sovereignty’. States are then, as a matter of law, free but not required to grant asylum. Accordingly, no general right of individuals to be granted asylum exists under international law. There are several reasons for this view.

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577 UDHR art 14(1).
579 See, eg, UDHR art 13(2): ‘Everyone has the right to leave any country … and to return to his country’ (emphasis added); ICCPR art 12(4): ‘No one shall be arbitrarily deprived of the right to enter his own country’; CERD art 5(d)(ii). See, eg, Oppenheim’s, above n 34, 858: ‘The state of nationality of expelled persons is bound to receive them on its territory’; Guy S Goodwin-Gill, International Law and the Movement of Persons between States (Oxford University Press, 1978) 20–1, 44–6, 136; Nathwani, above n 544, 132–3. See below Section 4.5 Right to Return.
580 See, eg, María-Teresa Gil-Bazo, ‘Asylum as a General Principle of International Law’ (2015) 27(1) International Journal of Refugee Law 3, 7: ‘asylum is a right of states to grant if they so wish in the exercise of their sovereignty, without it being considered a hostile act towards other states, who have a correlative duty to respect it’ (emphasis in original); Grahl-Madsen, above n 578, 2; Nathwani, above n 544, 115–31.
582 ‘Asylum’ is used here for ‘the protection that a state grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it’. This definition appears in Institute of International Law, ‘Asylum in Public International Law’ (Resolution, September 1950) art 1. Furthermore, this section deals only with territorial asylum and not diplomatic asylum, that is, asylum in the premises of a diplomatic mission.
First, the UDHR is not legally binding itself.\footnote{Resolutions adopted by the General Assembly of the United Nations are normally not legally binding. Accordingly, the Charter of the United Nations refers to such resolutions as ‘recommendations’: see, eg, at arts 10–14. See generally Christian Tomuschat, ‘United Nations, General Assembly’ in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford University Press, 2011). See also Noll, Negotiating Asylum, above n 544, 357–62; Goodwin-Gill and McAdam, above n 5, 358–60.} and there is no other legally binding document of global scope setting forth a similar right.\footnote{There are, however, such provisions in some regional human rights treaties. See, eg, ACHR art 22(7); ACHPR art 12(3). See generally Gregor Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’ (2006) 17(3) International Journal of Refugee Law 542, 546 n 19.} Indeed, neither the Refugee Convention, nor the treaties adopted on the basis of the UDHR,\footnote{ICCPR; ICESCR.} refer to asylum in any operative way.\footnote{The Refugee Convention says nothing positive about asylum but, almost cynically, refers to it only in negative terms: ‘Considering that the grant of asylum may place unduly heavy burdens on certain countries’: at Preamble para 4 (emphasis added).} Instead, the ICCPR simply provides: ‘Everyone shall be free to leave any country, including his own’.\footnote{ICCPR art 12(2).} This dissonance — between the general recognition of a right to leave and the non-existence of a general right to be granted asylum — is reflective of the legal limbo of refugees and migrants under international law: you have the right to leave any country but you have no general right to enter another.\footnote{However, as further explained below Section 3.4 Non-Refoulement, a right of access may sometimes be incumbent on other norms of international law. The prohibition of refoulement is, however, not the same as a general right to asylum — but rather ‘only a half-hearted solution’ and ‘like an unfulfilled promise’: Nathwani, above n 544, 135.}

Second, the status of the right to asylum is likely no stronger under customary international law than under treaty law. There seems to be neither sufficient state practice nor opinio juris to support such a right.\footnote{Goodwin-Gill and McAdam, above n 5, 365: ‘there has been no [further] progress towards a universal instrument on asylum’; Nathwani, above n 544, 132: ‘The story of the individual right to obtain asylum in international law is a failure’; Noll, Negotiating Asylum, above n 544, 362: ‘To conclude, it has become clear that neither the UDHR generally, nor the specific content of [UDHR art 14] possess the quality of binding international law’ (emphasis added); Noll, ‘Seeking Asylum at Embassies’, above n 584, 547: ‘Neither a homogeneous state practice nor a corresponding opinio juris can be made out to support a right to access territory in order to seek asylum’ (emphasis added).} On the contrary, a considerable amount of state practice points against the existence of a customary right to be granted asylum. Some, apparently influential, states have consistently opposed the formation of a general right to asylum under international law.\footnote{See, eg, Goodwin-Gill and McAdam, above n 5, 358–63; Noll, Negotiating Asylum, above n 544, 357–62; Goodwin-Gill, International Law and the Movement of Persons between}
1967, which merely recognised the right of states to evaluate the grounds for the grant of asylum, and the failure of the United Nations Conference on Territorial Asylum in 1977, are significant examples. Other examples may be the recently adopted Global Compact on Refugees and the Global Compact for Migration, which explicitly recognise the authority of states to regulate migration without comparably clear references to something like a general right to asylum.

Another example is the practice within the EU, under the so-called ‘Dublin System’, of transferring asylum seekers to the member state responsible for examining the application — normally the member state where the asylum seeker first entered the Union. Such transfers would likely be incompatible with a general right to asylum under international law. If there was such a right, states would be obliged to try applications and, if fulfilled, grant asylum within their territories. Similar considerations derive from related practices pursuant to safe country concepts. Such practices are,

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591 Cf Declaration on Territorial Asylum, GA Res 2312 (XXII), UN Doc A/RES/2312(XXII) (14 December 1967) arts 1(3), 2(2).
592 See also Grahl-Madsen, above n 578, 60–8 describing the negotiations during the United Nations Conference on Territorial Asylum.
593 Global Compact on Refugees, UN GAOR, 73rd sess, Supp No 12, UN Doc A/73/12 (Part II) (2 August 2018, adopted 17 December 2018) para 10 referring to New York Declaration for Refugees and Migrants, GA Res 71/1, UN Doc A/RES/71/1 (3 October 2016), eg, paras 24, 42: ‘each state has a sovereign right to determine whom to admit to its territory’, 67: ‘reaffirm respect for the institution of asylum’ (emphasis added). Global Compact for Migration, UN Doc A/CONF.231/3 para 15: ‘reaffirms the sovereign right of states to determine their national migration policy and their prerogative to govern migration’ (emphasis added).
595 Another potentially significant, but specific, example concerns the practices of states in relation to asylum applications lodged on board war ships and other government ships while in foreign ports. Even though the regular immunity of such ships may limit the practical possibilities for the coastal state to effectively protest, there appear to be few signs of a general practice to process applications and grant asylum in such situations. See, eg, United States Navy Regulations and Official Records, 32 CFR § 700.939 (1999): ‘While temporary refuge can be granted … permanent asylum will not be granted’ (emphasis added). See also Tondini, above n 516, 65: ‘few states in the world recognize the right of migrants to ask for asylum while on board their warships’; Heijer, above n 116, 128; Dupuy, above n 196, 251: ‘in common practice the commander of a warship has the right to refuse to turn over to local authorities … member[s] of his crew’. However, asylum on board ships is different from territorial asylum: see above n 582.
Furthermore, not unique to Europe but a common component of migration policies around the world.597

In contrast to the traditional view,598 Gil-Bazo has argued that international law contains a right to asylum in the form of a general principle of law.599 Drawing on descriptions of asylum as an ancient institution — ‘well-grounded in the practice of states long before the international regime for the protection of refugees was born’600 — and references to more than thirty national constitutions,601 she concludes:

the extensive recognition of asylum in constitutions worldwide speaks to the value of [asylum] as one of the underlying principles in legal orders worldwide … And as such, it informs international law itself.602

Although this argument is clearly well-researched and merits attention, the conclusion does not seem very convincing. First and foremost, existing

597 See generally Hathaway, above n 544, 293–8. For an explanation of why such a practice ‘does not exempt … state[s] from carrying out a thorough and individualized examination of the situation of the person concerned’, see Tarakhel v Switzerland (European Court of Human Rights, Grand Chamber, Application No 29217/12, 4 November 2014) 44 [104].


600 Ibid 14.

601 Ibid 23–4: ‘The constitutions of Angola, Benin, Bolivia, Bulgaria, Burundi, Brazil, Cape Verde, Chad, China, Colombia, Costa Rica, Cuba, Democratic Republic of Congo, the Dominican Republic, Ecuador, Egypt, El Salvador, France, Germany, Guatemala, Guinea-Conakry, Honduras, Hungary, Italy, Ivory Coast, Mali, Mozambique, Nicaragua, Paraguay, Peru, Portugal, Spain, Venezuela all recognize the right to asylum’.

602 Ibid 27.
references to asylum in national constitutions appear to vary, and ‘a right reminiscent of that enshrined in [article 14 of the UDHR] can only be found in a handful of constitutions’. Moreover, even if there had been a sufficient number of consistent expressions in national constitutions in support of a right to asylum, the parallel existence of a relatively homogenous body of practice to the contrary would likely impede, if not prevent, the formation of a general principle of law.

603 Noll, Negotiating Asylum, above n 544, 359–60 (emphasis added) citing Oscar Schachter, International Law in Theory and Practice (Martinus Nijhoff, 1991) 336, who also notes that ‘actual state practice is not necessarily respectful of such constitutional rights’.

604 The relationship between customary international law and general principles of law is not obvious. See, eg, Marcelo Vázquez-Bermúdez, Special Rapporteur, [General Principles of Law (Syllabus), UN Doc A/72/10 (1 May–2 June and 3 July–4 August 2017) annex A, 233 [28].


607 The EU Charter is technically speaking not a treaty as defined in VCLT art 2(1)(a) but nonetheless part of primary EU law. Treaty on European Union, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993) art 6 (‘TEU’); ‘The Union recognizes the rights, freedoms and principles set out in the [EU Charter] which shall have the same legal value as the Treaties’ (emphasis added). For what constitutes a treaty, see above Section 1.3.2.1 Legal Material. See also Gil-Bazo, ‘The EU Charter of Fundamental Rights and the Right to Asylum’, above n 605, 35.

608 The EU Charter only applies to ‘the institutions, bodies, offices and agencies of the Union … and to the member states only when they are implementing Union law’: at art 51(1) (emphasis added). The significance of this limitation became evident in a recent judgment by
asylum. However, on closer reading a more traditional meaning appears. First, article 18 does not explain to whom it is directed — the member states or individuals? Given that the phrase ‘right to asylum’ has often been used for the right of states to grant asylum and not the right of individuals to be granted asylum, this ambiguity may not be without relevance. Second, the text of article 18 makes it clear that the meaning of the provided right is dependent on some other instruments:609 the Refugee Convention, the TEU and the Treaty on the Functioning of the European Union.610 Because none of these establishes a general right to be granted asylum, article 18 does not seem to do so either.611 Instead, it may be that the relevant provision merely serves to restate rights already existing under other instruments, most notably that of non-refoulement.612 This view seems to find some support in the preamble of the Charter:

This Charter reaffirms … the rights as they result … from the constitutional traditions and international obligations common to the member states, the [EHCR], the Social Charters adopted by the Union and by the Council of Europe and the case-law of the [CJEU] and of the [European Court of Human Rights].613

Consequently, it seems that the purpose of the EU Charter is not to establish new rights but rather to reaffirm such rights that already exist under other bodies of law, such as ‘the constitutional traditions … common to the member

the Court of Justice of the European Union (CJEU) in response to a request for a preliminary ruling by a Belgian court. The background was that a Syrian family had, at the Belgian Embassy in Beirut (Lebanon), applied for visas to enable them to leave the besieged city of Aleppo (Syria) in order to apply for asylum in Belgium. The applicants had, in the main proceedings claim, argued that EU Charter art 18 imposed a positive obligation on EU member states to guarantee the right to asylum and that the granting of asylum was the only way to avoid any risk that ECHR art 3 and EU Charter art 4 would be infringed. The Court found that the applications concerned visas for longer periods of time than what was governed by EU law (‘long-term visas and residence permits … on humanitarian grounds’). The applications therefore fell solely within the scope of national law and the EU Charter was not applicable. X and X v État Belge (European Court of Justice, C-638/16, 7 March 2017).

609 EU Charter art 18: ‘The right to asylum shall be guaranteed with due respect for the … [Refugee Convention] and in accordance with the Treaty Establishing the European Community’ (emphasis added).


612 See, eg, Refugee Convention art 33(1); ECHR art 3; EU Charter art 19(2). See below Section 3.4 Non-Refoulement.

613 EU Charter Preamble para 5 (emphasis added).
states’, the ECHR and the case law by the CJEU and the ECtHR. Indeed, none of these bodies of law establishes a general right to be granted asylum.\textsuperscript{614} Furthermore, this understanding corresponds to the mandate of the drafters of the Charter, which was to consolidate existing rights.\textsuperscript{615} It therefore seems that article 18 of the EU Charter resembles article 14(1) of the UDHR in that it merely sets forth a general right to asylum without establishing any obligation of states to grant asylum.

Having found that there is no general right to be granted asylum under international law, the next possible right to consider concerns the right to seek asylum. Article 14(1) of the UDHR provides:

\begin{quote}
Everyone has the right to seek and to enjoy in other countries asylum from persecution.\textsuperscript{616}
\end{quote}

These terms raise questions about what obligations states have to assess claims for asylum lodged with them.\textsuperscript{617} First, as explained above, the UDHR is not legally binding itself.\textsuperscript{618} Moreover, there is little evidence for the existence of a general obligation under customary international law of states to assess asylum applications.\textsuperscript{619}

Potentially more thought-provoking is that the Refugee Convention does not explicitly provide an obligation of states to assess and determine refugee status. However, such a requirement appears to be incumbent on other obligations under the Convention.\textsuperscript{620} The need to process an asylum

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\textsuperscript{614} See, eg, Hirsi Jamaa and Others v Italy (Judgment) [2012] II Eur Court HR 97, 140 [113] (‘Hirsi Jamaa’) in which the ECtHR stated that ‘the right to political asylum is not contained in either the [ECHR] or its Protocols’ (emphasis added).

\textsuperscript{615} The mandate appears in European Council, ‘Conclusions of the Presidency of the Cologne European Council, 3–4 June 1999’ (150/99 Rev 1 CAB, 3–4 June 1999) annex para 44: ‘the fundamental rights applicable at Union level should be consolidated … and thereby made more evident’. See also Noll, ‘Seeking Asylum at Embassies’, above n 584, 547 n 23.

\textsuperscript{616} Emphasis added.

\textsuperscript{617} In the same way as the right to asylum can be taken to mean the right of states to grant asylum, the right to seek asylum can be taken to mean the obligation of states not to prevent persons from applying for asylum in other states. Such a right seems to be incumbent on the freedom to leave: see, eg, Heijer, above n 70, 150–3. See below Section 4.4 Freedom to Leave.

\textsuperscript{618} See above n 583.

\textsuperscript{619} McAdam and Purcell note that resolutions by the General Assembly of the United Nations simply affirm the right to seek asylum without explaining its meaning. Jane McAdam and Kate Purcell, ‘Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum’ (2008) 27 Australian Year Book of International Law 87, 90 n 11 citing Goodwin-Gill and McAdam, above n 5, 369.

\textsuperscript{620} States bound by Refugee Convention arts 27–8 shall issue ‘identity papers to any refugee in their territory who does not possess a valid travel document’ and ‘[travel documents] to refugees
application and to determine refugee status arises when a state makes or plans to make asylum seekers subject to treatment that would be impermissible if they were refugees. A state that opens its borders, welcomes everyone to its territory and allows them to remain there under the same conditions as if they were refugees, without any discrimination whatsoever, would then not have a clear-cut duty to process asylum applications lodged with it. By contrast, a state that closes its borders, denies access to asylum seekers, and removes aliens from its territory or makes them subject to less favourable treatment than to which they are entitled by refugee rights, needs to process applications lodged with it to avoid breaching its obligations under international refugee law. The point being made is that while states may generally not be under a separate obligation under international law to process asylum applications irrespective of the circumstances under which the application is lodged, such a need generally arises as soon as the state means to deny non-refugees the rights of refugees.

This view of the need of a state to process asylum applications as incumbent on other obligations under international law seems to correspond to the position taken by Goodwin-Gill and McAdam:

Although neither the [Convention Relating to the Status of Refugees] nor the [Protocol Relating to the Status of Refugees] formally require procedures as a necessary condition for full implementation, their object and purpose of protection and assurance of fundamental rights and freedoms for refugees without discrimination, argue strongly for the adoption of such effective internal measures.

It also appears to conform to the position taken by Hathaway:

While there clearly is an implied duty to proceed to the assessment of refugee status if a state party elects to condition access to refugee rights on the results of such verification, governments are otherwise free to dispense with a formal procedure of any kind: they must simply respect the rights of persons who are, in fact, refugees.

lawfully staying in their territory … for the purpose of travel outside their territory’. See generally Hathaway, above n 544, 618–26.

But see Refugee Convention arts 27–8, which require contracting states to issue identity papers to refugees in their territory and travel documents to refugees lawfully staying in their territory. The obligations to issue these documents are, however, not the same as an obligation to process asylum applications. It would, for example, be possible for a state to issue the relevant documents for someone without having assessed his or her application for asylum.

Goodwin-Gill and McAdam, above n 5, 530 (emphasis added). See also at 358: ‘States have a duty under international law not to obstruct the individual’s right to seek asylum.’

Hathaway, above n 544, 180–1 (emphasis added) (citations omitted), and generally at 171–90. See also Grahl-Madsen, above n 578, 2, describing the right to seek asylum as
Interestingly, Gammeltoft-Hansen seems to take a slightly different view:

A closer reading of the drafting history further suggests that while the [UDHR] … falls short of an individual right to be granted asylum, a procedural right to seek, or in other words a right to an asylum process, was intended to remain.  

However, on closer reading it appears that Gammeltoft-Hansen’s argument is not really that there is a separate right to seek asylum under international law, in the sense of a general obligation of states to process asylum applications. Rather, he seems to indicate that asylum procedures may be necessary as part of compliance with other obligations under international refugee law. This understanding — that the need for a state to process asylum applications is incumbent on other obligations under international law — corresponds to the view taken here.

3.4 Non-Refoulement

Instead of a general right to asylum, the main protection mechanism for refugees under international law is more narrowly construed as an obligation not to send them back to persecution. This is a cardinal principle of refugee protection and the cornerstone of international refugee law. It is known as merely ‘the right of an individual to leave his country of residence in pursuit of asylum.’ See also Mark Pallis, ‘Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes’ (2002) 14 International Journal of Refugee Law 329, 345–7; Barnes, ‘The International Law of the Sea and Migration Control’, above n 70, 116; Bostock, above n 4, 283.


Gammeltoft-Hansen and Gammeltoft-Hansen, above n 624, 446–7: ‘While an important difference remains in some situations … the substantive non-refoulement obligation in practice compels states to undertake at least part of an asylum procedure in order to avoid sending back individuals to persecution’.


Office of the United Nations High Commissioner for Refugees, Executive Committee Conclusion No 65 (XLII) General Conclusion on International Protection, 42nd sess, UN Doc A/46/12/Add.1 (29 January 1992) para c.

*non-refoulement*, after the French word *refouler*, meaning to drive back or repel.629 Article 33(1) of the *Refugee Convention* reads:

No contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The fundamental nature of the prohibition of *refoulement* is evident from its non-derogable character.630 However, it is not an absolute prohibition without exceptions. Article 33(2) of the *Refugee Convention* reads:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Refugees posing a security risk to the receiving state or its community may therefore, under certain circumstances, be excluded from the protection against *refoulement*. The assessment required to determine if a refugee poses a risk to the security of the country or its community is necessarily a task for the concerned state. The concerned state enjoys for this purpose a margin of appreciation, naturally limited by considerations of proportionality.631 However, the compulsory character of the prohibition of *refoulement* is, notwithstanding the exceptions provided for, reinforced by the broadened scope of *non-refoulement* under international human rights law.632 This does not mean that article 33(2) of the *Refugee Convention* is no longer relevant. Rather, it means that the leeway for permissible *refoulement* has narrowed as a result of developments in international human rights law.633

631 Lauterpacht and Bethlehem, above n 626, 137–8 mention factors such as ‘the seriousness of danger posed to the security of the country’, ‘the likelihood of that danger being realized’, and ‘whether the danger … would be eliminated or significantly alleviated by the removal of the individual concerned’.
632 See, eg, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3(1) (‘*CAT*’); *ICCPR* art 7(1); *ECHR* art 3. See below Section 4.6 Non-Refoulement.
633 See, eg, *CAT* art 3(1), which does not allow any exceptions from its prohibition of *refoulement*; *ICCPR* art 4(2), which expressly prohibits derogations from its *non-refoulement* obligation; *ECHR* art 15(1). See below Section 4.6 Non-Refoulement. See generally Goodwin-Gill and McAdam, above n 5, 232–44; Andreas Zimmerman and Philipp Wennholtz, ‘Article 33, para 2 (Prohibition of Expulsion or Return (*Refoulement*)/Défense d’Expulsion
The notion of *non-refoulement* has, since its inclusion in the *Refugee Convention*, been included in several human rights treaties. Accordingly, the *CAT* provides:

No state party shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁶³⁴

In broader terms, article 7(1) of the *ICCPR* provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

This provision is clearly not as equally explicit an expression of *non-refoulement* as article 33(1) of the *Refugee Convention* or article 3(1) of the *CAT*. Even so, it is normally understood to include a prohibition on refoulement.⁶³⁵ The underlying logic is that that all acts resulting in the expulsion or return of a person to a place where he or she would be at risk of torture or cruel, inhuman and degrading treatment or punishment would *per se* amount to cruel, inhuman and degrading treatment or punishment, if not torture.⁶³⁶ The right set forth by article 7(1) of the *ICCPR* is thus of more general character but entails *non-refoulement*.

International humanitarian law also provides for *non-refoulement*. Article 45 of the *Fourth Geneva Convention* reads: ‘In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.’⁶³⁷ The prohibition of refoulement also appears in regional human rights treaties,

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⁶³⁴ CAT art 3(1).
⁶³⁵ General Comment No 36: The Right to Life, UN Doc CCPR/C/GC/36, para 12.
⁶³⁶ Ibid: ‘Moreover, the … obligation requiring that states parties respect and ensure the Covenant rights … entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm … either in the country to which removal is to be effected or in any country to which the person may subsequently be removed’ (emphasis added).
⁶³⁷ Emphasis added.
including the *ECHR*, the *ACHR*, and the *ACHPR*. It is also set out in the *EU Charter*. Several non-binding instruments also provide for *non-refoulement*. Important examples include the recently adopted Global Compacts on Refugees and for Migration, the Declaration on Territorial Asylum, other resolutions by the General Assembly of the United Nations, and numerous EXCOM conclusions. It is also provided for in the *ASEAN Human Rights Declaration*.

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638 *ECHR* art 3: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. The ECtHR has repeatedly interpreted art 3 to cover *non-refoulement*. See, eg, *Hirsi Jamaa* [2012] II Eur Court HR 97, 140 [114]: ‘expulsion, extradition or any other measure to remove an alien may give rise to an issue under [ECHR art 3] … where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to [art 3] in the receiving country. In such circumstances, [art 3] implies an obligation not to expel the individual to that country’. See also *Soering v United Kingdom (Judgment)* (1989) 161 Eur Court HR (ser A) 29 [91]; *Vilvarajah and Others v United Kingdom (Judgment)* (1991) 215 Eur Court HR (ser A) 30 [103]; *Tarakhel v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 29217/12, 4 November 2014) 41–2 [93]; *Salah Saeid v Netherlands* (European Court of Human Rights, Grand Chamber, Application No 1948/04, 11 January 2007) 39–40 [135].

639 *ACHR* art 22(8): ‘In no case may an alien be deported or returned to a country … if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions’.

640 *ACHPR* art 5: ‘Every individual shall have the right to the respect of the dignity inherent in a human being ... All forms of exploitation and degradation of man, particularly … torture, cruel, inhuman or degrading punishment and treatment shall be prohibited’.

641 *EU Charter* art 19(2): ‘No one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’.

642 See, eg, *Global Compact on Refugees*, UN Doc A/73/12 (Part II) paras 5, 87; *Global Compact for Migration*, UN Doc A/CONF.231/3, para 37. See also *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1, paras 24, 58, 67.

643 *Declaration on Territorial Asylum*, UN Doc A/RES/2312(XXII), art 3(1).


646 *ASEAN Human Rights Declaration*, art 14: ‘No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment’. Arguably, this is an expression for *non-refoulement* in the same way as ICCPR art 7(1) and *ECHR* art 3.
The prohibition of *refoulement* also finds support in state practice. Nearly three quarters of all states are parties to the *Refugee Convention*, and only a few members of the United Nations are not bound by a treaty providing for *non-refoulement*. Furthermore, most states have incorporated prohibitions of *refoulement* in their domestic law.

Many have commented on the status of *non-refoulement* under customary international law. Goodwin-Gill and McAdam refer to numerous statements by states in support of *non-refoulement* within the EXCOM. They also note that the binding nature of the prohibition is almost never questioned and that states claiming not to be bound normally invoke possible exceptions rather than challenge the validity of the prohibition. They also note that states’ failure ‘to protest openly at breaches of the principle of *non-refoulement* … should not necessarily be viewed as [acquiescence] in such breach, particularly where UNHCR does so protest [sic]’. For these and other reasons, Goodwin-Gill and McAdam conclude that the prohibition of *refoulement* has ‘crystallized into a rule of customary international law’.

This line of reasoning is similar to the ones put forward by Lauterpacht and Bethlehem, and by Kälin, Caroni and Heim. Many others have reached the same conclusion. Unsurprisingly, the UNHCR has consistently argued

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647 See above n 551.
648 As of December 2018, among the 193 members of the United Nations, 13 are not bound by any global treaty obligation (Refugee Convention, ICCPR, CAT) or regional treaty obligation (eg, ECHR) to respect the prohibition of *refoulement*. These were Bhutan, Brunei Darussalam, Kiribati, Malaysia, Marshall Islands, Micronesia, Myanmar, Oman, Palau, Saint Kitts and Nevis, Saint Lucia, Singapore, and Tonga. See also above n 551. Cf Lauterpacht and Bethlehem, above n 626, 170; Kälin, Caroni and Heim, above n 598, 1343 n 75.
649 Lauterpacht and Bethlehem, above n 626, 171–7.
650 Goodwin-Gill and McAdam, above n 5, 218–32.
651 Ibid 233–4. For a similar remark, see Gammeltoft-Hansen, *Access to Asylum*, above n 544, 74: ‘When looking for state practice in this area it is surprising how few examples one can find of states rejecting asylum-seekers … and simultaneously claiming that this is permissible under [Refugee Convention art 33]’ (emphasis in original).
652 Goodwin-Gill and McAdam, above n 5, 228.
653 Ibid 248.
654 Lauterpacht and Bethlehem, above n 626, 149–77. The presumably strongest part of the argument is that all but a few members of the United Nations participate ‘in some or other conventional arrangement embodying *non-refoulement*’: at 146–7. But see Hathaway, above n 544, 365.
655 Kälin, Caroni and Heim, above n 598, 1343–6.
for the customary status of the prohibition of *refoulement*.\(^\text{657}\) Moreover, the influential International Institute of Humanitarian Law has issued a declaration with the following unambiguous statement: ‘The principle of non-*refoulement* of refugees incorporated in [art 33 of the Refugee Convention] is an integral part of customary international law.’\(^\text{658}\)

Hathaway takes the opposite view, denying any customary status of the prohibition of *refoulement*:

> There is insufficient evidence to justify the claim that the duty to avoid the *refoulement* of refugees has evolved at the universal level beyond the scope of article 33 of the Refugee Convention.\(^\text{659}\)

He argues that customary law is not ‘simply a matter of words ... custom can evolve only through interstate practice in which governments effectively agree to be bound through the medium of their conduct’.\(^\text{660}\) This standard is not yet met in the case of non-*refoulement* of refugees, he means, simply because ‘*refoulement* still remains part of the reality for significant numbers of refugees, in most parts of the world’.\(^\text{661}\) Even though the argument is clearly

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\(^{658}\) International Institute of Humanitarian Law, ‘San Remo Declaration on the Principle of Non-Refoulement’ (September 2001). But see Hathaway, above n 544, 364 n 375: ‘the absence of an assertion that acts of *refoulement* are justified by legal norms is clearly not the same thing as the existence of state practice which affirms a duty not to send refugees back’ (emphasis added).

\(^{659}\) Hathaway, above n 544, 363.

\(^{660}\) Ibid.

\(^{661}\) Ibid 364. See also at 363–7.
well-researched, the conclusion seems questionable. As explained by Kälin, Caroni and Heim:

the existence of customary law does not depend on the absence of any violation. Rather, as stated by the ICJ, it suffices “that the conduct of states should, in general be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule”.

Like any question about customary international law, that about the customary status of the prohibition of refoulement is a question about factual criteria: is there ‘international custom, as evidence of a general practice accepted as law’? Providing an independent answer to this question would require a comprehensive analysis of state practice, which would take too long within the frames of this study. The reasonable alternative that remains is to rely on the findings of others. Even though case law is relatively scarce, and there are different opinions among authors, the majority view seems to be that the prohibition of refoulement of refugees is part of customary international law. This is also the position taken in this study. Therefore, it is believed that customary international law contains a prohibition that is essentially equivalent to that set forth by article 33 of the Refugee Convention.

Having now reached an understanding of the status of the prohibition of refoulement, it is time to proceed to the obligations flowing from it. These will be considered with reference to the personal, material and geographical scope of the prohibition.

3.4.1 Scope of the Prohibition

3.4.1.1 Personal Scope
The prohibition of refoulement set forth by the Refugee Convention extends to everyone recognised as a refugee (‘No state shall expel or return … a refugee’). It also covers those who have applied for protection in good faith but whose refugee status has yet to be recognised, that is, presumptive refugees or asylum seekers. This is, as explained above, a logical result of the empirical nature of the definition of a refugee, whereby refugee rights stem

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663 See above Section 1.4.2.2 Customary International Law.
664 There is no specialised international court for international refugee law. However, the ECtHR has stated that ECHR art 3 (allegedly including non-refoulement) reflects ‘an internationally accepted standard’. Soering v United Kingdom (Judgment) (1989) 161 Eur Court HR (ser A) 28 [88] (‘Soering’).
665 See above nn 649–58 and accompanying text.
666 Refugee Convention art 33(1) (emphasis added).
from refugee status alone and not any formal decision to this end.\textsuperscript{667} Consequently, under international refugee law, states need to afford \textit{non-refoulement} not only to refugees but also to those whose claims for protection have not yet been assessed and finally refuted.\textsuperscript{668}

Persons other than refugees and presumptive refugees are, on the other hand, not covered by the prohibition of \textit{refoulement} under international refugee law, nor are refugees who pose a security risk within the meaning of article 33(2) of the \textit{Refugee Convention}. However, this exclusion does not exempt them from the broadened scope of \textit{non-refoulement} under international human rights law.\textsuperscript{669}

The limited personal coverage of international refugee law means that a state that sends non-refugees back to persecution does not violate the prohibition of \textit{refoulement} under article 33(1) of the \textit{Refugee Convention}. By contrast, it clearly does so if the persons are refugees or presumptive refugees. The personal scope of the prohibition is then directly linked to the refugee definition.

This link has at least one important consequence: persons that remain within their own country are not protected against \textit{refoulement} under international refugee law. This is because the refugee definition is predicated on alienage, so that only those who have left their country may be refugees.\textsuperscript{670} The concept of a country is taken to include both its land territory and its territorial waters.\textsuperscript{671} Refugees apprehended in the territorial waters of their own country are then not protected against \textit{refoulement} under the \textit{Refugee Convention}.\textsuperscript{672}

By contrast, international human rights law has universal ambitions and applies to everyone irrespective of refugee status.\textsuperscript{673} As already noted, international human rights law also prohibits \textit{refoulement}. Article 3(1) of the \textit{CAT}, article 7 of the \textit{ICCPR}, article 3 of the \textit{ECHR}, article 22(8) of the \textit{ACHR} and article 5 of the \textit{ACHPR} all provide for \textit{non-refoulement} in some way or other. Meaningfully, none of these provisions are similarly limited in scope as the prohibition under the \textit{Refugee Convention}. The applicability \textit{ratione}

\textsuperscript{667} See above nn 555–8 and accompanying texts.
\textsuperscript{668} See, eg, Hathaway, above n 544, 304: ‘The duty therefore applies whether or not refugee status has been formally recognized’; Kälin, Caroni and Heim, above n 598, 1369–75.
\textsuperscript{669} See below n 674 and accompanying text. See also Kälin, Caroni and Heim, above n 598, 1370.
\textsuperscript{670} See above n 554.
\textsuperscript{671} See, eg, \textit{UNCLOS} art 2(1): ‘The sovereignty of a coastal state extends, beyond its land territory and internal waters … to an adjacent belt of sea, described as the territorial sea’. See above Section 2.2.1 Territorial Waters.
\textsuperscript{672} See, eg, Bank, above n 363, 847–8.
\textsuperscript{673} See below Section 4.1 Introduction.
personae of non-refoulement is therefore significantly broader under international human rights law than under the Refugee Convention. States apprehending refugees and migrants in the territorial seas of their own countries of nationality may then not be bound by the prohibition under the Refugee Convention but may nonetheless be bound by their corresponding obligations under international human rights law. The limited reach of the protection against refoulement under the Refugee Convention is in this way to some extent remedied by the complementary protection afforded by international human rights law.674

3.4.1.2 Material Scope
While non-refoulement seems to be the main answer of the international community to refugees’ need for protection in other states, this is not the same as a general right to asylum. Several considerations support this view.

First, the prohibition of refoulement merely prohibits expulsions, returns and other actions. The obligations pursuant to the prohibition are then mainly of negative character — they do not require states to act in certain ways but only to refrain from treating refugees in a way that sends them back to ‘[threats to] their life or freedom … on account of race, nationality, membership of a particular social group or political opinion’ or, in a word, persecution.675 Second, the prohibition of refoulement does not prohibit all expulsions or returns but only those that would result in exposure to such risks. The removal of refugees and migrants to places where they would not be at risk is then not prohibited as refoulement. This is clearly different from the notion of a right to asylum, which would serve to prevent states from removing refugees from their territories regardless of the conditions at the destination of the removal. Furthermore, the protection under the prohibition of refoulement is merely of an essentially temporary character: it only lasts as long as the risk of persecution lasts.676

Accordingly, there are good reasons to distinguish between the prohibition of refoulement and the notion of a general right to asylum. Even so, the prohibition may sometimes lead to similar results as a general right to asylum.

A clear example is the situation when a state is prevented from removing refugees from its territory because no other state where they would not be at

674 See generally Jane McAdam, Complementary Protection in International Refugee Law (Oxford University Press, 2007). Goodwin-Gill and McAdam, above n 5, 285, conceptualise complementary protection as ‘a shorthand term for the widened scope of non-refoulement under international law.’ See also Lauterpacht and Bethlehem, above n 544, 90–3, 150–63; Hathaway, above n 544, 368–70.
675 Refugee Convention art 33(1). See above n 553.
676 See, eg. Hathaway, above n 544, 300–1.
risk is willing to receive them. As previously noted, states are generally only required to admit their own nationals, and since most refugees cannot be returned to their own countries because of the risks there this is normally not a practical option. States may therefore sometimes have no other lawful choice but to allow refugees to remain within their territories.

Another example concerns rejection and non-admittance at borders. Clearly, the prohibition of refoulement covers all forms of expulsion, return, extradition and other actions resulting in the removal of a refugee. Consequently, it also encompasses rejections at the borders of a state. Even though a narrow reading of the terms ‘expel or return (“refouler”)’ may not provide unambiguous support for such a broad interpretation, the immediately following terms warrant a broader reading: ‘No contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever’. The classification of the method of removal (expulsion, return rejection, extradition, etc) is then clearly irrelevant. Instead, any practice that forces refugees to return home or to some other place where they are at risk of persecution is covered. Even acts that stricto sensu do not entail returning refugees to a territory or even to the frontiers of a territory are prohibited if the effect is that the refugees are returned to a risk of persecution. It follows that even removals to international areas or to the territories of other states from where the refugees would be forwarded to places where they face persecution — so-called chain refoulement — are covered. Thus, the decisive factor is not the place to which the refugees but the effect of the expulsion or return. Push-back operations that send refugees and migrants to international waters, leaving them with no choice but to proceed to a place where they would face persecution risks, may therefore come within the scope of the prohibition of refoulement.

Consequently, a state that finds refugees at its borders must not act in a way that leaves them with no other possibility but to return to a place where they would be exposed to such threats covered by non-refoulement. While not every border rejection procedure can be expected to generate such effects, it seems clear that some would. Take, for example, the situation in which

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677 See above n 579 and accompanying text.
678 See below Section 4.5 Right to Return.
679 Refugee Convention art 33(1) (emphasis added).
680 See, eg, Lauterpacht and Bethlehem, above n 598, 112; Hathaway, above n 544, 363: ‘non-refoulement … has always included both ejection from a state and non-admission at the frontier’; Källin, Caroni and Heim, above n 598, 1367–8. See also New York Declaration for Refugees and Migrants, UN Doc A/RES/71/1, para 24: ‘We reaffirm that, in line with the principle of non-refoulement, individuals must not be returned at borders’ (emphasis added).
681 See, eg, Bank, above n 363, 849; Goodwin-Gill and McAdam, above n 5, 277. See also Hirsi Jamaa [2012] II Eur Court HR 97.
refugees arrive at the borders of a state directly facing a territory where they are at risk of persecution. The prohibition of refoulement then requires the state to find solutions that do not result in exposure to risks of persecution, such as removal to a safe third country or temporary admission. It is in such exceptional cases that the prohibition of refoulement may prevent states from not only expelling refugees but also denying them entry and temporary protection in their territories.

Despite such exceptional overlaps, the concepts of a general right to asylum and non-refoulement remain mostly distinct. While a general right to (be granted) asylum would require states to grant refugees asylum within their territories, the prohibition of refoulement merely requires them not to send refugees back to persecution. Even though this may at times leave states with no other option but to temporarily admit refugees and allow them to stay within their territories, the prohibition of refoulement is considerably more flexible in that it permits states to find other solutions not resulting in exposure to risk.

3.4.1.3 Geographical Scope

It is undisputed that the prohibition of refoulement applies within the territory of a state.682 What has been the subject of an intricate debate is if and how this prohibition applies extraterritorially, that is, beyond the borders of a state.

A famous event in this debate was the judgment in Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al, Petitioners v Haitian Centres Council, INC, et al, where the Supreme Court of the United States found, 8-1, that the prohibition of refoulement under the Refugee Convention did not apply extraterritorially.683 Accordingly, the Court held that neither the domestic law of the United States nor its obligations pursuant to the Refugee Convention prevented the United States Coast Guard from apprehending refugees and migrants (mostly of Haitian nationality) on the high seas and returning them to a country where they were exposed to risks of persecution (Haiti). The Court reached this conclusion after a selective reading of the travaux préparatoires and a narrow reading of article 33(1) of the

682 See, eg, VCLT art 29: ‘Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory’. Furthermore, parties to the Refugee Convention may ‘declare that [the] Convention shall extend to all or any of the territories for the international relations of which it is responsible’, at art 40 (emphasis added).

683 Sale, Acting Commissioner, Immigration and Naturalization Service v Haitian Centers Council Inc, 509 US 155 (1993) (‘Sale’). Emanating from a domestic court, the judgment is clearly not a source of international law. Accordingly, it is not referred to here for the purpose of determining the content of international law but only as an illustration.
Refugee Convention. The judgment was roundly criticised, not only by the dissenting Blackmun J and the Inter-American Commission on Human Rights, which later found that the United States had breached its non-refoulement obligation under the Refugee Convention, but also by authors. The most supported view today is that, opposite to the majority view in Sale, the prohibition of refoulement applies extraterritorially. This calls for some explanation.

One of the most influential, and arguably clearest, explanation of the geographical scope appears in the UNHCR’s Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations. Citing the general rule of interpretation, as set out in article 31 of the VCLT, the UNHCR argues that the extraterritorial character of the prohibition of refoulement follows from an interpretation of article 33(1) of the Refugee Convention in ‘good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of the treaty’s object and purpose’. Different from most human rights treaties, the Refugee Convention does not contain any general provision on its applicability.

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684 See, eg, ibid 178: ‘the text and negotiating history of [art 33] … are both completely silent with respect to the article’s possible application to actions taken by a country outside its own borders’. For further views, see at (Blackmun J); Goodwin-Gill and McAdam, above n 5, 247–9; Guy S Goodwin-Gill, ‘The Haitian Refoulement Case: A Comment’ (1994) 6(1) International Journal of Refugee Law 103; Hathaway, above n 544, 336–41; Noll, ‘Seeking Asylum at Embassies’, above n 584, 549 n 29; Gammeltoft-Hansen, Access to Asylum, above n 544, 45–90; Papastavridis, The Interception of Vessels, above n 66, 302–4.


687 See above n 684. See also R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport and another [2004] QB 811 (United Kingdom Court of Appeal) para 34 (Brown LJ): ‘For present purposes I propose to regard the Sale case as wrongly decided; it certainly offends one’s sense of fairness’; UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations 12 [24] n 54.

688 See, eg, Goodwin-Gill and McAdam, above n 5, 247–50; Kälin, Caroni and Heim, above n 598, 1361–3; Lauterpacht and Bethlehem, above n 626, 110–15; Gammeltoft-Hansen, Access to Asylum, above n 544, 44–99; Bank, above n 363, 832–41. See generally Noll, ‘Seeking Asylum at Embassies’, above n 584, 548–56.

689 UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations.

690 Ibid 11–12 [23]–[24].

691 See, eg, ICCPR art 2(1); CAT art 2(1); ECHR art 1.
ratione loci. Furthermore, article 33(1) itself is of little help as it merely sets forth a prohibition, without any geographical limitation:

No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.

Even though the text is essentially ambiguous, it does not preclude extraterritorial applicability. However, the phrase ‘return in any manner whatsoever’ seems to suggest an extensive interpretation. Moreover, while several other provisions of the Refugee Convention are explicitly limited to the territories of states parties, article 33(1) says nothing about territorial applicability. This silence may therefore be construed as an argument in support of extraterritorial applicability. Furthermore, the fundamentally humanitarian nature of the object and purpose of the Refugee Convention — ‘to assure refugees the widest possible exercise of … fundamental rights and freedoms’ — appears to suggest an extensive interpretation.

However, what seems to be the strongest argument for extraterritorial applicability comes from contextual elements taken into account in the interpretation pursuant to articles 31(3)(b)–(c) of the VCLT (subsequent practice, systemic integration). The material taken into account as subsequent practice includes a number of EXCOM conclusions and other

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692 Kälin, Caroni and Heim, above n 598, 1361.
693 See, eg, Gammeltoft-Hansen, Access to Asylum, above n 544, 54–5; Kälin, Caroni and Heim, above n 594, 1361 n 232: ‘The words “shall expel or return (“refouler”) a refugee” refer on the one hand (“expel”) to measures that presuppose the presence of the refugee on a state’s territory. On the other hand, the notion of “return” is open enough to cover refoulement carried out outside the state party’s territory’.
694 Refugee Convention art 33(1) (emphasis added). But see Gammeltoft-Hansen, Access to Asylum, above n 544, 53–4: ‘the expression “in any manner whatsoever” was not included out of any consideration as to geographical application.’
695 Cf Refugee Convention arts 14–19, 23–8, 31–2.
697 See, eg, Kälin, Caroni and Heim, above n 598, 1361. But see Gammeltoft-Hansen, Access to Asylum, above n 544, 54–5: ‘the fact that no territorial conditions are mentioned in … [art] 33(1) does not in itself call for a wider geographical scope of application, but only defers argumentation to subsequent stages of interpretation.’
698 Refugee Convention Preamble para 2. See also Kälin, Caroni and Heim, above n 598, 1361; Gammeltoft-Hansen, Access to Asylum, above n 544, 59–61.
699 UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations 16–19. The interpreter of a treaty shall, pursuant to VCLT arts 31(3)(b)–(c), take into account ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ as well as ‘any relevant rules of international law applicable in the relations between the parties’. See below Section 6.2.2.2 Context.
international refugee and human rights instruments drawn up since 1951. However, since not all parties to the Convention are members of the EXCOM, it is uncertain whether the conclusions can be used as subsequent practice within the meaning of article 31(3)(b) of the VCLT. This is clearly a weak link in the argument.

However, the interpretative element given the most weight by the UNHCR is not subsequent practice but other ‘relevant rules … applicable in the relations between the parties’ or, in other words, systemic integration. The essence of the argument is that customary international human rights law indicates extraterritorial effects of the prohibition of refoulement under the Refugee Convention. The UNHCR founds its reasoning on the extraterritorial applicability of a number of human rights treaties, including the ICCPR, the CAT, and the ECHR. The requirement, reflected in article 31(3)(c) of the VCLT, that only ‘relevant’ norms may be taken into account in the interpretation seems to be satisfied by the analogous meanings of non-refoulement under the Refugee Convention and non-refoulement under international human rights law. The second criterion set forth by article 31(3)(c) of the VCLT, that only ‘applicable’ norms may be taken into account, seems to be met by the customary nature of the relevant norms under international human rights law. Consequently, the UNHCR argues:

\[\text{the reasoning adopted by courts and human rights treaty bodies in their authoritative interpretation of the relevant human rights provisions is relevant also to the prohibition of refoulement under international refugee law, given the}\]

\footnote{UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations 15 [33]. The actual practice of states in undertaking interception operations at sea is, however, not taken into account. Guilfoyle, Shipping Interdiction, above n 66, 224–6 has suggested that the practice of Australia and the United States, coupled with other parties’ acquiescence, establishes ‘an agreement of the parties’ that such acts are compatible with the Refugee Convention. However, given the relatively clearer meaning of the non-refoulement obligations under the Refugee Convention and the existence of opposing state practice, which clearly treats this obligation as applying extraterritorially, this appears to be a difficult argument to make. See, eg, Sea Borders Regulation [2014] OJ L 189/93, arts 4, 7–10.}

\footnote{Accordingly, ‘parties’ shall be read as ‘all parties’ in VCLT art 31(3). See below Section 6.2.2.2 Context.}

\footnote{VCLT art 31(3)(c).}

\footnote{UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations 15–19.}

\footnote{See below n 711 and accompanying text.}

\footnote{VCLT art 31(3)(c) refers to ‘any relevant rules of international law applicable in the relations between the parties’ (emphasis added).}

\footnote{See below Section 6.2.2.2 Context.}
similar nature of the obligations and the object and purpose of the treaties which form their legal basis.\textsuperscript{707}

While the interpretation put forward by the UNHCR closely follows article 31(3)(c) of the \textit{VCLT}, it relies on a not entirely uncontroversial view of customary international human rights law as consistently applying extraterritorially. To this end, Noll has noted that

human rights treaty law shows significant variations in the precise formulations delimiting the applicability of single instruments … It is not correct to state that human rights treaty law is applicable \textit{ratione loci} wherever the jurisdiction of a state extends.\textsuperscript{708}

Moreover, an interpretation of article 33(1) of the \textit{Refugee Convention} that takes into account the applicability \textit{ratione loci} of the \textit{ICCPR} and the \textit{ECHR} as primary means of interpretation is, according to Noll, methodologically flawed since ‘the group of states bound by the \textit{Refugee Convention} is not coextensive with either the group bound by the \textit{ICCPR} or the group bound by the \textit{ECHR}.\textsuperscript{709}

However, it appears that the relevant norms to be taken into account are those that establish the applicability \textit{ratione loci} of \textit{non-refoulement} under customary international human rights law — not those governing the applicability of the \textit{ICCPR} or any other human rights treaty as a whole. Even so, human rights treaties have an important role to play: as evidence of the customary international law governing the applicability \textit{ratione loci} of \textit{non-refoulement} under international law human rights law.\textsuperscript{710} Significantly, both the \textit{ICCPR} and the \textit{CAT} extend to all persons within the territory of a state and to all persons subject to its jurisdiction.\textsuperscript{711} The customary norms governing the

\begin{enumerate}
\item \textit{UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations} 19 [42].
\item Noll, ‘Seeking Asylum at Embassies’, above n 584, 552. See also Gammeltoft-Hansen, \textit{Access to Asylum}, above n 544, 82–3, doubting that ‘these instruments can be considered a primary source under \textit{VCLT art 31(3)(c)}’. Instead, he believes that they can ‘be considered treaties \textit{in pari materia}, and as such subsidiary sources of interpretation’.
\item Noll, ‘Seeking Asylum at Embassies’, above n 584, 552 n 39 (emphasis added).
\item See, eg, Goodwin-Gill and McAdam, above n 5, 248.
\item \textit{ICCPR} art 2(1): ‘Each state party … undertakes to respect and to ensure to all individuals \textit{within its territory} and \textit{subject to its jurisdiction} the rights recognized in the present \textit{Covenant}’ (emphasis added). The Human Rights Committee has made the extraterritorial applicability of the \textit{Covenant} explicit: ‘a state party must respect and ensure the rights laid down in the \textit{Covenant} to anyone \textit{within the power or effective control} of that state party, even if not situated within the territory of the state party’: \textit{General Comment No 36: The Right to Life}, UN Doc CCPR/C/GC/36, para 10 (emphasis added). This interpretation seems to have been accepted by the ICJ in \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)} [2004] ICJ Rep 136, 179 [111]: ‘the \textit{ICCPR} is applicable in

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geographical scope of the prohibition of refoulement reflected in these treaties seem to be sufficiently consistent to be taken into account through systemic integration as an indication of the extraterritorial applicability of the prohibition of refoulement under the Refugee Convention. All in all, it appears reasonable to concur with the conclusion presented by the UNHCR:

a state is bound by its obligation … not to return refugees to a risk of persecution wherever it exercises effective jurisdiction. As with non-refoulement obligations under international human rights law, the decisive criterion is not whether such persons are on the state’s territory, but rather, whether they come within the effective control and authority of that state.  

Considerations of the extraterritorial applicability of non-refoulement frequently arise in relation to state responses to irregular maritime migration, which often take place in areas beyond the sovereignty of any state. Ships in such areas are generally subject only to the jurisdiction of the flag state. Everyone on board such ships is subject to the jurisdiction of the flag state, and thus the domestic law of that state applies to them. This does not mean that everyone on board is at all times subject to the flag state’s ‘jurisdiction’ in the sense of the extraterritorial applicability of the prohibition of refoulement. Even though this difference may at first appear to be a trick issue of semantics, it is explained by the fact that states are only responsible for acts respect of acts done by a state in the exercise of its jurisdiction outside its own territory.’ The non-refoulement provision of the CAT — art 3 — does not include any geographical limitation. This has led the Committee against Torture to conclude that the applicability is not limited to territory but extends to all situations in which a state exercises effective control. See, eg, Committee against Torture, General Comment No 2: Implementation of Article 2 by States Parties, 39th sess, UN Doc CAT/C/GC/2 (24 January 2008) para 16: ‘the jurisdiction of a state party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law’; Committee against Torture, Decision: Communication No 323/2007, 41st sess, UN Doc CAT/C/41/D/323/2007 (21 November 2008) para 8.2 (‘Marine 1’): ‘This interpretation of the concept of jurisdiction is applicable in respect … of all provisions of the CAT’ (emphasis added). See also Goodwin-Gill and McAdam, above n 5, 247, 301–5; Gammeltoft-Hansen, Access to Asylum, above n 544, 86.


713 See above Section 2.2.2.3 High Seas.

714 See, eg, UNCLOS art 94(2)(b), which requires every state to ‘assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship’.
that can be attributed to them.\textsuperscript{715} Non-attributable acts therefore do not trigger state responsibility:

There is an internationally wrongful act of a state when conduct consisting of an action or omission:

(a) Is attributable to the state under international law; and

(b) Constitutes a breach of an international obligation of the state.\textsuperscript{716}

Clearly, a state is responsible for the conduct of its organs.\textsuperscript{717} It is also responsible for the conduct of de facto state organs or ‘a person or group of persons in fact acting on the instruction of, or under the direction or control of, the state’\textsuperscript{718} as well as for ‘conduct which is … acknowledged and adopted by the state as its own’.\textsuperscript{719} Accordingly, acts by private actors can sometimes be attributable to a state even when committed outside its territory. Where these requirements are met,

an act which would amount to an exercise of extraterritorial jurisdiction is no less so because it is committed by an entity (for example, a private corporation) under contract with a government than if committed directly by officials of the state party itself.\textsuperscript{720}

Acts committed by means of a ship operated by a state organ are therefore generally attributable to the state to which the organ belongs. This is the case with warships as well as other government ships. Persons on board such ships are typically subject to the jurisdiction of the flag state, de jure as well as de facto.\textsuperscript{721}

The ECtHR made this explicit in its judgment in \textit{Hirsi Jamaa}.\textsuperscript{722} The case concerned 24 asylum seekers who were part of a larger group of some

\begin{footnotesize}
\textsuperscript{715} This basic limitation of the responsibility of a state under international law is sometimes overlooked, leading otherwise reasonable authors into unnecessarily complicated ideas about indirect applicability of the prohibition of \textit{refoulement} to private actors (eg, masters of merchant ships). See, eg, David Testa, ‘Safeguarding Human Life and Ensuring Respect for Fundamental Human Rights: A Consequential Approach to the Disembarkation of Persons Rescued at Sea’ (2014) 28 \textit{Ocean Yearbook} 555, 572. For more accepted views, see, eg, Barnes, ‘The International Law of the Sea and Migration Control’, above n 70, 119; Bank, above n 363, 846: ‘Private ships … are not addressed directly by the \textit{non-refoulement} obligation’.

\textsuperscript{716} \textit{ARSIWA} art 2 (emphasis added).

\textsuperscript{717} Ibid art 4(1): ‘The conduct of any state organ shall be considered an act of that state under international law’.

\textsuperscript{718} Ibid art 8.

\textsuperscript{719} Ibid art 11.

\textsuperscript{720} Hathaway, above n 544, 340.

\textsuperscript{721} See, eg, ibid 339: ‘Interception by … military vessels … easily qualifies as an exercise of de facto jurisdiction’; Bank, above n 363, 845–6.

\textsuperscript{722} \textit{Hirsi Jamaa} [2012] II Eur Court HR 97.
\end{footnotesize}
200 individuals apprehended by Italian authorities on the high seas in the Mediterranean Sea between Libya and Italy. The apprehended asylum seekers were transferred to Italian government ships and, without any proper assessment of their need for protection, returned to Libyan authorities, where they were exposed to treatment proscribed by the ECHR. In assessing whether the acts by the Italian authorities had amounted to ‘jurisdiction’ for the purpose of the extraterritorial application of the ECHR, the Court stated:

a vessel sailing on the high seas is subject to the exclusive jurisdiction of the state of the flag it is flying … Where there is control over another, this is de jure control exercised by the state in question over the individuals concerned.

Then, the Court noted that the events took place on board Italian government ships, the crews of which were composed exclusively of Italian military personnel, and found that ‘the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities’. The events were therefore clearly within Italy’s jurisdiction for the purpose of the application of the ECHR. It was found that Italy had violated its obligation not to subject anyone to torture or to inhuman, degrading treatment or punishment under article 3 of the ECHR, as well as its obligation not to collectively expel aliens under article 4 of Protocol No 4 to the ECHR.

Importantly for the present purposes, the Court thoughtfully explained that Italy could not ‘circumvent its “jurisdiction” … by describing the events … as rescue operations on the high seas’. The nature and purpose of the intervention by the Italian government ships — rescue or interception — was therefore irrelevant. Instead, the decisive criterion was whether the applicants were under the control of the Italian authorities.

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723 ECHR art 1: ‘The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention’ (emphasis added).
725 Hirsi Jamaa [2012] II Eur Court HR 97, 133 [81].
727 Hirsi Jamaa [2012] II Eur Court HR 97, 133 [79].
728 See, eg, ibid 133 [81]: ‘Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion’.
A similar conclusion was reached by the Committee against Torture in *Marine 1*, where Spain was found to have had control over a group of migrants on board a Spanish government ship following rescue at sea.\(^{729}\)

The situation when persons are on board a private ship, for example following rescue, is notably different. It would certainly bear too long to suggest that the control that a state has over private ships flying its flag in its capacity as flag state is at all times equal to ‘jurisdiction’ for the purpose of the extraterritorial applicability of the prohibition of *refoulement*. Conduct by masters of private ships is generally not attributable to the flag state. The level of control exercised by the state in its function as flag state over the master of a private ship flying its flag is typically not nearly as comprehensive as that normally required for a private actor to qualify as a de facto state organ.\(^{730}\) Nor can this level of control be considered effective enough to amount to ‘jurisdiction’ for the extraterritorial application of the prohibition of *refoulement*. For these reasons, it appears that the master of a private ship who makes someone, for example a group of rescued refugees and migrants, subject to treatment not in conformity with *non-refoulement* does not engage the responsibility of the flag state. The level of control exercised by the flag state in such situations is simply not effective enough to trigger its obligations with respect to *non-refoulement*.

Although most acts by masters of private ships do therefore not engage responsibility of their flag states under international law, not all such acts fall outside the scope of international refugee law and international human rights law. By contrast, a coastal state that exercises control over a private ship, for example by directing it to act in a certain way in response to a distress call or for the purpose of disembarking someone rescued at sea would normally be in control of the situation in such a way that its commands can be assessed

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\(^{729}\) *Marine 1*, UN Doc CAT/C/41/D/323/2007. The rescue operation was initiated in the maritime search and rescue region of Senegal. The rescued migrants were eventually disembarked in Mauritania, following an agreement between the Spanish and Mauritanian governments. While most of the rescued persons requested asylum or signed voluntary repatriation agreements and were repatriated to their countries of nationality, a smaller group of some 23 persons refused to sign voluntary repatriation agreements and remained in detention under Spanish control in Mauritania. The complaint before the Committee against Torture concerned the conditions during the identification and repatriation process in Mauritania. The Committee found that Spain had control over the persons on board the *Marine 1* from the time the vessel was rescued and throughout their detention in Mauritania. However, the complaint was found inadmissible and the Committee did therefore not rule on the merits. For more here, see Wouters and Heijer, above n 368.

\(^{730}\) Cf *ARSIWA* art 8: ‘The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is *in fact acting on the instructions of, or under the direction or control of*, that state in carrying out the conduct’ (emphasis added). See above n 718 and accompanying text.
against the prohibition of *refoulement* — even if the commands are ultimately executed by the private ship. The difficulty of attributing acts by masters and crews of private ships to the flag state may in this way be remedied to some extent by the responsibility of the coastal state for conduct by its maritime authorities.\(^731\)

### 3.5 Non-Penalisation

As a result of the absence in international law of a general right to asylum, unauthorised entry and presence often remain the only practical options for refugees to receive protection in other states. The non-penalisation provisions of the *Refugee Convention* limit the power of states to punish such entry or presence.\(^732\) Article 31(1) of the *Convention* provides:

> The contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

For reasons already explained, the refugee definition covers not only those who have had their refugee status recognised but also presumptive refugees.\(^733\) However, the applicability *ratiōne personae* of article 31(1) of the *Refugee Convention* is narrower, as it only covers those ‘coming directly from a territory where their life or freedom was threatened’.\(^734\) Still, the term ‘coming directly’ should not be understood in a restrictive sense, taking into account the broader categories covered by the prohibition of *refoulement* and other provisions of the *Refugee Convention*.\(^735\) Noll accordingly concludes that the benefit of article 31(1) ‘must be accorded to any refugee, with the exception

\(^{731}\) See generally Bank, above n 363, 845–6.


\(^{733}\) See above nn 555–8 and accompanying text.

\(^{734}\) *Refugee Convention* art 31(1).

\(^{735}\) Ibid art 31(2) has a broader personal scope and applies, in line with the heading of the article, to ‘refugees unlawfully in the country of refuge’. Noll, ‘Article 31’, above n 732, 1267–8.
of those who have been accorded refugee status and lawful residence in a transit state to which they can safely return.  

This broad view of the personal scope seems to conform to the position taken by Hathaway:

> all refugees whose illegal entry or presence is due to the risk of being persecuted in a country of asylum are today entitled to exemption from immigration penalties.  

There is an additional limitation of the personal scope, namely that it only covers those who ‘enter or are present in their territory without authorization’. While the definition of state territory is reasonably well-settled and the meaning of the term ‘presence’ is seldom up for debate the meaning of ‘enter … territory’ is more elusive. The act of entering the territory of a state is, for logical reasons, only possible from outside that territory. Hence, there is no doubt that article 31(1) covers not only those present in the territory of a state but also those who are outside but about to enter it. Refugees apprehended outside the territory of a state can then be covered by article 31(1) if they were about to enter it. This observation may naturally be important in relation to irregular maritime migration and the apprehension of refugees and migrants in international waters. As noted by Noll:

> the extent to which the protection of [article 31] applies in the contiguous zone and on the high seas vis-à-vis a state which has taken jurisdictional measures with regard to the refugee, depends on whether the refugee can be said to be entering the territory of a state in that sense.  

States bound by article 31(1) of the Refugee Convention are under an obligation not to ‘impose penalties, on account of … illegal entry or presence’. First, the term ‘penalties’ has a broad meaning and covers a wide range of measures, from conventional criminal sanctions such as imprisonment and fines meted out as punishment to detention and custody imposed in lieu of punishment. However, expulsions and non-punitive detentions are not covered and are so permissible under article 31(1). Even so, if the detention has a punitive purpose, such as to deter future unauthorised entries, it may be

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737 Hathaway, above n 544, 401.  
738 Refugee Convention art 31(1).  
739 Noll, ‘Article 31’, above n 732, 1258 citing UNCLOS art 2(1): ‘land territory, internal waters, and, in the case of coastal states, territorial sea, all form part of a state’s sovereign territory.’  
prohibited under article 31(1). A too restrictive approach would easily risk undermining the protection purpose.

Second, article 31(1) only concerns penalties ‘on account of … illegal entry or presence’. This nexus significantly limits the list of penalties prohibited under article 31(1). Only penalties directly related to the illegal entry or presence are covered. Penalties for other offences, such as conventional thefts or other crimes, are therefore beyond the scope. Penalties for the use of fraudulent travel or identity documents or passports are, on the other hand, generally within the scope.

Article 31(2) of the Refugee Convention serves to some extent as a compensation for states’ loss of freedom to impose sanctions on refugees for illegal entry or presence pursuant to article 31(1). Article 31(2) ‘both legitimates and curtails states’ right to impose restrictions on the movement of refugees unlawfully present’. It reads:

The contracting states shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The contracting states shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

On the one hand, this provision clearly permits administrative detention. On the other hand, it only allows such restrictions to movement that are reasonable and necessary and not arbitrary, discriminatory or contrary to international human rights law. Restrictions lacking ‘basic safeguards (with respect to conditions, duration, review, and so on)’ will be equivalent to a penal sanction and thus possibly contrary to article 31(1). It is also difficult to denote collective or automatic detention as exceptional measures permitted by article 31(2).

Unlike the prohibition of refoulement, the non-penalisation provisions of the Refugee Convention are generally not believed to be reflective of customary international law. The mere fact that some 140 states have ratified the

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742 See, eg, Noll, ‘Article 31’, above n 732, 1263–4: ‘only non-punitive detention is permissible’.
743 Goodwin-Gill and McAdam, above n 5, 266 state: ‘An overly formal or restrictive approach is inappropriate since it may circumvent the fundamental protection intended’.
745 Goodwin-Gill and McAdam, above n 5, 266.
746 Ibid.
Convention, without any reservations to the applicability of article 31, is thus not considered sufficient for the formation of customary law.\(^{747}\)

### 3.6 Non-Discrimination

The last refugee right to consider here concerns non-discrimination.\(^{748}\) Article 3 of the Refugee Convention reads: ‘The contracting states shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.’ This provision protects refugees from discrimination between and among refugees in the allocation of refugee rights, provided for in the Convention, because of race, religion or country of origin. Accordingly, it is not relevant in any individual capacity but only in conjunction with other provisions of the Convention. In view of that, it has been described as ‘an “accessory” prohibition of discrimination’.\(^{749}\)

It follows that the prohibition of discrimination under the Refugee Convention does not prohibit discrimination against refugees as a group but only among refugees.\(^{750}\) Accordingly, states are not required by article 3 to treat refugees in the same manner as other aliens or their own nationals.\(^{751}\) Moreover, discrimination on grounds other than race, religion or country of origin is also beyond the scope and therefore permissible under article 3 of the Refugee Convention. However, such discrimination may be measured against other prohibitions of discrimination,\(^{752}\) most notably under international human rights law.\(^{753}\)

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\(^{747}\) Notably, most authors do not comment upon the customary status of Refugee Convention art 31. See, eg, ibid 266–7; Noll, ‘Article 31’, above n 732; Goodwin-Gill, ‘Article 31’, above n 732.


\(^{749}\) Marx and Staff, above n 748, 647, 649.

\(^{750}\) Hathaway, above n 544, 250–1; Marx and Staff, above n 748, 650–1.

\(^{751}\) Marx and Staff, above n 748, 645.

\(^{752}\) Refugee Convention art 7(1) requires states to ‘accord to refugees the same treatment as is accorded to aliens generally’ or more favourable treatment. It compensates in this way for the absence of a general prohibition of discrimination against refugees. Marx and Staff, above n 748, 648, 651.

\(^{753}\) See, eg, Goodwin-Gill and McAdam, above n 5, 379–80; Marx and Staff, above n 748, 644–5, 647. The two most important provisions in this regard are the identical ICCPR art 2(1) and ICESCR art 2(2). See also ICCPR art 26. See below Chapter 4 International Human Rights Law: Human Rights at Sea.
The personal scope of article 3 of the *Refugee Convention* is, in the same way as the *non-refoulement* and non-penalisation provisions thereof, linked to the refugee definition. Consequently, it covers persons recognised as refugees as well as presumptive refugees.\footnote{See above nn 555–8 and accompanying text.}

The prohibition of discrimination under the *Refugee Convention* is relevant in the context of irregular maritime migration mainly because it prevents states from applying different standards of treatment in their asylum procedures for refugees on account of race, religion or country of origin. States bound by article 3 may therefore not make one category of presumptive refugees subject to treatment different than other categories of presumptive refugees because of race, religion or country of origin. Migration management measures specifically targeting a particular group or groups of asylum seekers while simultaneously allowing the entry of other groups of asylum seekers may then amount to breaches of article 3, provided that the differential treatment is based on one of the relevant discrimination grounds.\footnote{See, eg, Hathaway, above n 544, 246, who means that the United States’ ‘interdiction and detention program of black Haitian asylum-seekers on the high seas, while simultaneously allowing predominantly white Cuban asylum-seekers to proceed to Florida, is … in breach of article 3’s duty of non-discrimination’.}

Although there are many reasons to believe that customary international law provides for non-discrimination in some form, for example on account of race,\footnote{See, eg, Office of the United Nations High Commissioner for Refugees, *UNHCR Intervention before the House of Lords of the United Kingdom in the Case of R (ex parte European Roma Rights Centre et al) v Immigration Officer at Prague Airport and another* reprinted in Guy S Goodwin-Gill, ‘R (ex parte European Roma Rights Centre et al) v Immigration Officer at Prague Airport and another (UNHCR intervening)’ (2005) 17(2) *International Journal of Refugee Law* 429, 440–5. See also Hathaway, above n 544, 248–9.} there is little reason to believe that article 3 of the *Refugee Convention* is reflective of customary law.\footnote{Most authors do not comment on the customary status of *Refugee Convention* art 3. See, eg, Goodwin-Gill and McAdam, above n 5, 379–80; Marx and Staff, above n 748, 648–9.} The practical significance of this view should, however, not be exaggerated given the limited scope of the article and the existence of broader prohibitions of discrimination elsewhere in international law.\footnote{See below Chapter 4 International Human Rights Law: Human Rights at Sea.}
3.7 Summary

International refugee law is the body of international law concerned with the status and rights of refugees. It is essentially dominated by the *Refugee Convention* even though customary international law is important in some respects. Like all human beings, refugees and migrants also benefit from protection under other parts of international law, most notably international human rights law (‘complementary protection’).

There is no general right to asylum under international law in the sense of an obligation of states to allow refugees to enter and remain within their territories. Instead, the primary protection for refugees under international refugee law flows from the prohibition of *refoulement*. This prohibition prevents states from returning refugees to places where they would be exposed to persecution risks. This prohibition applies to states that are parties to the *Refugee Convention* as well as to non-parties under customary international law. It covers refugees and presumptive refugees within the territory of a state or subject to its jurisdiction. Acts taken by a state outside of its territory are then generally within the scope of the prohibition of *refoulement*.

The non-penalisation provisions of the *Refugee Convention* prevent contracting states from imposing penalties on refugees on account of illegal entry or presence. Moreover, the non-discrimination provision of the same *Convention* prohibits states from subjecting different categories of refugees and presumptive refugees to differentiated treatment because of race, religion or country of origin. Neither the non-penalisation provisions nor the non-discrimination provision are thought to reflect customary international law.

Despite its central role in the protection of refugees, international refugee law is not of exclusive (or perhaps even primary) importance to the issue of disembarkation of refugees and migrants rescued at sea. Even though the special forms of protection provided for by international refugee law are of key importance to the treatment of refugees and migrants at sea, other portions of international law add significantly to the legal framework for irregular maritime migration. While the international law of the sea appears as the natural starting point, international refugee law appears as the most specifically important for the protection of refugees. In brief, the prohibition of *refoulement* prevents states from sending refugees to places where they would be at risk of persecution. This obviously has important consequences for the treatment of refugees and migrants at sea. However, international refugee law is hardly the only source of humanitarian considerations under international law. The law of the sea, for example, sets the parameters of state
authority at sea, and international human rights law, which is the focus of the
next chapter, provides rights for everyone, including refugees and migrants at
sea.
4 International Human Rights Law: Human Rights at Sea

4.1 Introduction

The preceding chapter, Chapter 3 International Refugee Law: Refugee Protection at Sea, considered obligations resulting from the area of international law concerned with the status and rights of refugees. Even though international refugee law may be the most specifically important set of norms for the protection of refugees, it is hardly the only set of norms that brings humanitarian considerations into the legal framework for irregular maritime migration. As was reflected in Chapter 2 International Law of the Sea: Authority and Rescue at Sea, humanitarian considerations are not unaccounted for in the branch of law concerned with the rights and obligations of states in maritime matters. On the contrary, various norms under the law of the sea are expressions of, informed by or in other ways related to such concerns. Still, it seems relatively clear that the main source of humanitarian considerations in the context of irregular maritime migration is the same as in international law in general, namely human rights.

Before proceeding to the specific norms under this area of law potentially relevant to the interpretation of the concept of ‘place of safety’, a few remarks of an introductory character seem appropriate.

International human rights law is dealt with here as the branch of international law mainly concerned with the rights of individuals *in relation to the state*.\(^{759}\) While civil and political rights\(^{760}\) have traditionally been associated with

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\(^{760}\) See especially *ICCPR*. See also *ECHR*; *ACHR*; *ACHPR* arts 2–14; *EU Charter* arts 2–19, 39–50.
protection against the state, economic, social and cultural rights have often, as a concept, been linked to protection by or through the state. The universal applicability ratione personae — that they concern not only some but each and every person — is often depicted as a main characteristic of human rights. Accordingly, human rights relates to ‘the inherent dignity and of the equal and inalienable rights of all members of the human family’. However, international human rights law also entails rights for members of certain categories of people, that is, individual group-differentiated rights. Such rights do not apply to everyone but only to those individuals included in the particular categories of persons covered. Examples of specially protected groups include children, women, persons with disabilities, and migrant workers. While such individual group-differentiated rights obviously do not apply to everyone, they clearly concern the position of the individual in relation to the state.

Group rights seem altogether different. Like individual group-differentiated rights, group rights do not confer rights on everyone. But unlike individual group-differentiated rights, group rights ascribe rights not to individual human beings but to groups or collectives of individuals. The clearest example is probably that of self-determination, which is conferred on ‘peoples’. Because of their special scope, group rights are a particular species of rights and to refer to them as human rights has been claimed to ‘totally denature a

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762 See, eg, Rodley, ‘International Human Rights Law’, above n 759, 791. But see Nowak, above n 759, XX: ‘[T]his philosophical categorization of ideals … has largely lost its antagonistic components over time.’
763 See, eg, World Conference on Human Rights, Vienna Declaration and Programme of Action, UN GAOR, UN Doc A/CONF.157/23 (12 July 1993) para 1: ‘The universal nature of these rights and freedoms is beyond question’ (emphasis added).
764 UDHR Preamble para 1 (emphasis added).
766 See especially CRC.
767 See especially CEDAW.
768 See especially CRPD.
769 See especially International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) (‘ICRMW’).
770 See, eg, Charter of the United Nations arts 1(2), 55; ICCPR art 1(1); ICESCR art 1(1). Nowak, above n 759, 15: ‘In no case … can the right of self-determination be conceived of as an individual right. On the contrary … [it] guarantees an exclusively collective right of peoples’ (emphasis in original) (citations omitted).
term that should be limited to denoting the rights of individual human beings in relation to the state.\textsuperscript{771} While there is much to say about the scope and meaning of group rights, there is no reason to delve deeper here.\textsuperscript{772} For the present purposes, it suffices to note that individual group-differentiated rights fit neatly within the notion of human rights and thus may logically be dealt with here.\textsuperscript{773}

In that vein, the purpose of this chapter is not to provide a comprehensive and full-fledged account of international human rights law. Instead, it merely seeks to describe a number of rights that are likely to require attention in situations when refugees and migrants are rescued at sea. While international human rights law may be important in various ways to migration management in general, its significance seems considerably more specific in the context of rescue of refugees and migrants at sea.

This chapter is structured in ten sub-chapters concerning, in order, the right to life, non-discrimination, the freedom to leave, the right to return, non-refoulement, the right to liberty and security, the prohibition of collective expulsions, family rights and a number of individual group-differentiated rights. The chapter ends with a brief summary.

4.2 Right to Life

The right to life has been described as ‘the most fundamental of all rights’\textsuperscript{774} and ‘the supreme right … whose effective protection is the prerequisite for the enjoyment of all other human rights’.\textsuperscript{775} It is set forth by article 3 of the \textit{UDHR}

\textsuperscript{771} Rodley, ‘International Human Rights Law’, above n 759, 791. But see Nowak, above n 759, 14: ‘From a semantic point of view, this strict distinction may appear correct, but it is of less legal significance than is often maintained: so-called human rights are not so homogeneous … as to justify this dualism.’

\textsuperscript{772} See, eg, Kymlicka, above n 765, 35–48.

\textsuperscript{773} International refugee law concerns the rights of members of a specific category of persons, namely refugees. Still, international refugee law is usually viewed as a separate body of law. In addition to historical factors, the reasons may be mainly institutional: the existence of a designated institution for international refugee law — the UNHCR. See above Chapter 3 International Refugee Law: Refugee Protection at Sea, especially nn 560–6 and accompanying text. See generally Goodwin-Gill and McAdam, above n 5, 285–301; Hathaway, above n 544, 119–23; Smith, above n 759, 382–7; \textit{Brownlie’s}, above n 34, 641.

\textsuperscript{774} \textit{Annotations on the Text of the Draft International Covenants on Human Rights}, UN GAOR, 10\textsuperscript{th} sess, Agenda Item 28 (Part II), UN Doc A/2929 (1 July 1955) 29 [1]; Human Rights Council, \textit{The Grave Human Rights Violations by Israel in the Occupied Palestinian Territory, including East Jerusalem}, HRC Res 13/8, UN Doc A/HRC/RES/13/8 (14 April 2010) Preamble para 10: ‘the right to life constitutes the most fundamental of all human rights’ (emphasis added).

\textsuperscript{775} \textit{General Comment No 36: The Right to Life}, UN Doc CCPR/C/GC/36, para 2.
and article 6(1) of the ICCPR. It is also provided for in regional treaties, including article 2 of the ECHR, article 4 of the ACHR, article 4 of the ACHPR, as well as in specialised treaties, such as article 6 of the CRC, article 10 of the CRPD and article 9 of the ICRMW. It is usually thought to be part of customary international law and, by some, even of jus cogens.776

Primarily, the right to life requires states to abstain from unwarranted deprivations of life.777 In addition, it also entails positive obligations, that is, to take measures to prevent the loss of life. Accordingly, the right to life has been described as a broad concept that ‘should not be interpreted narrowly.’778 While the second sentence of article 6(1) of the ICCPR — ‘[t]his right shall be protected by law’ — only requires legislative measures,779 a more far-reaching requirement to take positive measures to protect the right to life can be inferred from the general obligation under article 2(1) to ensure the rights of the Covenant.780

While the Human Rights Committee previously focused its calls for positive measures on those measures related directly to the extent of life781 rather than the quality of life, the Committee has recently taken a broader approach.782 In its new general comment on the right to life, adopted in 2018, the Committee explains that the right to life concerns not only freedom from ‘acts and omissions that … cause … unnatural or premature death’ but also ‘the entitlement … to enjoy a life with dignity.’783 Consequently, states must ‘ensure the right to life and exercise due diligence to protect the lives of individuals’.784

777 See, eg, ICCPR art 6(1): ‘No one shall be arbitrarily deprived of his life.’
778 General Comment No 36: The Right to Life, UN Doc CCPR/C/GC/36, para 3.
779 Cf ibid paras 18–20.
780 Ibid para 21. ICCPR art 2(1): ‘Each state party … undertakes to respect and to ensure to all individuals … the rights recognized in the present Covenant’ (emphasis added). See also Nowak, above n 759, 124.
781 See, eg, Human Rights Committee, General Comment No 6: Article 6 (Right to Life), 16th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (27 May 2008, adopted 30 April 1982) 176, para 5: ‘measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.’ The Committee also extended the scope to threats from nuclear energy and armed conflict. For an overview, see Nowak, above n 759, 123–7.
782 General Comment No 36: The Right to Life, UN Doc CCPR/C/GC/36.
783 Ibid para 3.
784 Ibid para 7.
Such a broad perception of the right to life was previously mainly associated with the ECtHR.\textsuperscript{785} In \textit{LCB v United Kingdom}, for example, the Court spelled out

that the first sentence of [article 2(1) of the \textit{ECHR}] enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take \textit{appropriate steps to safeguard the lives} of those within its jurisdiction.\textsuperscript{786}

The Court did not explicitly state the reasons for this finding but simply referred to an earlier judgment, namely \textit{Guerra v Italy}.\textsuperscript{787} In that case, which did not concern the right to life but the right to private or family life,\textsuperscript{788} the Court stated that ‘in addition to … primarily negative undertakings[s], there may be positive obligations inherent in effective respect for [the relevant right]’.\textsuperscript{789} It thus appears that the Court means that certain positive measures to protect life are inherent in the respect for the right to life. In addition to the specific right, there is at least one more reason pointing to the same end: the general obligation under article 1 of the \textit{ECHR} to ‘secure to everyone within their jurisdiction the rights and freedoms’.\textsuperscript{790}

The ECtHR has described the positive dimension of the right to life to cover a broad range of threats to human life, including emergency services,\textsuperscript{791} public health,\textsuperscript{792} protection against criminal acts of another individual,\textsuperscript{793} and even self-harm.\textsuperscript{794} For the purposes of this study, the positive obligation to provide emergency services is of special relevance. In \textit{Furdik v Slovakia}, which


\textsuperscript{786} \textit{LCB v United Kingdom} [1998] III Eur Court HR 1403, 1415 [36] (emphasis added).

\textsuperscript{787} \textit{ECHR} art 2(1): ‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.’

\textsuperscript{788} \textit{ECHR} art 8(1): ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’

\textsuperscript{789} \textit{Guerra v Italy} [1998] I Eur Court HR 210, 227 [58].

\textsuperscript{790} Emphasis added. Cf \textit{ICCPR} art 2(1). See above n 780 and accompanying text.

\textsuperscript{791} See below nn 795–800.

\textsuperscript{792} See, eg, \textit{LCB v United Kingdom} [1998] III Eur Court HR 1403, which concerned health risks after nuclear tests on Christmas Island.

\textsuperscript{793} See, eg, \textit{Tagayeva v Russia} (European Court of Human Rights, First Section, Application No 26562/07, 13 April 2017), which concerned obligations in relation to a large-scale hostage-taking by terrorists in Beslan, North Ossetia.

\textsuperscript{794} See, eg, \textit{Renolde v France} [2008] V Eur Court HR 31, which concerned violations of the right to life by not preventing a prisoner from committing suicide despite clear indications that he was endangered.
concerned the rescue of a person who had been injured while mountain climbing, the ECtHR explained that:

[The] positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction … must also be considered to extend to the provision of emergency services where it has been brought to the notice of the authorities that the life or health of an individual is at risk on account of injuries sustained as a result of an accident. Depending on the circumstances, this duty may go beyond the provision of essential emergency services such as fire-brigades and ambulances and, of relevance to the instant case, include the provision of air-mountain or air-sea rescue facilities to assist those in distress.795

It continued to state that:

the positive obligation is to be interpreted in a way as not to impose an excessive burden on the authorities … [and that] the choice of means for ensuring the positive obligations … is in principle a matter that falls within the contracting state’s margin of appreciation.796

Similarly, in Budayeva v Russia, which concerned a village in an area known to be affected by mud-slides, the ECtHR found that the duty to protect life also applies in situations where a natural hazard is imminent and clearly identifiable, especially ‘where it concern[s] a recurring calamity affecting a distinct area developed for human habitation or use’.797

Accordingly, it seems that the decisive criterion for the provision of emergency services, as a positive obligation under article 2 of the ECHR, is not really the nature of the threat,798 nor any possible personal contribution of the individual to his or her own need of such services, but the state’s degree of awareness799 or, in other words, whether the state and its authorities ‘knew,
or ought to have known at the time, of the existence of a real and immediate risk to the life’. 800

Even though no other international judicial organ seems yet to have taken a similarly broad approach to the positive dimension of the right to life as the ECtHR, its views may be revealing not only of the meaning of the right to life under the *ECHR* but also more generally. Indeed, in its new general comment on the right to life the Human Rights Committee explained that:

The obligation of states parties to respect and ensure the right to life extends to *reasonably foreseeable threats and life-threatening situations* that can result in loss of life. 801

This obligation covers, according to the Committee, ‘threats emanating from private persons and entities’, 802 including ‘reasonably foreseen threats of being murdered or killed’, 803 as well as ‘appropriate measures to address the general conditions in society … [and] may include … violence, … accidents, degradation of the environment, … diseases, … hunger … poverty and homelessness.’ 804 Importantly for the present purposes, such measures may also include ‘essential goods and services such as food, water, shelter, health-care, electricity and sanitation, and … effective emergency health services, [and] emergency response operations (including fire-fighters, ambulances and police forces)’. 805 The link to maritime search and rescue is expressly recognised:

States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea. 806

Clearly then, it seems that the right to life supports and underlies the duty to render assistance at sea: ‘to … protect the lives … of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.’ 807 In addition, it also sets a minimum standard for the treatment of persons rescued at sea, as reflected both in the preceding quote and in the following: ‘to respect and protect the

800  *Tagayeva v Russia* (European Court of Human Rights, First Section, Application No 26562/07, 13 April 2017) 106 [482].
801  *General Comment No 36: The Right to Life*, UN Doc CCPR/C/GC/36, para 7.
802  Ibid para 18.
803  Ibid para 21.
805  Ibid.
806  Ibid para 63.
807  Ibid (emphasis added).
lives of all individuals located on marine vessels … registered by them or flying their flag’.808

The universal scope of the right to life — that it concerns ‘[e]very human being’809 — reflects the non-discriminatory nature of the duty to render assistance at sea.810 In the same vein, the explicit irrelevance of ‘the circumstances in which that person is found’811 to the duty to render assistance also appears to link to the universal and fundamentally humanitarian character of the right to life.812 Indeed, both the right to life and the duty to render assistance aim to protect human life per se. As a result, it seems that the duty to render assistance can be seen as concomitant to the right to life.813

Despite the many links between the duty to render assistance and the right to life, there are important differences. States that fail to provide assistance themselves, or that do not ensure that masters of ships flying their flags do so, would generally be in breach of their obligations pursuant to the duty to render assistance at sea. However, whether they would also be in breach of their obligations pursuant to the right to life is not equally obvious. On the contrary, this would likely only be the case if the concerned state had a sufficient degree of awareness, that is, if it knew or should have known of the existence of a real and immediate risk to life.814 This requirement for awareness, which is seemingly reflected in the Human Rights Committee’s consistent references to ‘reasonably foreseeable threats’,815 seems to distinguish the obligations under the right to life from those under the duty to render assistance, which requires states to ensure that masters of ships flying their flag to render assistance regardless of the state’s own awareness of the need for assistance.816

Moreover, in measuring a state’s provision of rescue services against the right to life the limited geographical reach of international human rights law needs to be taken into account. For example, the ICCPR merely requires its states parties ‘to respect and to ensure [the rights of the Covenant] to all individuals

808 Ibid (emphasis added).
809 ICCPR art 6(1).
810 See above Section 2.3.3.1 Non-Discrimination.
811 SOLAS Convention annex ch V reg 33(1) (emphasis added); SAR Convention annex para 2.1.10 (emphasis added).
812 See above n 391 and accompanying text.
813 See, eg, Komp, above n 785, 237; Scovazzi, above n 168, 225. See also above Section 2.3.3 Duty to Render Assistance.
814 Cf the reasoning in Tagayeva v Russia (European Court of Human Rights, First Section, Application No 26562/07, 13 April 2017) 106 [482]. See above n 800 and accompanying text.
815 General Comment No 36: The Right to Life, UN Doc CCPR/C/GC/36 paras 7, 18, 21 (emphasis added).
816 Cf UNCLOS art 98(1)(a), which makes no reference to the state’s awareness of the need for assistance. See above Section 2.3.3 Duty to Render Assistance.
within its territory and subject to its jurisdiction’. \(^{817}\) This is clearly different from the geographical scope of the duty to render assistance at sea. While the flag state duty to render assistance — the obligation to require masters of ships flying their flag to render assistance to ‘any person found at sea in danger of being lost’ \(^{818}\) — entails no similar limitation \(\textit{ratione loci}\), the geographical scope of the coastal state duty to provide assistance is largely dependent on the establishment of maritime search and rescue regions. \(^{819}\) As a result, it appears that only acts in relation to individuals within the state’s territory or subject to its jurisdiction may constitute violations of the right to life under the \textit{ICCPR}. \(^{820}\) By contrast, the duty to render assistance at sea is significantly broader since it may, unlike the right to life, include areas outside of the state’s territory without it exercising jurisdiction there. \(^{821}\)

However, in its new general comment, it seems that the Human Rights Committee has taken a more expansive view of the geographical reach of the positive dimension of the right to life. To that end, the Committee explained that the positive obligations of a state under the right to life extend to

all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the state, whose right to life is nonetheless impacted by its military or other activities \textit{in a direct and reasonably foreseeable manner}. \(^{822}\)

Following this view, it seems that a coastal state that has failed to establish an adequate maritime search and rescue organisation would not only be in breach of its obligations under the duty to render assistance but also under the right

\(^{817}\) \textit{ICCPR} art 2(1). See above n 711 and accompanying text. See also \textit{ECHCR} art 1: ‘within their jurisdiction’; \textit{ACHR} art 1(1): ‘subject to their jurisdiction’; \textit{CRC} art 2(1): ‘within their jurisdiction’; \textit{ICRMW} art 7: ‘within their territory or subject to their jurisdiction’. See generally Marko Milanovic, \textit{Extraterritorial Application of Human Rights Treaties} (Oxford University Press, 2011).

\(^{818}\) \textit{UNCLOS} art 98(1)(a) (emphasis added).

\(^{819}\) All coastal states are, however, responsible for the rescue of persons around their coasts. See above Section 2.3.3.4.1 Geographical Scope.

\(^{820}\) \textit{General Comment No 36: The Right to Life}, UN Doc CCPR/C/GC/36 para 63: ‘all persons within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises \textit{power or effective control}’ (emphasis added). On the extraterritorial applicability of the \textit{ICCPR}, see above n 711. See also Nowak, above n 759, 43–5: ‘When states parties … take \textit{actions on foreign territory} that violate the rights of persons subject to their sovereign authority, it would be contrary to the purpose of the \textit{Covenant} if they could not be held responsible’, at 44 [29] (emphasis in original).

\(^{821}\) Such areas may be covered by the meaning of the terms ‘around its coast’ or within a search and rescue region: \textit{SOLAS Convention} annex ch V reg 7(1). See above Section 2.3.3.4.1 Geographical Scope.

\(^{822}\) \textit{General Comment No 36: The Right to Life}, UN Doc CCPR/C/GC/36, para 63 (emphasis added).
to life, provided that this failure would count as impacting the right to life in
‘a direct and reasonably foreseeable manner.’\textsuperscript{823} Another thinkable example of
such possible overlap of the obligations pursuant to the duty to render
assistance at sea and the right to life is if a coastal state intentionally fails to
respond to distress calls issued by persons in distress in international waters
within its maritime search and rescue region. In such a situation, it seems
reasonably likely that the right to life of those in distress could be said to be
‘impacted … in a direct and reasonably foreseeable manner’.\textsuperscript{824}

Accordingly, it seems that the view taken by the Human Rights Committee in
its new general comment goes some way in bridging the gap between the duty
to render assistance at sea and the positive dimension of the right to life. Still,
when comparing the scopes of the obligations pursuant to the duty to render
assistance and the right to life as described by the Human Rights Committee,
the obligations under the right to life are not as categorical as those under the
duty to render assistance at sea. While the positive dimension of the right to
life is essentially framed as a ‘due diligence obligation’ to take ‘reasonable
positive measures which do not impose … disproportionate burdens’,\textsuperscript{825} the
flag state obligations pursuant to the duty to render assistance are more
resolute, leaving little or no room for such subjective considerations.\textsuperscript{826}

To conclude, it seems that while there may be many important links and
similarities between the right to life and the duty to render assistance at sea,
the meanings are not so identical that any of them is redundant. Rather, the
relationship seems mutually supporting, as the right to life underlies and
reinforces the duty to render assistance at sea. Many failures to provide rescue
at sea would therefore result in breaches of not only the duty to render
assistance at sea but also the right to life.

\textsuperscript{823} Ibid.
\textsuperscript{824} Ibid.
\textsuperscript{825} Ibid para 21.
\textsuperscript{826} See above Sections 2.3.3.3 Flag State Obligations, 2.3.3.4 Coastal State Obligations.
4.3 Non-Discrimination

The notion of non-discrimination is a cornerstone of human rights and a fundamental rule of international human rights law. Indeed, a main characteristic of human rights — the universal applicability ratione personae — seems to be based on the premise that all humans, by virtue of their mere humanity, enjoy human rights ‘without distinction of any kind’.

Non-discrimination also has a prominent position in international law more generally. For example, several provisions of the *Charter of the United Nations* refer to ‘human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’. The law of the sea and international refugee law also entail expressions of non-discrimination.

However, the development of international human rights law has significantly contributed to the principle of non-discrimination. Similar to the *UDHR*, both the *ICCPR* and the *ICESCR* require their parties to respect and ensure and to guarantee, respectively, rights without distinction, particularly in terms of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The essence of these requirements is that states may not differentiate among holders of human rights on the basis of certain personal qualities, of mostly congenital (race, colour, sex, origin, etc) or nearly inalterable (religion, opinion, etc) character.

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829 Ibid. See also above Section 4.1 Introduction.

830 *Charter of the United Nations* arts 1(3); 13(1)(b); 55(c); 76(c) (emphasis added).

831 See above Sections 2.3.3.1 Non-Discrimination, 3.6 Non-Discrimination.

832 *UDHR* art 2(1): ‘Everyone is entitled to all the rights and freedoms set forth by this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

833 *ICCPR* art 2(1); *ICESCR* art 2(3).

834 It follows from the use of the terms ‘such as’ and ‘other status’ that the lists of discrimination grounds in *ICCPR* art 2(1) and *ICESCR* art 2(3) are non-exhaustive. See, eg, Nowak, above n 759, 46–7; Moeckli, above n 827, 64.
The general prohibitions of discrimination are complemented by general rights of equality, which also include prohibitions on discrimination, as well as more specific prohibitions. Similar provisions can be found in regional human rights law, as well as in specialised treaties. There is broad agreement that the principle of non-discrimination is part of customary international law.

Despite their general formulation, none of the prohibitions of discrimination under international human rights law is so absolute that it requires identical treatment in every situation. Quite the contrary, many human rights imply differentiated treatment. Take, for example, the absolute prohibition of death sentences under the ICCPR, which only covers persons below eighteen years of age and pregnant women, or the compulsory segregation from adults in penitentiary systems, which only covers juvenile offenders. As observed by the Human Rights Committee:

not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.
Furthermore, in relation to affirmative action:

the principle of equality sometimes requires states parties to take affirmative action … to diminish or eliminate … discrimination … Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.842

Both of these readings explain that there is some room for differentiated treatment within the principle of non-discrimination. However, the borderline between permissible distinction and discrimination is not always easy to discern, especially in the abstract. As a result, every situation needs to be scrutinised on its own merits, taking into account reasonableness, objectivity and legitimacy.843

The principle of non-discrimination may be relevant to irregular maritime migration in several more or less apparent ways. The most obvious is as a constraint of states’ powers to take migration management measures at sea. A state that routinely directs control efforts at ships coming from a particular country or region, thereby specifically targeting a certain group of migrants distinguished by race, origin or some other inherent personal quality, would presumably be at risk of contravening its obligations with respect to non-discrimination. For the application of the ‘accessory prohibition of non-discrimination’ under article 2(1) of the ICCPR,844 the necessary link to other rights in the case of border controls at sea is normally satisfied by the typical relevance in such situations of, for example, the rights to liberty and security of person,845 the prohibition of collective expulsions846 and family rights.847 Such controls may also trigger the prohibition of discrimination under article 3 of the Refugee Convention.848

Some degree of differentiation is, on the other hand, clearly permissible. A state that intercepts some ships, for example those approaching its coast directly from a particular port or area or bearing persons exhibiting certain behaviours or appearances is under no obligation to intercept every ship

842 Ibid para 10 (emphasis added).
843 For discussions of the room for permissible distinction, see Nowak, above n 759, 46–57; Moeckli, above n 827, 74–9.
844 Nowak, above n 759, 45.
845 See below Section 4.7 Liberty and Security.
846 See below Section 4.8 Collective Expulsions.
847 See below Section 4.9 Family Rights.
848 Refugee Convention art 3: ‘The contracting states shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.’ See above Section 3.6 Non-Discrimination.
around its coasts. Because immigration control is not itself illegitimate under the ICCPR or otherwise under international law and the described distinction would probably not be based on unreasonable or merely subjective criteria but rather real or reasonably assumed likelihood of illegal entry, it is difficult to see how such a distinction would amount to prohibited discrimination. By contrast, a state that routinely fails to grant access to asylum procedures for a specific group of asylum seekers distinguished by some congenital personal quality or that makes members of this group subject to other less-favourable conditions than members of other groups would probably be responsible for discrimination. The assessment of whether a particular distinction amounts to discrimination is accordingly one essentially centred on reasonableness, objectivity and legitimacy. As summarised by Nowak:

Whether a distinction among various persons or groups of persons is permissible or discriminatory depends on whether the parties are in a comparable situation, whether unequal treatment is based on reasonable and objective criteria and whether the distinction is proportional in a given case.849

The next main point to make here concerns the significance of the principle of non-discrimination to irregular maritime migration as a special link between international human rights law and international maritime rescue law. As explained above, non-discrimination constitutes a basic aspect of the duty to render assistance at sea.850 The mutual character of the notion of non-discrimination underlines the close relationship between international maritime rescue law and international human rights law. As a result, it seems that the meaning of the principle of non-discrimination under international human rights law may inform the meaning of non-discrimination under international maritime rescue law.

While some situations of distress at sea may be more acute and complex than others, for example because of weather, water temperature or the condition of those in need of assistance, other situations may be similar and thus call for an equal response. Coastal states that routinely give priority to some situations distinguished by the nationality, status or some other personal quality of the persons in distress unrelated to the need for assistance itself would clearly be contravening their responsibilities under international maritime rescue law. The duty to render assistance at sea simply leaves no room for differentiated treatment because of circumstances not related to the distress situation itself. Such unequal treatment would also likely be wrongful under international

849 Nowak, above n 759, 46 (emphasis in original).
850 Both the SOLAS Convention and the SAR Convention require assistance to be given ‘regardless of the nationality or status of such a person or the circumstances in which that person is found’: SOLAS Convention annex ch V reg 33(1) (emphasis added); SAR Convention annex para 2.1.10 (emphasis added). See above Section 2.3.3.1 Non-Discrimination.
human rights law, for example on account of the right to life in conjunction with the principle of non-discrimination.

On the basis of the foregoing, it seems that the room for differentiated treatment is markedly smaller under international maritime rescue law than under international human rights law. While the principle of non-discrimination under international human rights law is essentially directed mostly at congenital or nearly inalterable personal qualities (race, colour, sex, etc), the prohibition of discrimination under international maritime rescue law is clearly broader in extending to any distinction based on circumstances unrelated to the distress situation. Coastal states that fail to rescue refugees and migrants in distress at sea merely because of their statuses, for example for strategic purposes of deterring further attempts to reach their territories, would then be at clear risk of violating their obligations pursuant to the duty to render assistance at sea.

The third significance of the principle of non-discrimination to be noted here is of even more specific character and relates to the procedures for disembarkation of persons rescued at sea. Such procedures are, as previously explained, part of rescue operations and so trigger similar considerations of non-discrimination as the duty to render assistance. Coastal states that routinely designate different places of safety for different categories of survivors for reasons not related to the need for assistance can hardly be said to fulfill their obligations with respect to disembarkation. The wrongfulness of such actions seems particularly obvious if the conditions at the various locations differ in any great respect. Thinkable factors include those relating to the survivors’ basic human needs, such as access to medical services, shelter and possibilities for further transportation arrangements. A coastal state that designates locations with no or only limited availability of medical services or with no or only poor housing, boarding or other shelter as places of safety for refugees and migrants rescued at sea while assigning relatively better locations to other survivors would therefore not be fulfilling its obligations under international maritime rescue law. Similar considerations would likely arise if

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851 Cf the terms ‘regardless of … the circumstances in which that person is found’: SOLAS Convention annex ch V reg 33(1) (emphasis added); SAR Convention annex para 2.1.10 (emphasis added). See above Section 2.3.3.1 Non-Discrimination.
852 This is clear from references to non-discrimination in the 2004 Amendments, as well as in the definition of the term ‘rescue’. 2004 Amendments to the SAR Convention Preamble para 7; 2004 Amendments to the SOLAS Convention Preamble para 7: ‘persons rescued at sea will be provided a place of safety regardless of their nationality, status or the circumstances in which they are found’ (emphasis added); SAR Convention annex para 1.3.2 defines rescue as ‘[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety’ (emphasis added).
a coastal state routinely designates rescue units, vessels or other facilities at sea as places of safety for refugees and migrants rescued at sea, while other survivors are consistently disembarked on dry land.

The meaning of this potential significance of non-discrimination to the issue of disembarkation is not that refugees and migrants rescued at sea must at all times be disembarked at the same places of safety as others rescued at sea. In much the same way that not every distinction among individuals amounts to discrimination under international human rights law, not all differentiated treatments of those rescued at sea can be said to violate international maritime rescue law. By way of example, it may be permissible for a coastal state to arrange for disembarkation of refugees and migrants rescued at sea at specially designated places of safety, for example with availability of appropriate asylum procedures and other reception facilities for refugees and migrants. Even though such special treatment would obviously be based on the survivors’ status, it would presumably not amount to prohibited discrimination. This is because the distinction would be based on reasonable and objective criteria, namely the special needs and rights of refugees and migrants. This interpretation also finds some support in the reference to availability of screening and status-assessment procedures as permissible ‘Non-SAR Considerations’ in the IMO Guidelines on the Treatment of Persons Rescued at Sea.\footnote{Ibid annex paras 6.19–6.22.}

What these contemplations suggest is that considerations of international human rights may be significant for the understanding of international maritime rescue law. Having now considered two human rights of particularly basic character, those of life and non-discrimination, the ones that follow are of more specific meaning, starting with the freedom to leave.
4.4 Freedom to Leave

The freedom of movement comprises several distinct rights and freedoms. Accordingly, article 12 of the ICCPR provides:

1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

While the liberty of movement and the freedom to choose residence concern movements within a state, the freedom to leave and the right to return concern movement across state borders. As explicitly noted in article 12(3) of the ICCPR, none of the rights and freedoms of movement is absolute, but all may be subject to restrictions. For the present purposes, the freedom to leave and the right to return are of main relevance. This sub-chapter deals with the former, and the latter is dealt with in the next sub-chapter 4.5 Right to Return.

The freedom to leave appears, in addition to the ICCPR, in several other instruments, including article 13(2) of the UDHR, article 5(d)(ii) of the CERD, article 10(2) of the CRC, article 8(1) of the ICRMW, article 2(2) in the Protocol No 4 to the ECHR, article 22(2) of the ACHR, and article 12(2) of the ACHPR. Even so, it seems uncertain that the freedom to leave is part of customary international law. As noted by the Human Rights Committee, state practice 'presents an … array of obstacles making it more difficult to leave

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856 Emphasis added.
the country, in particular for their own nationals. Several authors have made similar observations.

The freedom to leave guarantees the right of everyone to leave every country, including one’s own. It covers both short-term leaves (freedom to travel) and permanent departures (freedom to emigrate). The personal scope is universal and thus applies to everyone, including both nationals and aliens. Accordingly, there is no doubt that it also extends to refugees and migrants present in the territory of a state, irrespective of whether or not their entry was compliant with national laws and regulations.

The obligations pursuant to the freedom to leave are mainly of negative character and prevent states from interfering with persons about to leave. However, the freedom to leave also entails positive obligations. For example, the Human Rights Committee has recognised a right to issuance of travel documents:

Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the state of nationality of the individual. The refusal by a state to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere.

As already noted, the freedom to leave may be subject to restrictions. Such restrictions must be provided for by law. They must also be necessary for one of the following purposes: national security, public order (ordre public), public health or the rights and freedoms of others. They must also be

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858 See, eg, Klein, above n 855, para 2; Brandl, above n 598, para 12: ‘state practice shows that many states still restrict the right of nationals to leave the country.’ See also Harvey and Barnidge, above n 855, 3–4, not mentioning customary international law when discussing the status of the right to leave under international law. See also Goodwin-Gill, ‘The Right to Leave’, above n 855, 99, concluding that ‘the only aspect of the right to leave that is recognized to impose any duty on states is the limited notion of the right to leave to seek and enjoy asylum from persecution, where it is backed by the principle of non-refoulement.’ But see Perruchoud, above n 572, 139: ‘the right to leave is entrenched in international conventional and customary law’ (emphasis added).
859 Human Rights Committee, General Comment No 27: Freedom of Movement (Article 12), 77th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) para 8: ‘[art 12(2)] is not restricted to persons lawfully within the territory of a state’.
860 Cf the general obligation under ICCPR art 2(1) to ‘ensure’ the rights of the Covenant.
861 Human Rights Committee, General Comment No 27: Freedom of Movement (Article 12), 77th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) para 9 (emphasis added).
862 See above n 856 and accompanying text.
compatible with the other rights of the ICCPR. This is all evident from article 12(3) of the Covenant. In addition, the Human Rights Committee has stated that restrictive measures must also be proportionate:

they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.863

Consequently, ‘the restrictions must not impair the essence of the right … the relation between right and restriction, between norm and exception, must not be reversed.’864 Thus, to be lawful, restrictions must not be of such quantity and nature that they make it wholly impossible to leave a state.

A special feature of the freedom to leave is that its realisation is often dependent on the will of other states. Because of the absence of a general right of entry into state territory under international law, individuals wishing to exercise their freedom to leave generally need admission into another state.865 Indeed, states are under no obligation to allow entry for non-nationals merely to allow them to exercise their freedom to leave. For that reason, the freedom to leave may be described as an ‘asymmetrical right’.866

However, because of the real existence of international areas and the legal statuses of such areas under international law, not all departures from a state can be said to imply entry into another. The most significant example is likely that of exits to international waters.867 Other clear but more hypothetical examples involve Antarctica868 and outer space.869 However, while it is true that large areas of the world do not belong to the territory of any state, such

864 Ibid para 13 (emphasis added).
865 See, however, Chapter 3 International Refugee Law: Refugee Protection at Sea and below Section 4.5 Right to Return.
866 Scovazzi, above n 168, 212.
867 See above Chapter 2.2.2 International Waters.
868 See, eg, The Antarctic Treaty, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) art VI(2): ‘No acts or activities … shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted’ (emphasis added). For a discussion of ‘Antarctica as a “Global Common”’, see Marie Jacobsson, The Antarctic Treaty System: Erga Omnes or Inter Partes? (PhD Thesis, Lund University, 1998) 375–8.
869 See, eg, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) art II: ‘Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means’ (emphasis added).
areas are generally profoundly inhospitable and impractical as destinations for individuals exercising their freedom to leave. As a result, it seems mainly correct to think of the exercise of the freedom to leave as being generally contingent on admission into another state despite the eventualities of exits to other areas than state territory. Even so, the notion of departures to international areas may still be important from a legal point of view because it helps to explain that states’ obligations pursuant to the freedom to leave are not limited merely to the situation when other states have permitted entry. As a result, it seems clear that states are not free to escape their obligations under the freedom to leave simply by referring to the non-existence of admission to the territory of some other state.

Moreover, the example of departures to international areas also triggers considerations of the relation between the freedom to leave and states’ powers to prevent exits from their territories for the purpose of preventing illegal entry somewhere else.870 States stopping individuals from leaving their territories for the sole purpose of preventing illegal entry elsewhere would clearly be limiting the freedom to leave. The relevant question that follows is if such limitations are permissible. If the preventive measures are provided for by law, and their implementation does not imply violations of other rights under the ICCPR, the first (‘provided by law’) and fourth (‘consistent with other rights’) criteria of permissible restrictions under article 12(3) of the Covenant would seem to be satisfied.871 Moreover, prevention of illegal entry into other states would most probably qualify as a permissible measure for the protection of ‘public order (ordre public)’ under the same provision.872 Such a measure may also be permissible for the protection of national security in certain exceptional cases, such as armed conflict or public emergency, or if the migration threatens the security where it takes place, for example if it is organised by smuggling groups or other networks threatening the security of the state in which they operate. Finally, the ‘proportionality’ criterion would

870 See generally Hathaway, above n 544, 308–14, 897–902.
871 See above nn 863–4 and accompanying text. For a discussion in relation to interception practices of EU member states in the territorial waters of third states, see Heijer, above n 70, 258–62.
872 See, eg, Nowak, above n 759, 277: “’Ordre public’ not only described the absence of disorder but also covers, in addition to public safety and the prevention of crime, all those ‘universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based’” (citations omitted).
873 See, eg, Perruchoud, above n 572, 137.
874 A possibly relevant example may be the decision by the Security Council of the United Nations, acting under Charter of the United Nations ch VII, which concerns threats to the peace, breaches of the peace, and acts of aggression, to authorise certain measures on the high seas ‘[e]xpressing concern that the situation in Libya is exacerbated by the smuggling of migrants and human trafficking into, through and from the Libyan territory, which could provide support to other organized crime and terrorist networks in Libya’: SC Res 2240, UN Doc S/RES/2240
seemingly also be fulfilled if there is no other way to effectively prevent the illegal entry. Accordingly, it seems that it would not be correct to depict the freedom to leave as an insurmountable obstacle for states trying to prevent illegal entry after departures from their territories. Quite the contrary, the freedom to leave seems to generally allow states to restrict departures for the purpose of preventing illegal entry elsewhere. It needs to be noted, however, that there are important limits to this view and the room for permissible restrictions. Obstacles of such quantity and nature that make it practically impossible to leave a state, for example, are likely to ‘impair the essence of the right’ and so be impermissible.875

Considerations of possible constraints on the powers of a state to prevent illegal entry after departure from its territory link closely to obligations under international law against transnational organised crime. Most importantly for the present purposes, the Smuggling of Migrants Protocol obliges its states parties to criminalise the smuggling of migrants and to strengthen their border controls to prevent such smuggling.876 This means, in essence, that states parties are required to prevent migrants from leaving their territories by unauthorised or irregular means. However, it is also explicitly set out that ‘nothing in the Protocol shall affect the … obligations and responsibilities of states … under international law, including … international human rights law’.877 The obligations to criminalise the smuggling of migrants and exercise border controls are accordingly expected to be fulfilled without prejudice to states’ human rights obligations, including the freedom to leave. States parties to the Smuggling of Migrants Protocol seem therefore to be subject to the same obligations pursuant to the freedom to leave as states that are not parties to the Protocol.

It follows that the freedom to leave places certain constraints on the possibilities for states to cooperate to suppress immigration.878 As reflected also in the preceding discussion, the negative dimension of this freedom is commonly only thought of as a possible impediment to states’ measures to restrict departures from their own territories. However, article 12(2) of the ICCPR seems to lend no support for such a limitation of the scope of the freedom to leave. On the contrary, it seems that this provision allows for an interpretation that states can also breach their obligations pursuant to the

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875 See above n 864 and accompanying text.
877 Smuggling of Migrants Protocol art 19(1).
878 See, eg, Nowak, above n 759, 279: ‘Whether … states may restrict the right to emigrate in order to assist neighbouring states in controlling illegal immigration is doubtful.’
freedom to leave when acting beyond their own territories. States’ obligations under the Covenant are, on the other hand, not geographically unlimited. As already noted, they only apply to the conduct of a state with respect to individuals ‘within its territory and subject to its jurisdiction’.\(^{879}\) Even so, it seems that states are not free to circumvent their obligations pursuant to the freedom to leave simply by outsourcing their immigration control measures by enabling other states to prevent departures from their territories. Importantly in this regard, article 16 of the ARSIWA provides:

> A state which aids or assists another state in the commission of an internationally wrongful act by the latter is responsible for doing so if:
> (a) That state does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that state.\(^{880}\)

Accordingly, a state that enables another state to prevent departures from its own territory may be responsible if the preventive measures amount to breaches of the freedom to leave, for example because it makes it wholly impossible to leave the relevant state, thus ‘impair[ing] the essence of the right’.\(^{881}\) However, for the responsibility for complicity to arise, the assisting state must not only have enabled the wrongful act but also have known of the circumstances of the breaches of the freedom to leave. Even though the meaning of this knowledge criterion is not very precise and such knowledge may be difficult to prove in practice, the risk of responsibility for complicity seems significant because it reduces the incentives for states to aid and abet other states’ contraventions of the freedom to leave.

In conclusion, the freedom to leave grants each and every person a right to leave every country, including his or her own. This freedom is, however, not absolute but may be subject to restrictions, for example for the purpose of preventing entry contrary to national laws and regulations elsewhere. To be lawful, such restrictions must be proportionate and must not make it wholly impossible to leave a state. While the freedom to leave is widely accepted in treaty law, its status in customary international law seems uncertain. States that aid or assist other states’ violations of the relevant freedom may, under certain circumstances, be internationally responsible for doing so.

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\(^{879}\) Cf ICCPR art 2(1). See above nn 711, 817 and accompanying text.

\(^{880}\) Emphasis added.

4.5 Right to Return

The right to return\(^{882}\) refers to the right of everyone to enter the territory of the state in which he or she is a national or permanent resident.\(^{883}\) It entails a right to remain as well as a prohibition of expulsion. It also implies a duty of states to admit and allow entry for such persons.

As already explained, international law does not establish a general right of immigration but only a right of entry into one’s own country.\(^{884}\) In addition to article 12(4) of the \textit{ICCPR} (‘right to enter his own country’), the right to return appears in article 13(2) of the \textit{UDHR} (‘right … to return to his country’), article 5(d)(ii) of the \textit{CERD} (‘right … to return to one’s country’), article 10(2) of the \textit{CRC} (‘right … to enter their own country’), article 8(3) of the \textit{ICRMW} (‘right … to enter and remain in their state of origin’), article 3(2) of the \textit{Protocol No 4 to the ECHR} (‘right to enter the territory of the state of which he is a national’), article 22(5) of the \textit{ACHR} (‘right to enter [the territory of the state of which he is a national]’), and article 12(2) of the \textit{ACHPR} (‘right … to return to his country’). Unlike the freedom to leave, it seems plausible that the right to return qualifies as customary international law.\(^{885}\)

The personal scope of the right to return is set out in slightly different terms in the various treaties. While the \textit{ECHR} and the \textit{ACHR} refer to nationals only,\(^{886}\) the \textit{ICCPR}, the \textit{UDHR}, the \textit{CERD}, the \textit{CRC}, the \textit{ICRMW} and the \textit{ACHPR} use the term ‘his own country’ or equivalent without setting forth any requirement of nationality.\(^{887}\) Accordingly, under these instruments the right to return not only entails a right of entry for nationals into their state of nationality but also of an alien to enter ‘his own country’.\(^{888}\) As explained by the Human Rights Committee, ‘[t]he scope of “his own country” is broader than the concept “country of his nationality”’.\(^{889}\) For example, persons stripped

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882 The term ‘return’ is used here for clarity — to distinguish it from the notion of asylum and other more general rights of entry — and not for the purpose of excluding first-time entries into a particular state. For a similar note, see Goodwin-Gill, ‘The Right to Leave’, above n 855, 100 n 15.
883 See generally the literature referred to in n 855.
884 See above Section 3.3 No General Right to Asylum.
885 See, eg, Klein, above n 855, para 2: ‘Only some of … the rights [compiled under the term freedom of movement] probably qualify [as customary international law] …, eg the right to enter the state of one’s own nationality and, the counterpart of this right, the right not to be expelled from the home country’; Goodwin-Gill, ‘The Right to Leave’, above n 855, 100–1; Perruchoud, above n 572, 130.
886 Cf \textit{Protocol No 4 to the ECHR} art 3(2); \textit{ACHR} art 22(5).
887 \textit{ICCPR} art 12(4); \textit{UDHR} art 13(2); \textit{CERD} art 5(d)(ii); \textit{CRC} art 10(2); \textit{ICRMW} art 8(3); \textit{ACHPR} art 12(2).
888 \textit{ICCPR} art 12(4).
of their nationality may have the right to enter a state to which they have ‘special ties to or claims in relation to’.\textsuperscript{890}

The right to return may not be made subject to restrictions in the same way as the other aspects of the freedom of movement. This is evident from the reference in article 12(3) of the ICCPR to ‘above-mentioned rights’, which does not cover the right to return under article 12(4) of the Covenant. Even though it may not be subject to such specific restrictions, the right to return is not part of the non-derogable rights of the Covenant and may therefore be derogated from in time of public emergency as provided for in article 4 thereof.\textsuperscript{891}

The significance to international migration seems reasonably clear. First and foremost, for refugees seeking voluntary repatriation, the right to return is of key importance since it safeguards their possibilities to return home if the conditions there improve.\textsuperscript{892} In addition, it may also be of great practical significance to the expulsion of aliens. The reason is that the right to return implies a duty of states to admit their own nationals and permanent residents. Put differently, the right to return prevents states from denying entry to their own nationals subject to expulsion or return from other states. This duty to admit seems also to be distinct from the individual right to return in that it is not dependent on their willingness to return. Otherwise, persons having entered the territory of a state in contravention of its national laws and regulations could easily prevent their expulsion by simply disagreeing to be returned to their own country. It seems, to say the least, unlikely that the international community of states would have agreed to establish such a potentially far-reaching right.

Keeping in mind that most states do not freely allow entry for non-nationals, it is easy to understand why the duty to admit is an important argument for states wishing to expel or return aliens to their own countries — the state of nationality may simply not deny entry because of its duty to admit. Accordingly, if it was not for the duty to admit, it would generally be more difficult in practice for states to expel or return aliens because it would require finding some other state that is willing or obliged to receive them.\textsuperscript{893} It follows

\begin{itemize}
  \item \textsuperscript{890} Ibid.
  \item \textsuperscript{891} Cf ICCPR art 4(2), which does not refer to art 12(4) (right to return).
  \item \textsuperscript{892} Human Rights Committee, \textit{General Comment No 27: Freedom of Movement (Article 12)}, 77th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) para 19.
  \item \textsuperscript{893} See, eg, ‘Draft Articles on the Expulsion of Aliens’, \textit{Report of the International Law Commission on the Work of Its Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014)}, UN Doc A/69/10, 11, art 22 (‘Draft Articles on the Expulsion of Aliens’): ‘An alien … shall be expelled to his or her state of nationality or any other state that has the obligation to receive the alien under international law, or to any state \textit{willing to accept} him or her’ (emphasis added).
\end{itemize}
that the right to return, or rather the duty to admit, may not always coincide with the interests of refugees and migrants but instead sometimes serve to enable states to manage migration.

An entirely different concept of international law that, like the right to return, is often thought of as a means of rather than an obstacle to migration management is state sovereignty.\(^{894}\) As explained above, the authority of the state over its territory provides the basic legal foundation for the power of states to deny entry into and remove persons from their territories.\(^{895}\) However, in some situations, state sovereignty also limits the possibilities for states to expel. The forced sending of non-nationals into the territory of another state, against its will, may naturally interfere with the internal affairs of the receiving state and so conflict with the principle of non-intervention under international law.\(^{896}\) This explains why the right to return implies the duty to admit. Moreover, territorial sovereignty is the legal basis of states’ rights to freely choose to grant asylum and admit non-nationals to their territories.\(^{897}\) To simply depict state sovereignty as at all times representing an obstacle to migration and human rights as always coinciding with the interests of refugees and migrants may be too one-sided and overly simplistic. The reality seems more complex.

\(^{894}\) See, eg, above nn 573–6 and accompanying text.

\(^{895}\) See above Section 3.2 Territorial Sovereignty.

\(^{896}\) The duty not to intervene is a fundamental principle of international law. It is a cornerstone of the *Charter of the United Nations*, eg, at arts 2(1), (4), (7), reflected in many other international instruments (eg, *UNCLOS* art 111(3): ‘The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state’), and generally understood to be part of customary international law (eg, *Nicaragua* [1986] ICJ Rep 14, 106 [202]: ‘though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law’ (emphasis added); *Corfu Channel* [1949] ICJ Rep 4, 35: ‘the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law’). It generally refers to the duty not to intervene in matters within the domestic jurisdiction of other states. See especially *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, GA RES 2625 (XXV), UN Doc A/25/2625 (24 October 1970) annex para 1: ‘The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter’. See generally *Oppenheim’s*, above n 34, 427–51; Shaw, above n 34, 874–84; *Brownlie’s*, above n 34, 448–9, 453–5; Daillier and Pellet, above n 133, 486–90, 1046; Malanczuk, above n 34, 25–6, 118–9, 221; Bring, Mahmoudi and Wrange, above n 34, 69, 173–6; Philip Kunig, ‘Intervention, Prohibition of’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008). See also Ratcovich, ‘Extraterritorial Criminalization and Non-Intervention’, above n 202.

\(^{897}\) See above nn 580–1 and accompanying text.
4.6 Non-Refoulement

As noted above in Chapter 3 International Refugee Law: Refugee Protection at Sea, not only international refugee law but also international human rights law offers protection against return to ill-treatment.\footnote{See above nn 638–41, 674 and accompanying text.} While article 33(1) of the Refugee Convention may be the first and original expression of the prohibition of refoulement, international human rights law has significantly contributed to the status and meaning of non-refoulement.\footnote{For a clear example, see the discussion of the extraterritorial applicability of the prohibition of refoulement above in Section 3.4.1.3 Geographical Scope.} While some human rights treaties contain explicit provisions on non-refoulement,\footnote{See, eg, CAT art 3(1); ACHR art 22(8); EU Charter art 19(2). See above nn 634, 639, 641 and accompanying text.} others merely implicitly prohibit refoulement as part of broader provisions.\footnote{See, eg, ICCPR art 7(1); ECHR art 3; ACHPR art 5. See above nn 635–6, 638, 640 and accompanying text.}

The scope of the prohibition of refoulement under international human rights law differs from that under international refugee law. While the prohibition under international refugee law only covers refugees and presumptive refugees and also allows for exclusion of refugees for certain reasons,\footnote{See above Section 3.4.1.1 Personal Scope.} the prohibition under international human rights law covers everyone.\footnote{For the universality of human rights, see above Section 4.1 Introduction.} However, the broader personal scope of the prohibition under international human rights law is not the only difference. While the prohibition under international refugee law protects against returns to risks of persecution,\footnote{Refugee Convention art 33(1) refers to ‘the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of particular group or political opinion.’} the counterpart under international human rights law protects against returns to torture or to cruel, inhuman or degrading treatment or punishment.\footnote{See above Section 3.4.1.2 Material Scope.}

This difference ratione materiae finds some explanation in the link between the prohibition of refoulement under international human rights law and the human rights to protection of the ‘physical integrity of the individual, and … the right to life and the right not to be tortured or suffer inhuman and degrading treatment’.\footnote{Perruchoud, above n 572, 134.} Due to this link, the prohibition of refoulement under international human rights law appears to be mainly a ‘means of achieving [such] protection’ rather than a separate objective itself.\footnote{Ibid.} The relatively broader material scope of the prohibition under international refugee law

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\footnote{898 See above nn 638–41, 674 and accompanying text.}
seems to correspond to its narrower personal scope: refugees have been considered a particularly vulnerable group and therefore merit a higher degree of protection against *refoulement*.

Even though there is much to say about the relationship between international refugee law and international human rights law, there is no real need to delve deeper here.\(^{908}\) Instead, it suffices to note that the prohibition of *refoulement* under international human rights law is important to irregular maritime migration as a complement to the protection against *refoulement* under international refugee law. Most importantly, the prohibition of *refoulement* under international human rights law expands the scope of the protection against *refoulement* to include not only refugees and presumptive refugees but also each and every person, including migrants.\(^{909}\) Furthermore, the prohibition of *refoulement* under international human rights law applies to any removals where there are substantial grounds for believing that those removed would be at risk of torture or cruel, inhuman or degrading treatment or punishment. In addition, there are institutional effects. Because of the protection against *refoulement* under international human rights law, not only the UNHCR and other institutions with a refugee focus but also those with more general mandates within human rights, such as the ECtHR, may become concerned with migration and border control issues.\(^{910}\) Finally, the prohibition of *refoulement* under international human rights law is important for its contributions to the status and meaning of *non-refoulement* under international refugee law.\(^{911}\)

### 4.7 Liberty and Security

The right to liberty and security of a person has, as the term suggests, two distinct components. While the right to liberty addresses arrests and detentions or ‘freedom from confinement of the body’,\(^{912}\) the right to security is broader and concerns freedom from injury in a more general sense.\(^{913}\)

\(^{908}\) See, eg, McAdam, *Complementary Protection*, above n 674. See also above Section 3.4 Non-Refoulement.

\(^{909}\) See, eg, *Global Compact for Migration*, UN Doc A/CONF.231/3, annex para 37: ‘We commit to guarantee due process, individual assessment and effective remedy, by upholding the prohibition of … returning migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment, or other irreparable harm’ (emphasis added).

\(^{910}\) *Hirsi Jamaa [2012] II Eur Court HR 97* is a clear example. See above nn 722–8.

\(^{911}\) See above Section 3.4 Non-Refoulement.

\(^{912}\) Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Persons)*, 112\(^{th}\) sess, UN Doc CCPR/C/GC/35 (15 December 2014) para 3.

\(^{913}\) See generally Nowak, above n 759, 210–40; Sir Nigel Rodley, *The Treatment of Prisoners under International Law* (Oxford University Press, 2009); Niels Petersen, ‘Liberty, Right to,
The right to liberty and security is one of the classic human rights and appears in several instruments. For example, article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Subsequent paragraphs of the article deal with specific rights of persons deprived of their liberty, including information upon arrest, review (habeas corpus proceedings) and compensation for unlawful arrests and detentions. Unlike the ICCPR, the UDHR does not express the right to liberty and security in a separate provision. Instead, the UDHR integrates it with the right to life: ‘Everyone has the right to life, liberty and the security of person.’

At the regional level, article 5 of the ECHR, article 7 of the ACHR and article 6 of the ACHPR all provide for the right to liberty and security. Furthermore, several specialised human rights treaties also include related provisions. The right to liberty and security is frequently thought to be part of customary international law.

Unlike the relevant provision of the ECHR, article 9 of the ICCPR does not contain an indicative list of types of arrests and detentions. Instead, the scope is set mainly by the terms ‘arrest’ and ‘detention’. However, it seems that a contextual interpretation, informed by the object and purpose of the Covenant, results in a broad scope of application encompassing ‘all deprivations of liberty, whether in criminal cases or in other cases’. Under this construction,

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For the historical background, see Nowak, above n 759, 216–18.

ICCPR arts 9(2)–(5).

UDHR art 3 (emphasis added).

CRC art 37(b)–(d); CERD art 5(b); ICRMW art 16–17; CRPD art 14.


Human Rights Committee, General Comment No 8: Article 9 (Right to Liberty and Security of Persons), 16th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (27 May 2008, adopted 30 April 1982) 176, para 1. See also Nowak, above n 759, 218–23; Petersen, above n 913.
immigration detentions, other administrative detentions and involuntary transportations may all come within the scope. This does not mean that such deprivations are unlawful per se but rather only that they are subject to certain procedural guarantees.

The right to liberty establishes two basic requirements for permissible deprivations of liberty. First, only deprivations based on law can be permissible. Second, deprivations must not be arbitrary. While the meaning of the requirement of lawfulness is relatively straightforward, the meaning of the prohibition of arbitrariness is more opaque. Only deprivations provided for by law in which neither the law itself nor its enforcement is arbitrary are permissible. Accordingly, the notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.

Article 10(1) of the ICCPR complements article 9(1) thereof by establishing a substantive minimum standard of treatment of persons deprived of their liberty: ‘All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.’ Approximating the broad scope of the right to liberty, the right to humane treatment extends not only to those subject to criminal procedures (arrest) but to everyone deprived of liberty under the laws and authority of a state.

From a conceptual point of view, the right to humane treatment under article 10(1) of the ICCPR seems to resemble the general prohibition of cruel, inhuman or degrading treatment or punishment under article 7(1) of the Covenant. However, the meanings are not precisely the same. The right to humane treatment is not only more specific but also more comprehensive.

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para 6: ‘the only permissible deprivations of liberty are arrest and detention. In return, these two notions have to be interpreted broadly’.

920 The Human Rights Committee has dealt with several cases of immigration detention. See also Nowak, above n 759, 226–7.

921 See further, Human Rights Committee, General Comment No 35: Article 9 (Liberty and Security of Persons), 112th sess, UN Doc CCPR/C/GC/35 (15 December 2014) para 18.

922 Ibid para 12.

923 ICCPR art 10(1). See also Human Rights Committee, General Comment No 35: Article 9 (Liberty and Security of Persons), 112th sess, UN Doc CCPR/C/GC/35 (15 December 2014) para 59: ‘Article 10 of the Covenant, which addresses conditions of detention for persons deprived of liberty, complements art 9, which primarily addresses the fact of detention.’

924 ICCPR art 7: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’
It is more specific because it only covers situations of deprivations of liberty. It is more comprehensive because it requires less severe mistreatment than the general prohibition of cruel, inhuman or degrading treatment. Take for example light. A state that keeps prisoners or other persons deprived of their liberty in pitch-black cells with no windows or lighting would probably be violating the right to humane treatment. By contrast, a state that does not provide street lighting can hardly be said to be responsible for cruel, inhuman or degrading treatment. The rationale of the difference is that states depriving individuals of their liberty must not only refrain from serious ill-treatment but also assume responsibility for satisfying basic human needs, such as access to light. Partly reflecting this approach, the Human Rights Committee has stated that people deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.925

Different from the right to liberty, the right to security is mainly directed at interferences with personal integrity on the horizontal level between individuals. It is broader than the right to liberty in the sense that it applies regardless of whether the victim is a detainee or not. State officials inflicting bodily injury may then violate the right to security even without detaining the victim. In addition to such negative aspects, the right to security also has a positive dimension in the form of an obligation of states to protect individuals from injury caused by others. States are obliged to take appropriate measures to prevent ‘foreseeable threats to life or bodily integrity … from any governmental or private actors.’926 Arguably, such measures may also include reactive activities, such as enforcement of criminal law.927

State responses to irregular maritime migration often entail measures depriving individuals of their liberty.928 For example, following interception or rescue, persons may be held in locked or otherwise confined spaces on board ships. Once disembarked, they may be subject to detention pending asylum procedures, relocation or expulsion. While any such measure may raise issues with regard to the right to liberty and security, not all deprivations of liberty are wrongful per se. Indeed, deprivation of liberty has long been a


926 Human Rights Committee, General Comment No 35: Article 9 (Liberty and Security of Persons), 112th sess, UN Doc CCPR/C/GC/35 (15 December 2014) para 9.

927 See generally Nowak, above n 759, 214–15.

standard means for the exercise of state authority, and there has never been any real political will among states to abolish it as a whole. Accordingly, international human rights law does not offer complete and absolute protection against deprivation of personal liberty. Instead, the right to liberty and security merely concern the forms and procedure of such measures.

The right to liberty and security is relevant to irregular maritime migration in a number of more or less apparent ways. First and foremost, all deprivations of liberty must be based on law and not arbitrary. The requirement of lawfulness applies equally to detention at sea and to treatment after delivery and disembarkation. Second, neither the laws themselves nor their application may be arbitrary. Third, the conditions of the detention must be humane. Compartments, holds and other spaces of confinement on board ships need to be sufficiently large and fit. Examples of other relevant factors may be the physical boundaries of the ship and the availability of basic services, such as protection against wind and weather and health and sanitary facilities. In the same vein, reception centres and detention facilities on land need to be constituted, equipped and managed in such a way that the dignity of those detained is ensured. In particular, such facilities must not be punitive in nature. The permissible minimum standard concerns the general state of the facilities, including the possibility of satisfying basic human needs such as food, clothing, shelter, health care, education, recreation, privacy, security and so on. The finer details are naturally context-specific and require assessment on a case-by-case basis.

4.8 Collective Expulsions

While there are few general restrictions of states’ powers to expel aliens under international law, international human rights law specifically prohibits collective expulsions. Although article 13 of the ICCPR does not use the

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929 Refugee Convention art 31(1) prohibits states from imposing penalties on refugees on account of illegal entry. See above Section 3.5 Non-Penalisation.

930 See above Section 3.2 Territorial Sovereignty.

precise term ‘collective expulsions’, it establishes procedural guarantees that
tacitly prevent the legality of such expulsions:

An alien lawfully in the territory of a state party to the present Covenant may
be expelled therefrom only in pursuance of a decision reached in accordance
with law and shall, except where compelling reasons of national security
otherwise require, be allowed to submit the reasons against his expulsion and
to have his case reviewed by, and be represented for the purpose before, the
competent authority or a person or persons especially designated by the
competent authority.932

While the implied prohibition of collective expulsions under the ICCPR only
covers ‘aliens lawfully in the territory’, regional human rights treaties contain
prohibitions of a more inclusive nature extending also to aliens not lawfully
in the territory of the expelling state.933 Prohibitions of general character also
appear elsewhere, including the ICRMW934 and international humanitarian
law.935 Many believe that the prohibition of collective expulsions is of
customary status.936

What generally characterises collective expulsions is that they target groups
of individuals distinguished by, for example, a particular racial or ethnic

932 ICCPR art 13 (emphasis added). Human Rights Committee, General Comment No 15: The
Position of Aliens under the Covenant, 27th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I)
(27 May 2008, adopted 30 September 1986) 189, para 10: ‘it entitles each alien to a decision in
his own case and, hence, art 13 would not be satisfied with laws or decisions providing for
collective or mass expulsions’ (emphasis added).

933 ECHR art 4: ‘Collective expulsions of aliens is prohibited’; ACHR art 22(9): ‘The collective
expulsion of aliens is prohibited’; ACHPR art 12(5): ‘The mass expulsion of non-nationals shall
be prohibited.’ See also art 19(1) EU Charter: ‘Collective expulsions are prohibited.’

934 ICRMW art 22.

935 Fourth Geneva Convention art 49(1): ‘Individual or mass forcible transfers … from occupied
territory to the territory of the occupying power or to that of any other country … are prohibited,
regardless of their motive.’ However, evacuations are allowed ‘if the security of the population
or imperative military reasons so demand’; at art 49(2). Corresponding rules for non-

936 See, eg, Perruchoud, above n 572, 146: ‘Prohibition of collective expulsion is a customary
norm that is also evident in international conventions’; Kälin, ‘Aliens, Expulsion and
Deportation’, above n 656, para 32: ‘As a matter of customary law, mass expulsions may be
permissible in very exceptional cases’; Pisillo Mazzeschi, above n 918, 562. But see
Maurice Kamto, Special Rapporteur, Third Report on the Expulsion of Aliens, UN Doc
A/CN.4/581 (19 April 2007) 21 [112]–[115] who makes no reference to customary international
law but suggests that ‘there is a general principle of international law on this matter that is
“recognized by civilized nations” and prohibits collective expulsions’: at [115].
Such expulsions are typically ordered without individual decisions regarding each of the expelled persons. Seen in this way, the prohibition of collective expulsion seems to reinforce the principle of non-discrimination under international human rights law.

Because of the relevant prohibition, the burden of proof for showing that a specific set of expulsions does not amount to collective expulsions rests upon the expelling state. The prohibition also runs as a corollary of non-refoulement, as it requires expelling states to make individual assessments. Indeed, collective expulsions are impermissible precisely because they deny aliens the right to individual assessments.

The prohibition of collective expulsions is relevant to irregular maritime migration mainly because it prevents states from expelling aliens without prior examination of their personal circumstances. Refugees and migrants present in the territory of a state may for that reason not be arbitrarily removed. The legality of the means of entry is irrelevant for the protection against collective expulsion: while the ICCPR only covers aliens lawfully present, the prohibitions under regional human rights law are of general nature so that they apply to everyone. Refugees and migrants taken to the territory of a state following rescue or interception in international waters normally fall within the category of aliens lawfully present. However, persons rescued or apprehended at sea after having entered the territory of a state in contravention of its laws do not benefit from the protection against collective expulsions under the ICCPR but only under regional human rights law. Another effect of the limited personal scope of article 13 of the Covenant (‘lawfully within the territory of a state’) is that persons outside the territory of a state fall outside the protection under that article. Consequently, refugees and migrants rescued or apprehended in international waters are not covered by the specific protection against collective expulsions under the ICCPR.

By contrast, in Hirsi Jamaa the ECtHR found that the prohibition of collective expulsions under the ECHR applied to acts outside the territory of any state party. Italy had breached its obligations pursuant to the prohibition of collective expulsions under the ECHR when it expelled a group of asylum seekers.

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937 See especially ACHPR art 12(5): ‘Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.’
938 See above Section 4.3 Non-Discrimination.
939 See above nn 616–25 and accompanying text.
940 Nowak, above n 759, 292: ‘An alien’s residency is lawful when he or she has entered the state of residence in accordance with its legal system (not necessarily a law in the formal sense)’ (emphasis added).
941 Hirsi Jamaa [2012] II Eur Court HR 97. See also above nn 722–7 and accompanying text.
seekers apprehended in international waters. The Court explained that if the prohibition was to apply only to expulsions from within the territory of states a significant component of contemporary migration patterns would not fall within the ambit of that provision … and [the prohibition of collective expulsions] would thus be ineffective in practice with regard to such situations, which, however, are on the increase.942

In addition to this argument, which mainly concentrated on the effectiveness of the prohibition, the Court argued for the coherence of the ECHR:

to afford [the prohibition of collective expulsions] a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of [the prohibition], which would go against the principle that the Convention must be interpreted as a whole.943

The Court’s reasoning is significant for several reasons, not least because it shows that the prohibition of collective expulsion applies extraterritorially. Even though this was obviously the case under the ECHR, it does not seem obvious that corresponding prohibitions under the ICCPR and elsewhere have the same meaning. On the contrary, the Court’s interpretation of the prohibition under the ECHR may probably best be seen as a measure for the ‘further realisation of human rights and fundamental freedoms’. 944 In the same vein, the relevant finding may represent an example of the ‘evolutive interpretation’ of the ECHR.945 Following this line of thought, it seems uncertain to what extent the Court’s findings in Hirsi Jamaa are indicative of the meaning of the prohibition of collective expulsions beyond the ECHR.

942 Hirsi Jamaa [2012] II Eur Court HR 97, 47 [177] (emphasis added).
943 Ibid 47 [178] (emphasis added).
944 ECHR Preamble para 4: ‘the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms’ (emphasis added).
945 See, eg, Tyrer v The United Kingdom (Judgment) 1978 Series A no 26 (European Court of Human Rights) 12 [31]: ‘the Convention is a living instrument which … must be interpreted in the light of present-day conditions’ (emphasis added). For a description and discussion of the notion of evolutive interpretation, see, eg, George Letsas, A Theory of Interpretation of the European Convention on Human Rights (Oxford University Press, 2007) 74–9.
4.9 Family Rights

Despite the inherently collective nature of the family as a concept, family rights are not group rights (‘rights of families’). The term is, on the contrary, used for a variety of rights of individuals with respect to their families. Key rights include those to marry and found a family, equality of spouses, and respect for family life. Because of the predominantly structure-oriented and long-time perspective of other family rights, it is mainly the respect for family life that merits special consideration here. Article 17 of the ICCPR provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence …
2. Everyone has the right to the protection of the law against such interference or attacks.

While this provision protects ‘the privacy of individual family members, as expressed in family life, against unlawful or arbitrary interferences’, the family as an institution receives special protection under article 23(1) of the Covenant: ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.’

Similar provisions appear in the ICESCR, regional human rights treaties and various other instruments. The basic obligation not to engage in

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946 For the vocabulary, see above nn 770–3 and accompanying text.
948 See, eg, ICCPR art 23(2): ‘The right of men and women of marriageable age to marry and to found a family shall be recognized.’
949 See, eg, ibid art 23(3): ‘No marriage shall be entered into without the free and full consent of the intending spouses.’ See also at art 23(4): ‘States parties … shall … ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.’
950 See, eg, ibid arts 17(1), 23(1).
951 Nowak, above n 759, 393.
952 ICESCR art 10(1): ‘The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society’.
953 See, eg, ECHR arts 8, 12; ACHR art 17; ACHPR art 18.
954 See, eg, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc A/CONF.2/108/Rev.1 (26 November 1952, adopted 28 July 1951) [B]: ‘the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee’; CRC art 16(1); CEDAW art 16. See also Fourth Geneva Convention arts 26 (family reunification), 49(3) (non-separation of families in the context of transfers or evacuations of civilians); Additional Protocol I art 74 (family reunification); Additional Protocol II art 4(3)(b) (family reunification).
arbitrary or unlawful interference with the family is often taken to be part of customary international law.\textsuperscript{955}

The main reason for including family rights in the present discussion is because of the possible implications of the respect for family life for the treatment of refugees and migrants following rescue or interception at sea. In that context, the question frequently arises of whether such treatment is compatible with the obligation to respect the family life of the persons apprehended or rescued. As a rule, states shall seek to ensure that members of the same family are not forcibly separated. Furthermore, the term family should be interpreted broadly as including ‘all those comprising the family as understood in the society of the state party concerned’.\textsuperscript{956} Although there may in some situations be good and valid reasons for separating men and women and children on board rescue ships and other units, interferences with family life should be avoided unless there are compelling reasons for it. Individuals rescued or apprehended at sea are often traumatised and in need of support and care by family members. In general, children should always be accompanied by at least one parent. However, the right to respect for family life is not unconditional, and operational factors such as special protection needs (sickness, privacy needs of breastfeeding women, young children, etc) of the individuals concerned combined with limited accommodation possibilities on board may warrant temporary separation.\textsuperscript{957} The main point is that family members should not be separated unless there are compelling reasons for it. The implications for disembarkation procedures are further commented upon below.\textsuperscript{958}

\textsuperscript{955} See, eg, Hathaway, above n 544, 545, 548; Office of the United Nations High Commissioner for Refugees,\textit{ Executive Committee Conclusion No 24 (XXXII) Family Reunification}, 32\textsuperscript{nd} sess, UN Doc A/36/12/Add.1 (21 October 1981) para 1: ‘the Principle of the unity of the family’ (emphasis added). See also Jean-Marie Henckaerts and Louise Doswald-Beck, \textit{Customary International Humanitarian Law} (Cambridge University Press, 2005) vol 1, 379–83: ‘Family life must be respected as far as possible ... State practice establishes this rule as a norm of customary international law’, at 379.

\textsuperscript{956} Human Rights Committee, \textit{General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation}, 32\textsuperscript{nd} sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (27 May 2008, adopted 8 April 1988) 191, para 5. Common criteria include factors such as ‘life together, economic ties, a regular and intense relationship’: Nowak, above n 759, 518.

\textsuperscript{957} ICCPR art 17(1) refers to ‘arbitrary or unlawful interferences’ (emphasis added).

\textsuperscript{958} See below Section 7.2.2.3 International Human Rights Law.
4.10 Individual Group-Differentiated Rights

4.10.1 Children

While far from being the only legal instrument relevant to the protection of the rights and interests of children,959 the CRC stands as the most comprehensive and principally important.960 With its near-universal ratification, it is also the most widely recognised.961

The CRC sets forth a number of general principles, one of which establishes an obligation to ensure that the best interests of the child are assessed and taken as a primary consideration in all actions affecting children.962 Article 3(1) of the CRC states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.963

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959 See, eg, ICCPR art 24 (every child’s right to protection); ICESCR arts 10 (special measures of protection), 12(2)(a) (infant mortality), 13(2)(b) (education); CEDAW arts 5(b) (children’s interest as the primordial consideration in family education), 16(1) (children’s interests with regard to non-discrimination of women in matters relating to marriage and family relations); CRPD art 7 (children with disabilities). Relevant norms also exist in other areas of international law, including international humanitarian law: see, eg, Fourth Geneva Convention arts 17 (evacuation), 23 (free passage of relief); Additional Protocol I arts 77 (protection), 78 (evacuation); Additional Protocol II art 4(3) (fundamental guarantees).


962 The Committee on the Rights of the Child has recognised four general principles of the CRC: non-discrimination (art 2), the best interests of the child (art 3), the right to life, survival and development (art 6), the right to be heard (art 12). See, eg, Committee on the Rights of the Child, General Comment No 5 (2003) on General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6), 34th sess, UN Doc CRC/GC/2003/5 (27 November 2003) para 12.

963 Emphasis added.
The best interests principle is substantiated by other rights of the child set out in the *CRC*. For example, states parties shall ‘ensure to the maximum extent possible the survival of … the child’ and that no child ‘is subjected to torture or other cruel, inhuman or degrading treatment or punishment’. They shall also ensure that children are not separated from their parents against their will ‘except when competent authorities subject to judicial review determine … that such separation is necessary for the best interests of the child.’ The best interests principle is considered one of the core features of the *CRC* and is sometimes even treated as reflective of customary international law.

The potential significance to irregular maritime migration is manifold. The best interests principle requires states to ensure that all measures taken in relation to children be guided by considerations of the best interests of the child. The practical significance naturally varies from case to case and depends on the specific circumstances. Rescue and interception procedures may need to be prepared and followed in a way so that children are specially

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965 *CRC* arts 6(2), 37(a).

966 Ibid art 9(1).

967 For example, the ECtHR has noted that, despite the lack of references to the best interests principle in the *ECHR*, ‘there is currently a broad consensus that in all decision concerning children, their best interests must be paramount’: *Neulinger v Switzerland (Judgment)* [2010] V Eur Court HR 193, 243 [135]. See also McAdam, *Complementary Protection*, above n 674, 173, describing the best interests principle as ‘reflecting an absolute principle of international law’. For further discussion, see Bueren, above n 960, 53–7.

968 *CRC* art 3(1) refers to ‘*all actions* concerning children’ (emphasis added).

969 The Committee on the Rights of the Child has recognised a need for a degree of flexibility in the application of the best interests principle ‘since [it] covers a wide range of situations’: Committee on the Rights of the Child, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (art 3, para 1), 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) para 39. See generally Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of the Child, *Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration*, UN Docs CMW/C/GC/3 and CRC/C/GC/22 (16 November 2017) paras 27–33: ‘States parties shall ensure that the best interests of the child are taken fully into consideration in immigration law, planning, implementation … and decision-making on individual cases …, where the best interests of the child shall be a primary consideration and thus have high priority’, at 6–7 [29].
protected. Standards for treatment on board may need to be revised so that children are treated in ‘a manner which takes into account the needs of persons of his or her age’. Furthermore, children should not be separated from their families unless it is necessary for the best interests of the child. However, children deprived of their liberty shall be separated from adults ‘unless it is considered in the child’s best interest not to do so.’ Furthermore, children may be deprived of their liberty ‘only as a measure of last resort and for the shortest appropriate period of time.’

Considerations of a similar kind seem to apply also to the final stage of rescue operations. Procedures for disembarkation, including the designation of a place of safety, may need to be adjusted so that children are protected and not unduly separated from their families. Children may naturally have special needs in terms of food, shelter, medical services, transportation, and so on. The standard of separation of children deprived of their liberty from adults may also require special attention. Although the finer details are necessarily context-specific, it is difficult not to sympathise with the view of the Committee on the Rights of the Child that the assessment of what is in the best interests of the child, as a rule, cannot be made outside the territory of any state. While the findings by the Committee are not legally binding per se, they may still be informative of the meaning of obligations under the Convention and elsewhere.

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970 CRC art 37(c): ‘Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.’
971 Ibid: ‘In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so’.
972 Ibid art 37(b).
973 See, eg, Joint General Comment on the General Principles Regarding the Human Rights of Children in the Context of International Migration, UN Docs CMW/C/GC/3 and CRC/C/GC/22 (16 November 2017) para 32: ‘Best-interests determination procedures should be put in place in any decision that would separate children from their family’.
974 See, eg, ibid para 43: ‘States parties should ensure that children in the context of international migration … have a standard of living adequate for their physical, mental, spiritual and moral development.’
975 Committee on the Rights of the Child, General Comment No 6: Treatment of Unaccompanied and Separated Children outside Their Country of Origin, 39th sess, UN Doc CRC/GC/2005/6 (1 September 2005) para 20: ‘determination of what is in the best interests of the child requires a clear and comprehensive assessment … Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process’ (emphasis added). For the best interests assessment in the context of migration, see Pobjoy, above n 960, 225–38.
976 They may also be of considerable political significance. Such non-legal considerations are, however, beyond the scope here: see above Section 1.4 Basic Theoretical Framework.
at least temporary admission to territory, it seems conceivable that the comprehensive and compulsory character of the obligations under the CRC requires assessments of such depth and nature that cannot easily be conducted on board ships in international waters. The main reason for such implied rights of admission is then not really the different statuses of international areas and state territory under international law. Rather, it is the typically harsh, shifting and essentially unfriendly conditions of international areas such as Antarctica, international waters and outer space — and the dubious credibility of assessments conducted under such conditions — that lead to deductions of obligations to grant at least temporary admission to territory.

4.10.2 Women

The *CEDAW* establishes special protection guarantees to protect and support the human rights of women. It was adopted ‘to condemn discrimination against women in all its forms’. To this end, the states parties have agreed to pursue ‘a policy of eliminating discrimination against women’ and to undertake certain actions, including legislative measures, and to refrain from engaging in any form of discrimination against women. They have also agreed to take

in all fields, in particular in the social, economic and cultural fields, all appropriate measures … to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

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977 See above Section 3.4 Non-Refoulement.

978 The extraterritorial applicability of the CRC is similar to that of other human rights treaties: ‘States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction’ (emphasis added). See also Joint General Comment on the General Principles Regarding the Human Rights of Children in the Context of International Migration, UN Docs CMW/C/GC/3 and CRC/C/GC/22 (16 November 2017) para 12: ‘The obligations … apply to each child within their jurisdictions, including the jurisdiction arising from a state exercising effective control outside its borders’ (emphasis added).

979 Cf above nn 867–6 and accompanying text.


981 *CEDAW* art 2.

982 Ibid.

983 Ibid art 3 (emphasis added).
This undertaking seems to be sufficiently expansive to cover maritime rescue operations and other emergency preparedness and response measures. Women and girls who are or have been in distress at sea may face different risks and have different needs than men and boys who are or have been in such situations. There is a clear risk that women and girls are disproportionately affected, not only because of physical factors such as an increased risk of hypothermia, but also because of social factors such as pre-existing inequalities. Therefore, rescue protocols as well as standards for treatment on board may need to be reviewed and adapted so as not to exacerbate gender inequalities and result in discrimination.

While far from all of the obligations set forth by the CEDAW are likely to have evolved into customary international law, the prohibition of gender-based violence is often believed to have done so. The potential significance to irregular maritime migration is straightforward: refugees and migrants rescued at sea may include women and girls in need of special protection. Standards for treatment on board as well as procedures for identifying places of safety may need to take into account risks of gender-based violence. The assessment is naturally context-specific and every situation needs to be considered on its own merits. Even so, the main point is that the CEDAW establishes obligations of a specific nature, including the prohibition of gender-based violence, that may require consideration in the course of rescue of refugees and migrants at sea.

984 For a description of the scope, see Freeman, Chinkin and Rudolf, above n 980, 104.
986 See also above Section 4.3 Non-Discrimination.
987 Freeman, Chinkin and Rudolf, above n 980, 29 assert that the principle of non-discrimination of women is part of customary international law but take a more cautious approach with respect to other obligations under the CEDAW: ‘Beyond [the principle of non-discrimination] … claims of customary international law status for particular articles … must be scrutinized for their compatibility with uniform and consistent state practice and opinio juris’ (emphasis in original).
988 See, eg, Committee on the Elimination of Discrimination against Women, General Recommendation No 35 on Gender-Based Violence against Women, UN Doc CEDAW/C/GC/35 (14 July 2017) para 2: ‘The opinio juris and state practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law.’
4.10.3 Persons with Disabilities

Persons with disabilities enjoy special rights under the *CRPD*. The overall purpose of the *Convention* is ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’. While equality and non-discrimination are at the heart of the *Convention*, most other provisions thereof establish obligations of a more specific nature. States parties shall, for example, ‘take appropriate measures to ensure … access, on an equal basis with others, to the physical environment, to transportation, to information and communications … and to other facilities and services’. They shall also ‘adopt immediate, effective and appropriate measures … to raise awareness throughout society … regarding persons with disabilities’, and ‘take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities’.

The possible relevance to irregular maritime migration seems clear: refugees and migrants apprehended or rescued at sea may, of course, be persons with disabilities. This is particularly conceivable taking into account that not only physical but also ‘mental, intellectual and sensory impairments’ qualify as disabilities under the *CRPD*. At least some disabilities seem likely to imply increased risks in distress situations and humanitarian emergencies. Consequently, states parties to the *CRPD* are required to take ‘all necessary measures to ensure the protection and safety of persons with disabilities in

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990 *CRPD* art 1(1).

991 See especially ibid art 4(1): ‘the full realization of all human rights … without discrimination of any kind on the basis of disability’ (emphasis added). See generally, eg, ibid arts 5 (equality and non-discrimination), 10 (right to life ‘on an equal basis with others’), 15 (freedom from torture or cruel, inhuman or degrading treatment or punishment ‘on an equal basis with others’), 25 (right to health ‘without discrimination on the basis of disability’).

992 Ibid art 9(1).

993 Ibid art 8(1).

994 Ibid art 20(1).

995 Ibid art 1(2) defines persons with disabilities to include ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’

To be compliant with the CRPD, maritime rescue operations therefore need to be conducted in a way that affords persons with disabilities a relatively higher level of protection for the purpose of ensuring the ‘effective enjoyment [of the right to life] by persons with disabilities on an equal basis with others.’\footnote{997}{CRPD art 10 (emphasis added).} As stated by the Committee on the Rights of Persons with Disabilities, ‘[n]ondiscrimination must be ensured in situations of risk and humanitarian emergencies … to address the increased risk, inherent in such situations, of discrimination against persons with disabilities.’\footnote{998}{Committee on the Rights of Persons with Disabilities, General Comment No 6: Equality and Non-Discrimination, 19th sess, UN Doc CRPD/C/GC/6 (9 March 2018) para 43.} The Committee has highlighted refugees and internationally displaced persons with disabilities as well as their access to basic necessities, such as ‘water, sanitation, food and shelter’, as matters of key concern.\footnote{999}{Ibid.}

4.10.4 Migrant Workers

Migrant workers and members of their families benefit from special protection under the ICRMW.\footnote{1000}{Migrant workers also benefit from protection under other treaties, not least those developed within the International Labour Organization (ILO): see, eg, ILO Convention No 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, opened for signature 24 June 1975, 1120 UNTS 323 (entered into force 9 December 1978); ILO Convention No 97 concerning Migration for Employment (Revised 1949), opened for signature 1 July 1949, 120 UNTS 71 (entered into force 22 January 1952). See generally Linda S Bosniak, ‘Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers’ Convention’ in Barbara Bogusz, Ryszard Cholewinski and Adam Cygan (eds), Irregular Migration and Human Rights: Theoretical, European and International Perspectives (Martinus Nijhoff, 2004) 311; Virginia Leary, ‘Labour Migration’ in T Alexander Aleinikoff and Vincent Chetail (eds), Migration and International Legal Norms (TMC Asser Press, 2003) 227; Joan Fitzpatrick, ‘The Human Rights of Migrants’ in T Alexander Aleinikoff and Vincent Chetail (eds), Migration and International Legal Norms (TMC Asser Press, 2003) 169; Michael Hasenau et al, ‘Special Issue: UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families’ (1991) 25(4) International Migration Review 687–872.} A migrant worker is defined as ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national.’\footnote{1001}{ICRMW art 2(1).} The ICRMW was adopted with a view
to ‘the need to bring about the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention’. It applies to ‘all migrant workers and members of their families … during the entire migration process … [including] preparation for migration, departure, transit and the entire period of stay’.

The ICRMW stipulates a wide range of human rights protections for migrant workers and their families, including the right to life and prohibitions of torture or cruel, inhuman or degrading treatment or punishment and of collective expulsion. States parties are also required to ‘collaborate with a view to preventing and eliminating irregular migration’. They shall also take appropriate measures to ensure that ‘when there are migrant workers and members of their families within their territory in an irregular situation … such a situation does not persist.’ It is also underlined that the Convention does not affect the rights of states to decide on admission into their territories.

In clear contrast to the other previously discussed international human rights instruments, the ICRMW has not been subject to very many ratifications. As of December 2018, it has only 54 parties, which include few migrant-receiving developed states.

The relevance of the ICRMW to irregular maritime migration is not precisely apparent. However, the reaffirmation of obligations that exist also under other instruments may have some meaning for the general status and content of those norms. Be that as it may, most obligations under the ICRMW are of such structural and long-term character that they do not have immediate consequences for rescue or interception procedures at sea.

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1002 Ibid Preamble para 17.
1003 Ibid art 1.
1004 Ibid arts 9–10, 22.
1005 Ibid art 68(1).
1006 Ibid 69(1).
1007 Ibid art 79.
4.11 Summary

International human rights law is relevant to irregular maritime migration in various ways. While international refugee law addresses refugees and presumptive refugees, the protection under international human rights law is more general and covers each and every person — including refugees and migrants at sea. Furthermore, international human rights law reinforces the protection of refugees and migrants under international refugee law; that is, it provides ‘complementary protection’.\textsuperscript{1009}

While many aspects of international human rights law seem relevant to migration in general, the relevance is more specific in the context of disembarkation of refugees and migrants at sea. The right to life is of key importance given its ramifications for rescue operations. Above all, the right to life supports and extends the duty to render assistance at sea. The various prohibitions of discrimination under international human rights law protect refugees and migrant from certain forms of unequal treatment. In particular, they constrain the possibilities of states to target their control efforts at certain groups of refugees and migrants. They also reinforce the essentially humanitarian character of maritime search and rescue operations: everyone is worthy of rescue. The freedom to leave and the right to return allow refugees and migrants to leave not only their own but also other states without surrendering the possibility of returning home. The prohibition of refoulement is of critical value because it prohibits states from removing individuals from their jurisdiction when they would be at risk of irreparable harm upon return. Indeed, more or less every rescue or interception operation involving refugees and migrants at sea triggers considerations of non-refoulement. The right to liberty and security protects against arbitrary detention and guarantees a minimum standard of treatment on board and while in detention. The prohibition of collective expulsions requires states to undertake individual assessments before expelling or removing aliens from their territories. Family rights entitle refugees and migrants rescued or apprehended at sea to family unity. Children have the right to be afforded special standards of treatment and protection. In particular, the best interests principle requires assessments of such depth and nature that cannot properly be made on board ships at sea in international waters. Considerations of specific character also arise in relation to women and for persons with disabilities. Procedures for rescue as well as for interception, including treatment on board and disembarkation, may need to be adapted so that women and girls as well as persons with disabilities are protected and not discriminated.

\textsuperscript{1009} See above n 674 and accompanying text.
considerations, as well as of other rights dealt with in this chapter, would be
to preserve the ‘inherent dignity [of every human being]’.1010

As a final point, it needs to be reiterated that the present chapter is not intended
as an all-encompassing or exhaustive treatment of all possibly relevant aspects
of international human rights law in the context of irregular maritime
migration. Rather, the intent is to focus on a number of rights that are
especially likely to require consideration when refugees and migrants are
rescued or apprehended at sea. As we shall see in later chapters, more than a
few of these rights seem to contribute to the meaning of the concept of ‘place
of safety’.1011 However, before proceeding to the meaning of the relevant
concept, an additional potentially relevant body of international law remains
to be considered, namely international law against transnational organised
crime.

1010 UDHR Preamble para 1. See above nn 764–70 and accompanying text.
1011 See below Chapters 7 Meaning of the Concept of ‘Place of Safety’, 8 General Conclusions.
5 International Law against Transnational Organised Crime: Law Enforcement and Protection of Victims

5.1 Introduction

The United Nations Convention against Transnational Organized Crime stands as the main instrument in the fight against transnational organised crime.\textsuperscript{1012} While not the only aspect of international law relevant to such crime, it is clearly the most explicit.\textsuperscript{1013} The \textit{UNTOC} was adopted by the General Assembly of the United Nations in 2000, after it opened for signature at a conference in Palermo, Italy.\textsuperscript{1014} Its purpose is ‘to promote cooperation to prevent and combat transnational organized crime more effectively.’\textsuperscript{1015}


\textsuperscript{1013} Like other real and politically contested issues, transnational organised crime is an issue intersecting several areas of international law. Other potentially relevant areas include, in addition to general parts such as the \textit{Charter of the United Nations} and the law of state responsibility, international human rights law, international law of the sea and international economic law. The intersectional character is evident in several ways in the relevant treaties. See, eg, \textit{UNTOC} art 4 (protection of sovereignty); \textit{Smuggling of Migrants Protocol} arts 7, 9(3) (references to the international law of the sea), 19 (references to international refugee law and international human rights law); \textit{Trafficking in Persons Protocol} art 14(1): ‘Nothing in this Protocol shall affect the rights, obligations and responsibilities of states and individuals under international law, including international humanitarian law and international human rights law’. See generally, Gallagher and David, above n 71, 2–3.


\textsuperscript{1015} \textit{UNTOC} art 1.
While the *UNTOC* addresses more or less all forms of criminality that facilitate the profit-making activities of organised criminal groups, its three additional protocols target particular forms of transnational organised crime.\textsuperscript{1016} While the *Smuggling of Migrants Protocol* and the *Trafficking in Persons Protocol* deal with smuggling of migrants and trafficking in persons, respectively, the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* deals with certain activities involving firearms and related components.\textsuperscript{1017}

Like the international law of the sea, international refugee law and international human rights law, international law against transnational organised crime is part of the legal framework for irregular maritime migration. As such, it calls for description and analysis with a focus on the relevance to situations involving rescue of refugees and migrants at sea, which is the purpose of the present chapter. The chapter is, for reasons that will be further explained, relatively brief and focuses on the smuggling of migrants and trafficking in persons.\textsuperscript{1018} Accordingly, in addition to the present introduction, the chapter has three sub-chapters: 5.2 Smuggling of Migrants, 5.3 Trafficking in Persons and, last, 5.4 Summary.

### 5.2 Smuggling of Migrants

Smuggling of migrants is, under international law, defined 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’.\textsuperscript{1019} The term ‘illegal entry’ is defined as ‘crossing borders without complying with the necessary requirements for legal entry into the receiving state’.\textsuperscript{1020} It follows that not all acts that enable or facilitate illegal immigration constitute smuggling of migrants but rather only those that involve a profit-making interest.\textsuperscript{1021} The

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\textsuperscript{1016} Cf ibid art 2(a) (‘organized criminal group’), 2(b) (‘serious crime’), 3 (scope of application).
\textsuperscript{1018} See below Section 7.2.2.4 International Law against Transnational Organised Crime.
\textsuperscript{1019} *Smuggling of Migrants Protocol* art 3(a). See also above n 172.
\textsuperscript{1020} Ibid art 3(b). See also above Section 1.8 Terminology.
\textsuperscript{1021} Ibid refers to ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry’ (emphasis added). See, eg, McClean, above n 1012, 383: ‘It was not the intention … to criminalize the activities of family members or support groups such as religious or non-governmental organizations.’ However, it appears that many states, contrary to the intention of the drafters, have embraced a broader definition, without financial benefits as an element of the crime, in their domestic legislations. See, eg, Anne Gallagher,
definition is purposely specific, reflecting an intricate balance of interests permeating the *Protocol*.\textsuperscript{1022} The distinction between smuggling of migrants and trafficking in persons is subject to further discussion below.\textsuperscript{1023}

The *Smuggling of Migrants Protocol* was adopted noting ‘that effective action to prevent and combat the smuggling of migrants … requires a comprehensive international approach’.\textsuperscript{1024} The interest in preventing and combatting the smuggling of migrants is balanced against the interest to provide ‘migrants with humane treatment and full protection of their rights’.\textsuperscript{1025} This balance between law enforcement and human rights protection is reflected in the manifold purpose of the *Protocol*: ‘to *prevent and combat the smuggling of migrants*, as well as to *promote cooperation* among states parties to that end, *while protecting the rights of smuggled migrants*.\textsuperscript{1026}

To that end, the *Protocol* establishes several concrete obligations for its states parties. Among the most important are the obligations to criminalise the smuggling of migrants,\textsuperscript{1027} exchange certain information,\textsuperscript{1028} strengthen border controls,\textsuperscript{1029} ensure the security of travel and identity documents,\textsuperscript{1030} verify such documents,\textsuperscript{1031} and provide training and technical cooperation.\textsuperscript{1032} All parties are, moreover, obliged to take measures to preserve and protect the rights of smuggled migrants and to afford appropriate assistance to migrants whose lives or safety are endangered because of smuggling of migrants.\textsuperscript{1033}

\textsuperscript{1022} See below nn 1024–5 and accompanying text.

\textsuperscript{1023} See below Section 5.3 Trafficking in Persons.

\textsuperscript{1024} *Smuggling of Migrants Protocol* Preamble para 1.

\textsuperscript{1025} Ibid Preamble para 3.

\textsuperscript{1026} Ibid art 2 (emphasis added).

\textsuperscript{1027} Ibid art 6(1)(a): ‘Each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences … [t]he smuggling of migrants’.

\textsuperscript{1028} Ibid art 10: ‘States parties … shall … exchange … information on matters such as: embarkation and destination … routes, carriers and means of transportation … organizations … travel documents … [l]egislative experiences and practices … [s]cientific information’.

\textsuperscript{1029} Ibid art 11(1): ‘Without prejudice to international commitments in relation to the free movement of people, states parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.’

\textsuperscript{1030} Ibid art 12: ‘Each state party shall take … measures … [t]o ensure that travel or identity documents … cannot easily be misused … or unlawfully altered, replicated or issued; and [t]o ensure the integrity and security of travel or identity documents’.

\textsuperscript{1031} Ibid art 13.

\textsuperscript{1032} Ibid art 14.

\textsuperscript{1033} Ibid art 16. See below nn 1053–7 and accompanying text.
The Protocol has received widespread support and has, as of December 2018, 147 parties, including the European Union.  

Three features of the Protocol are of main interest to the present discussion: the obligation to criminalise the smuggling of migrants, the legal framework for measures against the smuggling of migrants by sea, and the provisions concerning protection and assistance of smuggled migrants.

Starting with the first, groups of individuals rescued at sea may naturally include persons suspected of having been engaged in the smuggling of migrants. While such suspects retain their status as survivors and therefore merit delivery to and disembarkation at a place of safety, they must be treated in a manner that does not prevent further investigation into their suspected criminal activity. Although the Protocol does not explicitly oblige its states parties to investigate and prosecute persons suspected of smuggling of migrants, such an obligation seems to be implicit in the obligation to criminalise the smuggling of migrants. Accordingly, persons rescued at sea suspected of smuggling of migrants should be delivered to places of safety where such measures are not impossible.

Second, articles 7–9 of the Protocol provide an operational scheme for dealing with smuggling of migrants by sea. The provisions deal with cooperation, measures against the smuggling of migrants by sea and safeguard clauses. States parties are obliged to cooperate ‘to the fullest extent possible to prevent and suppress smuggling of migrants by sea, in accordance with the international law of the sea’. The closing reference is an explicit recognition of the framework character of the international law of the sea, thus implying that the Protocol does not override but needs to be applied consistent with the

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1035 Smuggling of Migrants Protocol art 6(1) refers to ‘legislative and other measures as may be necessary to establish as criminal offences … the smuggling of migrants’ (emphasis added). See also UNTOC arts 11(1)–(2), which requires its states parties to ‘make the commission of an offence … liable to sanctions’ and ‘to endeavour that any discretionary legal powers under its domestic law … are exercised to maximise the effectiveness of law enforcement measures in respect of those offences’. See also McClean, above n 1012, 394 noting that ‘other measures’ are measures additional to legislative measures and presuppose the existence of a law’.

1036 Smuggling of Migrants Protocol art 7.
law of the sea.\textsuperscript{1037} This relationship is, for natural reasons, especially important in relation to measures taken at sea against the smuggling of migrants.\textsuperscript{1038}

Accordingly, article 8(1) of the \textit{Protocol} entitles a state party to request the assistance of other states parties in suppressing the use of vessels of its own nationality for the purpose of smuggling of migrants. Requested states parties are obliged to ‘render such assistance to the extent possible within their means’\textsuperscript{1039}. The next sub-paragraph deals with requests for flag state consent. A state party that has ‘reasonable grounds to suspect that a vessel exercising freedom of navigation … is engaged in the smuggling of migrants’ may inform the flag state and request its authorisation to take appropriate measures.\textsuperscript{1040} Such measures may include boarding, searching and ‘[i]f evidence is found … appropriate measures with respect to the vessel and persons and cargo on board’, which at least in some situations are likely to entail seizure.\textsuperscript{1041} The \textit{Protocol} does not explicitly require the flag state to authorise such measures but simply provides that it ‘\textit{may} authorize the requesting state’\textsuperscript{1042}. While the rationale of these provisions may not be readily apparent compared to the regular competence of flag states over ships flying their flags,\textsuperscript{1043} the practical significance of the next sub-paragraph of the article is clearer, as it obliges states parties to respond to requests for authorisation in an expeditious way.\textsuperscript{1044} Given the general importance of timing for law enforcement at sea, the potential for lacking or overdue answers to obstruct the possibilities to take the requested measures in practice seems obvious. For example, suspected ships may escape, or planned measures may become impractical because of other operational factors such as weather, on-scene endurance or conflicting commitments.

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\textsuperscript{1037} For the encompassing nature of the law of the sea, see above Section 2.1.2 Special Features.
\textsuperscript{1038} This has, to some extent, already been noted above. See above Section 2.2.3 Interception of Ships Used for Irregular Maritime Migration.
\textsuperscript{1039} \textit{Smuggling of Migrants Protocol} art 8(1).
\textsuperscript{1040} Ibid art 8(2).
\textsuperscript{1041} Ibid art 8(2)(a)–(c). Gallagher and David, above n 71, 436: ‘it may authorize not only boarding but also seizure of the vessel and arrest of any persons abroad’.
\textsuperscript{1042} \textit{Smuggling of Migrants Protocol} art 8(2) (emphasis added). The general obligation to ‘cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea’ is naturally a relevant factor in this regard: at art 7.
\textsuperscript{1043} Nothing under the international law of the sea seems to prevent flag states from asking for assistance or authorising other states to intervene against ships flying their flags. See above Section 2.2 Jurisdiction over Ships. See also Gallagher and David, above n 71, 430: ‘[the Protocol] does not itself create a new legal framework for interdicting vessels engaged in migrant smuggling.’
\textsuperscript{1044} \textit{Smuggling of Migrants Protocol} art 8(4): ‘A state party shall respond \textit{expeditiously} to a request from another state party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization’ (emphasis added).
\end{flushleft}
The succeeding sub-paragraph, article 8(5), entitles flag states to make their authorisations subject to conditions. It also prohibits states parties from taking additional measures without the express authorisation of the flag state, ‘except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements’. However, because flag states are not obliged to authorise such measures, it seems that there is nothing that would prevent them from defining the outer limits of potential authorisations. The prohibition of additional measures without the consent of the flag state appears for this reason as primarily a reaffirmation of the exclusive character of flag state jurisdiction.

The next sub-paragraph, article 8(6), which establishes an obligation of states parties to designate an authority responsible for receiving and responding to requests by other states parties, is more concrete. For the same reasons that answers to such requests should be expeditious, other states parties need to know where to direct such requests.

Finally, the last sub-paragraph, article 8(7), deals with stateless vessels. It simply provides that states parties may board and search such vessels reasonably suspected of being engaged in the smuggling of migrants and, if evidence confirming the suspicion is found, take ‘appropriate measures in accordance with relevant domestic and international law’. Because of the framework character of the international law of the sea, the practical significance of this provision seems questionable. For reasons already explained, states other than the flag state are generally not entitled to intervene against stateless ships on the high seas with the exception of the right of visit. The reference to ‘appropriate measures’ is therefore not particularly helpful.

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1045 Ibid art 8(5). For a related discussion, see above Section 2.3.4 Forcible Rescue?
1046 Gallagher and David, above n 71, appear to share this view: ‘Consistent with the law of the sea, the Protocol provides that flag states granting such authorizations can make them subject to conditions’ (emphasis added). As regards the concept of flag state jurisdiction, see generally above Section 2.2 Jurisdiction over Ships.
1047 Smuggling of Migrants Protocol art 8(6).
1048 Ibid art 8(7).
1049 See above Section 2.2.3 Interception of Ships Used for Irregular Maritime Migration.
1050 But see McClean, above n 1012, 410: ‘No flag state is … involved, so any state party may act under this paragraph without seeking prior authorization from anyone.’ See also UNODC Legislative Guides, which is mostly silent with regard to the issue of measures against stateless ships, but in one sentence equates such ships with ships flying the same flag as the requesting state, thereby suggesting that such ships may be interfered with in the same way that a state may intervene against ships flying its own flag: ‘In cases where states parties suspect a maritime vessel flying their flag or a stateless vessel of involvement in smuggling, they may request general assistance of other states parties in suppressing such use of the vessel’: UNODC Legislative Guides 384 [93] (emphasis added).
Against this background, it seems that the significance of the operational scheme set forth by article 8 of the Protocol is more limited than it appears at first sight. The relatively detailed provisions contained in the UNCLOS leave little room for alterations of the legal framework for jurisdiction over ships.\footnote{See generally above Section 2.2 Jurisdiction over Ships.} This is likely also the explanation for why the operational scheme set forth by the Protocol closely follows the general parameters for interception of ships. Consequently, it seems that the importance of article 8 of the Protocol is not to expand the grounds for interference with foreign ships at sea but rather to facilitate the administration of requests for flag state consent. Even though this may seem like a mere technicality, the practical worth of efficient working procedures should not be underestimated.

The last article, article 9, which is contained in chapter II of the Protocol that deals with smuggling of migrants by sea, is titled ‘Safeguard clauses’. It provides that where a state party intervenes against a ship suspected of smuggling of migrants, it shall ensure the safety and humane treatment of the persons on board, without endangering the security of the vessel or its cargo, the commercial or legal interests of the flag state or the environment.\footnote{Smuggling of Migrants Protocol art 9(1).} Then, in separate sub-paragraphs, it provides for compensation in the event of unfounded interferences and the need not to interfere with coastal state and flag state jurisdictions. Finally, it clarifies that measures taken at sea to suppress smuggling of migrants shall be carried out only by government ships or aircraft.\footnote{Ibid art 9(2)–(4).} Even though the issues dealt with are clearly important, these safeguard clauses appear mostly as reaffirmations of already existing obligations pursuant to other norms of international law.\footnote{See, eg, ICCPR art 10(1) (humane treatment of persons deprived of their liberty); UNCLOS arts 87(2) (due regard for the interests of other states), 106 (liability for seizure without adequate grounds), 110(3) (right to compensation for wrongful visit), 110(5) (competence of other government ships than warships), 192 (general obligation to protect and preserve the marine environment). For similar comments, see, eg, McClean, above n 1012, 413: ‘most of the provisions … are to be found in previously existing international instruments’.}

The third feature of the Protocol of special interest here relates to the protection and assistance of smuggled migrants. Article 5 of the Protocol states ‘[m]igrants shall not become liable to criminal prosecution under this
Protocol for having been the object of [smuggling of migrants]’.1055 Moreover, article 16(1) requires states parties to take

all appropriate measures … to preserve and protect the rights of [smuggled migrants] as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.1056

Furthermore, states parties are obliged to afford migrants ‘appropriate protection against violence that may be inflicted upon them … by reason of being the object of [smuggling of migrants]’ as well as ‘appropriate assistance to [those] whose lives or safety is endangered by reason of being the object of [smuggling of migrants]’.1057

Smuggled migrants rescued at sea are, like everyone rescued at sea, entitled to delivery to and disembarkation at a place of safety, pursuant to the provisions of the SOLAS Convention and the SAR Convention, but, pursuant to article 5 of the Smuggling of Migrants Protocol, are not to be liable to criminal prosecution for the fact of having been the object of smuggling. It therefore cannot be lawful for states parties to the Protocol to deliver smuggled migrants rescued at sea to places where their likely treatment would in practice amount to a ‘penalty’, for example at a place where the rescued persons would be held in indefinite confinement equal to imprisonment.1058

Moreover, the obligations to protect against violence that may be inflicted on them by reason of being smuggled migrants and to afford assistance when their lives or safety are endangered by reason of their status as smuggled migrants prevent states parties from delivering smuggled migrants rescued at sea to places of safety where their lives or safety would be endangered by reason of being smuggled migrants. Both of these examples suggest that the obligations concerning protection and assistance of smuggled migrants under the Protocol establish an additional layer of protection of smuggled migrants rescued at sea.1059 The significance of the Protocol is thus not limited to the

1055 Emphasis added.
1056 Emphasis added. See also above Sections 4.2 Right to Life, 4.6 Non-Refoulement.
1057 Smuggling of Migrants Protocol arts 16(2)–(3) (emphasis added).
1058 For further discussion of the relation between non-criminalisation and detention of migrants, see Andreas Schloenhardt and Hadley Dickson, ‘Non-Criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air’ (2013) 25(1) International Journal of Refugee Law 39.
1059 See, eg, Boister, above n 1012, 86–7: ‘Although [art 16(1) of the Protocol] does not confer any rights on smuggled migrants beyond those already recognized in international human rights or humanitarian law, it would, for example, oblige parties to take positive action in certain situations such as ensuring the rescue of migrants abandoned in the desert by smugglers or wrecked in heavy seas, and to provide them with emergency food, shelter, and medical care’.
interest in law enforcement but also extends to the interest in protecting and assisting smuggled migrants. The manifold purposes of the Protocol are accordingly not only artificial but reflected also in its operative provisions.  

5.3 Trafficking in Persons

Whereas smuggling of migrants always involves the procurement of illegal entry for material benefit, trafficking in persons always involves the threat or use of force or other forms of coercion for the purpose of exploitation. 

Trafficking in persons is therefore clearly different from smuggling of migrants. The Trafficking in Persons Protocol defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. 

Even though the distinction between smuggling of migrants and trafficking in persons is in reality not always clear-cut, it seems reasonably safe to assume that most refugees and migrants travelling at sea with a view to illegal entry are not transported for the purpose of exploitation — at least not within the meaning of the definition of trafficking in persons. While smuggling of migrants generally involves the informed consent of the persons who are the object of the crime, trafficking in persons always involves coercion and the ‘element of obtaining a profit as a result of an exploitative purpose for which

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1060 For a more hesitant view see, eg, ibid 87: ‘While the Protocol … gives smuggled migrants specific protections … [it] offers slimmer specific protection … than the [Trafficking in Persons Protocol] offers trafficking victims, mainly because it does not view migrants as victims’.

1061 For further discussion of the distinction between trafficking in persons and smuggling of migrants, see, eg, Tom Obokata, Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach (Brill, 2006) 21–6; Boister, above n 1012, 77–8; Mallia, above n 67, 10–11.

1062 Trafficking in Persons Protocol art 3(a) (emphasis added).

1063 Refugees and migrants who start their journey by paying someone to facilitate their illegal entry into a state (smuggling of migrants) may, for example, be forced or otherwise coerced into exploitation along the way or at the final destination (trafficking in persons).

1064 See, eg, Jørgen Carling, Anne T Gallagher and Christopher Horwood, ‘Beyond Definitions: Global Migration and the Smuggling-Trafficking Nexus’ (Discussion Paper, Regional Mixed Migration Secretariat, 2015): ‘Smuggling is now the norm, not the exception, in large migration flows’.
the trafficking was undertaken.¹⁰⁶⁵ From an operational point of view, this means, as explained by Mallia, that

“trafficking” may require greater attention to be given to post-entry behaviour … efforts at curtailing migrant smuggling are primarily focused on maritime interception (since the offence is constituted by the act of the illegal crossing of an international border).¹⁰⁶⁶

Be that as it may, the *Trafficking in Persons Protocol* still establishes several obligations that may require attention when refugees and migrants have been rescued at sea. The purposes of the *Protocol* are ‘to prevent and combat trafficking in persons’, to protect and assist the victims’ and ‘to promote cooperation’.¹⁰⁶⁷ It applies to trafficking that is transnational in nature and involves an organised criminal group and to the protection of victims of such offences.¹⁰⁶⁸ Like the *Smuggling of Migrants Protocol*, the *Trafficking in Persons Protocol* has been the subject of general acclaim and has, as of December 2018, 173 parties, including the European Union.¹⁰⁶⁹

Most importantly, the *Trafficking in Persons Protocol* requires its states parties to criminalise trafficking in persons.¹⁰⁷⁰ The proper implementation of this obligation requires not only legislative measures but also concrete enforcement measures such as investigation and prosecution.¹⁰⁷¹ Thus, the requirement to criminalise prevents the delivery of persons suspected of trafficking in persons rescued at sea to places of safety where further investigation or prosecution measures are likely to be impossible. States deliberately risking such impunity would therefore normally be acting against the purposes of the *Protocol*.

Chapter II of the *Trafficking in Persons Protocol* deals with the protection of victims. States parties shall, inter alia, protect the privacy of victims,¹⁰⁷² take

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¹⁰⁶⁵ See, eg, Mallia, above n 66, 10–11.
¹⁰⁶⁶ Ibid 11.
¹⁰⁶⁷ *Trafficking in Persons Protocol* art 2.
¹⁰⁶⁸ Ibid art 4.
¹⁰⁷⁰ *Trafficking in Persons Protocol* art 5: ‘Each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences [trafficking in persons]’. See also *UNTOC* arts 11(1)–(2) and above n 1035.
¹⁰⁷¹ *Trafficking in Persons Protocol* art 5 refers to ‘legislative and other measures as may be necessary’ (emphasis added).
¹⁰⁷² Ibid art 6(1).
certain measures to promote access to justice,\textsuperscript{1073} consider taking measures for the recovery of victims,\textsuperscript{1074} and consider permitting victims to remain in their territories.\textsuperscript{1075} Instead of setting forth a right for victims to remain, the \textit{Protocol} relies on the duty of states to receive their own nationals.\textsuperscript{1076} Consequently, article 8(1) of the \textit{Protocol} requires the state party of which a victim is a national or permanent resident to facilitate and accept the return of that person.\textsuperscript{1077} The state party returning the victim shall do so ‘with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and [the return] shall preferably be voluntary.’\textsuperscript{1078} Notwithstanding the passing reference to voluntary return, it seems clear that the anticipated treatment of alien trafficking victims is deportation rather than permission to remain.\textsuperscript{1079} Furthermore, states parties are required to prevent and combat trafficking in persons, exchange information and train relevant officials in the prevention of trafficking in persons.\textsuperscript{1080} They shall also ‘strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.’\textsuperscript{1081}

Compared to the \textit{Smuggling of Migrants Protocol}, the \textit{Trafficking in Persons Protocol} puts more emphasis on the protection and assistance of victims.\textsuperscript{1082} The distinction between smuggling of migrants and trafficking in persons is for that reason not merely of theoretical interest but also important in practice.\textsuperscript{1083} If trafficking is confused with smuggling, there seems to be a clear risk that victims will not receive the protection and assistance to which they are entitled. Trafficking in persons is, furthermore, usually perceived as a  

\begin{itemize}
    \item \textsuperscript{1073} Ibid art 6(2) requires each state party ‘to ensure that its … system contains measures that provide to victims … [i]nformation on relevant court and administrative proceedings [and] [a]ssistance to enable their views … to be … considered at appropriate stages of criminal proceedings’.
    \item \textsuperscript{1074} Ibid art 6(3).
    \item \textsuperscript{1075} Ibid art 7(1).
    \item \textsuperscript{1076} See above Section 4.5 Right to Return.
    \item \textsuperscript{1077} \textit{Trafficking in Persons Protocol} art 8(1).
    \item \textsuperscript{1078} Ibid art 8(2).
    \item \textsuperscript{1079} McClean, above n 1012, 73–5.
    \item \textsuperscript{1080} \textit{Trafficking in Persons Protocol} arts 9–10.
    \item \textsuperscript{1081} Ibid art 11(1).
    \item \textsuperscript{1082} Cf, on the \textit{one} hand, ibid arts 6(3) (‘consider implementing measures for the physical, psychological and social recovery of victims of trafficking’), 6(4) (‘shall take into account … the special needs of victims of trafficking’), 6(5) (‘shall endeavour to provide for the physical safety of victims of trafficking’), and, on the \textit{other} hand, \textit{Smuggling of Migrants Protocol} arts 5 (non-criminalisation of smuggled migrants), 16 (‘appropriate measures … to preserve and protect the rights of [smuggled migrants] as accorded under applicable international law’).
    \item \textsuperscript{1083} See, eg, \textit{Global Compact for Migration}, UN Doc A/CONF.231/3, para 26(f): ‘Ensure that definitions of trafficking in persons … are in accordance with international law … to distinguish between the crimes of trafficking in persons and smuggling of migrants’.
\end{itemize}
worse form of offence than smuggling of migrants. Against this background it seems regrettable that not only some states\textsuperscript{1084} but also the European Union have at times failed to uphold a clear distinction.\textsuperscript{1085} While some instances of such terminological inconsistency may be explained as mere technical mistakes, it is not especially difficult to posit political reasons for deliberate obfuscation of the terms. As argued by a civil society organisation:

Incorrectly labelling “smugglers” as “traffickers” conveniently ignores reasons why asylum seekers and migrants chose to leave home — such as conflict, widespread human rights abuses, famine and economic destitution. It allows governments of countries they are trying to reach to imply that law enforcement is more important than ensuring asylum seekers can get protection and exercise their right to seek asylum and that actions such as destroying boats is a humanitarian act aimed at saving lives when in reality the objective … is to prevent people from migrating irregularly\textsuperscript{1086}

Notwithstanding the possible overuse of the term ‘trafficking’ in the context of irregular maritime migration, it seems clear that the \textit{Trafficking in Persons Protocol} entails obligations likely to require attention in situations where refugees and migrants are rescued at sea. Groups of refugees and migrants rescued at sea may involve persons engaged in or associated with, in one way or another, trafficking in persons. Recovered survivors may be offenders as well as victims. In any case, states parties to the \textit{Protocol} are expected to take measures to detect and investigate suspected trafficking. While suspected crimes shall be investigated and prosecuted as appropriate, victims shall be protected and assisted. Suspects and victims rescued at sea may for that reason not be delivered to places of safety where further investigation and possible prosecution or protection and assistance are impossible. The flag state of a government ship whose crew suspects that members of a group of refugees and migrants embarked in the course of a rescue operation are involved in trafficking in persons is then under an obligation to act in a way that does not render further measures impossible. Typically, this seems to imply delivery to a place of safety where law enforcement authorities, social services or other appropriate authorities have the capacity to take the necessary measures. This would in most situations implicate the territory of the flag state. This does not mean that any suspicion of involvement in trafficking in persons results in a

\textsuperscript{1084} See, eg, \textit{Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic} (signed and entered into force 2 February 2017) (inofficial translation) <http://eumigrationlawblog.eu>.
right of entry into the territory of the state coordinating the rescue operation. Rather, it means that most such cases are likely to require actions of a kind that generally cannot be properly conducted on board a ship at sea or in the territory of another state.

5.4 Summary

International law against transnational organised crime denotes the body of international law specifically concerned with the prevention and suppression of transnational organised crime. It entails a variety of obligations likely to require attention in situations when refugees and migrants have been rescued at sea. While the UNTOC and the Trafficking in Persons Protocol are not insignificant, the Smuggling of Migrants Protocol seems the most important in the context of irregular maritime migration.

States parties to the Smuggling of Migrants Protocol are required to criminalise the smuggling of migrants. They are also required to cooperate, including for the purpose of preventing and suppressing the smuggling of migrants by sea. For that purpose, the Protocol sets forth an operational scheme for measures against smuggling of migrants by sea. Among other provisions, it allows flag states to request the assistance of other states parties and other states to request authorisation from the flag state to board, search or take other appropriate measures with respect to vessels engaged in the smuggling of migrants. However, the importance of the scheme is more specific than it appears at first sight. Because of the encompassing nature of the international law of the sea, the operational scheme for measures against smuggling of migrants at sea needs to be applied consistent with the general legal framework for jurisdiction over ships at sea. As a result, it appears that the main contribution of the operational scheme set forth by the Protocol is not to provide additional grounds for interference with ships at sea but rather to clarify the procedures for requests for flag state authorisations. The basic legal conditions for the interception of ships used for smuggling of migrants are therefore generally the same under the international law of the sea as under international law against transnational organised crime.

Trafficking in persons is distinctly different from smuggling of migrants, not only because it does not require illegal entry but also because it always involves an element of forcible or otherwise coercive exploitation. The distinction is important. There is a clear risk that victims will not be given the same rights and treatment if the definitions are conflated. States parties to the Trafficking in Persons Protocol are required to criminalise the trafficking in persons. Victims of trafficking must, however, not be criminalised. Quite the contrary, states parties to the Protocol are required to protect and assist such
victims. Even so, victims are generally not entitled to remain in the territory of a state to which they have been trafficked. States parties are required to consider the question of stay but are not required to allow victims to remain. Instead, the Protocol relies on the duty of states to admit persons to their own states.

While this chapter has described the international law against transnational organised crime as part of the legal context of the concept of ‘place of safety’, it is not automatically clear that it is also relevant to the interpretation of this concept. On the contrary, the potential significance to the concept depends on its standard of interpretation. Leaving the substantive legal framework for rescue at sea aside for the moment, the standard of interpretation relevant to the concept of ‘place of safety’ is the focus of the next chapter.
PART II

INTERPRETATION OF THE
CONCEPT OF ‘PLACE OF SAFETY’
6 Standard of Interpretation for the Concept of ‘Place of Safety’

The concept of ‘place of safety’ is a feature of two treaties, namely the SOLAS Convention and the SAR Convention. Consequently, this concept calls for interpretation. This chapter aims to describe the standard relevant to that interpretation. The concern here then is not the interpretation itself but the standard for the interpretation. The application of this standard or, in other words, the interpretation, is dealt with in the next chapter, Chapter 7 Meaning of the Concept of ‘Place of Safety’.

The present chapter has two main parts. The first has a more theoretical tone and seeks to conceptualise a basic assumption of particular significance to the interpretation of the concept of ‘place of safety’, namely the idea of international law as a legal system. The second is of more concrete nature and deals with some key aspects of the general legal framework of the interpretation of treaties set out in the VCLT. Despite their differences, the two parts are closely related in that the first concerns an interpretative technique encompassed by the second: systemic integration, as provided for in article 31(3)(c) of the VCLT. It has already been noted that this particular technique is of key significance to the concept of ‘place of safety’. The idea is to envisage this technique as a point of confluence for two conflicting views in contemporary international law: one that strives towards the independence or singularity of treaties and one that struggles for the coherence or universality of international law as a whole. These forces are referred to as the ‘divergent view’ and the ‘convergent view’. The argument is that both the rationale for and the meaning of the interpretative technique set forth by

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1087 The term ‘interpretation’ can be understood in at least two different ways: as a process (the process of interpretation) or as a product (the product of interpretation). This chapter deals with it in the first sense, that is, as a process.  
1088 See above nn 46–50 and accompanying text.  
1089 Maria Fogdestam Agius, Interaction and Delimitation of International Legal Orders (Brill, 2014) 4, discusses ‘two countervailing forces … present in international law today: one that pushes towards fragmentation and one that pulls towards interconnection and coherence.’
article 31(3)(c) of the VCLT, systemic integration, appears to be linked to the systemic quality of international law.1090

6.1 International Law as a Legal System

6.1.1 Introduction

Understanding international law as a legal system no longer seems very controversial. Even so, it is impossible to deny that many have questioned whether international law is really ‘law’.1091 However, most such doubts seem to emanate from non-legal disciplines or from commentators with little interest in international law.1092 Well-known concerns draw on the non-existence in international law of a central body to create laws (legislature),1093


1091 This is an old debate, going back to early names such as Spinoza, Hobbes, Pufendorf and Hegel. For general discussions in this regard, see, eg, Oppenheim’s, above n 34, 8–13; Martti Koskenniemi, ‘What is International Law For?’ in Malcolm D Evans (ed), International Law (Oxford University Press, 4th ed, 2014) 29; Shaw, above n 34, 1–10; Malanczuk, above n 34, 5–7; Bring, Mahmoudi and Wrange, above n 34, 15–20.

1092 But see John R Bolton, ‘Is There Really Law in International Affairs?’ (2000) 10 Transnational Law & Contemporary Problems 1, 48: ‘International law is not superior to, and does not trump, the [US] constitution. The rest of the world may not like that approach, but abandoning it is the first step to abandoning the United States of America. International law is not law; it is a series of political and moral arrangements.’

1093 The General Assembly of the United Nations is not a world legislature, and there is no other organ with such powers in international law. On the contrary, the international community of states has been keen to reserve the exclusive character of their competence to create laws that will bind them. See, eg, Statute of the International Court of Justice art 38(1): ‘(a) international conventions … expressly recognized … ; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilised nations’ (emphasis added). See also above Section 1.4.2 Method and Material.
compulsory courts (judiciary),\textsuperscript{1094} and a system for unilateral law enforcement (executive).\textsuperscript{1095} Still, it is apparent that states invest much time and effort in international law. The everyday presence of experts in international law in government offices around the world and the frequent occurrence of references to international law in domestic legal systems are clear signs of its importance. Another argument to the same end is the usual claim that states generally act in a manner consistent with international law.\textsuperscript{1096} Even when they fail, states tend to acknowledge the significance of international law by trying to justify their behaviour by reference to international law. Few states deny or openly contest the importance of international law as a whole. All of this points to the social fact that international law exists, or in other words, international law exists because states think it does.\textsuperscript{1097}

The more complicated side of the assertion that international law is a legal system seems instead to relate to the second element: the systemic nature of international law. Coherence or systemic character is an essential quality of any legal ‘system’ and deeply embedded in legal thinking. It is also a quality with strong implications for the understanding of international law in general and for ‘the art of interpretation’ in particular.\textsuperscript{1098} Contemporary understandings of international law are in fact to a large extent dependent on the meanings of treaties and consequently on the understanding and application of standards of interpretation of treaties. The general legal framework of the interpretation of treaties appears therefore as a fundamental

\textsuperscript{1094} The ICJ can only decide cases based on the consent of the parties to the dispute. \textit{Statute of the International Court of Justice} art 36(1): ‘The jurisdiction of the Court comprises all cases \textit{which the parties refer to it’} (emphasis added).

\textsuperscript{1095} There is no equivalent to national police in international law. The law enforcement capacity of the Security Council of the United Nations is cautiously limited. See generally Katinka Svanberg, \textit{FN:s säkerhetsråd i rättens tjänst} (PhD Thesis, Stockholm University, 2014).

\textsuperscript{1096} See, eg, Louis Henkin, \textit{How Nations Behave} (Columbia University Press, 2nd ed, 1979) 47: ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’; \textit{Oppenheim’s}, above n 34, 13: ‘in practice international law is constantly recognised as law by the governments of states who regard their freedom of action as legally constrained by international law.’


\textsuperscript{1098} ‘Draft Articles on the Law of Treaties with Commentaries’ [1966] II \textit{Yearbook of the International Law Commission} 183, 218 [4]: ‘the interpretation of documents is to some extent an art, not an exact science.’
and almost constitutional-like matter in international law. Under the heading ‘General rule of interpretation’, article 31 of the VCLT provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.1099

Despite the initial focus on the terms of the treaty, it is clear that the meaning of the treaty shall be sought not only within the treaty itself but also beyond it in certain respects. Thus, for example, article 31(3)(c) of the VCLT provides:

There shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties.1100

This particular technique of interpretation — often called systemic integration — requires the interpreter to take into account other relevant and applicable norms external to the treaty subject to interpretation.1101 Given the multitude of potentially relevant and applicable norms and the various political interests underlying them, it is easy to understand why the result of interpretation — the meaning of the treaty — is occasionally linked to which external materials are taken into account in the interpretation.1102 It is therefore not really surprising that systemic integration has become a contested issue in international law. This interpretative technique entails, in brief, two basic criteria: applicability (‘applicable in the relations between the parties’) and relevancy (‘any relevant rules’).1103 Although the meaning of the first criterion is hardly uncontested, it seems more straightforward than the second criterion of relevancy.1104

This chapter suggests that both the rationale for and the meaning of systemic integration are linked to the systemic quality of international law. Consequently, systemic integration relates to the very character of international law: is it a tightly interconnected legal system or, conversely, an incoherent set of separate legal norms? The first part of this chapter discusses this notion, while the second deals with the general legal framework of the interpretation of treaties. The first part has the following structure. Section 6.1.2 Specialisation of International Law portrays the development of

1099 VCLT art 31(1). See below Section 6.2 Rules of Interpretation.
1099 Emphasis added.
1099 See, eg, McLachlan, above n 47; ILC Study Group Report on Fragmentation, UN Doc A/CN.4/L.682; Merkouris, above n 1090.
1099 A relevant example is the interpretation of the prohibition of refoulement under art 33(1) of the Refugee Convention, which is informed by developments in customary international law. See above Section 3.4.1 Scope of the Prohibition.
1099 VCLT art 31(3)(c).
1099 See below Section 6.2.2 Primary Means of Interpretation.
international law into different regimes. It suggests that the systemic quality of international law changes over time as a result of the continuous development of international law. The systemic quality of international law is therefore pictured as a sliding scale along which the meaning of systemic integration is a continuously moving position. Sections 6.1.3 The Convergent View and 6.1.4 The Divergent View describe the imagined scale with reference to its two extremes. On one extreme end is the notion of international law as one: a united whole or a singular unity. This is referred to as the convergent view. On the other extreme end is the notion of international law as a random collection of legal norms, where treaties exist and function irrespective of each other. This is referred to as the divergent view. The last section (Section 6.1.5 The Convergent View and the Divergent View: Significance of the Difference) closes the discussion by linking it to interpretation.

6.1.2 Specialisation of International Law

A significant event in the history of human relations was the introduction of sovereign states.\textsuperscript{1105} The Westphalian paradigm involves relations between states acting, at least formally, in their individual capacity. International relations may be seen as what creates international law and international law then appears as the legal reflection of international relations. Given that states have maintained relations with each other for particular reasons and aims, international law has developed for political reasons. From this point of view, both international law and international relations are seen as essentially preference-driven and target-oriented phenomena.

A more recent but likewise notable trend is the increasing globalisation of the world, which is supposed to have caused an explosion of international

\textsuperscript{1105} The Peace of Westphalia, which marked the end of the Thirty Years’ War in 1648, is often referred to as the starting point of the Western, state-oriented, international system of states — the ‘Westphalian system’ — and for the development of modern international law. Above all, it was the recognition of the principles of equality of states and territorial integrity that marked the end of one era and the opening of another. For a classic article to this end, see Leo Gross, ‘The Peace of Westphalia, 1648–1948’ (1948) 42 \textit{American Journal of International Law} 20. However, this view has been criticised for oversimplifying the historical material and ascribing meanings to the Peace of Westphalia that in fact were not there. See, eg, Andreas Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’ (2001) 55 \textit{International Organization} 251, 256, 260. Osiander argues that Gross and many others misconstrue the Thirty Years’ War as ‘a struggle between hierarchical, “universalistic” aspirations and the aspirations of the rising individual states; how the peace was really about sovereignty’, when in fact ‘the struggle between universalism and particularism or between empire and sovereignty’ was not a major issue of either the war or the peace.
relations. As a result, it may today be more difficult to think of strictly national issues with no international connotations than of international ones extending to other states in some way or the other. What used to be national has in a sense become international. Take for example tax policy. States’ taxations of their own populations used to be an essentially national affair, but the increasing interconnectedness of the world means that the design and implementation of taxes now often produce international effects. Capital or production means may move abroad and international legal proceedings may be instituted against the tax-imposing state.

Furthermore, the proliferation of international relations has led to a remarkable growth of international law. This is particularly evident from the growing number of treaties registered with the Secretariat of the United Nations. In the period between World War I and World War II, some 500 treaties were registered in the League of Nations Treaty Series, while in the period between January 1946 and December 2018, more than 50,000 treaties were published in the United Nations Treaty Series.

In combination with its largely preference-driven and target-oriented nature, the expanding scope of international law has led to a need for systematisation. This need has been met, at least in part, by the development of international law into specialised sets of norms focused on different issues. Relevant examples include the international law of the sea, international environmental law and international human rights law. Such functionally targeted clusters of rules have become known as regimes of international law. The then Chairman of the ILC Study Group on Fragmentation of International Law, Martti Koskenniemi, described regimes as

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\text{a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches.}
\]

Despite general agreement on its importance, globalisation is rather vaguely defined. A popular definition is ‘the widening, deepening and speeding up of worldwide interconnectedness in all aspects of contemporary social life’. See, eg, David Held et al, Global Transformations: Politics, Economics and Culture (Polity, 1999) 2.

Charter of the United Nations art 102(1): ‘Every treaty and every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.’


The regime terminology within international law is influenced by regime theory from the liberal tradition within the academic field of international relations.\textsuperscript{1110} The presumably most well-cited definition of regimes within international relations comes from the American scholar Stephen Krasner. He defines a regime as ‘principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area’.\textsuperscript{1111} Krasner’s and Koskenniemi’s definitions of regimes are similar in their object-oriented and relatively simple character — organising norms depending on issue and not any other factor such as origin, status or overarching objective.

The development of international law into regimes can be understood as a feature of a renowned process of late modernity, often referred to by sociologists as ‘functional differentiation’.\textsuperscript{1112} Although the widening scope of international law, coupled with the need for further systematisation and the concomitant functional differentiation, could be seen as logical and natural processes, concerns have been raised that the development of international law into regimes risks undermining its systemic character. This risk arises mainly because of the object-oriented character of regimes — neither the reality nor the objectives for which the norms were developed are equally sortable into similarly distinct regimes. On the contrary, it seems that every discernible part of reality involves a multiplicity of issues.

Still, both Krasner’s and Koskenniemi’s definitions of regimes imply the identification of relevant issues to determine which regime is relevant. Given that different regimes embody different objectives, such identification generally implies striking a hierarchy among the preferences fixed in different regimes. Identifying the relevant issue means pointing out the relevant objective, which will be given priority at the cost of others.\textsuperscript{1113} Take for example the hunting of whales. Is it a matter of conservation of living resources under the law of the sea, protection of endangered species under environmental law or an exercise of traditional living methods under human rights law? The political objectives fixed in these areas of law are distinctly

\begin{footnotesize}
\textsuperscript{1110} The gist of this tradition is the concept of rationality and the assumption that states and others are rational in the sense that they attempt to maximise their own short-term interests. For an introduction to international relations theory, see Joshua S Goldstein and Jon C Pevehouse, \textit{International Relations} (Pearson Longman, 7th ed, 2006) 55–7, 99–101.


\textsuperscript{1112} This term is closely associated with the German sociologists Max Weber and Niklas Luhmann: see below Section 6.1.3 The Convergent View. See also \textit{ILC Study Group Report on Fragmentation}, UN Doc A/CN.4/L.682 10–11 [7].

\end{footnotesize}
different. The choice of the applicable regime can in this way often be expected to have normative effects.1114

Moreover, because of the general character of the definition of a regime, every application of international law is bound to involve quite a number of regimes. Consequently, it seems that every instance of application of international law could be seen as a cross-regime enterprise. This triggers considerations of needs for regime coordination and integration. Otherwise, topics and objectives intersecting several regimes are likely to cause normative conflicts, which tend to arise as a result of insufficient coordination in the creation and development of norms.1115 The fear in fragmentation of international law is that it will become a random collection of norms without meaningful relations to each other.1116 Accordingly, much of the academic interest in systemic integration and article 31(3)(c) of the VCLT lies in its potential as a cure to the fragmentation of international law.

6.1.3 The Convergent View

On one extreme end of the imagined scale of the systemic quality of international law is ‘the convergent view’. This view understands all norms, regimes and other units of international law as intrinsically linked. International law then appears as a single convergent unity where no norm, regime or other part is separable from any or all other parts of international law.

The rationale of this view can be illustrated by reference to Ludwig Wittgenstein’s so-called rule-following considerations.1117 These appear in Wittgenstein’s later philosophy in a discussion of a sceptical paradox threatening our ordinary ways of ‘understanding, meaning, and thinking’.1118 Wittgenstein explains this paradox by describing a pupil who tries to follow her teacher’s simple mathematical rule: ‘starting from zero, add by twos’.1119 Imagine that the teacher begins the series by writing ‘0, 2, 4, 6, 8’ and then asks the pupil to carry on. At first, the pupil continues the series as expected, seemingly following the rule, but when she reaches 1000, she starts adding

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1114 See generally ILC Study Group Report on Fragmentation, UN Doc A/CN.4/L.682, 17 [21].
1116 See below Section 6.1.4 The Divergent View. See also below n 1196.
1117 As a basic caveat, it needs to be noted that there is much disagreement about what Wittgenstein actually thought.
1118 Ludwig Wittgenstein, Philosophical Investigations, ed GEM Anscombe, R Rhees and GH von Wright, tr GEM Anscombe (Basil Blackwell, 1958) 38 [81].
1119 Ibid 74–5 [185].
fours, writing ‘1000, 1004, 1008, 1012’ and so on. In this situation, the teacher could correct the pupil, for example by telling her to follow the rule. But what if the pupil replies that this is exactly what she is doing: ‘Yes, isn’t it right? I thought that was how I was meant to do it’?1120 The problem then is that it would be difficult for the teacher to prove, without providing any additional instructions such as ‘continue adding twos even after 1000’, that she is in fact wrong. The reason, according to Wittgenstein, is that there is no objective fact to show that, according to the first instruction, ‘998, 1000, 1002’ is correct, whereas ‘998, 1000, 1004’ is wrong. The original series written by the teacher simply does not by itself contradict the pupil’s behaviour. Indeed, the series ‘0, 2, 4, 6, 8’ is compatible with both a sequence that increases by two forever \( (a_n = 2n, \ n \geq 0) \) and one that increases by two for values under 1000 and by four for values over 1000 \( (a_n = 2n, \ 1 \leq n < 500; \ a_n = 4n - 1000, \ n \geq 500; \ n \in \mathbb{N}) \).1121

The root of the problem is that the teacher’s original instruction can be understood in several ways. Thus, in order to achieve the desired result, the teacher needs to clarify by giving additional instructions. However, these instructions can be challenged in the same way as the first instruction: the additional instructions are just as indeterminate as the first instruction. This paradox arises because the instructions are just words, which may be understood in different ways. Indeed, the words themselves do not explain how to understand them. Accordingly, ‘keep on adding by twos’ could be taken to mean ‘continue adding by twos forever and ever’ or ‘continue adding by twos until you reach 1000’. The main point is that there is no way to determine the meaning of words through objective facts. Instead, every rule formulated in words requires additional rules. This is Wittgenstein:

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict.1122

1120 Ibid: ‘Such a case would present similarities with one in which a person naturally reacted to the gesture of pointing with the hand by looking in the direction of the line from finger-tip to wrist, not from wrist to finger-tip.’
1122 Wittgenstein, above n 1118, 81 [201].
Wittgenstein’s rule-following dialect was further developed by the American philosopher Saul Kripke. His claim was that

our seeming inability to point to objective facts that justify our understanding of the correct way of following a rule leaves us unable to tell a satisfying account of what our words mean.\footnote{Finkelstein, above n 1121, 653.}

The basic outline of Kripke’s argument is that there is no way for the pupil in Wittgenstein’s example to know what was meant when the teacher told her to ‘add’. According to Kripke, Wittgenstein’s point was that there is no meaning of ‘plus’ that is an objective fact. The implications for law of this reading seem serious: if there is no meaning of ‘plus’ that is an objective fact, then there is no fact as to what is meant by any word — including those of legal texts. From such a radical position, it would be impossible to say if an act accorded or conflicted with a written legal norm. Even though the radical reading of Wittgenstein has attracted some interest from legal authors, it seems clear that it brings serious problems for legal thinking.\footnote{Finkelstein claims that some scholars have taken the sceptical interpretation of Wittgenstein’s rule-following considerations to provide an ‘intellectual justification for judicial activism’. Ibid 655 and further references there.} According to this reading, it would simply not be possible to communicate by words. Furthermore, it may be fundamentally incoherent because it requires one to assume particular meanings of words in order to show that they do not have other meanings.

The main significance of the rule-following example for the present purposes is the idea that any rule requires additional rules. This suggests that no legal norm is conclusive by virtue of itself. Instead, all legal norms are linked to each other. The possible implications for international law seem manifold.

First, international law would be inevitably indeterminate since no norm could be separated from another, leaving considerable room for the one applying the law to choose the meaning of the norm.\footnote{The concept of indeterminate law is well-known from contemporary legal theory and notably from critical international legal theory. For an introduction, see Pål Wrange, *Impartial or Uninvolved? The Anatomy of 20th Century Doctrine on the Law of Neutrality* (PhD Thesis, Stockholm University, 2007) 55–81.} Another notable consequence, not least for the present thesis, concerns how norms of international law relate to each other and so are to be understood. The rule-following dialect implies that no written norm can be properly understood by virtue of itself and without reference to other norms. Interpretations that limit themselves to the norms or concepts subject to interpretation would then by definition be inconclusive. Instead, a norm can only properly be understood by reference to its normative environment. Accordingly, the rule-following idea emphasises contextual
interpretation in order to grasp the meaning of norms, including those of international law.

Take for example the seemingly simple provision that ‘[e]very human being has the inherent right to life’, which hardly can be understood without consideration of the meanings of both ‘right’ and ‘life’.1126 Similarly, the international prohibition of the use of force,1127 except when conducted in self-defence or when sanctioned by the Security Council of the United Nations, seems to require an array of legal norms for its application, including for the identification of states, the definition of self-defence and for the functioning of the Security Council.1128

From the convergent view of the systemic quality of international law, the rule-following dialect makes complete sense. If all norms of international law are linked — because every norm requires additional ones — it is nothing but logical that no such norm can be properly understood without reference to other such norms. The determination of the meaning of a treaty is then reliant on far-reaching systemic integration.

6.1.4 The Divergent View

On the other extreme end of the imagined scale of the systemic quality of international law lies ‘the divergent view’. Contrary to the convergent view, this view emphasises the independence or singularity of treaties by separating them from other treaties and norms of international law. A treaty is then merely a document with a collection of norms that exist and function irrespective of other norms of international law. As a result, different parts, regimes and units of international law may bear meanings and point in different directions irrespective of each other.

The divergent view of treaties resembles a standard view of contracts in private law. In the same way that the meaning of such contracts may often, for example under the so-called ‘four-corners rule’, be determined only by reference to what appears in the contracts themselves, a treaty is, pursuant to the divergent view, to be understood by reference only to itself.1129

1126 ICCPR art 6(1).
1127 Charter of the United Nations art 2(4): ‘All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations’.
1128 Ibid arts 42, 51 concern actions by the Security Council of the United Nations to maintain or restore international peace and security and self-defence respectively.
1129 The four corners rule is well-known in common law systems. The essence is that the meaning of an agreement shall be determined only by reference to what appears in the agreement itself — ‘within its four corners’. See, eg, Black’s Law Dictionary (9th ed, 2009)
The rationale of the divergent view can be further illustrated by reference to a feature of late modernity well-known to sociologists as functional differentiation. In his thoughts on bureaucracy, Max Weber described functional differentiation as one of the three basic meanings of rationality. First, instrumental rationality means that actors make choices and calculations about the most efficient means to achieve their ends (individual cost-benefit calculation). Second, rationalisation entails secularisation or ‘disenchantment’, that is, dispensing of metaphysical forces as explanations of nature or society. The third and, for the present purposes, most relevant meaning of bureaucracy is as a rational form of administration. According to Weber, capitalism calls for bureaucracy. Capitalism needs an efficient administration that responds to its needs: a nation state with a rational legal system that provides it with efficient infrastructure. Bureaucracy offers, according to Weber:

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\text{above all the optimum possibility for carrying through the principle of specializing administrative functions according to purely objective considerations. … “Objective” discharge of business (which) primarily means a discharge of business, according to calculable rules and “without regard for persons.” “Without regard for persons,” however, is also the watchword of the market and, in general all pursuits of naked economic interests … Bureaucracy develops the more perfectly, the more it is “dehumanized,” the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational and emotional elements which escape calculation. This is appraised as its special virtue by capitalism.}]

A key feature of Weber’s bureaucratisation is the development of specialised professions or, in other words, professionalisation. For Weber, both bureaucratisation and professionalisation are aspects of the rationalisation of society. Both the development of professions and the development of institutions are then aspects of rationalisation. Furthermore, the relationship between professionalisation and institutionalisation is two-sided. Another

‘four-corners rule’: ‘the principle that no extraneous evidence should be used to interpret an unambiguous document.’


1131 Ibid 144–5.


1133 This is evident from Weber’s discussions of ‘law specialists’, ‘legal training’ and the development of a ‘rational legal order’. In short, Weber argues that a rational legal order is formed by law specialists who are shaped by specialised legal training. The institution (‘a rational legal order’) is thus created by the profession (‘law specialists’), which at the same time exists because of the institution (the legal order). Ibid, vol 2, 775–6, 785–802. See also George Ritzer, ‘Professionalization, Bureaucratization and Rationalization: the Views of Max Weber’ (1974–5) 53 Social Forces 627.
aspect of bureaucratisation that is closely related to professionalisation is functional differentiation. This is the process whereby parts of society or some other organisation become increasingly specialised. Such specialisation implies increasing differentiation, that is, processes whereby specialised parts operate more and more independently from each other and eventually as autonomous parts.

Weber’s theory is illustrative of what is here called the divergent view because it describes how capitalism/modernism demands rationalisation, which implies bureaucratisation, professionalisation and functional differentiation, that is, fragmentation. Despite the ostensibly close fit, it seems clear that Weber did not have international law in mind when thinking about bureaucratisation. Even so, his theory provides a helpful model of the reasons for the divergent view. Indeed, the ILC Study Group on Fragmentation of International Law even equated functional differentiation of international law with fragmentation of international law:

From a system-theoretical perspective, the position of courts is absolutely central in managing the functional differentiation — i.e. fragmentation — within the law.\(^{1134}\)

Weber’s concept of bureaucratisation has been further elaborated by Niklas Luhmann.\(^{1135}\) In short, Luhmann describes (national) society as being divided into several autopoietic and separated social (sub)systems. Notable examples include the legal system (the law), the political system (politics) and the economic system (economy). The basic element of Luhmann’s theory is communication, which through constant juxtapositions develops social systems.\(^{1136}\) Hence, the law appears as ‘a system within society, which is constituted by communications that operate with reference to the binary code of legal/illegal’.\(^{1137}\)

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\(^{1134}\) *ILC Study Group Report on Fragmentation*, UN Doc A/CN.4/L.682, 33 n 53 (emphasis added) and, more generally, at 11 [7], 16 [20], 68 [129].


\(^{1136}\) See, eg, Luhmann, above n 1135, 84: ‘a description of the legal system cannot start from the assumption that norms … are made up of different substance or quality than communications.’

\(^{1137}\) Venzke, above n 560, 35.
Importantly, the relevant social systems are self-generating or, in Luhmann’s words, ‘autopoietic’. This autopoiesis is driven by operative closure and functional differentiation. The social systems are more or less closed and more or less specialised/functionally differentiated. A system is closed when it sets its own limits against its surroundings. The more specialised a social system is, the more restricted it is to its own terms. Luhmann uses the concept of autopoiesis ‘to suggest that communications within a system can only operate by reference to communications of that same system — legal claims have to refer to legal claims in order to be valid legal claims’. Even though Luhmann perceives modern societies as being more or less fragmented into separate autopoietic sub-systems, the systems are hardly entirely autonomous. Rather, the autopoietic systems are constantly evolving and some communication continues to exist between them. Such intra-system communication occurs, using Luhmann’s word, through ‘structural couplings’. Between politics and law, for example, is the constitution, which allows politics to feed into law, and between politics and the economy is the central bank, which allows politics to feed into the economy.

For international law, Luhmann’s systems theory triggers the idea that international law consists of several self-generating or autopoietic (sub)systems. This obviously comes close to the description of international law as consisting of several more or less separate regimes. Furthermore, for Luhmann, these systems would be constantly evolving through juxtapositions of communication. In the context of international law, examples of such communication could be state practice, the creation of treaty relations, and other acts that produce new norms or generate new normative meanings of existing ones. Highly specialised regimes, such as perhaps international trade law or international environmental law, would be more autopoietic and less open to influence from other areas. Even though Luhmann’s theory is not without systemic features (structural couplings), the notion of self-generating or autopoietic sub-systems is useful for the present purposes as an illustration of international law as diverging into separate parts or regimes.

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1138 Autopoiesis is Greek for ‘self-making’ (autos: self; poiein: make). See, eg, Luhmann, above n 1135, 70: ‘the law produces by itself all the distinctions and concepts which it uses … the unity of law is nothing but the fact of this self-production, this “autopoiesis”.’

1139 Ibid 81–6. See also Venzke, above n 560, 38.

1140 Venzke, above n 560, 35.

1141 See, eg, Luhmann, above n 1135, 381–422: ‘coupling mechanisms are called structural couplings if a system presupposes certain features of its environment on an ongoing basis and relies on them structurally’, at 382.

1142 See, eg, ibid 390, 403–12: ‘the structural coupling between the legal and political systems … was and still is called “constitution”’, at 404.

6.1.5 The Convergent View and the Divergent View: Significance of the Difference

While the preceding sub-chapters tried to introduce the imagined scale of the systemic quality of international law with reference to its two extremes, the present sub-chapter means to illuminate the difference and its significance in the context of interpretation. A few words on hermeneutics seem helpful for this purpose.

The basic question of hermeneutics is how a text shall be understood. As explained by the German philosopher Hans-Georg Gadamer:

The goal of all communication and all understanding is agreement in the matter at hand. Thus from time immemorial hermeneutics has had as its task to restore lagging or interrupted agreement.\(^{1144}\)

Being an essentially hermeneutic exercise, this also appears as the central query of treaty interpretation. What is the meaning of the treaty? What is the agreement? A fundamental hermeneutical formula is that every interpretation presupposes the rationality of the object of interpretation. Naturally, the primary aim of interpretation is to determine the meaning of something: the object of interpretation. However, such determination only appears possible if there is rationality in the object of interpretation through which the meaning can be sought. The required rationality does not need to be very significant, but there needs to be some. If the interpreters did not expect any rationality in the object of interpretation, why would they be trying to grasp its meaning through interpretation? Against this backdrop, Gadamer argues that every interpretation presupposes some sense of rationality in the object of interpretation. This necessary presupposition is referred to as ‘the anticipation of perfection’.\(^{1145}\) The anticipation does not mean that the author or creator of the object of interpretation must have been rational but simply that ‘we can only understand that which represents a perfect unity of meaning’.\(^{1146}\) The expected rationality is then not an empirical fact but simply an essential assumption in the notion of interpretation.

The notion of the anticipation of perception is useful here because it helps to highlight the importance of context. A common theme in all hermeneutics is the extent to which a text is to be understood by reference to the terms of the text itself or, conversely, by also taking into account extrinsic elements such


\(^{1145}\) Ibid 74.

\(^{1146}\) Ibid.
as external context. The inherent circularity of understanding is highlighted by the concept of the so-called hermeneutic circle. The simple assertion of this figure is that one must understand the whole from the individual and the individual from the whole.\textsuperscript{1147} Accordingly, there is a relation between the meanings of the words of a sentence and the meaning of the sentence of the words. According to Gadamer, this resembles the idea that a text can only be understood on its own terms.\textsuperscript{1148}

Gadamer’s concepts of the anticipation of perfection and the hermeneutic circle are helpful for the present purposes in that they help to highlight the significance of pre-understanding. In order to initiate an interpretation of a treaty it seems that one must have at least some prior knowledge about certain things, such as the notions of interpretation and treaty. The interpreter simply needs a basic context in relation to which the elements of the interpretation can be understood. For the present purposes, the hermeneutical distinction between the parts and the whole may be taken to relate to the understanding of international law as a united whole — the convergent view — or as a disconnected set of separate norms — the divergent view. The convergent view proposes that no norm, regime or other unit of international law can be properly understood by reference solely to itself. The reason is that, from the convergent view, all norms and parts of international law are linked. Conversely, the divergent view rejects the interpretative value of external elements for the determination of the meaning of a treaty. Instead, the divergent view focuses on the treaty, regime or other unit of international law for the determination of its meaning. Thus, the key difference between the views is the extent to which the context shall be taken into account.

It would be easy to think that the divergent view gives the drafters of a treaty better opportunities to predict and control how their treaty will be interpreted, since the interpretation would be confined to the treaty itself — whose formulation lies within the exclusive control of the drafters. However, the convergent view is no different in this regard. Importantly, the convergent view implies no restriction on how a treaty may be drafted; rather, this view implies the drafters’ understanding of international law as a legal system — their position on the imagined scale between the divergent view and the convergent view — impacts how they choose to formulate their treaty.

First, the convergent view requires the drafters to be aware of the legal context in which their treaty will be interpreted. Their knowledge of international law is then of key importance to their ability to formulate the treaty so that it holds their intended meaning when interpreted in the wider context of international

\textsuperscript{1147} Ibid 68.
\textsuperscript{1148} Ibid 69 and further references there.
law. By contrast, the divergent view, in its extreme form, requires the drafters to forget not only their own but also the interpreters’ prior knowledge of international law, so that no issue covered by the treaty remains for background law to regulate. It also requires them to predict and address all issues that could possibly arise under the treaty.

Accordingly, both the convergent view and the divergent view require extensive knowledge, intellectual capacity and awareness of the drafters of a treaty. It would therefore not be correct to describe either of the views as being simpler or more sophisticated than the other. Neither would it be correct to say that the divergent view takes better account of the intention of the parties and therefore better reflects the principle of pacta sunt servanda. On the contrary, the key difference between the views relates to the ways in which — that is, through which means of interpretation — the intentions of the parties shall be identified.

Indeed, as held by the ICJ, the aim of treaty interpretation is to establish ‘the intentions of the authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation’. What the Court points out is that the elements referred to in the legal framework of the interpretation of treaties set out in the VCLT can be taken to reflect the intention of the parties. There is a basic logic in this. Because the intention of the parties is a subjective matter, it cannot be identified by reference to itself but only through objective elements discernible by an interpreter. Consequently, the emphasis on objective elements does not mean that the intention of the parties is neglected. Instead, it merely reflects the view that objective elements are the only means through which the parties’ intention can be identified.

The convergent view submits that the intention of the parties cannot be determined with exclusive reference to the text of the treaty but must also be sought in its legal context. This is not because the parties’ intention is unimportant but only that the means through which it can be identified entail systemic integration. In other words, because the parties envisaged their treaty to be interpreted in its legal context, external elements need to be taken into account to determine the meaning of the treaty through the intention of the parties. By contrast, the divergent view implies that the parties did not

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1149 VCLT art 26: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’
1151 This resembles how customary international law has both an objective element (usus) and a subjective element (opinio juris). See above Section 1.4.2.2 Customary International Law.
1152 See generally Eirik Bjørge, The Evolutionary Interpretation of Treaties (Oxford University Press, 2014).
expect their intention to be grasped by taking any external context into account.

Clearly, the convergent view and the divergent view are merely imaginary illustrations devised for the present purposes of conceptualising the notion of systemic integration. Indeed, even though the interpretative technique set forth by article 31(3)(c) of the VCLT is open for interpretation itself, it cannot precisely be understood as utterly subjective. Otherwise, interpreters could choose the meaning of systemic integration, and as a result much of the meaning of the treaties subject to their interpretation. Such flexibility would make the meanings of treaties essentially subjective and international law as a whole entirely arbitrary.

Accordingly, the purpose of the present discussion is not to propose that interpreters are free to choose their own positions on the imagined scale between the convergent view and the divergent view. The point being made is solely that the meaning and reach of systemic integration may be understood as a specific but continuously moving position along this scale. Rather than suggesting that interpretation of treaties is an entirely subjective enterprise, this means that there is at any given time a certain standard of interpretation for every treaty, under the general legal framework of the interpretation of treaties, even though this standard may evolve and change over time. Furthermore, this point implies that the meaning of systemic integration is the result of a combination of the convergent and divergent views. Seemingly reflecting this approach, the general rule of interpretation as set out in the VCLT requires the interpreter to derive the meaning of a treaty not only from the text of the treaty but from ‘the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. This seems neither an utterly convergent view nor an utterly divergent view. Instead, it seems to represent a compromise involving aspects of both views. Still, because of the changing systemic quality of international law — not least because of the constant development of the content of international law — the meaning of systemic integration is thought to be changing over time.

In summary, systemic integration may be seen as a reflection and consequence of the systemic quality of international law, which is changing over time. To highlight this feature — that systemic integration appears as an expression of the systemic quality of international law — the meaning of systemic

1153 VCLT art 31(1) (emphasis added). See below Section 6.2 Rules of Interpretation.
integration may be understood as an existing but evolving standard that is continuously moving along a scale between convergence and divergence:

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Systemic integration

Convergent view ←X→ Divergent view
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6.2 Rules of Interpretation

The first part of this chapter considered the idea of international law as a legal system as an underlying assumption of the systemic integration of treaties. The present part is of noticeably more concrete character and seeks to describe the standard of interpretation relevant to the concept of ‘place of safety’ with reference to the general legal framework of the interpretation of treaties. As already noted, this framework appears in the VCLT. After a couple of initial remarks, the various means of interpretation provided for in this framework are discussed to the extent relevant for the standard of interpretation for the concept of ‘place of safety’. The chapter closes with a summary.

6.2.1 Initial Remarks

The general legal framework of the interpretation of treaties is laid down in articles 31–2 of the VCLT. These provisions are generally taken to reflect customary international law.

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1154 See above Section 1.4.2.1 Treaties.
1156 The ICJ has repeatedly affirmed that VCLT arts 31–2 reflect customary international law. See, eg, Maritime Dispute (Peru v Chile) (Judgment) [2014] ICJ Rep 3, 26 [57]; Oil Platforms
The VCLT defines a treaty as

an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.\(^{1157}\)

A parallel definition appears in the analogous Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which applies to treaties where one or more parties are international organisations.\(^{1158}\)

The VCLT applies ‘only to treaties which are concluded by states after the entry into force of the [Convention]’.\(^{1159}\) However, the significance of the non-retroactive applicability is curtailed by the character of major parts of the Convention as codifications of customary law in force at the time of the adoption of the Convention, to the effect that the non-retroactivity of the Convention does not apply to its customary equivalents. Even though not all provisions of the Convention may be declaratory of customary international law, those on interpretation are thought to be.\(^{1160}\) The non-retroactivity of the Convention is therefore not an obstacle to the application of the customary law reflected in articles 31–2 of the Convention to treaties adopted prior to the entry into force of the Convention.
However, the general format of the legal framework of the interpretation of treaties set out in the *VCLT* does not mean that this framework always applies. Instead, this framework runs as *jus dispositivum* so that it applies only unless the parties have agreed otherwise. The applicable standard of interpretation may accordingly differ from treaty to treaty.  

6.2.2 Primary Means of Interpretation

Article 31 of the *VCLT* sets out the general rule of interpretation:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

The first component of the general rule of interpretation is the obligation to interpret treaties in good faith. This obligation links to the principle of *pacta sunt servanda*, to the effect that ‘the crucial link is … established between the

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1161 The *ECHR* is an example, where the ECtHR, acting in its normative capacity under the *ECHR*, has explicated a standard of interpretation that is not entirely identical to that which flows from the *VCLT*. The Court has, for this purpose, characterised the *ECHR* as a ‘living instrument … which must be interpreted in the light of present-day conditions’: *Tyrer v The United Kingdom* (Judgment) 1978 Series A no 26 (European Court of Human Rights) 15–6 [31]; *Loizidou v Turkey (Preliminary Objections)* (Judgment) 1995 Series A No 310 (European Court of Human Rights) 21 [71]. For a concrete example of interpretation beyond the interpretative framework set out in the *VCLT*, see *Case of the National Union of Rail, Maritime and Transport Workers v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 31045/10, 8 April 2014), in which the Court appears to have interpreted the *ECHR* taking into account external material (other treaties) that was not binding for all parties to the *ECHR*.
interpretation of a treaty and its performance”. The obligation to interpret a
treaty in good faith seems in this way to entail a duty for the parties to ensure
the effectiveness of their treaty obligations. More precisely:

The prohibition of the abuse of rights, flowing from good faith, prevents a party
from evading its obligations and from exercising its rights in such a way that
cause injury to the other party.1164

In addition to the notion of good faith, the general rule of interpretation
comprises three primary means of interpretation: text, context, and object and
purpose. These are meant to be of equivalent significance. The context is
accordingly of no less obligatory character than the text or the object and
purpose. Thus, grouping the means of interpretation referred to in
article 31(3) reflects simply that they are all external to the text rather than any

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1162 Villiger, above n 556, 425 citing ‘Draft Articles on the Law of Treaties with Commentaries’
1163 When drafting the VCLT, the ILC did not give the ‘principle of effective interpretation’ a
separate formulation but considered it embodied in the obligation to interpret a treaty in good
faith and the general rule of interpretation. See, eg, ‘Draft Articles on the Law of Treaties with
1164 Villiger, above n 556, 426. See also Aust, Modern Treaty Law and Practice,
above n 556, 209–10: ‘Even if the words of the treaty are clear, if applying them would lead to
a result that would be manifestly absurd or unreasonable … the parties must seek another
interpretation’; Sorel and Boré Eveno, above n 1155, 818: ‘it must be noted that good faith
should cover … the rule of effectiveness’; Orakhelashvili, above n 1155, 317: ‘The rules of
treaty interpretation are meant to serve the observance of treaty obligations in good faith’.
1165 The ILC, which played a major role in drafting the VCLT, emphasised that the application
of the elements of interpretation in VCLT art 31 would be a single combined operation, as
indicated by the heading ‘General rule’ in the singular. The intention was that ‘[a]ll the various
elements, as they were present in any given case, would be thrown into the crucible, and their
intention would give the legally relevant interpretation’. Instead of any legal hierarchy, it was
‘considerations of logic … which guided the Commission in arriving at the arrangement’: ‘Draft
Articles on the Law of Treaties with Commentaries’ [1966] II Yearbook of the International
Law Commission 183, 219–20 [8]–[9]. See also ‘Draft Conclusions on Subsequent Agreements
and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries’,
UN Doc A/73/10, 16, 21–2 [12]: ‘The reference to the process of interpretation as a “single
combined operation” avoids a possible misunderstanding that any one of the different means
of interpretation has priority over others’. But see Aust, Modern Treaty Law and Practice,
above n 556, 208: ‘although [VCLT art 31(1)] contains both the textual (or literal) and the
effectiveness (or teleological) approaches, it gives precedence to the textual’. See also
1166 ‘Draft Articles on the Law of Treaties with Commentaries’ [1966] II Yearbook of the
International Law Commission 183, 220 [9]: ‘[the elements referred to in VCLT art 31(3)] are
all of an obligatory character and by their very nature could not be considered to be norms of
interpretation in any way inferior to those which precede them’.
lesser significance.\textsuperscript{1167} The emphasis on the equality of the primary means of interpretation does not mean that the text is unimportant but merely that the context and object and purpose are of like importance. Possible meanings derived from the context or from the object and purpose are as a result limited by the text, and thus ‘one of the (originally many possible) meanings will eventually prevail’.\textsuperscript{1168}

6.2.2.1 Text

The natural place to begin the interpretation of a treaty is its text (‘the ordinary meaning of the terms’). The starting point is ‘the elucidation of the meaning of the text, and not an investigation \textit{ab initio} into the intentions of the parties’.\textsuperscript{1169} The text is accordingly presumed to be the authentic expression of the intentions of the parties.

The textual approach, as articulated in article 31(1) of the \textit{VCLT}, entails three separate principles. First, the treaty shall be interpreted in good faith. Second, the parties are presumed to have the intention that appears from the ordinary meaning of the terms. Third, the ordinary meaning of a term is not to be determined abstractly but in the context of the treaty and in the light of its object and purpose.\textsuperscript{1170} The express significance of context and object and purpose reflects the ‘relativist view of hermeneutics’ underlying the general rule of interpretation. From this view, the terms are not seen as holding any meaning of their own but instead are given meaning ‘by the interpreter in good faith’.\textsuperscript{1171} The recognition of the interpreter’s role also helps to explain so-called intertemporal interpretation, according to which the meaning of a term may change over time. As pointed out by Linderfalk, the use of ‘generic referring expressions’ is an indication that the ordinary meaning shall be determined with reference to the language used at the time of interpretation.\textsuperscript{1172} By contrast, a technical term shall be given the special meaning intended by the parties.\textsuperscript{1173}

\textsuperscript{1167} Ibid 220 [9]: ‘the logical consideration … is that these elements are extrinsic to the text. But these three elements are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them’.

\textsuperscript{1168} Villiger, above n 556, 428.


\textsuperscript{1170} Ibid 220.

\textsuperscript{1171} Villiger, above n 556, 426. This appears to be the same idea that Orakhelashvili refers to as ‘autonomous meaning’. Orakhelashvili, above n 1155, 335–8.

\textsuperscript{1172} Linderfalk, \textit{On the Interpretation of Treaties}, above n 1155, 73–95.

\textsuperscript{1173} \textit{VCLT} art 31(4).
6.2.2.2 Context

Proceeding to the context, a basic distinction may be made between materials of an internal versus external nature to the treaty being interpreted. Whereas article 31(2) of the *VCLT* deals with materials of an internal character, article 31(3) deals with such materials of an external character. The context comprises, in addition to other parts of the treaty, two classes of documents:

a) any agreement relating to the treaty … made between all the parties in connection with the conclusion of the treaty;

b) any instrument … made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.\(^{1174}\)

In addition, article 31(3) of the *VCLT* refers to certain material of an external character to the treaty subject to interpretation. It specifies that the following elements shall be taken into account together with the context:

a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions

b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c) any relevant rules of international law applicable in the relations between the parties.

The obligation to take into account subsequent agreements regarding the interpretation or the application of a treaty — article 31(3)(a) — reflects the view that an agreement on the interpretation of a provision reached before or at the time of conclusion of a treaty is to be regarded as forming part of the treaty.\(^{1175}\) Similarly, subsequent practice in the application of the treaty — article 31(3)(b) — is important because it constitutes ‘objective evidence of the understanding of the parties as to the meaning of the treaty.’\(^{1176}\) However, the existence of subsequent practice alone is not sufficient for forming an element of interpretation; the practice must also establish ‘the agreement of the parties regarding its interpretation’.\(^{1177}\) Accordingly, the interpretative value of subsequent practice varies depending on whether it is expressive for the understanding of the parties. Not every party must have engaged in the practice for it to be part of the external context of the treaty, but all parties must have accepted it.\(^{1178}\) However, subsequent practice that does not reflect

\(^{1174}\) Ibid art 31(2).


\(^{1176}\) Ibid 221 [15].

\(^{1177}\) *VCLT* art 31(3)(b).

\(^{1178}\) ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries’, UN Doc A/73/10, 16, 20; ‘Draft Articles on the Law of Treaties with Commentaries’ [1966] *Yearbook of the International Law*
the agreement of all parties but only of a group of them may sometimes be used as a supplementary means of interpretation.\textsuperscript{1179} The significance of subsequent agreements and subsequent practice in the general legal framework of the interpretation of treaties recognises that ‘the common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty.’\textsuperscript{1180}

Article 31(3)(c) of the \textit{VCLT} adds a third element to take into account together with the context, namely ‘any relevant rules of international law applicable in the relations between the parties’. The basic meaning is that a treaty shall be interpreted in the wider context of international law — systemic integration. Even though this may seem obvious, not least if accepting that international law is a legal \textit{system}, systemic integration is one of the most intricate of all elements of interpretation.\textsuperscript{1181} Any norm that springs from the principal sources of international law may be taken into account.\textsuperscript{1182} However, not all norms of international law may be taken into account — only those that are both ‘\textit{relevant}’ and ‘\textit{applicable} in the relations between the parties’.\textsuperscript{1183} Norms that only apply to some of the parties may therefore not be taken into account as primary means of interpretation. Accordingly, in article 31(3)(c) of the \textit{VCLT}, ‘parties’ shall be read as ‘all parties to the treaty’.\textsuperscript{1184} This limitation is

\textit{Commission 183, 221 [15]. This point was highlighted by the ICJ in \textit{Whaling in the Antarctic (Australia v Japan) (Judgment)} [2014] ICJ Rep 226, in which the Court found that certain resolutions of a treaty body could not be regarded as subsequent agreement or subsequent practice within the meaning of \textit{VCLT} arts 31(3)(a)–(b). The reason was that the resolutions had been ‘adopted without the support of all state parties to the [treaty], and, in particular, without the concurrence of [one of the parties to the dispute]’: at 32 [83].}

\textsuperscript{1179} ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries’, UN Doc A/73/10, 16, conclusion 2.5. See below Section 6.2.3.4 Agreements and Practice among a Sub-Group of Parties.

\textsuperscript{1180} ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries’, UN Doc A/73/10, 24 [3].

\textsuperscript{1181} See above Section 6.1 International Law as a Legal System.

\textsuperscript{1182} Accordingly, the phrase ‘rules of international law’ is normally thought to correspond with the sources of international law as set out in the \textit{Statute of the International Court of Justice} art 38(1): see above Section 1.4.2 Method and Material. See, eg, Villiger, above n 556, 433; Orakhelashvili, above n 1155, 366; Gardiner, above n 1155, 307; Linderfalk, \textit{On the Interpretation of Treaties}, above n 1155, 177; \textit{ILC Study Group Report on Fragmentation}, UN Doc A/CN.4/L.682, 217 [426]; Dörr, ‘Article 31’, above n 1155, 605; Fogdestam Agius, above n 1089, 311.

\textsuperscript{1183} \textit{VCLT} art 31(3)(c) (emphasis added).

\textsuperscript{1184} This point was highlighted by a panel of the World Trade Organization (WTO) in the \textit{EC-Biotech} case. In interpreting \textit{VCLT} art 31(3)(c), the Panel noted that it does not refer to ‘one or more parties’ or to ‘the parties to the dispute’ and that \textit{VCLT} art 2(1)(g) defines ‘party’ as ‘a state which has consented to be bound by the treaty and for which the treaty is in force’. The Panel meant that ‘[i]t may be inferred from these elements that the rules of international law applicable in the relations between “the parties” are the rules of international law applicable in
naturally more important in relation to other treaties than to customary law, which is generally binding for parties as well as non-parties to the treaty subject to interpretation. However, in assessing the applicability of a specific norm it needs to be noted that treaties may codify customary international law.\textsuperscript{1185}

The heart of the difficulties associated with article 31(3)(c) of the \textit{VCLT} seems to lie in its function as an expression for the objective of systemic integration, that is, ‘the process … whereby international obligations are interpreted by reference to their normative environment’.\textsuperscript{1186} This feature was highlighted in the \textit{Oil Platforms} case.\textsuperscript{1187} The central question in that case was whether the United States, by conducting a number of attacks on Iranian oil platforms in the Persian Gulf during the so-called Tanker War in the 1980s, had violated a provision concerning freedom of commerce and navigation in the \textit{Treaty of Amity, Economic Relations, and Consular Rights, United States of America–the relations between the states which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force'}, that is, all parties to the treaty being interpreted: Panel Report, \textit{European Communities—Measures Affecting the Approval and Marketing of Biotech Products}, WTO Doc WT/DS291–293/R (29 September 2006) 333 [7.68]. For further comments on the case, see \textit{ILC Study Group Report on Fragmentation}, UN Doc A/CN.4/L.682, 227 [448]. See also Orakhelashvili, above n 1155, 368.

\textsuperscript{1185} See, eg, Noll, ‘Seeking Asylum at Embassies’, above n 584, 552 n 39, criticising Lauterpacht and Bethlehem, above n 626, for taking into account the ICCPR and the ECHR — as elements of interpretation within the meaning of \textit{VCLT} art 31(3)(c) — in an interpretation of the prohibition of \textit{refoulement} under the Refugee Convention. According to Noll, the interpretation is methodologically flawed since ‘the group of states bound by the [Refugee Convention] is not coextensive with either the group bound by the ICCPR or the group bound by the ECHR’. However, if the extraterritorial applicability of the non-refoulement obligations under the ICCPR and the ECHR is the result of customary norms applicable to all parties to the Refugee Convention, it seems that it may be correct to take them into account in the interpretation of the geographical reach of the non-refoulement obligation of the Refugee Convention. See also above nn 709–11 and accompanying text.

\textsuperscript{1186} \textit{ILC Study Group Report on Fragmentation}, UN Doc A/CN.4/L.682, 207 [412]. But see Orakhelashvili, above n 1155, 367: ‘[a]lthough the integration of extraneous rules into a treaty can be an interpretative outcome in some cases, it is certainly not a principle, still less a principle that applies across the board’.

\textsuperscript{1187} \textit{Oil Platforms} [2003] ICJ Rep 161. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16, 19 [53] (‘Namibia Case’): ‘interpretation cannot remain unaffected by the subsequent development of law … an international instrument has to be interpreted and applied \textit{within the framework of the entire legal system prevailing at the time of the interpretation}’ (emphasis added).
Iran. The Court found that the United States had not. Even so, the Court examined a defence invoked by the United States, namely that the actions complained of by Iran were justified under another provision of the treaty, providing that

> [t]he present treaty shall not preclude the application of measures … necessary to fulfil the obligations of a high contracting party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

For the interpretation of this provision, the Court stated:

> under the general rules of treaty interpretation, as reflected in the [VCLT], interpretation must take into account ‘any relevant rules of international law applicable in the relations between the parties’ (art 31(3)(c)). The Court cannot accept that [the treaty subject to interpretation] was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to his question thus forms an integral part of the task of interpretation entrusted to the Court.

After a thorough discussion of the conditions of legitimate self-defence under international law, the Court concluded that

> the actions carried out by the United States … cannot be justified … as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated … by that provision of the treaty.

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1189 The principal reason was that there was at the time of the attacks no commerce between the territories of Iran and the United States with respect to oil produced from the attacked platforms. The attacks could therefore not be said to have infringed the freedom of commerce in oil between the parties, which was protected under the relevant treaty: Oil Platforms [2003] ICJ Rep 161, 207 [98].


1192 Ibid 199 [78].
The judgment was supported by a large majority of the judges, even though different views on the question of treaty interpretation were expressed in the separate opinions. The judgment has been criticised, primarily on arguments that the jurisdiction of the Court was limited to pronouncing on the provisions concerning freedom of commerce and navigation and not the international law on the use of force.\footnote{See, eg, Aust, Modern Treaty Law and Practice, above n 556, 216. Aust refers to the judgment as a misunderstanding of VCLT art 31(3)(c) and notes, drawing on the separate opinion of Judge Higgins, that the Court ‘used [art 31(3)(c)] as a peg on which to hang the whole corpus of international law on the use of force’. In her separate opinion, Judge Higgins also pointed out the need to interpret the provision in accordance with the ordinary meaning of the terms and in its context which, in her view, was ‘clearly that of an economic and commercial treaty’. In critical words, she argued that the ‘Court has … not interpreted [the treaty] by reference to the rules on treaty interpretation [but] rather invoked the concept of treaty interpretation to displace the applicable law’: Oil Platforms [2003] ICJ Rep 161, 237 [46], 238 [49], 240 [54] (Higgins J). See also Rosalyn Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’ (2006) 55 International and Comparative Law Quarterly 791, 802–3; Orakhelashvili, above n 1155, 368: ‘Oil Platforms is not a case that can explain the mainline aspect of the operation of art 31(3)(c)’.} Even so, the judgment in Oil Platforms is an important recognition of the significance of systemic integration for the interpretation of a treaty.\footnote{See also Namibia Case [1971] ICJ Rep 16.} However, the judgment provides little clarification of the practical application of systemic integration.\footnote{For further comments, see, eg, Villiger, above n 556, 434; ILC Study Group Report on Fragmentation, UN Doc A/CN.4/L.682, 228–32 [451]–[460]. In the Final Report of the Study Group, it is argued that it may have been unnecessary for the ICJ to have recourse to VCLT art 31(3)(c), since the treaty subject to interpretation contained the term ‘necessary’, which required interpretation. The Study Group suggested that ‘[a]bsent the possibility of using a documented party intent to elucidate it, the Court could simply have turned to what “general international law” said on the content of that standard’: at 232 [459]. The rationale for this, the Study Group meant, would be the universal character of customary international law. What the Study Group seems to suggest is that the ICJ and other international courts habitually have taken into account customary international law and general principles of international law as lex generalis when dealing with particular agreements, notwithstanding any limitation of the jurisdiction of the Court, and that the ICJ simply could have done so in Oil Platforms — without explicitly referring to systemic integration. However, it does not seem obvious how any material external to the treaty could have been integrated as a primary means of interpretation without resorting to systemic integration or any of the other elements referred to in VCLT art 31(3).} The ‘principle of systemic integration’ was also the subject of much attention by the ILC in its work on fragmentation of international law, in which the Commission sought to examine whether international law itself — and in particular the general legal framework of the interpretation of treaties — would not solve the problems of substantive fragmentation of international law.\footnote{For the concern about fragmentation of international law, see above n 50.} The ILC Study Group laid particular emphasis on the lex specialis and
lex posterior maxims as well as the systemic character of international law. The Study Group even stated:

Without the principle of “systemic integration” it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, which is not reducible to the good of any particular institution or regime”.

Similar to the judgment by the ICJ in the Oil Platforms, the work by the ILC Study Group is an important acknowledgement of the role of systemic integration while leaving many practical issues unanswered.

The understanding of article 31(3)(c) of the VCLT put forward in this thesis is thought to be restrictive. The main reason is that it only accepts norms that apply to all parties to the treaty subject to interpretation and that govern the same subject matter. Merkouris has taken a somewhat different and seemingly more extensive approach arguing that the scope of article 31(3)(c) of the VCLT, and thereby the external norms that may be taken into account through it, is guided by a single and all-encompassing standard referred to as

1197 ILC Study Group Report on Fragmentation, UN Doc A/CN.4/L.682, 244 [480]. Higgins is sceptical about VCLT art 31(3)(c) as the overall answer to systemic fragmentation because ‘invocation of this provision brings with it as many problems as it resolves’. Higgins, ‘A Babel of Judicial Voices?”, above n 1193, 803−4. For the concept of so-called self-contained regimes, see Koskenniemi, ‘Outline of the Chairman of the ILC Study Group on Fragmentation of International law’, above n 1090: ‘A regime is a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches. When such a regime seeks precedence in regard to the general law, we have a “self-contained regime”, a special case of lex specialis’. See also ILC Study Group Report on Fragmentation, UN Doc A/CN.4/L.682, 216.

1198 This understanding lies close to Orakhelashvili, above n 1155, 371−3: ‘Given the nature of treaties as lex specialis, the relevance of the rest of international law in interpreting them must be viewed as limited to two fields. The first field is the clarification of meaning of the terms employed in the treaty … The second field … is where the meaning of treaty rules is qualified by external factors.’

1199 Accordingly, the requirement that external rules must be ‘relevant’ is taken to mean that the rule must govern the same ‘state of affairs’ as the treaty subject to interpretation. See, eg, Gardiner, above n 1155, 299, 305, 330–1; Dörr, ‘Article 31’, above n 1155, 610; Linderfalk, On the Interpretation of Treaties, above n 1155, 178. While this may first seem an obvious criterion, it may not always be easy to apply. In fact, the relevancy criterion may be circular. This is because there is no pre-existing classification scheme of existing subjects. In the words of the ILC Study Group on Fragmentation of International Law, ‘[e]verything would be in fact dependent on argumentative success in pigeon-holing legal instruments as having to do with “trade”, instead of “environment”, “refugee law” instead of “human rights law”, “investment law” instead of “law of development” … The criterion of “subject-matter” leads to a reductio ad absurdum.’: ILC Study Group Report on Fragmentation, UN Doc A/CN.4/L.682, 18 [22]. Although this passage appears in a discussion of the classification of normative conflict, it seems to be relevant also to the relevancy criterion of VCLT art 31(3)(c). For another sceptical view, but for different reasons, see Orakhelashvili, above n 1199, 365–82.
‘the proximity criterion’. This criterion encompasses four different elements of proximity: terminological proximity (how), subject matter proximity (what), temporal proximity (when), and actor/shared parties proximity (who). The relationship between the different elements is complementary and thus norms that meet all of the elements or only some of them may fulfil the proximity criterion. The proximity elements are therefore not cumulative but alternative, so that the presence of certain elements can compensate for the absence of others. The flexible nature of the proximity criterion allows Merkouris to conclude that ‘the term “parties” does not always mean “parties to the treaty” nor does it always mean parties to the dispute’. Thus, the ‘actor/shared parties element’ is, like all other elements, not of an absolute nature but dependent on the fulfilment of the other elements.

Merkouris arrives at this proximity criterion from an interpretation of article 31(3)(c) that makes extensive use of jurisprudence from international courts and tribunals to determine its meaning. Accordingly, he argues:

One of the most important advantages of the proximity criterion, apart from it revealing how the term “relevant” [of article 31(3)(c)] is identified, is that it can explain the variety of approaches both of pre-VCLT and post-VCLT jurisprudence.

Although the notion of the proximity criterion is both elaborate and well-researched, it does not seem very convincing. In determining the meaning of article 31(3)(c) through the jurisprudence by courts and tribunals, Merkouris seems to subscribe to the idea that such institutions are at all times correct in their pronunciations of the content of the law. However, this assumption could be challenged, not least if the relevant jurisprudence is inconsistent and shows several different views. As a result, the theory of the proximity criterion serves mainly as a helpful description of the various approaches that can be derived from this jurisprudence without shedding more light on the meaning of article 31(3)(c) than what can be derived from this very jurisprudence. For this reason, Merkouris’s notion of the proximity criterion is ultimately mainly a restatement of the same uncertainty of the scope of article 31(3)(c) as that given by this jurisprudence. Whereas others have tried to dissect article 31(3)(c) and separately examine its components (‘rules’, ‘applicable’, ‘parties’, ‘relevant’ and so on), Merkouris takes a step back, distancing himself from such precise analyses, and suggests that all of these components should be considered jointly in an integrated way. In doing so, some of the clarity attained by others seems to be lost and the proximity criterion merely restates the generality of the terms of article 31(3)(c).

1201 Ibid 93.
1202 Ibid 92 (emphasis in original).
6.2.2.3 Object and Purpose
The last of the primary means of interpretation set out in article 31 of the *VCLT* is the object and purpose. Notably, the *VCLT* does not provide any guidance on how the object and purpose shall be determined. Neither does it say if a treaty can have only one or several objects and purposes. Furthermore, it does not say which object and purpose is the relevant one: the object and purpose of the treaty as a whole or of the particular provision subject to interpretation? That of the treaty as a whole may naturally be different from that of a particular provision. Regardless, it seems reasonable to limit the use of the object and purpose to the other primary means of interpretation: the text and context.1203 However, if the meaning of the treaty continues to vary even after such limitation, supplementary means of interpretation need to be considered.

6.2.3 Supplementary Means of Interpretation
Article 32 of the *VCLT* deals with supplementary means of interpretation. It reads:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

This shows that the purpose of treaty interpretation is not to determine the intention of the drafters before and during the negotiations of the treaty but rather the intention of the parties at the time of and after the adoption of the treaty.1204 Preparatory works and other material that might be expressive of the intentions before and during the negotiations of the treaty may, therefore, not

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1204 See, eg, ‘Draft Articles on the Law of Treaties with Commentaries’ [1966] II *Yearbook of the International Law Commission* 183, 223 [18]: ‘the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and … the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation’.
be used categorically in the interpretation of a treaty but only for three purposes:

i. ‘to confirm the meaning resulting from the application of [the general rule of interpretation]’
ii. ‘to determine the meaning when the interpretation according to [the general rule of interpretation] leaves the meaning ambiguous or obscure’
iii. ‘to determine the meaning when the interpretation according to [the general rule of interpretation] … leads to a result which is manifestly absurd or unreasonable.’

The relationship between the primary means of interpretation (article 31) and the supplementary ones (article 32) is not entirely separate. Instead, ‘a general link between the two articles … maintains the unity of the process of interpretation’. This link arises from the general permissibility of using supplementary means of interpretation for confirmation purposes. Conversely, it is only if the primary means of interpretation lead to a meaning that is either ‘ambiguous or obscure’ or ‘manifestly absurd or unreasonable’ that supplementary means may be used to establish a meaning beyond that resulting from the application of the general rule of interpretation.

It follows from the term ‘including’ in article 32 that the preparatory work of the treaty and the circumstances of its conclusion are not the only supplementary means of interpretation. However, the VCLT itself does not specify what other material may be used as supplementary means of interpretation. Thinkable examples include, inter alia, preparatory works of earlier versions of the treaty, interpretative declarations that do not qualify as reservations, general techniques of interpretation and non-authentic translations. What follows is a brief discussion of some possible supplementary means of interpretation that may be relevant to the interpretation of the concept of ‘place of safety’.

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1205 VCLT art 32 (emphasis added).
1207 VCLT art 32.
1208 See, eg, Oppenheim’s, above n 34, 1277–82; Aust, Modern Treaty Law and Practice, above n 556, 220–1; Villiger, above n 556, 445–6; Bouthillier, above n 1155, 861–3.
6.2.3.1 Preparatory Work
The preparatory work of a treaty includes written material from its preparations, understood in a broad sense.\(^{1209}\) Such material may include, for example, correspondence during negotiations, successive drafts of the treaty, records from the conference where it was adopted, records from preparatory committees and work by the ILC. Aust also refers to ‘explanatory statements by an expert consultant at a codification conference’ and ‘uncontested interpretations by the chairman of a drafting committee’.\(^{1210}\) Linderfalk similarly favours a broad understanding,\(^{1211}\) including ‘all … representations produced in the preparation for the establishing of the treaty as definite’.\(^{1212}\)

6.2.3.2 Circumstances at the Time of the Conclusion of the Treaty
Naturally, every conclusion of a treaty has a background — a set of immediately surrounding political, social and cultural factors. The reference to ‘circumstances at the time of the conclusion of the treaty’\(^{1213}\) justifies having recourse to such factors or ‘the milieu … surrounding the treaty’s conclusion’ as supplementary means of interpretation.\(^{1214}\) Such circumstances do not have the ‘technical connotation of preparatory works’ but may include a wide range of elements existing at the time of the conclusion of the treaty.\(^{1215}\) The relevant circumstances naturally differ from treaty to treaty and need to be identified on a case-by-case basis. Furthermore, it may not always be apparent if an element belongs to the ‘context’ of a treaty, within the meaning of article 31, or to the ‘circumstances at the time of the conclusion of the treaty’, within the meaning of article 32.\(^{1216}\)

6.2.3.3 Treaties in Pari Materia
Other treaties concerning the same subject matter that use the same or similar terms may be used as supplementary means of interpretation.\(^{1217}\) Such treaties may sometimes be part of the external context, within the meaning of article 31(3)(c) of the VCLT. If not all parties are parties to the other treaty, it

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\(^{1209}\) ‘Draft Articles on the Law of Treaties with Commentaries’ [1966] II Yearbook of the International Law Commission 183, 223 [20]: ‘[n]othing] would be gained by trying to define travaux préparatoires; indeed, to do so might only lead to the possible exclusion of relevant evidence’. See generally Orakhelashvili, above n 1155, 382–92; Villiger, above n 556, 445; Oppenheim’s, above n 34, 1277–8; Bouthillier, above n 1155, 852–9.

\(^{1210}\) Aust, Modern Treaty Law and Practice, above n 556, 218.

\(^{1211}\) Linderfalk, On the Interpretation of Treaties, above n 1155, 235–45.

\(^{1212}\) Ibid 245.

\(^{1213}\) VCLT art 32.

\(^{1214}\) Villiger, above n 556, 445.

\(^{1215}\) Bouthillier, above n 1155, 859.

\(^{1216}\) Ibid 859 n 112 citing Linderfalk, On the Interpretation of Treaties, above n 1155, 248–9.

\(^{1217}\) Aust, Modern Treaty Law and Practice, above n 556, 220; Villiger, above n 556, 446; Linderfalk, On the Interpretation of Treaties, above n 1155, 255–9. According to Bouthillier, the ICJ has ‘considered other treaties concluded … [but] has not expressly stated that these treaties are supplementary means’: Bouthillier, above n 1155, 862.
does not easily fit within article 31(3) of the VCLT. However, in such a scenario, the other treaty may still be indicative of the intention of the parties and therefore relevant to use as a supplementary means of interpretation. The underlying logic is that drafters of treaties can be assumed to pursue terminological consistency and use terms with precision. This seems similar to why material referred to in article 31(3) of the VCLT can be used as a primary means of interpretation: no treaty exists and operates in complete isolation from its legal context.\textsuperscript{1218}

### 6.2.3.4 Agreements and Practice among a Sub-Group of Parties

A further possible type of supplementary means of interpretation is agreements and practice among a sub-group of parties to the interpreted treaty. Even though such materials do not apply to all parties to the interpreted treaty and so are not part of the context under article 31,\textsuperscript{1219} they may still be used as supplementary means of interpretation.\textsuperscript{1220} For essentially the same reasons that other relevant and applicable rules of international law may be indicative of the intentions of the parties and so shall be used as primary means of interpretation under article 31(3)(c), other relevant and semi-applicable materials may also be indicative and used as supplementary means of interpretation under article 32 of the VCLT.

### 6.2.3.5 Principles of Conflict Resolution

Last, principles of conflict resolution such as vertical hierarchy (e.g., jus cogens), and lex posterior derogat legi priori and lex specialis derogat legi generali, may be used as supplementary means of interpretation to resolve conflicts arising within the interpretation of a treaty.\textsuperscript{1221}

Naturally, normative conflicts may arise not only within the interpretation of a treaty but also between two or more similarly applicable but contradictory norms of international law. However, the possible use of principles of conflict resolution as supplementary means of interpretation relates only to the former type of normative conflicts, that is, within the interpretation. The latter form

\textsuperscript{1218} See above Section 6.1.3 The Convergent View.

\textsuperscript{1219} See above Section 6.2.2.2 Context. See also Bouthillier, above n 1155, 861–2 n 130.

\textsuperscript{1220} See, eg, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries’, UN Doc A/73/10, 16, conclusion 2.5; Villiger, above n 556, 446 and reference there to Santiago Torres Bernárdez, ‘Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties’ in Gerhard Hafner et al (eds), Liber Amoricum: Professor Ignaz Seidl-Hohenfelder (Kluwer Law International, 1998) 721.

\textsuperscript{1221} See, eg, Villiger, above n 556, 445; Aust, Modern Treaty Law and Practice, above n 556, 221.
of conflicts is not really a matter of treaty interpretation but rather relates to the choice between norms.1222

Principles of conflict resolution may only be used if there is a conflict. However, the existence of a conflict may not always be obvious. Jenks has suggested that ‘a conflict … arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties’.1223 In seemingly more precise terms, the ILC Study Group on Fragmentation of International Law embraced ‘a wide notion of conflict as *a situation where two rules or principles suggest different ways of dealing with a problem*.1224 The Study Group took this view because

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\text{[focusing on a mere logical incompatibility mischaracterizes legal reasoning as logical subsumption, [while in fact] any decision will involve interpretation and choice between alternative rule-formulations and meanings that cannot be pressed within the model of logical reasoning.1225}
\]

Merkouris has argued that principles of conflict resolution may be applied already at the first stage of the process of interpreting a treaty, that is, as a primary means of interpretation under article 31 of the *VCLT*. He means that such principles can be used through article 31(3)(c) as ‘“relevant rules” that can be used to determine the “relevance” of other “rules”’.1226 There is little reason to doubt that traditional principles of conflict resolution satisfy the ‘applicability criterion’ of article 31(3)(c) as customary international law or general principles of law.1227 Even so, the idea does not seem very convincing. The problem is not that the argument is legally wrong or poorly founded but rather that it relies on an illogical presupposition, namely that a normative conflict may arise before any meaning of the treaty has been established, that is, before the interpretation pursuant to article 31 of the *VCLT* has come to an end. Quite the contrary, it seems that there can be no conflict within the meaning of a treaty before all materials covered by the primary means of interpretation have been ‘thrown into the crucible’.1228 As a result, it seems more sensible to deal with the resolution of normative conflicts as a matter of

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\text{1222 See, eg, *ILC Study Group Conclusions on Fragmentation*, UN Doc A/CN.4/SER.A/2006/ Add.1 (Part 2) 1 [2], distinguishing between ‘relationships of interpretation’ and ‘relationships of conflict’.}\\
\text{1223 Wilfred Jenks, ‘Conflict of Law-Making Treaties’ (1953) 30 *British Yearbook of International Law* 401, 429.}\\
\text{1224 *ILC Study Group Report on Fragmentation*, UN Doc A/CN.4/L.682, 19 [25].}\\
\text{1225 Ibid and further references there. See also Merkouris, above n 1090, 169–72.}\\
\text{1226 Merkouris, above n 1090, 230.}\\
\text{1227 For a discussion of the legal nature of principles of conflict resolution, see ibid 173–6.}\\
the second stage of treaty interpretation, that is, as a supplementary means of interpretation.

6.3 Summary

This chapter has sought to describe the standard of interpretation relevant to the concept of ‘place of safety’. It has done so by considering the general legal framework of the interpretation of treaties, as set out in the VCLT, against the background of a more theoretical discussion where systemic integration was conceptualised as a point of confluence between two opposing views of the systemic quality of international law. These views were referred to as the convergent view and the divergent view. It is hoped that this way of describing the standard of interpretation helps to highlight the character of the concept of ‘place of safety’ as involving a multiplicity of areas of international law. A pertinent question against the background of the multifaceted character of the surrounding law is whether and, if so, to what extent and how the various meanings resulting from these different areas can be gathered and combined.

The present chapter has shown that the interpretation of the concept of ‘place of safety’ is not precisely a subjective matter. Quite the contrary, it is a process guided by a specific standard. This standard relies on the general legal framework of the interpretation of treaties set out in the VCLT. Accordingly, the concept shall be ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Supplementary means of interpretation may be used to either confirm or determine the meaning.

The extent to which norms under other areas of international law may be taken into account in the interpretation is linked to the notion of systemic integration and article 31(3)(c) of the VCLT. A more convergent view of international law lends support for a more inclusive and far-reaching systemic integration incorporating additional external norms into the interpretation. By contrast, a more divergent view supports a more exclusive and limited systemic integration incorporating fewer external norms. The recognition of the theoretical possibility of these two conflicting views and the imagined scale between them is not meant to propose that interpreters of treaties are free to pick and choose their own understandings of systemic integration. Rather, the idea is mainly to suggest that the meaning of systemic integration is dynamically evolving as a result of the development of the systemic quality of international law as a whole.

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1229 VCLT art 31(1).
Without ruling out the possibility of other views, the present thesis opts for a seemingly conventional and relatively restrictive understanding of systemic integration in which only norms that relate to the same subject matter and that apply between all parties to the treaty subject to interpretation qualify for integration. The practical significance of this understanding to the meaning of the concept of ‘place of safety’ remains to be clarified. This is the purpose of the next chapter, which deals with the application of the standard of interpretation to the concept of ‘place of safety’.
7 Meaning of the Concept of ‘Place of Safety’

Where shall refugees and migrants recovered in the course of rescue operations at sea be taken for disembarkation? What is the meaning of the concept of ‘place of safety’? Can it mean different things in different situations? Is it prone to change over time?

The preceding chapter explained that there is more to the interpretation of a treaty than merely its text and that some interpretative elements are capable of evolving over time.\textsuperscript{1230} Part I of this thesis showed that situations in which the concept of ‘place of safety’ requires application usually involve a diversity of applicable norms and several different areas of international law.\textsuperscript{1231} Regardless, the concept in question is an issue of primary concern in rescue at sea situations. Naturally, those involved in a rescue operation are normally eager to conclude it by delivery of the survivors to a place of safety. This raises questions about the role and influence of other legal norms under the concept of ‘place of safety’. How is it possible to comply with applicable norms under other areas of international law at the same time as those under international maritime rescue law? How do the international law of the sea, international refugee law, international human rights law and international law against transnational organised crime relate to the meaning of the concept of ‘place of safety’? Are there any contradictions within the meaning and if so how can they be resolved?

This chapter therefore focuses in-depth on the meaning of the concept of ‘place of safety’.\textsuperscript{1232} While the preceding chapters dealt with the legal context (Chapters 2–5) and the standard of interpretation (Chapter 6), the present chapter deals with the interpretation of the concept itself. The presentation follows, for clarity, the structure of the legal framework of the interpretation of treaties set out in the \textit{VCLT}. Accordingly, it begins with primary means of interpretation, as set out in article 31 of the \textit{VCLT}, and continues to supplementary means of interpretation, as set out in article 32 of the \textit{VCLT}.

\textsuperscript{1230} See above Section 6.2 Rules of Interpretation.
\textsuperscript{1231} See above Chapters 2–5.
\textsuperscript{1232} Parts of this chapter, mainly in a slightly different form, appear in Ratcovich, ‘The Concept of “Place of Safety”’, above n 5.
Furthermore, it includes sub-chapters on ‘Text’, ‘Context’ and ‘Object and Purpose’. The chapter concludes with a summary of the meaning of the concept of ‘place of safety’. However, before initiating the interpretation a couple of introductory remarks may be helpful.

7.1 Introduction

The concept of ‘place of safety’ appears in one provision of the SOLAS Convention and two provisions of the SAR Convention. It is not self-explanatory. While the word ‘place’ seems relatively straightforward, the word ‘safety’ is of more open-ended character. The phrase ‘place of safety’ may therefore refer equally well to a place where it is safe in general or one where it is safe from some threats (but not from others). In the former sense, ‘place of safety’ would encompass any threat, including drowning as well as persecution, ill-treatment and other risks to the personal security of survivors. In the latter sense, it would be limited to some threats, such as drowning, hypothermia and other natural dangers of the marine environment. The ambiguity of the ordinary meaning of the terms underscores the need for interpretation.

Another matter of initial character concerns the standard of interpretation, which was discussed in the preceding chapter. Neither the SOLAS Convention nor the SAR Convention contains specific provisions on interpretation. Instead, the general legal framework of the interpretation of treaties applies. Both conventions are ‘international agreements concluded between states in written form and governed by international law’ and thus are treaties as defined in the VCLT. However, they were both adopted prior to the entry into force of the VCLT and so, because of its non-retroactivity, are beyond the scope of the VCLT itself. The general legal framework of the interpretation of treaties set out in the VCLT is, on the other hand, understood to reflect customary international law existing at the time of the conclusion of the relevant conventions. The standard of interpretation relevant to the concept of ‘place of safety’ is therefore, stricte sensu, not determined by the VCLT but by the customary equivalents of the relevant provisions. References will nonetheless, for simplicity, be made to the VCLT.

1233 SAR Convention annex paras 1.3.2, 3.1.9; SOLAS Convention annex ch V reg 33(1).
See also above Section 1.8 Terminology.
1234 See below Section 7.2.1 Text.
1235 See above Chapter 6 Standard of Interpretation for the Concept of ‘Place of Safety’.
1236 VCLT art 2(1)(a).
1237 See above n 1157.
1238 Cf VCLT art 4. See above n 1159 and accompanying text.
1239 See above nn 1156, 1160 and accompanying text.
A further matter concerns the unitary character of the concept of ‘place of safety’. Can it really be correct to refer to and treat it as a single concept, even though it appears in several provisions and treaties? There are several reasons to believe so. First, a basic assumption for the interpretation of treaties is that terms and expressions used multiple times in a treaty may be deemed to bear uniform meaning. Unless there are indications to the contrary, the drafters may simply be expected to have been rational and used terms with precision.\(^\text{1240}\) This suggests that the term ‘place of safety’ has the same meaning in the \textit{SAR Convention} as in the \textit{SOLAS Convention}. However, there is at least one more important reason, namely that the meaning of the relevant provisions of the \textit{SAR Convention} form part of the context for the interpretation of the relevant provisions of the \textit{SOLAS Convention} — and vice versa. This will be further explained below.\(^\text{1241}\) For now, it suffices to note that the concept of ‘place of safety’ is dealt with as a single unit with the same meaning in both the \textit{SOLAS Convention} and the \textit{SAR Convention}.\(^\text{1242}\)

### 7.2 Primary Means of Interpretation

#### 7.2.1 Text

The general rule of interpretation, as set out in the \textit{VCLT}, directs the interpreter to ‘the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.\(^\text{1243}\) As already noted, the ordinary meaning of the individual terms — place, of, and safety — seems imprecise.\(^\text{1244}\)

According to general dictionaries, the term ‘place’ refers to ‘a particular part or region of space; a physical locality, a locale; a spot, a location’\(^\text{1245}\) or ‘an area, town, building, etc’,\(^\text{1246}\) while the term ‘safety’ refers to ‘the state of being protected from or guarded against hurt or injury; freedom from danger’\(^\text{1247}\) or ‘a state in which or a place where you are safe and not in danger or at risk’.\(^\text{1248}\) Clearly, these meanings do not specify the kinds of dangers, risks, or injuries encompassed. Neither do the equally authoritative French (‘\textit{lieu sûr}’) and

\(^{1240}\) For the ‘anticipation of perfection’, see above nn 1145–8 and accompanying text.
\(^{1241}\) See below nn 1269–76.
\(^{1242}\) For a similar note, see above Section 1.8 Terminology.
\(^{1243}\) \textit{VCLT} art 31(1).
\(^{1244}\) See above n 1234 and accompanying text.
\(^{1245}\) \textit{Oxford English Dictionary} ‘place’ (n, def 5a).
\(^{1247}\) \textit{Oxford English Dictionary} ‘safety’ (n, def 1a).
\(^{1248}\) \textit{Cambridge Advanced Learner’s Dictionary} ‘safety’ (n, def b2).
Spanish (‘lugar seguro’) wordings seem to provide any clearer meaning.\textsuperscript{1249} In sum, it seems that the ordinary meaning of the terms does not explain whether a place of safety shall be free from \textit{all} or just \textit{some} dangers.

Despite the ambiguous character of the ordinary meaning of the terms, the text sets the limits of the meaning resulting from the application of the other primary means of interpretation. However, it is important to note that the general rule of interpretation does not direct the interpreter to the ordinary meaning plain and simple but to ‘the ordinary meaning \textit{to be given} to the terms … \textit{in their context and in the light of its object and purpose}’\textsuperscript{1250} Accordingly, the interpretation cannot stop at the text but needs to proceed to the other elements of interpretation covered by the general rule of interpretation.

7.2.2 Context

The context of the concept of ‘place of safety’ consists of several different components. First, it entails the texts of the \textit{SOLAS Convention} and the \textit{SAR Convention}, including their preambles and annexes. It also includes the \textit{IMO Guidelines on the Treatment of Persons Rescued at Sea}. In addition to such internal elements, several elements of an external nature, including norms under other areas of international law, also need to be taken into account. While the internal context seems relatively straightforward, the external context triggers more extensive considerations.

While the preambles of the original conventions seem rather rudimentary and mainly provide general references to the duty to rescue at sea, international co-operation and the needs of maritime traffic for such rescues,\textsuperscript{1251} the preambles of the 2004 Amendments are more detailed and explain who bears the primary responsibility for arranging for the place of safety — namely the party responsible for the search and rescue region in which the survivors were recovered.\textsuperscript{1252} Even though the allocation of responsibility is clearly a separate issue, it seems reasonable to assume that it has some bearing on the meaning of the concept. The idea is that the identification of the party responsible for the search and rescue region as also responsible for arranging for the place of safety may be indicative of the parties’ view of the meaning of such a place.

\textsuperscript{1249} Both conventions were established in Chinese, English, French, Russian and Spanish, and each text is equally authentic: \textit{SOLAS Convention} art VIII; \textit{SAR Convention} art VIII. See also \textit{VCLT} art 33(1): ‘When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language’.

\textsuperscript{1250} \textit{VCLT} art 31(1) (emphasis added). This seems to reflect a ‘relativist view of hermeneutics’, see above n 1171 and accompanying text.

\textsuperscript{1251} \textit{SOLAS Convention} Preamble paras 2–3; \textit{SAR Convention} Preamble paras 2–5.

\textsuperscript{1252} 2004 Amendments to the \textit{SOLAS Convention} Preamble para 8; 2004 Amendments to the \textit{SAR Convention} Preamble para 8.
The parties may, in other words, be expected to have thought of the place of safety as something that the party responsible for the search and rescue region would normally be capable of arranging for. Otherwise, it would not have made much sense to entrust this party with the primary responsibility for arranging for this place.

While the allocation of responsibility therefore seems to suggest that most places of safety are located within the territory of the party responsible for the search and rescue region, it does not seem correct to consider presence within the territory of the responsible state as an essential feature of the meaning of the concept of ‘place of safety’. By contrast, a state that is capable of arranging for a place of safety somewhere other than within its own territory, for example after having been invited by another state to arrange for disembarkation within the territory of that state, seems generally permitted to do so under the concept of ‘place of safety’. The references to the responsible party’s obligation ‘to provide … or to ensure that a place of safety is provided’ and ‘to exercise primary responsibility for … co-ordination and co-operation’ strongly imply such flexibility. Unsurprisingly, this was a matter of significant importance to some delegations during the negotiations that led to the adoption of the 2004 Amendments.

In addition to the preambles, a number of other provisions of the SAR Convention and the SOLAS Convention further elucidate the meaning of the concept of ‘place of safety’. Important material stems from the requirements 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 ship’s intended voyage’ and to

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1253 This means, in essence, that the concept of ‘place of safety’ does not establish a general right of entry into the territory of the party responsible for the search and rescue region — at least not directly. However, this does not mean that a coastal state is always free to arrange for disembarkation outside of its own territory. Naturally, other factors may require coastal states to grant access to their territories. See below Section 7.4 Summary. See also Seline Trevisanut, ‘Is There a Right to be Rescued at Sea? A Constructive View’ (2014) 1 Questions of International Law 3, 7: ‘the coastal state has a “residual obligation” to allow disembarkation on its own territory when it has not been possible to do so safely anywhere else’ (emphasis added); Trevisanut, ‘Search and Rescue Operations at Sea’, above n 70, 432–3. This seems similar to how non-refoulement sometimes resembles a right to enter; see above Section 3.4 Non-Refoulement. But see Papastavridis, The Interception of Vessels, above n 66, 299: ‘there is no residual obligation of the coastal state to allow disembarkation on its own territory when it has not been possible to do so anywhere else.’ See also Klein, ‘International Migration by Sea and Air’, above n 5, 275–80.

1254 2004 Amendments to the SOLAS Convention Preamble para 8; 2004 Amendments to the SAR Convention Preamble para 8; SOLAS Convention annex ch V reg 33(1-1); SAR Convention annex para 3.1.9.

1255 See below Section 7.3 Supplementary Means of Interpretation.
‘arrange for … disembarkation … as soon as reasonably practicable’. These requirements are important because in most cases there will not be merely one but several potential places of safety. However, the number of appropriate places is effectively limited by the requirements to effect disembarkation as soon as reasonably practicable and to minimise the deviation for the rescue ship. Places that can only be reached after lengthy voyages or other time-consuming preparations, such as obstinate attempts to persuade other states to invite disembarkation within their territories, or that involve significant deviations from the ship’s intended course are therefore beyond the scope of the concept of ‘place of safety’.

Moreover, both the SOLAS Convention and the SAR Convention refer to ‘the particular circumstances of the case and guidelines developed by the [IMO]’. The first reference, to ‘particular circumstances’, prevents the meaning of the concept from being determined in the abstract. It also gives the responsible party a certain degree of flexibility to evaluate situations on a case-by-case basis. However, the discretionary power afforded to the responsible party is not unlimited but remains subject to the other aspects of the meaning of the concept of ‘place of safety’.

The second reference, to ‘guidelines developed by the [IMO]’, designates the IMO Guidelines on the Treatment of Persons Rescued at Sea. Despite its legally non-binding character, this document is of central importance to the interpretation. First, the Guidelines reiterate the intent of the 2004 Amendments, namely ‘to ensure that in every case a place of safety is provided within a reasonable time’, and then point out who bears the responsibility for that obligation, namely ‘the contracting government/party responsible for the [search and rescue] region in which the survivors were

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1256 SOLAS Convention annex ch V reg 33(1-1); SAR Convention annex para 3.1.9.
1257 For a couple of examples, see above nn 11–13 and accompanying text.
1258 SOLAS Convention annex ch V reg 33(1-1); SAR Convention annex para 3.1.9.
1259 These other elements include, naturally, ‘the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’: art 31(1) VCLT. For a similar argument, albeit in a different area of law, see Ulf Linderfalk, ‘Treaty Abuse: Why Criticism of the Doctrine is Unfounded’ (2018) 9(2) Journal of International Dispute Settlement 254–90.
1260 See, eg, IMO Guidelines on the Treatment of Persons Rescued at Sea paras 1.1–1.2: ‘The purpose of these Guidelines are [sic] to provide guidance … These Guidelines are intended to help Governments and masters better understand their obligations … and provide helpful guidance with regard to carrying out these obligations’ (emphasis added).
recovered’. With regard to the meaning of the concept, the Guidelines explain that it is a location
- where rescue operations are considered to terminate …
- where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met … [and]
- from which transportation arrangements can be made for the survivors’ next or final destination.

The Guidelines continue to explain that a ‘place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea’. However, 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’. Furthermore, the Guidelines clarify that the delivery of the survivors should take into account ‘factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units’. Finally, it is provided that:

The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum seekers and refugees recovered at sea.

In the light of the broad scope of these directions, it seems that the Guidelines intend to provide a full and final picture of the concept of ‘place of safety’. However, the directions provided are not very precise in their formulations but leave many questions unanswered. While this does not mean that the Guidelines are unimportant or superfluous, it underscores the significance of other materials in the interpretation of the concept. The non-binding character of the Guidelines is a further reason to rely on other materials for its interpretation.

The next contextual components to consider are the ones referred to in articles 31(2)(a)–(b) of the VCLT. These have previously been referred to as parts of the internal context. In addition to the text, including its preamble and annexes, the internal context for the purpose of interpretation of a treaty comprises ‘any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty’ and ‘any instrument

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1261 Ibid Preamble para 9.
1265 Ibid para 6.15.
1266 Ibid para 6.17.
1267 See above Section 6.2.2.2 Context.
which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty’.\textsuperscript{1268}

As previously noted, it seems that the 2004 Amendments to the SAR Convention belong to the context within the meaning of article 31(2)(b) of the VCLT for the interpretation of the concept of ‘place of safety’ under the SOLAS Convention — and vice versa.\textsuperscript{1269} Both the 2004 Amendments to the SAR Convention and the 2004 Amendments to the SOLAS Convention were adopted in connection with each other. However, they were not adopted by the same groups of parties. Instead, both instruments were adopted on 20 May 2004 by the Maritime Safety Committee of the IMO on behalf of the parties to the SOLAS Convention and the SAR Convention, respectively.\textsuperscript{1270} Because the conventions bind different groups of parties, neither of the 2004 Amendments seems to qualify as an ‘agreement between all the parties in connection with the conclusion of the treaty’ within the meaning of article 31(2)(a) of the VCLT.\textsuperscript{1271} Yet, both instruments were adopted in connection with each other. Therefore, what remains to be considered, to establish if they are ‘instruments … made by one or more parties’ within the meaning of article 31(2)(b) of the VCLT is if they were ‘accepted by the other parties as an instrument related to the treaty’, that is, if the 2004 Amendments to the SAR Convention were accepted by the parties to the 2004 Amendments to the SOLAS Convention as a related instrument — and vice versa.\textsuperscript{1272} For several reasons, this seems to have been the case. Both instruments were adopted in response to the same resolution of the Assembly of the IMO,\textsuperscript{1273} and not only the preambles but also several of the provisions referring to the concept of ‘place of safety’ are analogous.\textsuperscript{1274} Moreover, both instruments were adopted following joint preparation and adoption procedures.\textsuperscript{1275} As a

\begin{itemize}
\item \textsuperscript{1268} VCLT art 31(2)(a)–(b) (emphasis added).
\item \textsuperscript{1269} See above Sections 7.1 Introduction, 7.2.2 Context.
\item \textsuperscript{1270} Cf the references to the IMO Guidelines on the Treatment of Persons Rescued at Sea in SOLAS Convention annex ch V reg 33(1-1), SAR Convention annex para 3.1.9, and the Convention on the International Maritime Organization, opened for signature 6 March 1948, 289 UNTS 3 (entered into force 17 March 1958) art 28(b): ‘The Maritime Safety Committee shall provide machinery for performing any duties assigned to it … or any duty … assigned to it by or under any other international instrument’ (emphasis added).
\item \textsuperscript{1271} Emphasis added. In addition, it may also be pondered whether they qualify as ‘agreements’.
\item \textsuperscript{1272} VCLT art 31(2)(b) (emphasis added).
\item \textsuperscript{1273} 2004 Amendments to the SOLAS Convention Preamble para 3; 2004 Amendments to the SAR Convention Preamble para 3.
\item \textsuperscript{1274} Cf 2004 Amendments to the SOLAS Convention Preamble, annex para 4; 2004 Amendments to the SAR Convention Preamble, annex para 3.
\item \textsuperscript{1275} See, eg, Report of the Maritime Safety Committee on Its Seventy-Eighth Session, IMO Doc MSC.78(26) (28 May 2004) 112–13 [16.46]–[16.56]; Sub-Committee on Radiocommunications and Search and Rescue, Report to the Maritime Safety Committee,
result, it seems reasonable to assume that the 2004 Amendments to the SOLAS Convention and the 2004 Amendments to the SAR Convention constitute contextual elements for the interpretation of one another. Because of this intimate relationship between the instruments it seems that the concept of ‘place of safety’ has the same meaning under the SOLAS Convention as under the SAR Convention. This view of the concept as forming a single unit with the same meaning in both conventions also seems to be confirmed by the preparatory works.1276

Having now exhausted the internal context, the next step of the interpretation concerns certain material of an external character. In accordance with article 31(3) of the VCLT, there shall be taken into account, together with the context, subsequent agreements and practice and other relevant rules of international law. With regard to the concept of ‘place of safety’, the last element is of exclusive importance. The simple reason is that, as of December 2018, there appear to be no subsequent agreements or practice within the meaning of articles 31(3)(a)–(b) of the VCLT, except for the IMO Guidelines on the Treatment of Persons Rescue at Sea.1277 Even though the provisions concerning disembarkation of persons rescued at sea are likely to have been applied many times, it is unlikely that this body of practice is sufficiently consistent and approved so that it reflects ‘a common understanding regarding the interpretation … which the parties are aware of and accept.’1278 Neither do there appear to be any subsequent agreements between all parties with regard to the meaning of the concept.1279

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1276 See, eg, Sub-Committee on Radiocommunications and Search and Rescue, Report to the Maritime Safety Committee, IMO Doc COMSAR 7/23 (20 February 2003) 29 [8.25], where it was recognised that ‘the new proposed SAR Convention annex para 3.1.9 contained the same provision as new SOLAS Convention ch V art 33.1bis as adjusted for the purpose’. See below Section 7.3 Supplementary Means of Interpretation.

1277 Papastavridis, ‘Rescuing Migrants at Sea and the Law of International Responsibility’, above n 66, 165–6, argues that the IMO Guidelines on the Treatment of Persons Rescue at Sea may be seen as ‘subsequent practice under art 31(3)(a) of the VCLT.’ Notwithstanding the possible correctness of this view, the explicit references to the Guidelines in SOLAS Convention annex ch V reg 33(1-1) and SAR Convention annex para 3.1.9 make the practical significance of this argument somewhat unclear.

1278 Cf ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries’, UN Doc A/73/10, 16 conclusion 10.1: ‘An agreement under [VCLT art 31(3)(a)–(b)] requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept.’

1279 But see a certain circular issued by the Facilitation Committee of the IMO: below Section 7.3 Supplementary Means of Interpretation.
Consequently, the most significant external element to consider here is the wider context of international law within the meaning of article 31(3)(c) of the VCLT, that is, systemic integration. While Chapters 2–5 provided an overview of the legal context of the concept of ‘place of safety’, the following Sections 7.2.2.1–7.2.2.4 consider which parts of it that shall be taken into account in the interpretation. Despite the different purposes, a certain degree of repetition seems unavoidable.

7.2.2.1 International Law of the Sea
Chapter 2 International Law of the Sea: Authority and Rescue at Sea explained that the concept of ‘place of safety’ is part of international maritime rescue law,1280 which in turn is a sub-field of the international law of the sea.1281 As a result, the law of the sea appears to be the closest and most obvious part of the external legal context of the concept of ‘place of safety’. The encompassing nature of the law of the sea is a further reason. However, this does not mean that all norms that this area comprises are permitted to assist in the interpretation of the concept. On the contrary, only those that are both ‘relevant’ and ‘applicable’ are to be taken into account.1282 The customary status of major parts of the law of the sea is, for natural reasons, an important factor in this regard.1283

The description of the concept of ‘place of safety’ as a feature of the law of the sea is useful to draw attention to certain basic aspects of the concept. In particular, it helps to explain that the obligations associated with the concept are not merely discretionary but closely related to the duty to render assistance at sea. For reasons to be further described, it also helps to explain why foreign ships at sea and locations abroad are generally unsuitable as places of safety.1284 Finally, this description suggests that conduct with respect to the concept of ‘place of safety’ may be of interest to institutions with general mandates in the field of the international law of the sea and/or international maritime law.1285 While such institutional considerations may be significant

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1280 See above Section 2.3 International Maritime Rescue Law.
1281 See above Chapter 2 International Law of the Sea: Authority and Rescue at Sea.
1282 See above nn 1183–5.
1283 For a discussion of the contribution of customary norms to the interpretation of a treaty, see above n 1185 and accompanying text.
1284 See below nn 1287–94 and accompanying text.
1285 See, eg, UNCLOS art 288(1): ‘A court or tribunal [established under the UNCLOS] … shall have jurisdiction over any dispute concerning the interpretation and application of the Convention’ (emphasis added); Convention on the International Maritime Organization art 1(a): ‘The purposes of the [IMO] are … to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety … and to deal with administrative and legal matters’; ‘The Maritime Safety Committee shall consider any matter within the scope of the [IMO] concerned with … rescue, and any other matters directly affecting maritime safety’, at art 28 (emphasis added).
for both practical and political reasons, they are not really integral to the
determination of the meaning of the concept and so go beyond the present
scope.\textsuperscript{1286}

The general legal framework for the allocation of authority at sea — the
division of the sea into maritime zones and the regulation of states’ jurisdiction
within them — is, like it is to most other maritime matters, of fundamental
significance to the concept of ‘place of safety’.\textsuperscript{1287} In particular, this framework
assists in explaining which locations may be identified as places of safety.
Pursuant to the starting point as regards jurisdiction over ships in international
waters, states other than the flag state are generally not permitted to interfere
with ships in such waters except for in the contiguous zone. Unilateral
identifications of foreign ships as places of safety, for example, may therefore
be inconsistent with obligations related to the respect for freedom of
navigation.\textsuperscript{1288}

However, the SOLAS Convention explicitly empowers search and rescue
services to requisition ships for rendering assistance and also requires masters
of ships to comply with such requisitions.\textsuperscript{1289} Even though this right to
requisition clearly bestows coastal states with some authority to require
foreign ships to assist in rescue operations, it does not seem to extend to
requests to provide a place of safety. Rather, it seems that the right to
requisition is limited to requests to proceed to the site of the persons in distress.
The scope of the authority appears to be linked to the limits of the
the Convention itself but from implementation at the national level. For the view
that shipmasters do not have obligations directly under international maritime rescue law, see
above Section 2.3.3.3 Shipmaster Duty?
\textsuperscript{1291} Cf UNCLOS art 98(1): ‘to render assistance to any person found at sea in danger of being
lost’, ‘to proceed … to the rescue’; SAR Convention annex paras 2.1.9–2.1.10, 4.7.1–4.7.3:
‘Parties … shall use search and rescue units and other available facilities for providing
assistance’, at para 2.1.9 (emphasis added). See also IAMSAR Manual vol 2, 1-4 [1.3.4]: ‘Ships
are a key [search and rescue] resource … but requests … must be weighed against the
considerable cost to shipping companies when they do divert to assist.’
appears that coastal states are generally not free to unilaterally designate foreign ships at sea as places of safety.

Second, the international law of the sea helps to explain why unilaterally designated locations within the territories of other states do not qualify as places of safety. In point of fact, article 2(1) of the UNCLOS explicitly recognises that ‘the sovereignty of a coastal state extends, beyond its land territory and internal waters … to … the territorial sea’. States that nonetheless appoint locations within the territories of other states as places of safety would then normally be responsible for prohibited intervention. The prohibition of intervention is, however, only an issue in the absence of consent from the concerned state. Indeed, the authority of states to decide over their territories naturally also entitles them to offer parts of their territories for use by other states as places of safety. As already noted, there is nothing in the concept of ‘place of safety’ itself that prevents states that have been invited to designate locations within the territories of other states as places of safety to do so. On the contrary, international maritime rescue law appears to encourage such cooperation.

For these reasons, it seems beyond doubt that the concept of ‘place of safety’ does not exist in isolation from the international law of the sea. A proper understanding of the concept therefore requires the interpreter to take account of relevant parts of the law of the sea. While this may seem too obvious a point to make, not least because of the close relationship between the relevant concept and the law of the sea, the aspects of the meaning described above are examples of concrete results of systemic integration.

Having now considered how the international law of the sea assists in the interpretation of the concept of ‘place of safety’, it is time to proceed to other relevant but perhaps less apparent areas of international law. In line with the structure of Part I of this thesis, the discussion begins with international refugee law, proceeds to international human rights law and ends with international law against transnational organised crime.

1292 For the principle of non-intervention, see above n 896.
1293 This does not mean that other criteria of a place of safety cease to apply. See below nn 1335–7 and accompanying text.
1294 See, eg, SOLAS Convention annex ch V reg 33(1-1); SAR Convention annex para 3.1.9: ‘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’ (emphasis added).
7.2.2.2 International Refugee Law

Similar to the international law of the sea, international refugee law ties into the interpretation of the concept of ‘place of safety’ in several different ways. While the law of the sea serves mainly as a general framework or background law, the impact of international refugee law seems more specific. As described in Part I, international refugee law establishes certain protection guarantees for refugees and presumptive refugees. These guarantees are implemented through the corresponding obligations of states with regard to such persons. While several of these obligations can be expected to require consideration at some point following rescue of refugees and migrants at sea, not all of them are of such significance that they shall be taken into account in the interpretation of the concept of ‘place of safety’. On the contrary, the view taken here is that it is mainly the prohibition of refoulement that contributes to the meaning of the concept. There are several reasons for this view.

In the absence of a general right to asylum under international law, the prohibition of refoulement stands as the main protection mechanism under international refugee law. As has been explained in some detail above, this prohibition prevents states from expelling or returning refugees to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. Basically, the prohibition of refoulement prevents states from returning refugees and presumptive refugees to places where they would be at risk of persecution. As noted above, it further seems that the scope of the protection against refoulement has broadened as a result of developments elsewhere in international law.

The relevance of non-refoulement to the concept of ‘place of safety’ is relatively clear. One main reason is the similarity ratione materiae between the concepts. Clearly, both concern conditions after movements of persons where their individual preferences are generally not much of an issue. But while the prohibition of refoulement under the Refugee Convention refers to ‘expel or return … in any manner whatsoever’ to distinguish the situations in which it applies, international maritime rescue law requires states to ‘deliver … to a place of safety’. Even though these phrases are not exactly

\[1295\] See above Chapter 3 International Refugee Law: Refugee Protection at Sea.
\[1296\] See above Section 3.3 No General Right to Asylum.
\[1297\] See above Section 3.4 Non-Refoulement.
\[1298\] See above Sections 4.6 Non-Refoulement, 7.2.2.3 International Human Rights Law.
\[1299\] Refugee Convention art 33(1).
\[1300\] SAR Convention annex para 1.3.2, which defines the term rescue as ‘an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.’ See also SOLAS Convention annex ch V reg 33(1-1); SAR Convention annex para 3.1.9.
interchangeable, their meanings are similar in that they both concern movements of persons from one physical location to another with little or no regard to their own will. But while the prohibition of *refoulement* under international refugee law concerns the risk of persecution, the concept of ‘place of safety’ seems to be of more general meaning. Indeed, while the notion of *refoulement* under international refugee law is directed at personal security, international maritime rescue law covers risks in a broader sense. The overarching purpose is, however, much the same: to ensure that persons are not forcibly moved to harmful conditions.

The relevance of *non-refoulement* to the concept of ‘place of safety’ is, furthermore, underscored by the *IMO Guidelines on the Treatment of Persons Rescued at Sea*:

The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum seekers and refugees recovered at sea.1301

However, as previously noted, relevance alone is not sufficient for systemic integration. In addition to being *relevant*, external norms must be *applicable* to qualify for such integration.1302 Even though not all states bound to apply the concept of ‘place of safety’ are parties to the *Refugee Convention*, the requirement for applicability may still be met by the customary status of the prohibition of *refoulement*. Following the view of customary international law as containing a prohibition of *refoulement* that is essentially equivalent to that set forth by article 33 of the *Refugee Convention*, it is not really that provision that is to be taken into account in the interpretation but the customary law that it reflects.1303 This detail does not, however, alter the basic conclusion: that the prohibition of *refoulement* belongs to the legal context to be taken into account in the interpretation of the concept of ‘place of safety’.

The prohibition of *refoulement* is the main but not the only protection mechanism under international refugee law. As explained above, both the prohibition of penalisation of refugees on account of illegal entry and the principle of non-discrimination under international refugee law establish important protection guarantees for refugees and presumptive refugees.1304 Both of these norms are, moreover, of such meaning that they are likely to require consideration in situations in which refugees and migrants have been rescued at sea. While it could therefore be argued that both are similarly relevant to the concept of ‘place of safety’ as the prohibition of *refoulement*,

1302 See above Section 6.2.2.2 Context, especially nn 1198–202 and accompanying text.
1303 See above nn 647–65 and accompanying text.
1304 See above Sections 3.5 Non-Penalisation, 3.6 Non-Discrimination.
the practical value of such arguments would likely be limited.\textsuperscript{1305} The simple reason is that neither the prohibition of penalisation nor the principle of non-discrimination under international refugee law seems to be applicable among all parties to treaties containing the concept of ‘place of safety’.\textsuperscript{1306} As a result, there is no ground for taking them into account in the interpretation within the ambit of the general rule of interpretation.\textsuperscript{1307} This does not mean that states are free to ignore their obligations pursuant to these provisions once the concept of ‘place of safety’ requires application. Rather, these obligations are not eligible for incorporation into the meaning of the concept through systemic integration.

In summary, international refugee law ties into the meaning of the concept of ‘place of safety’ through the prohibition of refoulement. The practical effect is that the meaning of the concept imports risks covered by the said prohibition. Accordingly, a place of safety shall be free not only from natural dangers of the marine environment (drowning, hypothermia, dehydration, etc) but also from risks of persecution and other treatment tantamount to refoulement. This broad view of the concept receives further support from the impact of international human rights law, which is the topic of the next sub-chapter.

\subsection*{7.2.2.3 International Human Rights Law}

International human rights law has previously been described as ‘the branch of international law mainly concerned with the rights of individuals in relation to the state.’\textsuperscript{1308} It is a complex of norms that — similar to other dedicated and functionally limited bodies of international law — has its own principles, objectives and institutions. However, neither international human rights law nor any other distinct part of international law exists and operates in complete isolation from other parts of international law. International law is, by contrast, a legal system, and its various norms therefore exist and operate in relation to each other.\textsuperscript{1309} Hence, it is not surprising that a number of human rights seem relevant to the interpretation of the concept of ‘place of safety’.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1305} That there is room for such arguments is particularly likely taking into account the evolving nature of the relevant standard of interpretation. See above Section 6.1 International Law as a Legal System.
\item \textsuperscript{1306} For the (non-customary) statuses, see above nn 747, 757, and accompanying text. For the impact of the principle of non-discrimination under international human rights law, see below Section 7.2.2.3 International Human Rights Law.
\item \textsuperscript{1307} However, this does not exclude them from being taken into account as supplementary means of interpretation. See below Section 6.2.3 Supplementary Means of Interpretation.
\item \textsuperscript{1308} See above Section 4.1 Introduction.
\item \textsuperscript{1309} See above Section 6.1 International Law as a Legal System.
\end{itemize}
\end{footnotesize}
Even though the account of international human rights law included in Part I may not be conclusive in all aspects, it showed that several human rights are likely to require consideration in situations when refugees and migrants are rescued at sea.\textsuperscript{1310} This does not mean that all of these rights shall be taken into account in the interpretation. On the contrary, only those norms that are both ‘relevant’ and ‘applicable’ shall be taken into account under the general rule of interpretation.\textsuperscript{1311} What follows is a description of how international human rights law contributes to the meaning of the concept of ‘place of safety’. The structure of the discussion follows that of Chapter 4 International Human Rights Law: Human Rights at Sea. Accordingly, it begins with a number of rights of general character (the right to life, non-discrimination, the freedom of movement, non-refoulement, liberty and security, prohibition of collective expulsions, family rights) and proceeds to some more specific rights (children, women, persons with disabilities, migrant workers).

The right to life is of basic importance. As explained above,\textsuperscript{1312} the right to life is a broad concept ‘which should not be interpreted narrowly’, as it ‘cannot be properly understood in a restrictive manner’.\textsuperscript{1313} In point of fact, an important reason for the description of international maritime rescue law as a distinct legal field was to highlight the many links between human rights and maritime search and rescue.\textsuperscript{1314} The very idea of a duty to rescue persons in distress at sea seems to be underpinned by values closely associated with the right to life, and thus the relevance of this right to the present interpretation seems relatively straightforward. Basically, the right to life carries the very reason for rescue at sea. The customary status of the right, moreover, guarantees its applicability in the relations between the parties.\textsuperscript{1315} While the formal reasons for taking the right to life into account in the interpretation of the concept of ‘place of safety’ therefore seem relatively clear, the practical effects are less so. Because of the close relationship between international maritime rescue law and international human rights law, many aspects of the meaning of the concept of ‘place of safety’ seem to link to the right to life in some way or another. For example, the description of a place of safety as ‘a place where the survivors’ safety of life is no longer threatened and where their basic human needs … can be met’ seems to allude to the right to life.\textsuperscript{1316} While the existence of such close links may make it difficult to separate the impact of the right to

\textsuperscript{1310} See above Chapter 4 International Human Rights Law: Human Rights at Sea.
\textsuperscript{1311} \textit{VCLT} art 31(3)(c). See above Chapter 6 Standard of Interpretation for the Concept of ‘Place of Safety’.
\textsuperscript{1312} See above Section 4.2 Right to Life.
\textsuperscript{1313} \textit{General Comment No 36: The Right to Life}, UN Doc CCPR/C/GC/36, para 3. See above n 778 and accompanying text.
\textsuperscript{1314} See above n 319 and accompanying text.
\textsuperscript{1315} See above n 776 and accompanying text.
\textsuperscript{1316} \textit{IMO Guidelines on the Treatment of Persons Rescued at Sea} para 6.12 (emphasis added).
life on the meaning of the concept, it cannot be ignored. Quite the contrary, the contribution of the right to life seems important because it shows that the humanitarian character of the concept derives not only from the text, the internal context (the *IMO Guidelines on the Treatment of Persons Rescued at Sea*) and the object and purpose but also from the external legal context. As a result, this aspect of the concept seems more embedded and therefore less likely to change. In sum, the right to life seems to underpin and reinforce the humanitarian character of the concept of ‘place of safety’.

The seemingly reciprocal humanitarian character of international human rights law and international maritime rescue law is further underscored by the impact of the principle of non-discrimination. As previously explained, the notion of non-discrimination is fundamental to the very idea of human rights and firmly established in international human rights law.\(^{1317}\) International maritime rescue law reflects in principle the value of equality through the distinct non-discrimination element of the duty to render assistance at sea,\(^{1318}\) alongside more specific expressions of the broad coverage *ratione personae* of the concept of ‘place of safety’.\(^{1319}\) In view of the many close links between international maritime rescue law and international human rights law, the relevance of the principle of non-discrimination to the concept of ‘place of safety’ seems relatively clear. The customary status of the principle, moreover, confirms that it is also applicable in the relations between the parties.\(^{1320}\) Therefore, it appears that the principle of non-discrimination is also part of the legal context that shall be taken into account in the interpretation of the concept of ‘place of safety’. The basic effect is that the principle of non-discrimination supports and reinforces the non-discriminatory nature of the relevant concept. As previously noted, the meaning of the non-discrimination element of the concept is not that all disembarkation situations must be dealt with in the same way or that all survivors need to be brought to the same place of safety.\(^{1321}\) Rather, it means that a proper application of the concept of ‘place of safety’ requires considerations with respect to non-discrimination much like the duty to render assistance at sea does.\(^{1322}\) Differentiated treatments based on reasonable and objective criteria, such as the medical situations of injured survivors or the special protection needs of refugees and migrants, are thus generally permissible. By contrast, differentiated treatment for reasons

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\(^{1317}\) See above Section 4.3 Non-Discrimination.

\(^{1318}\) See above Section 2.3.3.1 Non-Discrimination.

\(^{1319}\) See, eg, 2004 Amendments to the SOLAS Convention; 2004 Amendments to the SAR Convention Preamble para 7: ‘Realizing the need … to guarantee that persons rescued at sea will be provided a place of safety regardless of their nationality, status or the circumstances in which they are found’ (emphasis added).

\(^{1320}\) See above n 839 and accompanying text.

\(^{1321}\) See above n 854 and accompanying text.

\(^{1322}\) See above Section 2.3.3.1 Non-Discrimination.
not related to the rescue operation or the need of assistance itself, such as the nationality or status of the survivors, is generally impermissible and so constitutes discrimination.

The significance of freedom of movement seems more questionable. As previously explained, freedom of movement encompasses several rights and freedoms of general significance to migration.\textsuperscript{1323} Parts of this significance probably extend to irregular maritime migration. However, the relevance to the concept of ‘place of safety’ is not precisely apparent. Even though some disembarkation procedures may involve measures that restrict survivors’ freedom of movement, this does not seem an implicit feature of the concept of ‘place of safety’. Indeed, there is nothing in the concept itself that requires such a restriction. On the contrary, freedom of movement and the concept of ‘place of safety’ seem to concern fundamentally different subject matters. While freedom of movement addresses human mobility in a more general sense, the relevant concept is of more specific character, as it relates to the immediate need to disembark survivors recovered in the course of a rescue operation at sea. In addition to the dubious relevance, the uncertain customary status of the freedom to leave poses another obstacle to systemic integration.\textsuperscript{1324} The right to return, on the other hand, seems to be of customary status and in that sense applicable for all parties.\textsuperscript{1325} Still, the relevance of the right to return to the concept of ‘place of safety’ seems uncertain. While the right to return entails obligations of states to allow entry for persons to their own countries, the relevant concept concerns obligations to arrange for disembarkation of survivors recovered at sea.\textsuperscript{1326} These seem to be distinct issues. As a result, it appears that freedom of movement may not be part of the external context to be taken into account through systemic integration in the interpretation of the concept of ‘place of safety’.

By comparison, the significance of the right not to be returned to ill-treatment seems clearer. This aspect of the various prohibitions of torture and cruel, inhuman or degrading treatment or punishment has previously been referred to as the prohibition of \textit{refoulement} under international human rights law.\textsuperscript{1327} This right differs from the corresponding prohibition under international refugee law because it is not directed at protection against returns to risks of persecution but at torture or cruel, inhuman or degrading conditions.\textsuperscript{1328} The different coverage \textit{ratione materiae} is, however, not the only difference. While the personal scope of the prohibition of \textit{refoulement} under international

\begin{itemize}
  \item See above Sections 4.4 Freedom to Leave, 4.5 Right to Return.
  \item See above n 857 and accompanying text.
  \item See above n 885 and accompanying text.
  \item See above Section 4.5 Right to Return.
  \item See above Section 4.6 Non-Refoulement.
  \item See above nn 904–7 and accompanying text.
\end{itemize}
refugee law is limited to refugees and presumptive refugees,\textsuperscript{1329} the corresponding prohibition under international human rights law is of universal character in the sense that it covers each and every person.\textsuperscript{1330} Notwithstanding these and other differences, the significance to the meaning of the concept of ‘place of safety’ seems comparable. For basically the same reasons that the prohibition of \textit{refoulement} under international refugee law shall be taken into account in the interpretation, so it seems that the prohibition under international human rights law shall.\textsuperscript{1331} Like its counterpart under international refugee law, the prohibition of \textit{refoulement} under international human rights law is assumed to be of customary status. The relevance, furthermore, appears analogous.\textsuperscript{1332} Therefore, a place of safety should not only be safe from the natural dangers of the marine environment and risks of persecution but also from risks of torture or cruel, inhuman or degrading treatment or punishment. In this vein, the prohibition of \textit{refoulement} under international human rights law simply enlarges the material scope of the protection against \textit{refoulement} under international law. This contribution seems important because it explains that the basic security guarantees under the concept of ‘place of safety’ are not limited to refugees but extend to each and every one rescued at sea irrespective of nationality or status. This broad view of the concept seems, furthermore, to align well with the humanitarian underpinnings of international maritime rescue law.\textsuperscript{1333}

The possible contribution of the right to liberty and security seems specific. As explained above, the right to liberty entails procedural guarantees for persons deprived of their liberty.\textsuperscript{1334} Detentions, arrests and other deprivations of liberty shall be provided for by law and must not be arbitrary. Moreover, everyone deprived of their liberty needs to be treated with humanity. The basic relevance to irregular maritime migration is apparent: refugees and migrants at sea often find themselves deprived of their liberty. Such deprivations may occur, for example, on board a ship at sea following interception or rescue or on land following disembarkation. While the right to liberty does not prohibit any deprivation of liberty, it makes the legality of such deprivations conditional on certain procedural guarantees. An important consequence for the present purposes may be that places involving deprivation of survivors’ liberty need to meet the requirements pursuant to the right to liberty and security in order to qualify as places of safety. Delivery to places resulting in unlawful or arbitrary detention or inhuman treatment of persons deprived of

\textsuperscript{1329} See above Section 3.4.1.1 Personal Scope.
\textsuperscript{1330} For the universality or more precisely universal applicability \textit{ratione personae} of human rights, see above Section 4.1 Introduction.
\textsuperscript{1331} See above Section 7.2.2.3 International Human Rights Law.
\textsuperscript{1332} See above nn 1299–303 and accompanying text.
\textsuperscript{1333} See above Sections 2.3 International Maritime Rescue Law, 4.1 Introduction.
\textsuperscript{1334} See above Section 4.7 Liberty and Security.
their liberty would therefore not seem to qualify as delivery to a place of safety. While such considerations may seem distant and unrelated in the context of some rescue operations, for example if the survivors were members of the crew of a merchant ship, they clearly may be more relevant in other contexts, for example if the survivors are refugees and migrants.

The contribution of the rights to liberty and humane treatment seems to prevent places of safety from exposing survivors to unlawful or arbitrary detention or to inhuman treatment while being deprived of their liberty. This aspect of the meaning of the concept may be especially significant in the context of so-called international disembarkation schemes, that is, arrangements where a state other than the one responsible for arranging for the place of safety provides it. Because of the contribution of the rights to liberty and humane treatment, the responsible state may not be permitted to identify a place of safety outside its own territory if delivery to this place would expose the survivors to unlawful or arbitrary detention or to inhuman treatment while being deprived of liberty.

For obvious reasons, this may pose a challenge for states that wish to combat irregular maritime migration by establishing disembarkation schemes that risk exposing refugees and migrants rescued at sea to unlawful or arbitrary detention or inhuman treatment during detention. A seemingly relevant example is the proposal by the European Commission in June 2018 that the EU would support ‘the development of … regional disembarkation platforms … to … reduce the incentive to embark on perilous journeys’.

Even though the proposal did not explicitly explain where the disembarkation platforms would be located, it seems safe to assume that it would not be within the EU but rather in some third country, presumably in Northern Africa. Neither did the proposal explain how the platforms would be run or how survivors taken there would be treated. In the meantime, reports were forthcoming about large groups of refugees and migrants being held in prolonged arbitrary and unlawful detention or subjected to other forms of ill-treatment in Libya and elsewhere in Northern Africa. The proposal was, however, not adopted in

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its original form but transformed into a call for further preparations.\textsuperscript{1337} The possible contribution of the rights to liberty and humane treatment to the concept of ‘place of safety’ means that disembarkations in, for example, Libya would be impermissible as a matter of international maritime rescue law if they would lead to the survivors being exposed to arbitrary or unlawful detention or inhuman treatment while being deprived of their liberty. The contribution of the right to liberty and security is thus not only of theoretical interest but also of concrete practical significance.

The right to security seems to inform the meaning of the relevant concept by extending the necessary protection to persons not deprived of their liberty as well as to interferences with personal integrity on the horizontal level between individuals.\textsuperscript{1338} A place of safety must then not only be free from unlawful or arbitrary detention and inhuman treatment of persons deprived of their liberty but also from general foreseeable threats to life or bodily integrity. Areas affected by armed conflicts, violent rivalries or otherwise insecure conditions, within the meaning of the right to security, are therefore generally unsuitable as places of safety.

Compared to some of the previously discussed rights, the significance of the prohibition of collective expulsions seems more doubtful.\textsuperscript{1339} Even though collective expulsions may have become a standard ‘means of migratory control in so far as they constitute tools for states to combat irregular immigration’, this does not seem an issue for the concept of ‘place of safety’.\textsuperscript{1340} It appears, on the contrary, that the subject matter of the prohibition of collective expulsions, namely the means of removal of aliens, is fundamentally different from the subject matter of the concept of ‘place of safety’, namely the character of the place where a maritime rescue operation is considered to terminate. While the concept of ‘place of safety’ concerns the features and qualities of the physical locations to which persons rescued at sea shall be delivered, the prohibition of collective expulsions concerns the means of taking them there. This distinguishes the said prohibition from other external elements to be taken into account in the interpretation. However, this does not mean that the prohibition is unimportant to maritime search and rescue and thus can be ignored in the conduct of such activities.\textsuperscript{1341} Rather, the point being made is solely that the prohibition may not be of such relevance

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{1337} Council of the European Union, General Secretariat of the Council, ‘European Council Meeting (28 June 2018) — Conclusions’, Doc EUCO 2/18 (29 June 2018) para 5: ‘to swiftly explore the concept of regional disembarkation platforms, in close cooperation with relevant third countries as well as UNHCR and IOM.’
  \item \textsuperscript{1338} See above n 927 and accompanying text.
  \item \textsuperscript{1339} See above Section 4.8 Collective Expulsions.
  \item \textsuperscript{1340} Hirsi Jamaa [2012] II Eur Court HR 97, 154 [176].
  \item \textsuperscript{1341} The ECtHR made this explicit in Hirsi Jamaa. See above nn 722–8 and accompanying text.
\end{enumerate}
\end{footnotesize}
that it requires incorporation, through systemic integration, into the meaning of the concept of ‘place of safety’. The practical significance of this view should not, however, be overstated. Because of other aspects of the meaning, it seems unlikely that disembarkations amounting to collective expulsions constitute delivery to a ‘place of safety’.  

The significance of family rights seems more straightforward. As previously explained, family rights is used here as an umbrella term for a variety of rights of individuals with respect to their families. In the context of irregular maritime migration, the right to respect for family life seems to be of main significance. The basic meaning of this right is that family life should be respected and that families should generally not be separated. In line with some of the aforementioned human rights, the right to respect for family life is different from the prohibition of collective expulsions because it does not merely concern the means for bringing survivors to places of safety but a certain feature of such places, namely the possibility of family life. The additional requirement for applicability is likely met if the right to respect for family life has attained customary status. For these reasons, it seems that the right to respect for family life may be part of the external context to be taken into account in the interpretation of the concept of ‘place of safety’. As previously noted, the meaning of the right to respect for family life is not that family members must always be treated in the same way or delivered to the same places of safety. On the contrary, such separation is generally allowed if there are compelling reasons for it. Medical needs and special protection needs, for example, may justify separation or otherwise different treatment. The finer details are naturally context-specific and properly assessable only on a case-by-case basis. The basic point is that family life should be respected and that family members should generally not be separated in the course of delivery to a place of safety. Places that imply excessive separation of family members or other forms of unwarranted interferences with family life may therefore not qualify as places of safety.

Having considered a number of rights of more general application, the focus now turns to individual group-differentiated rights. As previously explained, such rights are not the same as group rights but are rights of individuals belonging to the groups of persons covered.

1342 See above Sections 3.4 Non-Refoulement, 4.6 Non-Refoulement.
1343 See above Section 4.9 Family Rights.
1344 See above nn 950–5 and accompanying text.
1345 See above n 955 and accompanying text.
1346 See above nn 956–7 and accompanying text.
1347 See above Section 4.1 Introduction.
The significance of the special rights of children to irregular maritime migration is multifarious. In addition to the principle of the best interests of the child, a number of more specific obligations are likely to require consideration in the context of rescue of refugees and migrants at sea. For example, the obligations to ensure to the maximum extent possible the survival of the child and that children are not subjected to torture or other cruel, inhuman or degrading treatment or punishment may require attention. Furthermore, the main rule of non-separation of children from their parents against their will may lead to considerations similar to those pursuant to the right to respect for family life. While it does not seem impossible that any of these norms could be considered relevant to the concept of ‘place of safety’, it does not seem very likely that they are also applicable for consideration in the interpretation. Even though the CRC is subject to near-universal ratification, it is not applicable to all parties to the treaties that include the concept of ‘place of safety’.

Moreover, not all provisions of the CRC can be considered reflective of customary international law. Therefore, in accordance with the view of systemic integration opted for above, not all relevant norms set forth by the CRC shall be taken into account in the interpretation. Even though the overwhelming number of ratifications of the CRC is an important indication of its customary status, it is not sufficient on its own as a reason to conclude that its provisions are reflective of customary international law. Rather, it appears that, besides those provisions that are analogous to customary norms generally recognised in other international human rights treaties, only the best interests principle may be sufficiently well-established and widely recognised to qualify as customary international law. As previously explained, the practical meaning of this principle is that all measures taken in relation to children shall be guided by considerations of the best interests of the child. This requirement seems to be sufficiently broad to cover arrangements for places of safety for the disembarkation of children rescued

1348 See above Section 4.10.1 Children.
1349 See above nn 963–72 and accompanying text.
1351 See above nn 1198–201 and accompanying text.
1352 For a related discussion of the status of the prohibition of refoulement, see above nn 659–65.
1353 See, eg, CRC arts 2 (non-discrimination), 6(1) (right to life), 37(1) (prohibition of torture).
1354 See above n 967 and accompanying text.
1355 See above nn 968–77 and accompanying text.
at sea. The finer details are naturally context-specific and need to be determined with reference to the individual case.

Even so, it is noteworthy that the Committee on the Rights of the Child has stated that the assessment of what is in the best interests of the child normally cannot be done outside the territory of any state.\textsuperscript{1356} If correct, it effectively rules out places of safety on board ships at sea in international waters and other locations outside the territory of any state. Be that as it may, the point being made here is simply that the special rights of children may contribute to the meaning of the concept of ‘place of safety’ through the best interests principle so that the identification of places for the disembarkation of children rescued at sea needs to take into account the best interests of the child.

The impact of the special rights of women seems more opaque.\textsuperscript{1357} Even though more than a few of the obligations under the \textit{CEDAW} may be sufficiently broad to require consideration in situations when persons have been rescued at sea, their general lack of customary status makes their applicability in the interpretation of the concept of ‘place of safety’ uncertain. There is, on the other hand, at least some support for the view that the prohibition of gender-based violence is of customary status.\textsuperscript{1358} However, the relevance of this particular prohibition to the concept of ‘place of safety’ is not very clear. While the said concept addresses the state of the place of delivery for persons rescued at sea, the said prohibition addresses security from gender-based violence. These seem different matters. As a result, it would probably be too great of a digression to consider the prohibition of gender-based violence relevant to the concept of ‘place of safety’ for the purpose of systemic integration. By contrast, it may be that the prohibition of discrimination of women is both applicable and relevant to the interpretation, triggering considerations similar to those with respect to non-discrimination more generally.\textsuperscript{1359} Essentially, a place of safety must not exacerbate gender inequalities and result in discrimination.

The relevance of the special rights of persons with disabilities to the concept of ‘place of safety’ seems uncertain. Even though some provisions of the \textit{CRPD} might be considered relevant to the concept, it is not very likely that they are also applicable for consideration in the interpretation.\textsuperscript{1360} Not all parties to the treaties that contain the concept of ‘place of safety’ are parties

\textsuperscript{1356} See above n 975 and accompanying text.
\textsuperscript{1357} See above Section 4.10.2 Women.
\textsuperscript{1358} See above n 987 and accompanying text.
\textsuperscript{1359} See above nn 1317–22 and accompanying text.
\textsuperscript{1360} See above Section 4.10.3 Persons with Disabilities.
Moreover, in view of the recent and innovative character of many of the obligations under the CRPD it does not seem very likely that state practice has become uniform to the extent necessary to give rise to customary international law. However, much like certain provisions of the CRC, certain provisions of the CRPD seem analogous to broader customary norms of international human rights law. The likely effect is, however, that the customary norms rather than the CRPD shall be taken into account in the interpretation.

The special rights of migrant workers lead to similar considerations. Even though some of the provisions of the ICRMW might be considered relevant to the concept of ‘place of safety’, it is not likely that they are also applicable for consideration in the interpretation. Not all parties to the treaties comprising the concept are parties to the ICRMW, and it seems unlikely that any of the potentially relevant norms reflects customary international law.

To summarise, international human rights law contributes to the meaning of the concept of ‘place of safety’ in several important ways. The view taken here is that the right to life, the principle of non-discrimination, the right to return, the prohibition of refoulement, the right to liberty and security, the right to respect for family life and the principle of the best interests of the child seem to be of such relevance and applicability that they merit integration into the meaning of the concept of ‘place of safety’. By contrast, it is believed that the freedom to leave, the prohibition of collective expulsions and the special rights of persons with disabilities and migrant workers do not.

7.2.2.4 International Law against Transnational Organised Crime

Part I of this thesis described international law against transnational organised crime as the body of international law concerning the prevention and suppression of transnational organised crime. It concluded that several obligations in this area of law are of such implication that they are likely to require consideration in situations involving refugees and migrants rescued at sea. Against this background, it would not seem misplaced to argue for the relevance of some of these norms to the interpretation of the concept of ‘place of safety’. Notwithstanding the possible merit of any such argument, the

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1362 See, eg, CRPD arts 5 (non-discrimination), 10 (right to life), 15 (freedom from torture or cruel, inhuman or degrading treatment or punishment).
1363 See above Section 4.10.4 Migrant Workers.
1364 See above Chapter 5 International Law against Transnational Organised Crime: Law Enforcement and Protection of Victims.
1365 See above nn 1056–8 and accompanying text.
practical significance to the interpretation would probably be small, if any. The simple reason is that none of the potentially relevant norms seems to be applicable for consideration in the interpretation. Because not all parties to the treaties that contain the concept of ‘place of safety’ are parties to the relevant treaties against transnational organised crime (UNTOC, Smuggling of Migrants Protocol, Trafficking in Persons Protocol), the potentially relevant norms are not applicable as a matter of treaty law. Moreover, it does not seem likely that any of the potentially significant provisions are reflective of customary international law. As a result, it appears that international law against transnational organised crime is not of such significance to the interpretation of the concept of ‘place of safety’ for consideration pursuant to the general rule of interpretation. This does not mean that the obligations under this area of law are irrelevant and thus can simply be discarded in situations where refugees and migrants are rescued at sea. Quite the contrary, they continue to apply alongside the disembarkation obligations and require application in a separate sense.

Having now considered the text and the context within the meaning of the general rule of interpretation, it is time to proceed to the remaining primary means of interpretation: object and purpose.

7.2.3 Object and Purpose

The SOLAS Convention was adopted in a desire to promote safety of life at sea by establishing uniform norms directed thereto. To this end, it sets forth standards for the safe construction, equipment and operation of ships.

The SAR Convention has a narrower focus than the SOLAS Convention but shares ‘the interest of safety of life at sea’. It was adopted noting the great importance of the duty to render assistance at sea under international law and with a desire to promote cooperation in search and rescue organisations. Essentially, it aims ‘to create an international system for coordinating rescue operations and for guaranteeing their efficiency and

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1366 See, eg, Gallagher and David, above n 71, 355: ‘Customary international law does not recognize any criminalization-related obligations with regard to smuggling of migrants.’
1367 SOLAS Convention Preamble para 1: ‘Being desirous of promoting safety of life at sea by establishing in a common agreement uniform principles and rules directed thereto’.
1368 See above Section 2.3.2 SOLAS Convention.
1369 SAR Convention annex paras 1.1, 1.2, 3.1.9. See above Section 2.3.1 SAR Convention.
1370 SAR Convention Preamble para 1: ‘Noting the great importance attached in several conventions to the rendering of assistance to persons in distress at sea and to the establishment … of adequate and effective arrangements for … search and rescue services’.
1371 Ibid Preamble para 4: ‘Wishing to promote co-operation among search and rescue organizations around the world and among those participating in search and rescue operations at sea’.

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safety’. In addition to the conventions themselves, the 2004 Amendments were adopted realizing the need for clarification of existing procedures to guarantee that persons rescued at sea will be provided a place of safety regardless of their nationality, status or the circumstances in which they are found.

The preambles, furthermore, explain that the intent of the amendments is ‘to ensure that in every case a place of safety is provided within a reasonable time’ and ‘that the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the party responsible for the [search and rescue] region in which the survivors were recovered’.

In the light of these provisions, it seems warranted to conclude that the object and purpose of the concept of ‘place of safety’ is of an essentially humanitarian character: to promote the effectiveness of maritime search and rescue operations so that human life is not lost at sea. More specifically, the aim seems to be to ensure that persons rescued at sea are delivered to places that do not expose them to further dangers. Importantly, it seems that there are no contradictions or inconsistencies within the object and purpose itself, that is, between the various expressions of the object and purpose (the SOLAS Convention, the SAR Convention, the 2004 Amendments, and specific provisions dealing with the ‘place of safety’). By contrast, all of these appear to share the basic humanitarian interest in and devotion to the effectiveness of maritime search and rescue. There consequently seems to be no need to resolve any normative conflicts within the object and purpose itself.

Moreover, the object and purpose seems to be sufficiently general to accommodate the meaning resulting from the text and context. In other words, it appears that the essentially humanitarian character of the object and purpose aligns well with the broad meaning of the concept of ‘place of safety’ resulting from the text and context as described above.

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1373 2004 Amendments to the SOLAS Convention Preamble para 7; 2004 Amendments to the SAR Convention Preamble para 7.
1374 2004 Amendments to the SOLAS Convention Preamble para 8; 2004 Amendments to the SAR Convention Preamble para 8.
1375 Concerning the possibility of conflicts within the object and purpose, see above Section 6.2.2.3 Object and Purpose.
7.3 Supplementary Means of Interpretation

Having now accomplished the first step of the interpretation — the general rule of interpretation — the next step concerns supplementary means of interpretation. As previously explained, such means may be used either to *confirm* the meaning resulting from the primary means of interpretation or to *determine* the meaning if the use of the primary means leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

The examination of the primary means of interpretation in the preceding subchapter showed that the concept of ‘place of safety’ has a broad albeit rather concrete meaning when interpreted in the wider context of international law. Even though the terms themselves are imprecise, their meaning unfolds when understood in their context and in the light of the object and purpose. As a result, it appears that the meaning resulting from the application of the general rule of interpretation is neither ambiguous nor obscure nor manifestly absurd or unreasonable; rather, it represents a delicately balanced outcome of careful preparations. For these reasons, it seems that the aim of resorting to supplementary means of interpretation shall be to confirm rather than to determine the meaning.

The central role of the concept of ‘place of safety’ was the result of lengthy negotiations and careful preparations within the IMO. The negotiation records show that the *2004 Amendments* were prepared, drafted and adopted with a view to situations in which refugees and migrants are rescued at sea, such as the *Tampa* affair. Importantly, the *travaux préparatoires* confirm that the phrase ‘place of safety’ was intended as a broad concept encompassing interests fixed not only in maritime law but also more generally in

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1376 VCLT art 32. See above Section 6.2.3 Supplementary Means of Interpretation.

1377 However, the practical significance of this view — that the supplementary means of interpretation should be used to confirm rather than to determine the meaning — should not be exaggerated. The elementary similarity of the meanings resulting from the different means of interpretation make the distinction between confirmation and determination somewhat theoretical.

1378 See, eg, *Decisions of Other IMO Bodies*, IMO Doc MSC 75/2/2/Add.2 (12 March 2002) in which Norway explained that the *Tampa* affair was ‘the direct background’ of the negotiations that led to the adoption of the *2004 Amendments*. For the *Tampa* affair, see above nn 4–5 and accompanying text.

1379 See above Section 6.2.3.1 Preparatory Work.

1380 See, eg, *Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea*, A Res 920(22), IMO Doc A 22/Res.920 (29 November 2001) 2 [1], in which the Assembly of the IMO requested a revision of certain conventions so that ‘survivors of distress incidents are given assistance regardless of nationality or status or the circumstances in which they are found; ships which have retrieved persons in distress at sea are able to deliver the survivors to a place of safety; and survivors, regardless of nationality or status, including
international law, such as the authority of a state to control entry into its territory,\textsuperscript{1381} as well as in international refugee law and international human rights law, such as the prohibition of \textit{refoulement}.\textsuperscript{1382} In addition, the \textit{travaux} suggest that the intention of the drafters was not to establish a general right for shipmasters and rescue coordination centres to decide where persons rescued at sea shall be disembarked but to create obligations for states to arrange for disembarkation. This seems particularly clear from a proposal by Spain for a clarification that ‘rescue coordination centres should not enjoy discretion to identify suitable place(s) of disembarkation without reference to the competent authorities of the state concerned’\textsuperscript{1383} and the response by the Maritime Safety Committee of the IMO that such centres were merely ‘authorized to “initiate” the identification of a place of safety, while the states … have the responsibility to complete [it] … and arrange the delivery of the persons found in distress at sea to that place.’\textsuperscript{1384} Accordingly, it seems that the intention of the drafters was not to establish a general obligation of states to

\begin{quote}
undocumented migrants, asylum-seekers, refugees and stowaways are treated while on board in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing humanitarian maritime traditions’ (emphasis added). See also Sub-Committee on Radiocommunications and Search and Rescue, \textit{Report to the Maritime Safety Committee}, IMO Doc COMSAR 7/23 (20 February 2003) 27–8 [8.10]–[8.13], in which it was stressed that ‘the asylum seeker and refugee issues should not be ignored’ and that the UNHCR had informed the relevant working group of core obligations under international refugee law.
\end{quote}

\textsuperscript{1381} See, eg, \textit{Report to the Maritime Safety Committee}, IMO Doc COMSAR 7/23, 30 [8.29], in which the United States, supported by a number of other delegations, emphasised ‘the interests of the state to protect its borders and other sovereignty concerns.’ This group of states meant that the furthest the IMO could go was to assist ‘contracting governments to very clearly understand their treaty obligations, and to provide the master with clear guidance, if not some certainty as to the [disembarkation] procedures to be followed’. In particular, they meant that ‘any attempt to try to regulate any further in the delivery process would run the risk of going beyond the remit of the IMO.’ The statement appears to be a clarification of an earlier position in which Australia, supported by the United States, ‘opposed any proposals … which would have the effect of extending convention obligations to encompass disembarkation of rescued persons at a particular port’: Sub-Committee on Radiocommunications and Search and Rescue, \textit{Report to the Maritime Safety Committee}, IMO Doc COMSAR 6/22 (8 March 2002) 36 [8.65]. The interest in migration management is clearly reflected in the appendix of \textit{IMO Guidelines on the Treatment of Persons Rescued at Sea}: ‘As a general principle of international law, a state’s sovereignty allows that state to control its borders, to exclude aliens from its territory and to prescribe laws governing the entry of aliens into its territory.’

\textsuperscript{1382} See, eg, Sub-Committee on Radiocommunications and Search and Rescue, \textit{Report to the Maritime Safety Committee}, IMO Doc COMSAR 7/23 (20 February 2003) 28 [8.13], in which the UNHCR emphasised \textit{non-refoulement}.

\textsuperscript{1383} Spain, ‘Consideration and Adoption of Amendments to Mandatory Instruments’, Submission to the 78th Session of the Maritime Safety Committee, International Maritime Organization, IMO Doc MSC 78/3/7 (12 December 2003) 2 [6].

accept disembarkation within their territories. They were especially careful not to create anything like a right of entry under international law.\textsuperscript{1385} Rather, it seems that their main interest was to establish an obligation of states to ensure that a place of safety is provided within a reasonable time.\textsuperscript{1386} Above all, the travaux show that the concept of ‘place of safety’ was the result of lengthy and complex negotiations in which not only maritime safety interests but also more general protection needs of persons rescued at sea, as well as general sovereignty interests of states, were important ingredients. Accordingly, the travaux appear to confirm a broad view of the meaning of the concept of ‘place of safety’.

Another category of supplementary means of interpretation seemingly relevant to the present interpretation is agreements on the same subject matter among a sub-group of parties to the interpreted treaty.\textsuperscript{1387} As previously explained, such agreements \textit{in pari materia} do not fit within article 31(3) of the \textit{VCLT}, as they are not binding for \textit{all} parties and thus do not qualify for systemic integration.\textsuperscript{1388} However, this does not seem to prevent their use as supplementary means of interpretation.\textsuperscript{1389} The seemingly most significant example with regard to the concept of ‘place of safety’ is an agreement concluded between the member states of the EU: the \textit{Sea Borders Regulation}.\textsuperscript{1390} This \textit{Regulation} applies to ‘border surveillance operations carried out by the member states at their external sea borders in the context of operational cooperation coordinated by the [European Border and Coast Guard Agency]’.\textsuperscript{1391} It includes provisions on, inter alia, detection, interception, search and rescue situations and disembarkation. It also provides for protection of fundamental rights and \textit{non-refoulement}.\textsuperscript{1392} What seems important for the present purposes is that the \textit{Regulation} incorporates the

\begin{itemize}
\item \textsuperscript{1385} See above Sections 3.2 Territorial Sovereignty, 3.3 No General Right to Asylum.
\item \textsuperscript{1386} See, eg, \textit{2004 Amendments to the SOLAS Convention} Preamble para 8; \textit{2004 Amendments to the SAR Convention} Preamble para 8.
\item \textsuperscript{1387} See above Section 6.2.3.3 Treaties in Pari Materia.
\item \textsuperscript{1388} For the requirement for consent, see generally above nn 1178, 1184–5, 1198–9 and accompanying text.
\item \textsuperscript{1389} See generally above Section 6.2.3.3 Treaties in Pari Materia.
\item \textsuperscript{1390} \textit{Sea Borders Regulation} [2014] OJ L 189/93. See above n 406 and accompanying text; Ghezelbash et al, above n 68, 336–8; Mungianu, above n 66, 196–8.
\item \textsuperscript{1392} See especially \textit{Sea Borders Regulation} [2014] OJ L 189/93, art 4.
\end{itemize}
protection of fundamental rights and non-refoulement in its definition of a place of safety as:

a location where rescue operations are considered to terminate and where the survivors’ safety of life is not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivors’ next destination or final destination, taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement.\(^{1393}\)

The explicit reference to fundamental rights and non-refoulement is important for the present purposes because it shows that a relatively large sub-group of parties understands the concept of ‘place of safety’ to encompass not only natural dangers of the marine environment but also basic protection needs of survivors.\(^{1394}\) While the understanding by the EU is obviously not decisive for all parties, it provides support for a broad view of the concept of ‘place of safety’. Accordingly, it seems to confirm the interpretation put forward above.

Another seemingly relevant supplementary means of interpretation concerns a circular adopted in 2009 by the Facilitation Committee of the IMO with the title ‘Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea’.\(^{1395}\) This circular was the result of lengthy discussions over several sessions following the adoption of the 2004 Amendments.\(^{1396}\) Despite its legally non-binding character,\(^{1397}\) the circular ties into the

\(^{1393}\) Ibid art 2(12) (emphasis added).

\(^{1394}\) As of December 2018, all 28 EU member states are parties to the SOLAS Convention and all but three (Austria, the Czech Republic, and Slovakia) are parties to the SAR Convention. International Maritime Organization, Status of Multilateral Conventions (Web Page) <http://www.imo.org/>.

\(^{1395}\) Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, IMO Doc FAL.3/Circ.194 (22 January 2009).


\(^{1397}\) The non-binding character follows both from the preparatory works and the use of non-binding language (eg, ‘should’, ‘urge’). See also; Guy S Goodwin-Gill, ‘Setting the Scene: Refugees, Asylum Seekers, and Migrants at Sea: the Need for a Long-Term, Protection-Centred Vision’ in Violeta Moreno-Lax and Efthymios Papastavridis (eds), ‘Boat Refugees’ and Migrants at Sea: A Comprehensive Approach (Brill, 2016) 17, 26; Douglas Guilfoyle and Efthymios Papastavridis, above n 67, 7.
interpretation as subsequent agreement or practice among a sub-group of parties.\textsuperscript{1398}

Although the circular does not deal explicitly with the meaning of the concept of ‘place of safety’, nearly all of its principles concern different aspects of the application of the concept. The circular sets forth five ‘essential principles’. First, coastal states should ensure that search and rescue services coordinate their efforts with other entities responsible for the disembarkation of persons rescued at sea.\textsuperscript{1399} Second, ‘any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress are to be carried out after disembarkation to a place of safety.’\textsuperscript{1400} Third, the state responsible for the search and rescue region where the persons were rescued ‘should exercise primary responsibility for ensuring [cooperation in order to ensure that disembarkation … is carried out swiftly, taking into account the master’s preferred arrangements … and the immediate basic needs of the rescued persons.’\textsuperscript{1401} Then, in more concrete terms, ‘if disembarkation … cannot be arranged swiftly elsewhere, the government responsible for the [search and rescue] area should accept the disembarkation of the persons rescued’.\textsuperscript{1402} Fourth, all parties involved should cooperate with the government of the area where the survivors have been disembarked. Fifth and lastly, ‘international protection principles as set out in international instruments should be followed’.\textsuperscript{1403}

Notwithstanding its reasonably concrete language, the practical significance of the circular seems limited. The non-binding character and lack of acceptance among all of the parties undermine its legal significance for the present purposes. However, as a supplementary means of interpretation, it seems to provide support for a broad view of the concept of ‘place of safety’.

\textsuperscript{1398} See above Section 6.2.3.4 Agreements and Practice among a Sub-Group of Parties. The circular was adopted by majority vote, and several states (Australia, Malta, United States) reserved their positions. Accordingly, it seems that the circular was not accepted by all parties and therefore cannot be seen as subsequent agreement or practice within the meaning of VCLT arts 31(3)(a)–(b): Report of the Facilitation Committee on Its Thirty-Fifth Session, IMO Doc FAL 35/17 (19 March 2009) 30 [6.44]–[6.45] (reservation by the United States), annex 1 (Rules of Procedure of the Facilitation Committee) r 27(a): ‘decisions of the Committee … shall be made and reports, resolutions, recommendations adopted by a majority of the members’ (emphasis added), annexes 4–6 (statements by the delegations of Spain, Australia and Malta).

\textsuperscript{1399} Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, IMO Doc FAL.3/Circ.194 (22 January 2009) 1 [2.1].

\textsuperscript{1400} Ibid 1 [2.2].

\textsuperscript{1401} Ibid 1 [2.3].

\textsuperscript{1402} Ibid 1–2 [2.4].

\textsuperscript{1403} Ibid 2 [2.5]. A footnote states that the principles ‘include obligations not to return persons, where there are substantial grounds for believing that there is a real risk of different forms of irreparable harm’: at 2 n 1.
The last possible supplementary means of interpretation to consider here concerns the resolution of normative conflicts. As previously explained, principles of conflict resolution may be used to resolve conflicts within the interpretation. However, such principles may only be used if there are any conflicts that need to be resolved. As regards the interpretation of the concept of ‘place of safety’, no such need seems to arise. Indeed, none of the aspects of the meaning presented above appears to be of such scope and content that it generates conflicts with other aspects of the meaning. Rather, the notion of a place that is free not only from natural dangers of the marine environment but also from threats to the basic personal security of the survivors seems essentially consistent. The aspects of the meaning related to the right to life, for example, seem to align well with those concerning non-refoulement. The temporal dimension of the meaning, that is, the need to ensure that a place of safety is provided within a reasonable time, furthermore seems to be consistent with the aspects relating to the capacity of the responsible state to arrange for disembarkation at the place of safety. The point being made is simply that there seems to be no risk that states bound to apply the concept of ‘place of safety’ are obliged, pursuant to some aspects of the meaning, to act in a way that contravenes other aspects of the same meaning. Accordingly, there seems to be no need to have recourse to principles of conflict resolution as a supplementary means of interpretation.

Finally, it needs to be acknowledged that the present account of supplementary means of interpretation may not be conclusive. Accordingly, it would not be correct to rule out the possible existence of other material that could be used to confirm the meaning. Be that as it may, the material considered here seems to establish reasonably clear support for the broad meaning of the concept of ‘place of safety’ resulting from the application of the general rule of interpretation.

1404 See above Section 6.2.3.5 Principles of Conflict Resolution.
1405 See above nn 1225–8 and accompanying text.
1406 Cf the definition of a conflict discussed above nn 1223–4 and accompanying text.
7.4 Summary

The meaning of the concept of ‘place of safety’ derives from an interpretation in good faith in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose. The meaning resulting from the application of the general rule of interpretation is confirmed by supplementary means of interpretation.

It follows from the ordinary meaning of the terms that a place of safety is a physical location free from danger, risk or injury. While the ordinary meaning does not specify the nature or type of dangers, risks or injuries covered, other interpretative elements explain that potential places must be free not only from natural dangers of the marine environment but also from real and serious threats to the personal security of the survivors. Put differently, a place of safety shall be safe not only in a maritime safety sense but also in a basic security sense.

A place of safety is a location where the survivors’ safety of life is not at risk because of natural dangers of the marine environment, such as drowning, hypothermia, dehydration, physical exhaustion and so on. It is also a place where the survivors are not exposed to treatment amounting to refoulement. Places that expose survivors to risks of being subjected to persecution, torture or otherwise cruel, inhuman or degrading treatment or punishment are therefore not appropriate as places of safety. This aspect of the meaning seems to imply a need to assess the risk for such treatment in the event of indications to this end, such as explicit requests for asylum or implicit expressions of fear of return. Because of the generally inhospitable nature of places at sea, such risk assessments generally cannot be properly conducted at sea but imply a need to deliver the survivors to a place of safety on land. It is in this sense that the concept of ‘place of safety’ can be said to ‘involve a “residual obligation” to allow disembarkation on its own territory when it has not been possible to do so safely anywhere else’.

In addition to such non-refoulement aspects, a place of safety must not involve violations of survivors’ rights to liberty and security. Places that expose survivors to arbitrary or unlawful detention or inhuman treatment while being deprived of their liberty, or other real and serious security risks such as armed conflicts, violent rivalries or other conditions contrary to the right to security can therefore not serve as places of safety. A place of safety is, furthermore, a location where survivors’ basic human needs can be met (food, shelter,

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1407 See above Chapter 6 Standard of Interpretation for the Concept of ‘Place of Safety’.
1408 See above Section 7.2.1 Text.
1409 Trevisanut, ‘Is There a Right to be Rescued at Sea?’, above n 1253, 7. See also Trevisanut, ‘Search and Rescue Operations at Sea’, above n 70, 432–3.
medical needs, etc). It is also a place that does not expose survivors to unnecessary or otherwise unwarranted interferences with their right to family life. Family members should, therefore, normally be taken to the same place of safety. In the event that survivors are children, the identification of the place of safety shall take into account the best interests of the child.

Moreover, the designation of the party responsible for the search and rescue region as the one primarily responsible for arranging for a place of safety suggests that only places where the responsible party has the capacity to arrange for disembarkation can serve as places of safety. Places on board foreign ships at sea or within the territory of another state are therefore in principle excluded. This does not mean that a place of safety must always be located within the territory of the responsible party. States that are able to arrange for disembarkation outside their own territories, for example following arrangements with neighbouring states, are then generally permitted to do so, provided that the conditions of a place of safety are fulfilled. Locations abroad or on board ships or other units at sea are accordingly subject to the same requirements as other places of safety.

The broad meaning of the concept of ‘place of safety’ is confirmed by the travaux préparatoires. It is also confirmed by subsequent practice and agreements within the EU as well as the IMO Facilitation Committee.

In conclusion, a place of safety is a physical location where the responsible party can arrange for disembarkation within a reasonable time and where

- the survivors’ safety of life is not threatened;
- the survivors are not exposed to risks of persecution, torture or other cruel, inhuman or degrading treatment or punishment; arbitrary or unlawful detention; inhumane treatment while being deprived of liberty; armed conflict; or other severe security risks;
- the survivors’ basic human needs (food, shelter, medical needs, etc) can be met;
- the survivors are not subjected to prohibited discrimination;
- the survivors’ right to family life can be respected;
- the best interests of the child are taken into account;

In short, a place of safety is a location where not only the maritime safety of the survivors but also their basic security is no longer threatened.
8 General Conclusions

8.1 International Law as a Reason for Irregular Maritime Migration

Although there are multiple causes of irregular maritime migration, some may be more significant and/or worthy of note than others. In keeping with the aim and basic framework of this study, it would not seem justified to make comprehensive conclusions on the root causes and real drivers of irregular maritime migration. This is particularly clear following the specific scope and theoretical underpinnings of the study. Even so, there is motivation to note that international law may not be wholly unrelated to the reasons for irregular maritime migration.

While increased implementation of law is often thought of, or at least presented, as a roadmap towards a better world, including for refugees and migrants, some aspects of international law also seem to leave room for, facilitate or even encourage irregular maritime migration. Take for example the basic authority of states to control and decide who may enter into and remain within their territories. While this authority is what in principle entitles states to expel people from their territories, it is also what entitles them to allow people to enter and stay there. If no state other than their own had the capacity to allow them to remain, the incentives for many refugees and migrants to try to enter other states would likely diminish. While state sovereignty is often depicted as a barrier to irregular migration, it also seems

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1410 See above Section 1.4 Basic Theoretical Framework.
1412 See, eg, New York Declaration for Refugees and Migrants, UN Doc A/RES/71/1, paras 5, 11–14, 21, 23–4, 35, 43, 54; Global Compact on Refugees, UN Doc A/73/12 (Part II) para 9; Global Compact for Migration, UN Doc A/CONF.231/3, annex paras 15, 23–5, 27–8, 41.
1414 See above Section 3.2 Territorial Sovereignty.
1415 See above Section 3.3 No General Right to Asylum.
to be the main legal basis of a regular desire of refugees and migrants: to be allowed to stay.

Another and perhaps clearer example of how international law may relate to the reasons for irregular maritime migration concerns the limitations of the authority of states to act against migration at sea. As described in Chapter 2 International Law of the Sea: Authority and Rescue at Sea, states other than the flag state generally have few legal possibilities to stop and prevent ships used for such purposes from approaching their coasts. Coastal states are usually only allowed to intercept such ships within their territorial waters and contiguous zones.\footnote{See above Section 2.2 Jurisdiction over Ships.} However, if international law was more permissive in this regard by permitting states to interfere with unwanted ships in any manner whatsoever, more states would probably find it practicable to suppress irregular migration at sea. Even though such a scenario would likely bring all sorts of other problems, it still suggests that some fundamental tenets of the law of the sea may be among the factors that generate irregular maritime migration.\footnote{See, eg, Klein, Maritime Security and the Law of the Sea, above n 71, 127, referring to the ‘longstanding deference to exclusive flag state authority and the freedom of navigation’ in the context of smuggling of migrants and trafficking in persons. See also at 117–18: ‘A common theme is the ongoing deference to exclusive flag state authority … despite the seriousness of the problems’, 146: ‘Overall, law enforcement efforts to enhance maritime security have been beleaguered by the emphasis on flag state authority.’}

Another possibly illustrative example relates to the concept of non-refoulement which prohibits states from returning refugees and migrants to places where their lives and security would be at serious risk.\footnote{See above Sections 3.4 Non-Refoulement, 4.6 Non-Refoulement.} While this prohibition mainly serves as a basic safeguard for human dignity, it has also ‘been claimed to create a perverse incentive for states not to conduct proactive search and rescue operations on the high seas.’\footnote{See, eg, Jacques Hartmann and Irini Papanicolopulu, ‘Are Human Rights Hurting Migrants at Sea?’, EJIL: Talk! (Blog Post, 24 April 2015) <https://www.ejiltalk.org/>, discussing such claims without indicating who has made them. See also Ralph Wilde, “‘Let Them Drown”: Rescuing Migrants at Sea and the Non-Refoulement Obligation as a Case Study of International Law’s Relationship to “Crisis”: Part I’, EJIL: Talk! (Blog Post, 25 February 2017) <https://www.ejiltalk.org/>.

nationals into the territory of other states may well amount to interferences with the internal affairs of those states.\textsuperscript{1420} As a result, states may sometimes find themselves in situations where they have no other option but to allow people to remain within their territories because no state to which they could be lawfully removed is willing to receive them. To simply target international refugee law and other basic safeguards for human dignity as the main reasons for irregular migration may therefore be too one-sided and overly simplistic.\textsuperscript{1421} On occasion, it may be the sovereignty of (other) states that prevent removal rather than the fundamental forms of protection established by these areas of law.

Nonetheless, and in spite of the complexity of this picture, it seems defensible to note that international law may be part of the reality that leads to irregular maritime migration. Fewer refugees and migrants would probably be willing to risk their lives in attempts to reach distant shores by irregular means if no state other than their own was entitled to admit and allow them to stay. The result would probably be the same or at least similar if states were always free to intervene against unwanted ships at sea or if there were no legal safeguards for the human dignity of refugees and migrants. The basic point being made is that even though it is surely not the only or the most important, international law may, in various ways, be among the reasons for irregular maritime migration.

What this means is not necessarily that international law should be abandoned or changed in any dramatic way; rather, in the context of irregular maritime migration, it may not be entirely correct to think of international law as something given and value-free or as the ultimate and categorically most benevolent roadmap for all. A wiser approach may be more cautious and acknowledge the importance of international law both in the specific context and at large based on careful assessments of its pros and cons in relation to

\textsuperscript{1420} See above Section 4.5 Right to Return.

\textsuperscript{1421} Equivalent and similar arguments appear to be on the rise in Europe and elsewhere, generally from political voices of typically right wing character. See, eg, Ole Mikkelsen, ‘Denmark Wants Geneva Convention Debate If Europe Cannot Curb Refugee Influx’, Reuters (online, 28 December 2015) <https://www.reuters.com/>; Australian Conservatives, Our Policies (Web Page, 2018) <https://www.conservatives.org.au/> [Immigration & Citizenship]: ‘We will withdraw from the Refugee Convention to allow Australia to determine its refugee intake free from external constraints’; Sweden’s Television, ‘Migration’, Val 2018: Utfrågningen [Election 2018: the Hearing], 2 September 2018 (Jimmie Åkesson, Leader of the Sweden Democrats Party) 0:48:15: ‘Sverige är ju det land i vår del av världen som har fått mest problem [med invandring], vi har tagit emot allra flest per invånare i Sverige och är det något land som rimligen borde vilja omförhandla [flyktingkonventionen] så är det Sverige’ [Sweden is the country in our part of the world that has had the most problem with immigration, we have admitted the most per capita, and if there is any country that should reasonably want to renegotiate the Refugee Convention it is Sweden].
different interests and settings. In addition, further studies of international law in the context of irregular maritime migration and the resulting expertise may be of value for informed discussions about this topic.

8.2 Epicentre of Legal Complexities

It is generally acknowledged that the international legal framework for irregular maritime migration is multifaceted and highly complex. Several different areas of law are at play, each with their own purposes, principles and institutions. The picture is further complicated by the fact that these areas are often contentious in themselves. Such internal controversies and balances of interests, for example within the law of the sea,\textsuperscript{1422} are in no way reduced when confronted with the controversies and balances of interests of other areas of law, such as international refugee law or international law against transnational organised crime.\textsuperscript{1423} Rather, the challenges seem to multiply.

Moreover, the age-old background and relatively well-established character of the law of the sea compared to international refugee law or international human rights law, for example, are further factors of complexity.\textsuperscript{1424} The \textit{UNCLOS} was adopted in a desire to ‘settle all issues relating to the law of the sea’\textsuperscript{1425} and its encompassing nature limits room for interests reflected only in other areas of law.\textsuperscript{1426} Another factor is that the legal framework for irregular maritime migration consists of norms of different scopes and levels. Relevant examples of a more general character include those related to the sovereignty of states and interpretation,\textsuperscript{1427} while those of international maritime rescue law seem more precise and technical.\textsuperscript{1428} The legal complexities are evident not only from previous research but also from the regular occurrence of real situations involving intricate legal questions concerning refugees and migrants at sea.\textsuperscript{1429}

Instead of merely taking note of the complexity of the law, this study has tried to advance the understanding for it by approaching the concept of ‘place of safety’ as nested in the legal difficulties surrounding irregular maritime migration. The centrality of the concept is traceable not only in the \textit{travaux}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1422} See above Section 2.1 Introduction.
\item \textsuperscript{1423} See above Sections 3.2 Territorial Sovereignty, 5.2 Smuggling of Migrants.
\item \textsuperscript{1424} See above Section 2.1 Introduction.
\item \textsuperscript{1425} \textit{UNCLOS} Preamble para 1.
\item \textsuperscript{1426} The operational scheme for interception under the \textit{Smuggling of Migrants Protocol} is an example. See above Section 5.2 Smuggling of Migrants.
\item \textsuperscript{1427} See above Sections 3.2 Territorial Sovereignty, 6.2 Rules of Interpretation.
\item \textsuperscript{1428} See above Section 2.3 International Maritime Rescue Law.
\item \textsuperscript{1429} See above Sections 1.2 Legal Problem, 1.5 Previous Research.
\end{itemize}
\end{footnotesize}
préparatoires but also in the factual background of the negotiations preceding it: the Tampa affair. Because of its open texture and central role, a proper understanding of the concept requires considerations of many aspects of the legal framework for irregular maritime migration. To provide an answer to, for example, the controversial question about whether the concept entails a general right of entry, it is necessary to be familiar not only with the minutiae of international maritime rescue law but also with fundamental concepts such as sovereignty, asylum and non-refoulement. Likewise, knowing where states responsible for the coordination of rescue operations may exercise authority implies an understanding of not only international maritime rescue law but also the general legal framework for jurisdiction over ships.

The importance of contextual knowledge for the understanding of the concept of ‘place of safety’ is reflected both in the principal aim and the outline of this thesis, where Part I discussed the legal framework and Part II the interpretation of the concept. The relationship between the concept (the individual) and the legal context (the whole) is key to the meaning of the concept. It seems simply impossible to arrive at an informed understanding of the concept without contemplating major parts of the legal framework for irregular maritime migration as well as the standard of interpretation relevant to the concept, including, in particular, systemic integration. It is precisely for this purpose — to draw attention to its role in the legal framework for irregular maritime migration and to underline the significance of systemic integration for its meaning — that the concept of ‘place of safety’ may be described as an epicentre of the legal complexities surrounding irregular maritime migration.

8.3 Duty to Provide Place of Safety

Before returning to the meaning of the concept of ‘place of safety’, it seems motivated to recapitulate the important but hardly simple question of whether international maritime rescue law entails a duty to provide such a place. The present study has found reasons to answer in the affirmative.

To begin with, international maritime rescue law is part of international law and as such is primarily concerned with relations between states. While it is widely accepted that some areas of international law involve rights and

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1430 See above Section 7.3 Supplementary Means of Interpretation.
1431 See above Section 1.1 Background.
1432 See above Section 7.2.2.2 International Refugee Law.
1433 See above Section 7.2.2.1 International Law of the Sea.
1434 See above Sections 1.3 Aim, 1.7 Outline of the Thesis.
1435 See above Chapter 6 Standard of Interpretation for the Concept of ‘Place of Safety’.
1436 See above n 34 and accompanying text.
obligations of individuals and other private entities, international maritime rescue law is not thought of as such an area of law. Instead, it seems to fit rather neatly with the classic state-centred view of international law.

In this vein, it seems that masters of merchant ships and other private entities have no clear obligations deriving directly from international law to deliver and disembark persons rescued at sea to places of safety. Instead, such obligations arise as a result of implementation at the national level. National legislation entailing such obligations may apply because of flag state jurisdiction and/or the sovereignty of the coastal state over territorial waters. Such obligations can also arise because of the exercise of special jurisdictional rights for maritime search and rescue. Indeed, both the UNCLOS and the SOLAS Convention allow states to requisition ships for search and rescue purposes. Shipmasters are, furthermore, generally obliged to comply with such orders. States responsible for rescue operations seem therefore to be principally permitted to require shipmasters to disembark survivors at places of safety. Accordingly, it seems that masters of private ships may occasionally find themselves legally required to proceed to a place of safety. However, such requirements do not derive directly from international law but rather from national legislation or some other measure at the national level, such as a decision by a rescue coordination centre.

While considerations of the duties of shipmasters and other private entities to disembark persons rescued at sea may clearly be interesting and intricate, they do not appear to be the most contested and practically important aspect of the legal problems surrounding disembarkation. Most shipmasters can, for natural reasons, be expected to be eager to disembark survivors recovered at sea. The more controversial and supposedly complex question is whether states are obliged, under international law, to arrange for disembarkation within their own territories. While it is widely accepted that places of safety must not always lie within the territory of the responsible state, this study has found

1437 International human rights law is an example: see above Section 4.1 Introduction.
1438 See above Sections 2.3.3.3.2 Implementation, 2.3.3.4 Coastal State Obligations.
1439 See above Section 2.3.3.3.5 Miscellaneous.
1440 SOLAS Convention annex ch V regs 33(1)–(2); UNCLOS art 98(1)(b).
1441 See above Section 1.1 Background.
1442 See, eg, Goodwin-Gill, ‘Setting the Scene: Refugees, Asylum Seekers, and Migrants at Sea’, above n 1397, 26: ‘As yet, there is no rule obliging any particular state to accept disembarkation’; Klein, ‘A Maritime Security Framework for the Legal Dimensions of Irregular Migration by Sea’, above n 132, 48: ‘no agreement could be reached on clarifying that any particular state must accept those rescued at sea within their territory’; Barnes, ‘The International Law of the Sea and Migration Control’, above n 70, 146: ‘although the absence of a specific obligation to allow disembarkation … appears to be critical to the system of protection, it is clear that such an obligation is presently unacceptable’; Gammeltoft-Hansen, ‘The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration’,
reasons to answer that question in the affirmative — relying for this purpose on the *SOLAS Convention* and the *SAR Convention* as amended by the 2004 Amendments — if this is the only possible way to ensure that survivors are disembarked and delivered to a place of safety within a reasonable time.\footnote{1443}

The duty to provide a place of safety is thus not really of independent character but rather implicit in the duty to ensure that such a place is provided.

The main reasons, which were explained at some length in Part I, are that the relevant treaties require, first, their parties ‘to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations’ and, then, the party responsible for the search and rescue region in which such assistance is rendered is rendered to ‘exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors are disembarked from the assisting ship and delivered to a place of safety’.\footnote{1444}

Even though the ordinary meaning of the terms ‘exercise primary responsibility … so that survivors … are disembarked … and delivered to a place of safety’ does not provide unambiguous support for an obligation of the responsible party to ensure that survivors are disembarked, only to ‘exercise primary responsibility’ to this end, it seems to be sufficiently general to accommodate the fuller meaning arising as a result of other interpretative means.\footnote{1445}

In particular, the 2004 Amendments explain that ‘the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the party responsible for the [search and rescue] region in which the survivors were recovered.’\footnote{1446} Even though these provisions appear in preambles, they leave little room for doubt that the drafters envisaged the responsible party as providing the place of safety if this is the only possible way to ensure that such

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\footnote{1444} *SOLAS Convention* annex ch V reg 33(1-1) (emphasis added); *SAR Convention* annex para 3.1.9 (emphasis added).

\footnote{1445} Ibid.

\footnote{1446} 2004 Amendments to the *SOLAS Convention* Preamble; 2004 Amendments to the *SAR Convention* Preamble.
a place is provided: ‘the responsibility to provide a place of safety … falls on the party responsible for the [search and rescue] region’.1447 This reading is further corroborated by the object and purpose.1448 It is also confirmed by the travaux préparatoires and subsequent practice in the application of the treaties.1449 As a result, it seems that the party responsible for the coordination of a rescue operation is required not only to cooperate with other parties towards the provision of a place of safety but also to provide such a place if this is the only possible way to ensure that the survivors are disembarked within a reasonable time.

8.4 Broad Meaning of the Concept of ‘Place of Safety’

On the face of it, the concept of ‘place of safety’ appears to be a technical and highly specific issue with a supposedly narrow meaning. However, on closer inspection, it becomes clear that it is more than just a detail of maritime rescue procedures. It is also, as previously noted, a centrepiece of the international legal framework for irregular maritime migration.1450 Seen in this way, it should be no surprise that the concept has a broad meaning.

The meaning of the concept is not self-evident or obvious. On the contrary, it only appears as a result of interpretation. Neither of the relevant conventions nor the IMO Guidelines on Persons Rescued at Sea are sufficiently categorical that they provide a clear and final picture of the meaning. Instead, the relevant standard of interpretation requires the meaning to be determined ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’1451 The boundaries of the legal context and the extent to which it shall be taken into account in the interpretation are closely linked to article 31(3)(c) of the VCLT. This thesis has conceptualised the meaning of this interpretative means (systemic integration) as a reflection and consequence of the systemic character of international law.1452 Consequently, systemic integration and the ensuing interpretations may change over time. It follows that the meaning of the concept of ‘place of safety’ should not be thought of as something permanent or fixed but rather as dynamically evolving because of its links to the wider context of international law.

1447 2004 Amendments to the SOLAS Convention Preamble; 2004 Amendments to the SAR Convention Preamble. See also Papastavridis, ‘Rescuing Migrants at Sea and the Law of International Responsibility’, above n 66, 166.
1448 See above Section 7.2.3 Object and Purpose.
1449 See above Section 7.3 Supplementary Means of Interpretation.
1450 See above Section 8.2 Epicentre of Legal Complexities and further references there.
1451 VCLT art 31(1). See above Section 6.2 Rules of Interpretation.
1452 See above Section 6.1 International Law as a Legal System.
Furthermore, the meaning of the concept does not seem very specific. On the contrary, it is of general character so as to be applicable to a wide range of different situations. This generality is not the result of faulty or insufficient interpretation but rather an integral and intentional feature of the concept. The 2004 Amendments were the result of complex negotiations and are intended to meet varying circumstances. More precisely, this means that the concept of ‘place of safety’ has a particular meaning that can be determined at any given time but is broad and challenging to establish with any higher precision. The meaning changes over time — as a result of developments both within the relevant standard of interpretation (including linguistic changes) and in the legal context of the concept — and its purposely general format requires considerations of the circumstances of the specific case.

While the concept thus seems broad and flexible, the present study has also shown that it carries a certain meaning to be identified through legal interpretation. This meaning was thoroughly considered in Chapter 7 Meaning of the Concept of ‘Place of Safety’. To conclude, it was summarised as a location where not only the maritime safety of the survivors but also their basic security is no longer threatened.

There are several reasons for the description of the meaning of the concept of ‘place of safety’ as broad. First, the meaning is not very precise but general and flexible for application to a variety of scenarios. Second, it is broad because in addition to risks to survivors’ maritime safety it also encompasses threats to their basic personal security. Third, the meaning is broad because it derives from considerations related not only to international maritime rescue law and the law of the sea but also to international refugee law and international human rights law. Consequently, the meaning is broad in terms of not only scope but also nature as well as origin.

8.5 Evolving Standard of Interpretation

A particular challenge in the search for the meaning of the concept of ‘place of safety’ is that the standard of interpretation may develop over time. While the evolving nature of the general legal framework of the interpretation of treaties is naturally not unique to the relevant concept, it is particularly noteworthy because of the open format of the concept. The general character of the ordinary meaning of the terms, as well as of other interpretative materials, including the IMO Guidelines on the Treatment of Persons Rescued at Sea, requires the interpreter to afford considerable attention to the wider context of international law. The extent and degree to which this context shall be taken into account is linked to the standard of interpretation. The changing
8.6 Threat to the Safety of Refugees and Migrants at Sea

As previously noted, international law provides a relatively well-established and seemingly effective framework for rescue at sea — at least for the initial phases of finding and recovering those in distress. The UNCLOS establishes the basic parameters, including firm expressions of the duty to render assistance at sea, while the SOLAS Convention and the SAR Convention set forth the details. The expectations are reasonably clear, and not many openly challenge the existence of the duty to render assistance at sea or the importance of complying with it. The effectiveness of the framework is underpinned by humanitarian considerations, including international human rights law and non-discrimination.

In sharp contrast to this picture, the meaning of the concept of ‘place of safety’ is complex to grasp, and its meaning links to the wider context of international law. This makes the meaning of the concept largely dependent upon systemic integration and major parts of the legal framework of irregular maritime migration — which are far from uncontested. As a result, the interpretation becomes challenging.

It is feared that the challenges to providing a clear legal answer to the question of place of disembarkation risk undermining the effectiveness of international maritime rescue law in general and for the rescue of refugees and migrants at sea in particular. It is not difficult to envisage the practical concerns of the staff of rescue coordination centres or the masters of ships who have recovered distressed refugees and migrants in trying to navigate the legal intricacies of the concept of ‘place of safety’. The challenges associated with grasping the meaning of the concept increase the risk that not only states but also private actors such as merchant ships or volunteer rescue units become occupied with difficult and time-consuming disembarkation procedures. In the meantime, the willingness to engage in rescue operations can be expected to decline.

Moreover, because disembarkation is typically only controversial when those recovered are refugees and migrants, the complexity of the concept of ‘place of safety’ runs the risk of a different standard of treatment for refugees and migrants than for others. Such a distinction could be an issue with respect to

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1453 See above Chapter 6 Standard of Interpretation for the Concept of ‘Place of Safety’.
not only the general prohibitions of discrimination but also, because of the basic importance of non-discrimination in the duty to render assistance at sea, international maritime rescue law more generally.\footnote{See above Sections 2.3.3.1 Non-Discrimination, 4.3 Non-Discrimination.}

While legal research, including the present thesis, and further inquiry into the meaning and significance of the legal framework for irregular maritime migration may be of some value to ease this threat, further support and work at the international level also seem important. In this context, it is not only somewhat surprising but also regrettable that the \textit{IMO Guidelines on the Treatment of Persons Rescued at Sea} do not pronounce more clearly on the broad meaning of the concept of ‘place of safety’. Even though the \textit{Guidelines} are not completely silent about situations in which those in distress are refugees and migrants, the attention afforded to such situations is remarkably meagre. The \textit{Guidelines} were, after all, adopted in the aftermath of the \textit{Tampa} affair. While they are meant to support the application of the concept of ‘place of safety’ rather than to change its meaning, it seems that there is a clear risk that a main effect of the \textit{Guidelines}, in their current formulation, is to narrow the meaning of the concept.\footnote{\textit{IMO Guidelines on the Treatment of Persons Rescued at Sea} para 1.1 explains that the purpose of the \textit{Guidelines} is ‘to provide guidance to governments and shipmasters with regard to humanitarian obligations and obligations under the relevant international law relating to treatment of persons rescued at sea.’} Accordingly, there may be reasons to consider reviewing the \textit{Guidelines}. It is therefore worrying that the IMO is believed to be of a different view, maintaining that the ‘international legal framework for the rescue of persons is sound’.\footnote{\textit{Implementation of Resolution 2380 (2017): Report of the Secretary-General}, UN Doc S/2018/807 (31 August 2018) para 36. See also Statement of IMO to the 5th Informal Thematic Session on Facilitating Safe, Orderly and Regular Migration (Vienna, 4–5 September 2017) <https://refugeesmigrants.un.org>/: ‘The ultimate solution lies in addressing “push” factors and that is not in IMO’s remit’; Letter from Kitack-Lim, Secretary-General of the International Maritime Organization, to Louise Arbour, Special Representative of the Secretary-General for International Migration and Secretary-General of the Intergovernmental Conference to Adopt a Global Compact for Safe, Orderly and Regular Migration, 7 November 2017, \textit{Outcome of the Inter-Agency Meeting with the Maritime Industry on Mixed Migration} (30 October 2017) <https://refugeesmigrants.un.org>/.}
Summary in Swedish/Svensk sammanfattning


Att rädda flyktingar och migranter till sjöss innebär vanligtvis att nödställda tas ombord på räddningsfartyg. Dessa fartyg är ofta statsfartyg även om det händer att handelsfartyg är inblandade. Oberoende av fartygstyp är den oundvikliga frågan var de räddade ska sättas i land. Svaret på den frågan är många gånger omstritt, inte minst om nödsituationen uppstod i samband med att de nödställda försökte att ta sig in i kuststaten utan uttryckligt tillstånd.

Folkrätten var länge i princip tyst i frågan. År 2004 antogs dock nya regler till SOLAS-konventionen och SAR-konventionen om landsättning av människor som räddas till sjöss. Av dessa framgår att alla som räddas till sjöss ska sättas i land och föras till en säker plats (place of safety) samt att ansvaret för att tillhandahålla en sådan plats eller att se till att den tillhandahålls ligger på den statspart inom vars sjöräddningsregion som de nödställda togs ombord. Vad som avses med ”säker plats” definieras dock inte i konventionerna. Till stöd för tillämpningen finns istället en samling riktlinjer från Internationella sjöfartsorganisationen (International Maritime Organization, IMO). Riktlinjerna är dock inte juridiskt bindande och många frågor är obesvarade.
Denna avhandling behandlar folkrättens regler om plats för landsättnings av människor som räddas till sjöss, mot bakgrund av att många av de som räddas är flyktingar och migranter. Syftet är att utifrån ett juridiskt perspektiv utreda innebörden av begreppet ”säker plats” i ett större folkrättsligt sammanhang. Hänvisningen till det rättsliga sammanhanget anknyter till den tillämpliga tolkningsstandarden, som innebär att inte bara konventionens ordalydelse utan även dess sammanhang samt ändamål och syfte ska beaktas i tolkningen.

Avhandlingen har två huvudsakliga delar. Den första avser det internationella regelverket om flyktingar och migranter till sjöss. I denna del finns kapitel om havsrätt, internationell flyktingrätt, mänskliga rättigheter och gränsöverskridande organiserad brottslighet. Viktiga slutsatser är att havsrätten ger kuststater litet utrymme att ingripa mot fartyg som används för irreguljär migration, att flyktingar och migranter inte får återsändas till platser där de riskerar att utsättas för förövande, tortyr eller annan allvarlig fara samt att stater har skyldigheter i fråga om mänskliga rättigheter även när de agerar utanför sina egna territorier.

Avhandlingens andra huvudsakliga del behandlar tolkningen av begreppet ”säker plats” mer i detalj. Det första kapitlet innehåller en diskussion om den tillämpliga tolkningsstandarden, det vill säga de regler som gäller själva tolkningen av begreppet. Det andra kapitlet beskriver tillämpningen av denna standard. En huvudsaklig slutsats är att ”säker plats” inte kan förstås enbart utifrån havsrätten utan att hänsyn ska tas till relevanta och tillämpliga regler även inom andra rättsområden, såsom internationell flyktingrätt och mänskliga rättigheter. Viktiga exempel på sådana andra regler handlar om förbud mot återsändande (non-refoulement), rätten till liv och icke-diskriminering. Sammanfattningsvis beskrivs en ”säker plats” som en plats där de räddade är säkra inte bara i sjösäkerhetshänseende (maritime safety) utan även med avseende på grundläggande personlig säkerhet (basic security).

Avhandlingens sista kapitel sammanfattar några huvudsakliga slutsatser i ett större perspektiv. Här sägs bland annat att det inte går att bortse från folkrätten när det gäller frågor om varför flyktingar och migranter ger sig ut till sjöss, att begreppet ”säker plats” har en bred innebörd samt att de juridiska utmaningarna med att fastställa begreppets innebörd riskerar att motverka räddningen av flyktingar och migranter till sjöss.
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Is there a duty to rescue refugees and migrants in distress at sea? Where shall survivors be taken? Can they be returned to the state from which they sailed? What are the rights and obligations of states under international law? Do human rights apply at sea?

Following recent amendments, international maritime rescue law requires that everyone rescued at sea be disembarked and delivered to a place of safety. However, ‘place of safety’ is not clearly defined. This thesis examines the meaning of the concept of ‘place of safety’ against the background that many of those rescued at sea are refugees and migrants. Drawing on an explorative survey of the international legal framework for irregular maritime migration covering norms under the international law of the sea, international refugee law, international human rights law and international law against transnational organised crime and on a dedicated discussion of the applicable standard of interpretation, this thesis argues that the meaning of the concept of ‘place of safety’ is broader than it first may seem.

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