

Centre d'Etude de Droit militaire et de
Droit de la Guerre
Association sans but lucratif



Studiecentrum voor Militair Recht en
Oorlogsrecht
Vereniging zonder winstgevend doel

Journée d'Etude du 7 juin 2018 - Studiedag op 7 juni 2018

**Migratie, maritiem recht en maritieme operaties
Migrations, droit maritime et opérations maritimes**

DUTY TO RENDER ASSISTANCE AT SEA –

LEGAL AND PRACTICAL IMPLICATIONS FOR MERCHANT SHIPS

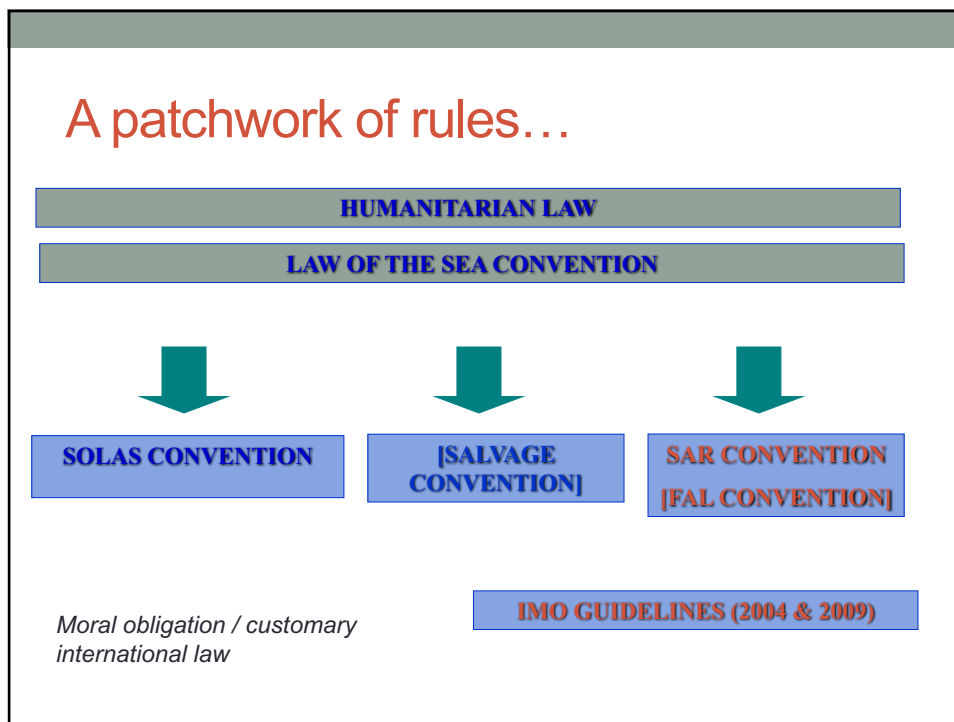
Prof. Dr. G. Gonsaeles

Brussels, 7 June 2018

All viewpoints expressed throughout this presentation are solely the responsibility of the individual lecturer and should not be construed as necessarily reflecting the views or official attitudes or policies of any of the institutions with which the lecturer is affiliated.

LEGAL PROVISIONS AT STAKE

A patchwork of rules...



Art. 98 LOSC (+Art. 58(2))

(1) Every flag State must 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:

- to render assistance to any person found at sea in danger of being lost;
- 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;
- [...].

(2) Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances require, by way of mutual regional arrangements, to co-operate with neighbouring States for this purpose.

SOLAS

- *"The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so."*
- *contracting Governments should undertake "to ensure that necessary arrangements are made . . . for the rescue of persons in distress at sea around its coasts."*

SALVAGE CONVENTION

While primarily concerned with the (voluntary) salvage of property (ship & cargo) and the prevention of marine pollution,

the 1989 Salvage Convention restates the obligation on the master to render assistance to any person in danger of being lost at sea



SAR Convention + IAMSAR

- obligation to initiate action activated once the responsible authorities of a State Party receive information that any person is, or appears to be, in distress at sea
- once a State Party has accepted responsibility to provide SAR services for a specified area, it is obliged to use SAR units and other available facilities for providing assistance to anyone in distress at sea
- such assistance is to be provided "*regardless of the nationality or status of such a person or the circumstances in which that person is found*"

SAR Convention + IAMSAR

- “Rescue“
 - not only "*an operation to retrieve persons in distress, provide for their initial rudical or other needs*", but also
 - to "*deliver them to a place of safety*" .
- “Distress phase”
 - “*A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance*”

(cfr. *infra*)

SAR Convention + IAMSAR

- no matter where an accident occurs, rescue of persons in distress at sea to be co-ordinated by a SAR organization and - when necessary - by co-operation between neighbouring SAR organizations
- ensure closest practicable coordination between maritime and aeronautical services > IAMSAR Manual
- world's oceans divided into 13 SAR areas, in each of which countries concerned have delimited SRRs for which they are responsible.
- States must ensure that sufficient SRRs are established
 - contiguous and - as far as practicable - not overlap
 - each SRR established by agreement among parties concerned
 - delimitation of an SRR is not related to, and shall not prejudice, the delimitation of any boundary between States

FAL CONVENTION

- sets forth special facilitation measures for ships calling at ports in order to put ashore sick or injured crew members, passengers or other persons for emergency medical treatment.



A SHIP'S VIEWPOINT

TO DO... ?

MASTER'S OBLIGATION...

DUTY TO RENDER ASSISTANCE

- only a distress situation requires a rescue
- variety of acts that may constitute assistance
 - tow the vessel to safety,
 - extricate a grounded vessel,
 - fight a fire aboard a ship,
 - provide food and supplies,
 - embark crewmen aboard to re- place the tired or the missing,
 - secure aid or assistance from other nearby ships,
 - simply *stand-by* to provide navigational advice.

SALVAGE Δ SAR !

CALLING UPON SAR AUTHORITIES?

SAR Convention + IAMSAR

- “Distress phase”
 - “A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance”
- different interpretations according to which State is handling the situation
 - vessel on the point of sinking ?
 - sufficient for vessel to be unseaworthy?
 - (ILC) although a situation of distress may at most include a situation of serious danger – it is not necessarily one that jeopardizes the life of the persons concerned > see also Council Decision 2010/252/EU

Council Decision 2010/252/EU

- additional guidelines that must be respected by EU MS during SAR operations at sea.
- *When deciding whether a vessel is in distress, search and rescue units should take all relevant elements into account, in particular:*
 - a) the existence of a request for assistance;
 - b) the seaworthiness of the ship and the likelihood that the ship will not reach its final destination;
 - c) the number of passengers in relation to the type of ship (overloading);
 - d) the availability of necessary supplies (fuel, water, food, etc.) to reach a shore;
 - e) ...

Council Decision 2010/252/EU

- e) the presence of qualified crew and command of the ship;
- f) the availability of safety, navigation and communication equipment;
- g) the presence of passengers in urgent need of medical assistance;
- h) the presence of deceased passengers;
- i) the presence of pregnant women or children; and
- j) the weather and sea conditions.

unseaworthiness does not automatically imply a distress situation

- taking into account *non-refoulement* principle
- “FRONTEX” operations

OR NOT TO DO... ?

FACING CRIMINAL & DISCIPLINARY SANCTIONS

BE Code of Conduct for Merchant Marine and Fisheries

- ❖ Loi du 5 juin 1928 portant revision du Code disciplinaire et pénal pour la marine marchande et la pêche maritime
- ❖ Wet van 5 juni 1928 houdende herziening van het Tucht- en Strafwetboek voor de koopvaardij en de zeevisscherij

> Maritime Disciplinary Court

Law of 5 June 1928, as amended

(Art. 62)

Met gevangenisstraf van een maand tot twee jaar en met geldboete van vijfhonderd frank tot vijfduizend frank wordt gestraft de kapitein die nalaat hulp te verlenen aan enig persoon, zij het een vijand, die in levensgevaar wordt aangetroffen in zee of in de zeewateren voor zover hij zulks kan doen zonder ernstig gevaar voor schip of opvarenden.

Tout capitaine qui, autant qu'il peut le faire sans danger sérieux pour son navire ou pour les personnes embarquées, n'a pas prêté assistance à toute personne, même ennemie, trouvée en mer ou dans les eaux maritimes, en danger de se perdre, sera puni d'un emprisonnement d'un mois à deux ans et d'une amende de cinq cents francs à cinq mille francs.

HANDLING ON BOARD

Human, social and safety issues

- Taking care of the crew's, passengers' and refugees' safety and well-being
- Taking care of vessel's safety
- Taking care of contractual obligations
- Involvement of refugees in ships' care?



Law of 5 June 1928, as amended

(Art. 5)

De kapitein heeft over ieder die zich aan boord bevindt, het gezag dat vereist is voor de handhaving van de orde, voor de veiligheid van schip, opvarenden en lading, alsmede voor de goede afloop van de reis.

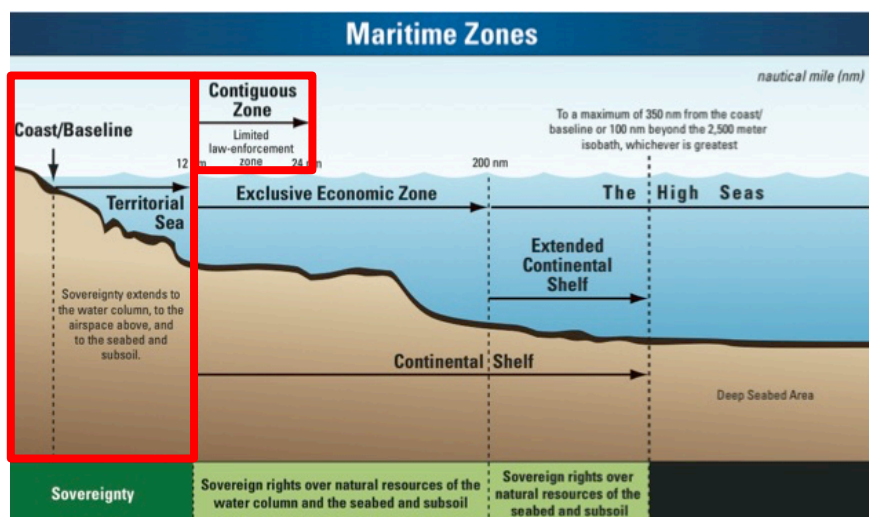
Hij kan alle daartoe dienstige dwangmiddelen gebruiken en ieder die aan boord is, opvorderen om hem daarin bij te staan.

Le capitaine a, sur quiconque se trouve à bord, l'autorité que comportent le maintien de l'ordre, la sécurité du navire, des personnes et de la cargaison, ainsi que la bonne fin de l'expédition.

Il peut employer à ces fins tous les moyens utiles de coercition et requérir quiconque se trouve à bord de lui prêter main-forte.

WHERE TO SAIL?

POSSIBLE PROHIBITIONS



WHERE TO DISEMBARK?

M/S TAMPA

Confrontation between Law of the Sea
and Humanitarian Law

Non-refoulement principle

Art. 33(1) of 1951 Convention Relating to the Status of Refugees

“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.”

NO STRICT DISEMBARKMENT RULES IN LEGAL PROVISIONS AT STAKE

DISEMBARKMENT IN PLACE OF SAFETY ONLY

- Rescue implies that persons in distress have to be delivered to a **place of safety**
 - a location where rescue operations are considered to terminate, where the survivors' safety or life is no longer threatened, basic human needs (such as food, shelter and medical needs) can be met and transportation arrangements can be made for the survivors' next or final destination
 - disembarkation of asylum-seekers recovered at sea, in territories where their lives and freedom would be threatened, must be avoided in order to prevent the violation of the *non-refoulement* principle

2004 SOLAS and SAR Amendments

no actual duty for States to disembark the persons rescued

States must arrange for the disembarkation of persons rescued at sea as soon as reasonably practicable

a State may still refuse disembarkation onto its own territory or make this dependent on certain conditions

2004 IMO Guidelines on the Treatment of Persons Rescued at Sea

no clear disembarkation duty

Government responsible for the SRR in which survivors were recovered will be responsible for providing a place of safety, or ensuring that such a place of safety is provided.

guidelines only, explicitly refused by certain CSs

2009 IMO Guidelines on Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea

no clear disembarkation duty

if disembarkation from the rescuing ship cannot be
arranged swiftly elsewhere, the Government responsible
for the SRR should accept the disembarkation

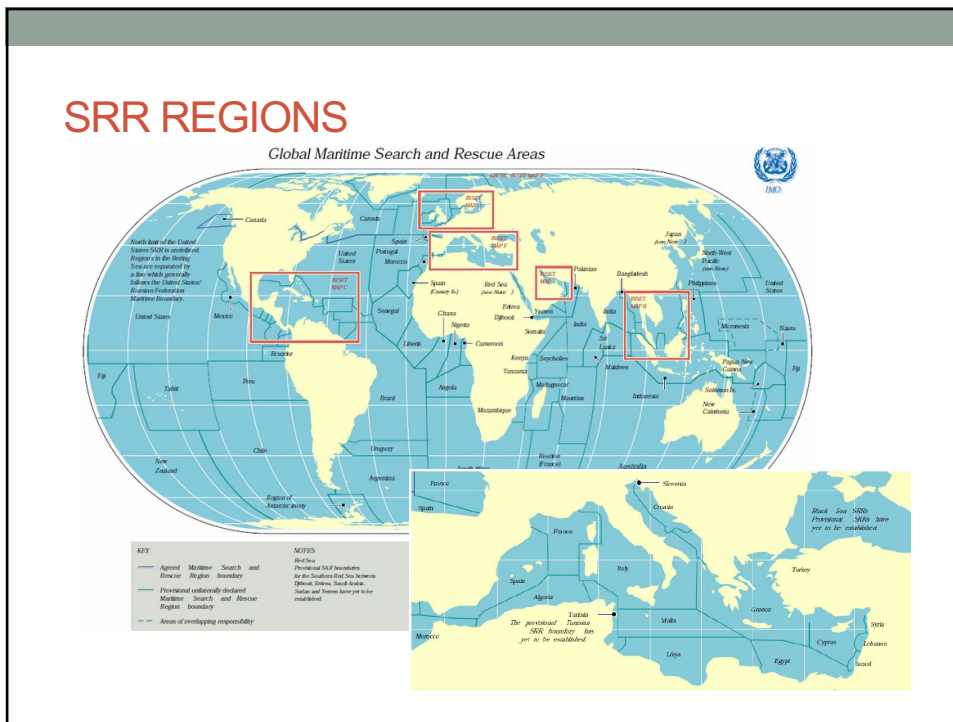
guidelines only, explicitly refused by certain CSs

Council Decision 2010/252/EU

priority should be given to the third country from where the
ship carrying the persons departed, or through the territorial
waters or SRR through which that ship transited

if this is not possible, priority should be given to
disembarkation in the MS hosting the surveillance
operation at sea

FRONTEX operations only (!)



IN GENERAL persons rescued at sea can spend weeks on a ship at sea before a State allows them to go ashore

DEALING WITH CONTRACTORS...

Whilst deviating / searching for a solution

...

- What about one's own contractual obligations?
- C/P normally provided for > off-hire
- Transport agreement
 - Cargo damage > force majeure?



WHO PAYS?

While the obligation to assist is clear, as are the possible criminal and civil legal consequences of failing to do so, the question concerning where the costs for the operation should fall as between a shipowner or a charterer, and/or their respective insurers, is not always as clear-cut.

Courtesy by Asterias Avocats – F. DOLLFUS

P&I Cover

What costs are covered by the P&I insurance?

- only expenditure which cannot be compensated by another party will be reimbursed by the P&I insurance
- Consequently, before seeking reimbursement from the Club, the member should explore the possibility of being reimbursed by the authority instructing the shipowner to take part in the SAR operations, alternatively the flag state.

« time is money »

SAR operations in the area around the busy Mediterranean routes typically last from a few hours up to a few days, depending on the circumstances of the individual case as well as the relevant vessel's involvement and the possibilities for disembarkment.

Courtesy by Asterias Avocats – F. DOLLFUS

Costs for diversion – a considerable item

- **costs for the diversion of the vessel in order to rescue and disembark the refugees**
 - Costs for a diversion are covered by P&I insurance if the diversion is justified and reasonably undertaken, which is typically the case when a shipowner is requested to assist by a national authority.
 - It is however important that the member always informs the Club about the event before the vessel diverts, in order to obtain approval and advice from the Club.
 - The diversion starts when the ship changes course to rescue refugees and ends when the vessel is reasonably back on course to its original destination.

Courtesy by Asterias Avocats – F. DOLLFUS

Costs for diversion – additional costs

- **Additional costs for diversion** that can be reimbursed include:
 - expenses for fuel,
 - insurance,
 - stores and provisions,
 - additional port charges attributable to the diversion and incurred as a direct consequence thereof.
 - including pilots and tugs as well as port dues and fees.
- **Conditions**
 - Cover is only provided for costs in excess of those that would have been incurred had it not been for the diversion.
 - Credit should be made for costs saved, if any.
 - Member may be asked to supply details of actual and calculated costs in order for the Club to establish the compensation due.
 - All actions should be recorded in the deck log and a log extract is required from the member to obtain compensation from the Club for expenses incurred.

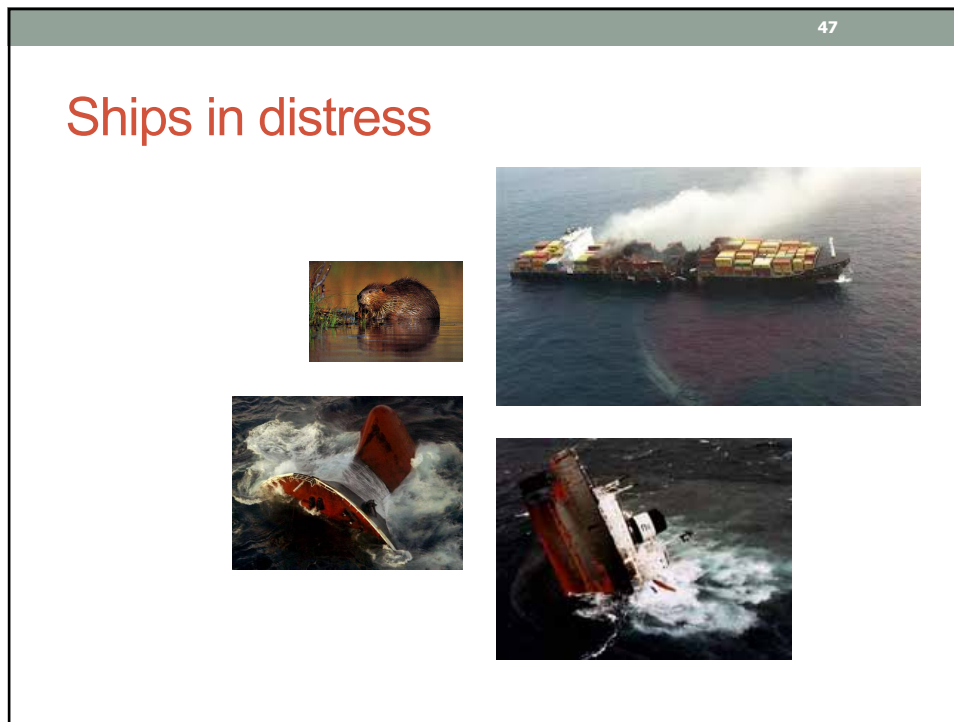
Courtesy by Asterias Avocats – F. DOLLFUS

Other costs

- costs that the shipowner incurs in order to manage the refugees' care and maintenance while aboard



ASSIMILATING
A PLACE OF SAFETY
AND
A PLACE OF REFUGE?



IMO Draft Regional Agreement for the Mediterranean Basin?

1. establish and strengthen co-operation among Parties to enable them to cope with incidents involving persons rescued at sea;
2. establish a system of communication between the countries in the region to exchange information on the movement of persons by sea;
3. ensure the safety of persons rescued at sea, pending a decision as to the place where such persons will be safely delivered, taking into account the prevailing weather and other conditions, including the safety of the delivering ships and the capacity of the places where they are delivered to provide care as may be necessary under the circumstances;
4. arrange that delivery of persons takes place without undue delays to the rescuing ships which should be allowed to promptly proceed to their destination once the delivery operation is over; and
5. promote co-operation for the delivery of persons rescued at sea to a port of a place of safety.

Future evolutions...



Further reading / Sources

Further reading / sources

- Coppens, J. & Somers, E., Towards New Rules on Disembarkation of Persons Rescued at Sea?, 25 *IJMCL*, 2010, 377-403
- Coppens, J., The essential role of Malta in drafting the new regional agreement on migrants at sea in the Mediterranean Region, 44 *JMARLC* 89, January 2013
- IMO-UNHCR-ICS, *Rescue at Sea – A Guide to Principles and Practice as applied to Refugees and Migrants*, January 2015, 16 p.
- International Chamber of Shipping (ICS), *Large-Scale Rescue Operations at Sea – Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons*, 2015, 28 p.

THANK YOU FOR YOUR ATTENTION

Prof. Dr. G. Gonsaeles

Antwerp Maritime Academy / Antwerp University

gwendoline.gonsaeles@hzs.be