

A Tale of Non-State Actors and Human Rights at Sea: Maritime Migration Crisis and Commercial Vessels' Obligations

*Una historia de actores no estatales y derechos
humanos en el mar: la crisis marítima de migración
y las obligaciones de las embarcaciones comerciales*

*Une histoire d'acteurs non étatiques et des droits
de l'homme en mer: la crise maritime de la migration
et les obligations des navires de commerce*

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SUMMARY: I. *Introduction*. II. *The Forefront of the Current Crisis*. III. *Distress at Sea*. IV. *Human and Refugee Rights at Sea*. V. *An Elephant in the Room*. VI. *The European Union's Reaction*. VII. *Conclusions: Is this a Sarago Novel?* VIII. *Bibliography*.

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Artículo recibido el 31 de mayo de 2017

Aprobado para publicación el 25 de septiembre de 2017

Anuario Mexicano de Derecho Internacional, vol. XVIII, 2018, pp. 35-64
Ciudad de México, ISSN 1870-4654

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RESUMEN: Este artículo presenta el papel que juegan los actores no estatales en la crisis migratoria marítima en Europa. Para ello, se realizan consideraciones acerca de las obligaciones de actores no estatales derivadas de instrumentos de derechos humanos y el derecho internacional de los refugiados. Se aduce que se ha prestado poca atención a la industria marítima y a las embarcaciones comerciales como titulares de responsabilidades en derechos humanos y, por lo tanto, ese análisis es necesario. El trabajo analiza diversos instrumentos internacionales desde la perspectiva del derecho internacional marítimo, de los derechos humanos y del derecho internacional de los refugiados. Se concluye que enfrentar el problema de la migración marítima puede implicar considerar una necesaria enmienda de diversos tratados internacionales. Adicionalmente, se sostiene que es necesario estudiar la migración marítima como un fenómeno complejo que no tiene sólo implicaciones respecto al derecho internacional en lo concerniente a los derechos humanos y al derecho de los refugiados, sino también respecto a la industria marítima.

Palabras clave: migración marítima, actores no estatales, industria marítima, derechos humanos, refugiados.

ABSTRACT: The main purpose of this article is to present the role which non-state actors have played in the maritime migration crisis in Europe. Therefore, theoretical considerations regarding non-state actors' obligations derived from human rights regulations and refugee law, in terms of maritime migration, have been conducted. The author points out that, in the current situation very little attention has been devoted to the shipping industry and commercial vessels as holders of human rights responsibilities and hence such analysis is necessary. The author analyzes international legal acts from the scope of international maritime law, human rights law and refugee law. In conclusion, it is summarized that addressing the issue of maritime migration would require amending many international legal treaties. Additionally, it is indicated that it is necessary to study migration as a complex phenomenon which has not only implications in international law pertaining to human rights and refugee law, but also for the shipping industry.

Key words: maritime migration, non-state actors, shipping industry, human rights, refugees.

RÉSUMÉ: Cet article présente le rôle des acteurs non étatiques dans la crise des migrations maritimes en Europe. À cette fin, il est tenu compte des obligations des acteurs non étatiques découlant des instruments relatifs aux droits de l'homme et du droit international des réfugiés. On soutient que peu d'attention a été accordée à l'industrie maritime et aux navires commerciaux en tant que détenteurs de responsabilités en matière de droits de l'homme et donc cette analyse est nécessaire. Le document étudie divers instruments internationaux dans la perspective du droit maritime international, des droits de l'homme et du droit international des réfugiés. On conclut que s'attaquer au problème de la migration maritime peut impliquer l'examen d'une modification nécessaire de divers traités internationaux. Il est en outre soutenu qu'il est nécessaire d'étudier la migration maritime comme un phénomène complexe qui a des implications non seulement pour le droit international en matière de droits de l'homme et de droit des réfugiés mais aussi pour l'industrie maritime.

Mots-clés: migration maritime, acteurs non étatiques, industrie maritime, droits de l'homme, réfugiés.

I. INTRODUCTION

When, at the end of 2014, high numbers of migrants (refugees and asylum-seekers) started to flow to Europe from North Africa and the Middle East, international attention became focused on two parties engaged in the unfolding crisis: migrants and their final destinations – European states. In the media, during academic disputes and friendly conversations one could witness two clear opposing voices in this debate: those advocating pro migrants and the less popular, “politically incorrect” – pro states.

Therefore, the dispute in the international arena, in the European Union and in migration-affected states focused on, on one hand, the states’ duties and obligations stemming from international human rights and refugee law and on the migrants’ rights on the other. Initially there were very few people (besides representatives of shipping firms and maritime lawyers) who openly recognized a third party heavily affected by the migration crisis—the shipping industry—and even after 2 years, this has not significantly changed. As the great majority of migrants have been reaching the “Old Continent” by sea routes (more than a million arrived to Europe by sea¹ and more than 50,000 were rescued by commercial vessels during rescue operations)² it started having very immediate and very huge implications for the shipping industry.

Thus, from the perspective of public international law several questions arise, which will be addressed in this article. First of all, it will be determined how many parties are, in fact, engaged in the migration crisis and explained how this crisis affects them. Furthermore, an analysis as to what extent it is possible to assign responsibility to them, based on human rights treaties, will be conducted. Finally, conclusions and lessons for the future

¹ According to the International Organization for Migration and the United Nations High Commissioner for Refugees only in 2015 more than a million migrants reached Europe by sea (available at: <https://www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom>, <http://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> [last access: 17 February 2017]).

² According to the International Chamber of Shipping more than 1,000 commercial vessels participated in rescue operations of migrants rescuing about 50,000 migrants (available at: <http://www.ics-shipping.org/docs/default-source/resources/safety-security-and-operations/large-scale-rescue-at-sea.pdf?sfvrsn=30> [last access: 17 February 2017]).

will be presented. However, what is of fundamental importance is that, the goal of the analysis in this article is to conduct it in the light of maritime reality and, thus, avoid over-theorized statements, which even though are legally correct, are simply inconsistent with the conditions prevailing at sea.

From a methodological point of view, it is important to point out that the rights and obligations of ships owned and operated by states are excluded from analysis in this article (in such cases states are responsible for their conduct and states can be condemned for violation of human and refugee rights).³

II. THE FOREFRONT OF THE CURRENT CRISIS

Due to the fact that the great majority of current migrants have come to Europe using sea routes, mainly from North Africa and the Middle East (mostly from countries such as Syria, Afghanistan, Eritrea, Somalia and Nigeria)⁴ the first affected party is the shipping industry. Several hours and sometimes even days before boat people⁵ reach the European Continent and countries have to face the problem with recognition of their refugee status, the necessity of providing them with medical assistance, accommodation and food, they have already been met by many commercial vessels at sea.

Typically, in a discussion about (land) migration, we talk about two parties engaged in this phenomenon: migrants (refugees, asylum-seekers) and

³ The matter of responsibility for a violation of the European Convention of Human Rights by vessels controlled and operated by states was analyzed before the European Court of Human Rights, see: *Medvedyev and others v. France* (the ECHR Judgment from 29 March 2010, application no. 3394/03), *Hirisi Jamaa and others v. Italy* (the ECHR Judgment from 23 February 2012, application no. 27765/09).

⁴ According to the United Nations High Commissioner for Refugees, *The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees*, Geneva, 1 July 2015 (full report available at: <http://www.unhcr.org/protection/operations/5592bd059/sea-route-europe-mediterranean-passage-age-refugees.html> [last access: 17 February 2017]).

⁵ The term “boat people” was originally employed in the context of Vietnamese migrants (refugees), who left from Vietnam in 1970’s, due to the war, on small boats to other countries in the region. More about this topic see: Diller, Janelle, *In Search of Asylum: Vietnamese Boat People in Hong Kong*, Washington, Indochina Resource Action Center, 1988.

state actors. However, in the case of maritime migration, which makes the current migration crisis significantly different than historically well-known migration movements,⁶ there is another, third party engaged in it, a non-state, private actor – the shipping industry.

In the case of land migration, there is an urgent necessity to protect migrants as a vulnerable group and the other value at stake is the safety and security of states receiving them (it includes the social and financial safety and security of their populations, and, for example, the quite often-recalled threat of terrorism). However, even arguments raised by opponents of pro-migratory policies in the affected countries, are related to —one could say— the rather indirect effect caused by migrants on the general well-being of nationals. As examples of an indirect effect one could enumerate the possibility of relocation of a state’s budgetary funds (e.g., to provide proper accommodation, medical care and schooling for migrants) or the increase in unemployment⁷ (and a competitively cheaper workforce).⁸ Probably, the most direct effect on national populations could be the cultural and religious differences between migrants and nationals, but the question is – does it really affect nationals so much? Even though the cultural and religious “patchwork” recently occurring in some European countries

⁶ Regarding the history of migration see: Ortega Velázquez, Elisa, “La consolidación histórica de la migración irregular en Europa: leyes y políticas migratorias defectuosas”, *Anuario Mexicano de Derecho Internacional*, Mexico City, vol. XIV, 2014, pp. 637-687. See also Livi-Bacci, Massimo, *A Short History of Migration*, Cambridge-Malden, Polity, 2012.

⁷ However, according to many studies, migrants have little impact on the national labor market (this is on the unemployment rate and level of wages). For example, in the case of the United Kingdom, many authors agree that migration contributed not only to reducing the unemployment rate, but also to suppressing inflationary pressures. Blanchflower, David *et al.*, “The Impact of the Recent Migration from Eastern Europe on the UK Economy”, *Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labor: Discussion Paper Series*, Bonn, no. 2615, 2007, p. 32. Similar about the impact of Syrian refugees on Turkish labor market: Akgündüz, Yusuf *et al.*, “The Impact of Refugee Crises on Host Labor Markets: The Case of the Syrian Refugee Crisis in Turkey”, *Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labor: Discussion Paper Series*, Bonn, No. 8841, 2015, pp. 18-19.

⁸ It is important to notice that this argument works both pro and contra the employment of migrants. From the perspective of national workers there is indeed the aforementioned threat of loss of jobs and/or difficulties in finding employment due to higher financial expectations (yet, as it was indicated above, migrants seem to have little impact on national labor markets). However, from the employers’ perspective employment of migrants constituting a cheaper work force (of course, without any violation of labor law) seems to be beneficial.

seems to be alarming at first sight, when one looks closer it is very hard to unambiguously determine that it directly affects (especially detrimentally) the whole population of a receiving country. However, the situation changes significantly in the case of maritime migration, where the impact on the shipping industry (and commercial vessels) is undoubtedly direct.⁹

To better understand this direct effect, it is important to realize that the term “a vessel” describes not only an inanimate object, but also a set of people (its crew), individuals, civilians, common employees working on contracts like any other land workers (school teachers, bus drivers, doctors or engineers). Moreover, all crewmembers are employed by private companies, being very often also a shipowner, which is bound to its charterers (business partners) by contractual agreements. Additionally, private insurers insure a vessel, its crew and cargo. This branch of industry—shipping—is formed mostly by seafarers (and additionally other types of workers, who provide plenty of different services to ships and their crews, however due to the fact that they belong to the category of land workers they are excluded from this analysis), who are clear holders of human rights themselves. Therefore, the shipping industry is much more than just an abstract conglomerate of commercial interests.

To make it easier to visualize, let us put it in a real scenario. A commercial vessel owned by a private company heads from Italy to India (through the Suez Channel and the Red Sea) and meets on its way migrants from Syria. According to international regulations, which I am going to discuss in detail later in this article, such a vessel is obliged to render them assistance and deliver them to a place of safety.¹⁰ Such conduct, certainly very proper from the humanitarian perspective, has many consequences

⁹ One of the very few analogic situations is the case of the Mexican freight trains colloquially called “La Bestia”, which are used by Latin American migrants, from different countries of the region, to cross Mexico in order to enter the United States of America (available at: <http://www.migrationpolicy.org/article/central-american-migrants-and-%E2%80%99C1a-bestia%E2%80%99D-route-dangers-and-government-responses> [last access: 10 March 2017]).

¹⁰ The term “a place of safety” as referred to in regulation 13.2, Chapter 1, SAR '79 Convention is not defined in any international convention. As explained in *IMO Guidelines on the Treatment of Persons Rescued at Sea* (Resolution MSC.167(78) adopted on 20 May 2004) it means a place where the life of a person rescued at sea is not endangered anymore and his/her basic human needs are met. In a place of safety a rescue operation is considered to be terminated and from this place further arrangements regarding transportation/delivery to the final destination of a person rescued at sea can be made.

for vessels and —what is of the most importance— their crews. Enumerating only the main consequences for the shipping industry, one could say: delays and changes of course; late deliveries of cargo; deterioration of perishable cargo; consumption of additional bunker fuel; breach of contracts; violation of insurance contracts and many others.¹¹ From the perspective of seafarers: the participation in dangerous rescue operations; delays resulting in prolonged work; life-threatening diseases; chaos resulting in safety and security accidents, etc. Seafarers' families cannot be also forgotten in this context. Quite often they are neglected in the discussion about maritime issues, but their lives, well-being, financial and emotional stability (and therefore their human rights) are heavily dependent on the situation on board of the vessels where their spouses, siblings, children or parents work.¹² Therefore, there is a direct impact of maritime migration on seafarers, commercial vessels and the whole shipping industry, being the forefront of the migration crisis.

1. *Non-State Actors at Sea*

Normally in the debate concerning non-state actors, scholars consider – international organizations, non-governmental organizations, non-state actors exercising effective territorial control over particular territory (e.g., regime *de facto*), trans/multinational corporations¹³ and others (e.g., reli-

¹¹ Available at: <http://www.southampton.ac.uk/smmi/news/2016/04/13-mediterranean-migrant-crisis-impact-on-the-shipping-industry.page> (last access: 25 February 2017).

¹² This argument was often raised in the context of maritime piracy in the Gulf of Aden. The non-governmental organization *Save our Seafarers* argued that giving the fact that approx. 100,000 seafarers are crossing (or are preparing to cross) the Gulf of Aden in the same time, if we take into account the stress of their families (due to the danger of acts of piracy on their family members) it results in more than half a million people living under the constant threat of piracy. Stępień, Barbara, *Prawo międzynarodowe publiczne a bezpieczeństwo żeglugi morskiej*. Gliwice, JBS, 2016, p. 249.

¹³ There have been adopted several international legal documents (from the scope of *soft law*) pertaining to the problem of non-state actors (mainly transnational corporations) and human rights, for example: Commission on Human Rights, Sub-Commission on the Promotion and Protection of Humans, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (UN Doc. E/CN.4/Sub.2/ 2003/12/ Rev.2) adopted on 13 August 2003; the United Nations Human Rights Council, *The Guiding*

gious groups).¹⁴ The reason why international lawyers devote attention to non-state actors is generally based on the fact that non-state actors enjoy “significant *de facto* economic, financial and institutional power”¹⁵ and “yet the[y] lack any corresponding legal responsibility”.¹⁶ Even though the last citation seems to be quite true in many situations, in the context of maritime migration and the shipping industry it is rather the opposite. As the difference between “typical” non-state actor’s obligations based on human rights regulations and the shipping industry’s is (as in the case of land *vs.* maritime migration) substantial, this topic requires some words of explanation.

2. Relationships at Sea

In general, non-state actors are not bound by human and refugee rights, and thus they remain unaccountable for their conduct.¹⁷ However, due to the fact that the role of non-state actors in the international arena keeps increasing, international lawyers also continue to develop legal concepts to protect individuals from human rights violations.¹⁸

In the context of maritime migrations, it is possible to distinguish three basic types of relationship pertaining to human rights: 1) vertical; 2) diagonal; and 3) horizontal,¹⁹ which may provide certain grounds for further consideration related to the matter of responsibility.

Principles on Business and Human Rights (UN Doc. A/HRC/17/31) endorsed on 6 June 2011; *The UN Global Compact* launched on 26 July 2000.

¹⁴ For more concerning non-state actors see: Wagner, Markus, “Non-State Actors”, *Max Planck Encyclopedia of Public International Law*, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1445?rskey=DogFV9&result=1&prd=EPIL> (last access: 20 February 2017).

¹⁵ Zarei, Mohammad and Safari, Azar, *The Status of Non-State Actors under the International Rule of Law: A Search for Global Justice*, p. 1, available at: <http://bit.ly/1EYkLjd> (last access: 20 February 2017).

¹⁶ *Idem*.

¹⁷ Peers, Steve *et al.*, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, vol. 3: *EU Asylum Law*, Boston-Leiden, Brill, 2015, p. 101.

¹⁸ Regarding expanding human rights obligations to non-state actors see: De Brabandere, Eric, “Non-State Actors, State-Centrism and Human Rights Obligations”, *Leiden Journal of International Law*, Leiden, vol. 22, no. 1, 2009, pp. 191-209.

¹⁹ Hessbruegge, Jan, “Human Rights Violations Arising from Conduct of Non-State Actors”, *Buffalo Human Rights Law Review*, New York, vol. 11, 2005, p. 3.

In the case of European maritime migration, the vertical obligation-right relationship is undoubtedly between European states and migrants (states which are state parties to human rights conventions). The diagonal relationship exists in this case between European states, maritime migrants and the shipping industry. However, this diagonal relationship covers partially the vertical obligation-right relationship between flag/coastal states and seafarers. And, finally, the horizontal relationship appears between non-state actors, namely commercial vessels, and maritime migrants. As follows from brief analysis of the aforementioned relationships, all three parties engaged in maritime migrations are both: donors and receivers of human rights and obligations (states of course are not considered in the group of human rights' holders).

This complexity of relationship causes not only methodological chaos, but also hierarchical problems. Thus, a pertinent question arises, which is: whose rights should prevail when a conflict of interests occurs, for example, when seafarers' and migrants' rights are mutually exclusive and the state needs to make a very tough decision whose human rights to violate? In the case of maritime migration, the general principle of human rights—their interdependence—is even more evident. It happens quite often that by violating the human rights of one group (e.g., maritime migrants by not allowing their disembarkation in a certain harbor) the human rights of the other group (in this situation – seafarers) are also abused (as is going to be further explained, declining permission by coastal states to enter its harbor to a ship carrying maritime migrants has very severe consequences also for seafarers).

However, regardless of how one would answer the above-stated question, the only clear responsibility in this context is the state's responsibility for violation of seafarers' and/or migrants' rights (in the vertical relationship).²⁰ Currently, from the perspective of international law, determination of responsibility in the diagonal and horizontal relationship in the case of maritime migration seems to be very difficult. The methodological solution, which lately has become more popular not only in constitutional law,²¹ but also in international law —*Drittwirkung*, called also *the third*

²⁰ For more about States' responsibility see: Becerra, Manuel, *Derecho internacional público*, Mexico City, UNAM, Instituto de Investigaciones Jurídicas, 1991, pp. 83-91.

²¹ For more about the third party effect in constitutional law see: Młynarska-Sobaczewska, Anna and Radziejewicz, Piotr (eds.), *Horyzontalne oddziaływanie Konstytucji Rzeczypospolitej Pol-*

party effect— also appears not to be helpful. As some authors duly notice, the most important legal act in the context of human rights and the maritime migration crisis in Europe —the European Convention of Human Rights (ECHR Convention)—²² was never designed with the intention to be applicable in a horizontal relationship between individuals.²³

As it was expressed by Clapham:

it is unfortunate that the questions have been cloaked with the mystique of the *Drittwirkung* doctrine... Without detailing all the competing theories of *Drittwirkung*, it is suggested that *Drittwirkung* is not helpful at the international level. The European Court of Human Rights is not seeking to harmonize constitutional traditions but to ensure international protection for the rights contained in the Convention. Key questions in *Drittwirkung* doctrine are the weight to be given to different rights such as: the right to free development of the personality, the right to work, the right to strike, the right to property, freedom of conscience, the right to equality, the right to free enterprise, and the right to freedom of contract. *Drittwirkung* theories which are based on the presence of social power or the sanctity of freedom of contract (protected under Article 2 of the German Basic Law) cannot really help to solve the international protection of the rights found in the European Convention on Human Rights.²⁴

Arguments supporting a similar point of view pertaining to the Convention relating to the Status of Refugees, 1951 (Refugee Convention '51)²⁵ are equally strong. It is based on the fact that similar to the ECHR Convention (and other international human rights treaties) the Refugee Convention is a

skiej oraz Konwencji o ochronie praw człowieka i podstawowych wolności, Warsaw, Biuro Trybunału Konstytucyjnego, 2015.

²² Formally called “The Convention for the Protection of Human Rights and Fundamental Freedoms” was adopted on 4 November 1950 and came into force on 3 September 1953. As of 27 February 2017 there are 47 state parties adhering to the convention (available at: <http://bit.ly/2x2DgIR> [last access: 27 August 2017]).

²³ Engle, Eric, “Third Party Effect of Fundamental Rights (*Drittwirkung*)”, *Hanse Law Review*, Bremen, vol. 5, no. 2, 2009, p. 169.

²⁴ Clapham, Andrew, *Human Rights in the Private Sphere*, Oxford-Clarendon, Oxford University Press, 1993, pp. 181-182, cited in Engle, Eric, *op. cit.*, p. 169.

²⁵ The United Nations Convention relating to the Status of Refugees was adopted in Geneva on 28 July 1951 and came into force on 22 April 1954. As of 16 February 2017 has been ratified by 145 parties (available at: <http://bit.ly/2cLEMCE> [last access: 16 February 2017]).

convention addressed to states and it was not intended to be self-executing. Additionally, some authors point out its “peculiar legal nature”.²⁶ This “peculiarity” is reflected in the fact that contracting parties to the Refugee ’51 Convention do not receive any advantages in exchange for certain obligations (as it is quite often in the case of international treaties),²⁷ but the Refugee ’51 Convention is “a form of solemn declaration made in order to benefit a third party”.²⁸

Therefore, currently it is not possible to assign responsibility to seafarers and the shipping industry based on human rights treaties or the Refugee ’51 Convention. Although, one needs to remember that international maritime law and the law of the sea, which are going to be analyzed later in this article, burden commercial vessels with many obligations and responsibilities in relation to maritime migrants.

III. DISTRESS AT SEA

Due to very dangerous conditions on vessels used by migrants (or in the majority of cases by illegal carriers) such as overmanning, lack of professional crew, insufficient rescue equipment and many others, tens and hundreds of migrants find themselves in very difficult, life-endangering conditions at sea – that is, in a state of distress.²⁹

The general rule, derived from international customary law, pertaining to the duty to render assistance to those in a distress situation at sea is based on the old maritime tradition (ethical and moral grounds expressing a

²⁶ Chetail, Vincent, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law”, in Rubio-Marín, Ruth (ed.), *Human Rights and Immigration*, Oxford, Oxford University Press, 2014, p. 62.

²⁷ *Idem*.

²⁸ Remark by the United Kingdom representative during the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, UN Doc. A/CONF.2/SR.19, 26 November 1951 (available at: <http://www.refworld.org/docid/3ae68cda4.html> [last access: 28 February 2017]).

²⁹ According to regulation 1.3.13, Chapter I, Annex to the SAR ’79 Convention, *distress phase* is “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”.

strong bond of the community of seafarers)³⁰ and the humanitarian need to assure every person in danger at sea that others will make all attempts to rescue him/her.³¹

Currently, the legal framework applicable in such a situation is based on three international, essential for legal order at sea, conventions: the United Nations Convention on the Law of the Sea, 1982 (UNCLOS '82),³² the International Convention for Safety of Life at Sea, 1974 (SOLAS '74),³³ and the International Convention on Maritime Search and Rescue, 1979 (SAR '79).³⁴

According to article 98.1 of UNCLOS '82, every state party of the convention, shall require the master of a ship flying its flag: 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 for 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/her own ship, its port of registry and the nearest port at which it will call. According to UNCLOS '82, this should happen without serious endangerment to the ship, the crew and its passengers. According to regulation 33 (1), Chapter V of the SOLAS '74, the master of a ship at sea which is in a position to be able to provide assistance on receiving information

³⁰ Łopuski, Jan, "Prawo morskie: zagadnienia ogólne", in Łopuski, Jan (ed.), *Prawo morskie*, Bydgoszcz, Branta, 1996, vol. I, p. 52.

³¹ Stępień, Barbara, *Prawo międzynarodowe publiczne a bezpieczeństwo żeglugi morskiej*, cit., p. 290.

³² United Nations Convention on the Law of the Sea was adopted on 10 December 1982 in Montego Bay and came into force in 1994. As of 3 February 2017 it has been ratified by 168 states (available at: http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm [last access: 16 February 2017]).

³³ The International Convention for the Safety of Life at Sea was adopted on 1 November 1974 and came into force on 25 May 1980. As of 7 February 2017 it has been ratified by 163 states (which is 99,15% of the world tonnage) (available at: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20of%20Treaties.pdf> [last access: 16 February 2017]).

³⁴ The International Convention on Maritime Search and Rescue was adopted on 27 April 1979 and came into force on 22 June 1985. As of 7 February 2017 it has been ratified by 108 states (which is 80,84% of the world tonnage) (available at: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20of%20Treaties.pdf> [last access: 16 February 2017]).

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. And according to regulation 1.10, Chapter 2 of the Annex to the SAR '79 Convention, state parties shall ensure that assistance will be provided to any person in distress at sea.

This obligation to provide assistance should be applied in a non-discriminatory way—as it is stated in the aforementioned regulations of the SAR '79 and SOLAS '74 conventions—regardless of the nationality or status of persons in distress at sea or the circumstances in which they are found.

Therefore, one may see that it is irrelevant from the perspective of a shipmaster, if a person in distress at sea is a migrant, tourist or a seafarer (e.g., who fell overboard from another vessel). Such construction of these regulations is based not only on humanitarian, but especially practical grounds. Similar to the case of any other emergencies, there is no time for legal considerations about status or nationality of a person in need of assistance,³⁵ but there is an urgent necessity for providing it. Even though, as one may see, regulations pertaining to a distress situation at sea are quite well-adjusted to typical maritime emergencies, as it was expressed by the IMO Secretary General Koji Sekimizu: “This situation [number of maritime migrants] is unprecedented in modern times and the principles and provisions of the SAR Convention were never designed for this kind of mass rescue operation”.³⁶

As the IMO Secretary General further said: “The risk to the safety of seafarers and mixed migrants on board these ships should not be underestimated. Merchant ships generally have small crews and are not configured to carry, feed and care for large numbers of people, many of whom are desperate, under stress and potentially violent”.³⁷ The shipping industry representatives indicate also technical difficulties during rescue operations when large vessels (mainly cargo vessels) are required to facilitate assistance to much smaller boats used by migrants. This difference in vessel size (espe-

³⁵ Similar to Lloyd's Standard Form of Salvage Agreement: Darling, Gerald and Smith, Christopher, *LOF 90 and the New Salvage Convention*, London, Lloyd's of London Press, 1991, p. V.

³⁶ The opening speech of the IMO Secretary General Koji Sekimizu during the 102nd session of the Legal Committee (LEG) held at IMO Headquarters in London (14-16 April 2015).

³⁷ The speech of the IMO Secretary General Koji Sekimizu during High-level Meeting to Address Unsafe Mixed Migration by Sea held at IMO Headquarters in London (4-5 March 2015).

cially in the height of a freeboard)³⁸ is a cause of many problems during rescue operations. Therefore, the above-mentioned problems and challenges which seafarers must face renders the opinion of the Chief Spokeswoman for the United Nations High Commissioner for Refugees (UNHCR) Melissa Fleming who said that “Commercial shipping companies have been «absolutely heroic»”³⁹ in preventing the loss of life at sea fully justified.

While, one may think that the rescue operation is the most difficult part for the shipping industry in the context of maritime migration, surprisingly this is just the beginning of the obstacles lying ahead for a vessel carrying rescued persons on board. Although, until the moment of embarkation (as the result of a rescue action), the status of a person rescued at sea is not within the scope of anyone’s interest (as it was proven above, the obligation to provide help to a person in distress at sea is a non-discriminatory obligation), since he/she is rescued aboard, the fact that such a person is not, e.g., a tourist or another seafarer (which means a person with personal data and nationality possible to determine, and in result, e.g., consular assistance, which allows for easy disembarkation of such a person in the next port of call) becomes highly relevant. The problem which results from the undetermined status and nationality of the person rescued at sea (or even determined nationality and a refugee claim) is very often a problem with his/her disembarkation in a place of safety.

According to the SAR ’79 Convention, shipmasters should disembark persons rescued at sea in a place of safety. Therefore, to facilitate such a disembarkation the Rescue Coordination Center⁴⁰ should undertake the

³⁸ According to regulation 3.8 of the International Convention on Load Lines (LL ’66 Convention) adopted on 5 April 1966 in London, a *freeboard* is the distance measured vertically downwards amidships from the upper edge of the deck line to the upper edge of the related load line. In other words, it is the height of a vessel above the waterline, measured in the middle of a vessel (the precise mathematical measurement method is defined in the LL ’66 Convention). The height of the correct waterline is indicted by the related load line, which determines the level to which the ship can be submerged (with its cargo). Stępień, Barbara, *Prawo międzynarodowe publiczne a bezpieczeństwo żeglugi morskiej, cit.*, pp. 86-87.

³⁹ Available at: <http://www.reuters.com/investigates/special-report/europe-migrants-ship/> (last access: 3 March 2017).

⁴⁰ According to regulation 1.3.5., Chapter 1, Annex to the SAR ’79 Convention a Rescue Coordination Center (RCC) is “a unit responsible for promoting efficient organization of search and rescue services and for coordinating the conduct of search and rescue operations within a search and rescue region”.

process of identifying the most appropriate place(s) for disembarking persons rescued at sea (according to regulation 4.8.5, Chapter 4, Annex to the SAR '79 Convention). In other words, this conventional obligation is further expressed in the *soft law* act of the International Maritime Organization (IMO) *Guidelines on the Treatment of Persons Rescued at Sea*⁴¹ stating that state parties to the SAR '79 Convention responsible for the SAR Region⁴² in which the survivors were rescued, hold responsibility to provide a place of safety (or to ensure that a place of safety is provided) for their disembarkation.

While, international law does not specify an explicit obligation to receive persons rescued at sea by coastal states, very often shipmasters are left alone with migrants' disembarkation as coastal states simply refuse to grant permission to access their ports by a vessel carrying migrants rescued at sea.⁴³

Such development of a situation can cause very distressing and frightening consequences, as one could witness during emblematic cases such as the *Cap Anamur*⁴⁴ (where criminal charges were brought against seafarers

⁴¹ Resolution MSC.167(78) adopted on 20 May 2004.

⁴² According to regulation 1.3.4., Chapter 1, Annex to the SAR '79 Convention a Search and Rescue Region (SAR Region) is "an area of defined dimensions associated with a rescue coordination center within which search and rescue services are provided".

⁴³ There is a dispute in the doctrine regarding the right to access to ports by foreign vessels. Many authors support an unrestricted access to ports by foreign vessels, however in the majority of cases it is also expressed that such access can be restricted in a situation jeopardizing state's interests. The International Court of Justice stated also (ICJ) in its judgment *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America, Merits, Judgment*, ICJ Reports 1986, p. 14) that a coastal State may regulate access to its ports by virtue of its sovereignty (para. 213 of the judgment). See also de La Fayette, Louise, "Access to Ports in International Law", *The International Journal of Marine and Coastal Law*, Boston-Leiden, vol. 1, no. 1, 1996, pp. 1-22.

⁴⁴ On 20 June 2004 a ship *Cap Anamur*, owned by a non-governmental organization called the same, rescued 37 maritime migrants at sea. After an 11-day-long misunderstanding with the port authorities in Porto Empedocle, Sicily (the closest place of safety to disembark migrants) the ship was finally granted permission to enter the harbor and to disembark people rescued at sea. As a result, the shipmaster Stefan Schmidt together with the 1st Officer Vladimir Dachkevitch was accused by the Italian Prosecutor's Office for violation of Italian immigration law (the criminal trial lasted more than 5 years). Papastavridis, Efthymios, *Rescuing Migrants at Sea: The Responsibility of States under International Law*, p. 3 (available at: <https://ssrn.com/abstract=1934352> [last access: 21 February 2017]). See also: Trevisanut, Seline, "Le Cap Anamur: profiles de droit international et de droit de la mer", *Annuaire du Droit de la Mer*, Paris, vol. 9, 2004, pp. 49-64.

as a result of rendering assistance to those in distress at sea and their further disembarkation) and *Pinar*⁴⁵ (which showed reluctance not only in granting permission for disembarkation by coastal states, but even in cooperation between them).

IV. HUMAN AND REFUGEE RIGHTS AT SEA

The Convention relating to the Status of Refugees, 1951 is one of the most important international conventions for maritime migrants. From their perspective, the most relevant provision is article 33 (1) of the aforementioned convention introducing the *non-refoulement* principle. This rule expressly prohibits any state party to the convention “any expulsion or return of a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion”. Thus, states should not return persons present on their territory as well as persons present at their frontiers (the broader interpretation of the *non-refoulement* principle is applicable also to frontiers, called *non-rejection at the frontier*, is generally accepted in the doctrine).⁴⁶

Even though the aforementioned rule is nothing new from the perspective of refugee protection⁴⁷ and has been well-known to lawyers specialized in

⁴⁵ On the 16 April 2009 the Panamanian flagged Turkish cargo ship *Pinar E* rescued approx. 150 people 45 miles from the Italian Island – Lampedusa (in the Maltese SAR region). Both engaged countries (Italy and Malta) refused to allow the disembarkation of migrants on their territories. Statement of Erika Feller, Assistant High Commissioner – Protection, UNHCR during the INTERTANKO Annual Tanker Event (14 May 2009) in Tokyo, Japan (available at: <http://www.unhcr.org/4a324a556.pdf> [last access: 21 February 2017]).

⁴⁶ It was also included in later legal acts, such as the Declaration on Territorial Asylum, 1967 (A/RES/2312 [XXII] of 14 December 1967) and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1967. Trevisanut, Seline, “The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection”, in Von Bogdandy, Armin and Wolfrum, Rudiger (eds.), *Max Planck Yearbook of United Nations Law*, Leiden-Boston, vol. 12, 2008, pp. 209-210.

⁴⁷ The *non-refoulement* principle has been included in many international conventions and acts such as, *inter alia*: the International Covenant on Civil and Political Rights, 1966; the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969; the American Convention on Human Rights, 1969; the Convention against Torture and Other Cruel,

migration and refugee studies', it causes certain, very specific consequences for the shipping industry. Nonetheless, I do not intend to delve into the application of *non-refoulement* by coastal states according to maritime zones (there is a dispute in the doctrine regarding the question if entering the territorial sea of a state constitutes entering its territory),⁴⁸ but what remains in the scope of my interest, is the application of the aforementioned rule in relation to shipmasters and commercial vessels.

As a response to the maritime crisis the IMO issued *the Guide to Principles and Practice as Applied to Refugees and Migrants (Rescue At Sea)*.⁴⁹ This guide addressed to many parties affected by the crisis, such as shipmasters, governments, shipowners, member states of the IMO and others contains brief explanations of applicable regulations and recommendations for management of rescue actions of migrants at sea.

Pursuant to the Guide, the only obligation indicated by the IMO to a shipmaster is the obligation (deriving from the aforementioned public international law regulations) of rendering assistance to those in distress at sea. However, what is quite interesting while analyzing the Guide is the indication, *inter alia*, of the *non-refoulement* principle. The Guide does not specify exactly to whom this rule is applicable (who is obliged to comply with it), and even though it is explicitly written that a shipmaster is not responsible for determining the status of a person rescued at sea, one reading the Guide can have a very strong impression that this rule is also applicable to the shipping industry (while it is not).

Analyzing the *non-refoulement* principle in the context of maritime migration, it is important to distinguish it from asylum. From a practical and legal perspective, the *non-refoulement* principle constitutes a negative obligation for a state (prohibition of expulsion), whereas asylum is a positive concept (allowing residence and granting further protection).⁵⁰ As it is stated in the doctrine "non-refoulement is an obligation of states, whereas asylum

Inhuman or Degrading Treatment or Punishment, 1984; the Inter-American Convention to Prevent and Punish Torture, 1985; the Charter of Fundamental Rights of the European Union, 2000; the UN International Convention for the Protection of All Persons from Enforced Disappearance, 2006. Chetail, Vincent, *op. cit.*, pp. 34-35.

⁴⁸ Trevisanut, Seline, "The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection", *op. cit.*, pp. 219-220.

⁴⁹ Full text available at: http://www.imo.org/en/MediaCentre/HotTopics/seamigration/Documents/UNHCR-Rescue_at_Sea-Guide-ENG-screen.pdf (last access: 22 February 2017).

⁵⁰ Chetail, Vincent, *op. cit.*, pp. 30-31.

is a right of states [not of the individual]”.⁵¹ This distinction is highly crucial from the perspective of our consideration, as from a practical point of view a coastal state, which wants to comply with a *non-refoulement* principle needs to grant *de facto* —at least temporal— asylum to maritime migrants.

Although one could argue that, practically speaking, this same situation occurs in the case of land migration when a state, which does not wish to return a refugee, needs to allow him/her to remain on its territory⁵² (which could constitute temporary asylum)⁵³ is in fact much more complex in the case of maritime migration.

In a typical situation of land migration *raison d'être* of the *non-refoulement* principle is based on the fact that, as already mentioned, a person is physically on a territory (or wishes to enter the territory, e.g., by crossing the border) of a contracting state. Therefore, the negative obligation prohibiting return of such a person exists. Whereas, in the case of maritime migration, migrants are very often rescued by commercial vessels at high sea⁵⁴ and even though a flag state's jurisdiction is applicable on board of a vessel flying its flag⁵⁵ it is not the flag state which is going to comply (or not) with the *non-refoulement* principle. This is related not only with the fact that commercial vessels owned by private entities are not bound by provisions of the Refugee '51 Convention, but with the specificity of the shipping industry. Due to the fact that the shipping industry is an international branch of industry (characterized by worldwide transportation of people and goods), it is very common that a flag state is located in a completely different part of the world than the region of the ship's operation.⁵⁶ According to the

⁵¹ *Ibidem*, p. 31.

⁵² One of the solutions derived from national legislations of the European Union countries is granting so called “tolerated stay”, which is one among over 60 different protection statuses granted on 15 different grounds in situations when removal of a person is impossible due to practical grounds (e.g., unknown nationality of a person) or when such a removal would be tantamount to a *refoulement*. Pestana, Ines, “Tolerated Stay: What Protection Does it Give?”, *Forced Migration Review*, Oxford, vol. 40, August 2012, pp. 38-39.

⁵³ Chetail, Vincent, *op. cit.*, p. 32.

⁵⁴ According to article 86 of UNCLOS high seas are “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”.

⁵⁵ According to article 94 of UNCLOS every state should “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”.

⁵⁶ For example, a ship flying the Malaysian or Panama's flag operates on the Mediterranean Sea.

report *Structure, Ownership and Registration of the World Fleet* of the United Nations Conference on Trade and Development (UNCTAD), the top 10 flags of registration with the largest registered fleets are: 1) Panama; 2) Liberia; 3) Marshal Islands; 4) Hong Kong (China); 5) Singapore; 6) Malta; 7) Greece; 8) Bahamas; 9) China; and 10) Cyprus.⁵⁷ Thus, supposing even that it is a flag state, which would be the one obliged to comply with the *non-refoulement* principle, this principle would need to find its extraterritorial application.⁵⁸ According to the position of the UNHCR expressed in the Advisory Opinion:

an interpretation which would restrict the scope of application of Article 33 (1) of the 1951 Convention to conduct within the territory of a State party to the 1951 Convention and/or its 1967 Protocol would not only be contrary to the terms of the provision as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with relevant rules of international human rights law. It is UNHCR's position, therefore, that a State is bound by its obligation under Article 33 (1) of the 1951 Convention 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.⁵⁹

Although, many agree with the above-mentioned position (although, there is no consensus either in the doctrine or in the states' practice regarding it),⁶⁰ which in the light of our consideration means that while the *non-*

⁵⁷ According to the report Panama, Liberia and the Marshal Islands account for 41,8% share of the world fleet tonnage. The United Nations Conference on Trade and Development, *Structure, Ownership and Registration of the World Fleet*, p. 41 (data as of 1 January 2015), available at: http://unctad.org/en/PublicationChapters/rmt2015ch2_en.pdf (last access: 5 March 2017).

⁵⁸ Compare: Jardón, Luis, "The Interpretation of Jurisdictional Clauses in Human Rights Treaties", *Anuario Mexicano de Derecho Internacional*, Mexico City, vol. XIII, 2013, pp. 99-143.

⁵⁹ The Office of the United Nations High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Geneva, 26 January 2007, p. 19 (available at: <http://www.refworld.org/pdfid/45f17a1a4.pdf> [last access: 10 March 2017]).

⁶⁰ *A contrario*: *Observations of the United States on the Advisory Opinion of the UN High Commissioner for Refugees on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 28 December 2007 (available

refoulement principle is applicable also on the high-seas, it still does not constitute the obligation of a flag state to receive maritime migrants (who may look for asylum in other countries).⁶¹

V. AN ELEPHANT IN THE ROOM

Long before the maritime migration crisis in Europe started, the shipping industry —and therefore maritime legal order— had faced a similar (also maritime migration-related) problem with stowaways (*i.e.*, illegal passengers on ships).⁶² The *modus operandi* of maritime stowaways⁶³ (in fact maritime migrants – the only legal and practical difference between them involves the element of secret), relied on getting on board a ship unnoticed by its crew (while the ship was in a harbor or at anchor), hiding somewhere inside the ship (or sometimes even outside, e.g., on a vessel’s bulb or rudder blade), and travelling, in the majority of cases in very dangerous conditions (in the engine room, anchor locker, under the walls’ casing, etc.) to the next port of call with the intention of disembarking there (also unnoticed). The problem —from the shipping industry’s perspective— is based on

at: <https://2001-2009.state.gov/s/1/2007/112631.htm> [last access: 13 March 2017]). See also: Llain Arenilla, Shirley, “Violations to the Principle of Non-Refoulement under the Asylum Policy of the United States”, *Anuario Mexicano de Derecho Internacional*, Mexico City, vol. XV, 2015, pp. 283-322.

⁶¹ Similar to the interception of maritime migrants at high-seas: Trevisanut, Seline, “The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection”, *op. cit.*, p. 244.

⁶² More about maritime stowaways see: Stępień, Barbara, “Aktualny problem: blindziarze – nielegalni pasażerowie na statkach. Refleksja na temat znaczenia Konwencji FAL”, in Perkowski, Maciej *et al.* (eds.), *Człowiek i prawo międzynarodowe. Księga dedykowana Profesorowi Bogdanowi Wierzbickiemu*, Białystok, Temida 2, 2014, pp. 469-477. Spanish translation available: Stępień, Barbara, “Problemas actuales: polizones-pasajeros ilegales a bordo de embarcaciones. Reflexiones en torno al Convenio FAL”, *Revista del Instituto Federal de Defensoría Pública*, Mexico, no. 23, June 2017, pp. 123-141.

⁶³ According to section 1. A of the Annex to the FAL ’65 Convention a stowaway is “a person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities”.

the fact that when a stowaway has been discovered by crew, the shipmaster has a legal obligation to notify the authorities, such as at the next port of call. As the intention of maritime stowaways is, in general, to stay in the country of the ship's destination (the highest number of stowaways appear in regions such as the coast of West Africa, Central America, Colombia, Venezuela and the Dominican Republic),⁶⁴ port authorities notified by the shipmaster concerning illegal passengers do not grant such a ship permission to call at their port (as is happening currently in the case of maritime migrants). Hence, in such a way, port and state authorities try—in many cases very successfully—to avoid the problem with maritime migrants. In extreme cases it results in a situation when ships are not able to call at any port for many days (or even weeks), because it happens repeatedly.⁶⁵

Even though the aforementioned concerns have been known by politicians, legislators and shipping industry for years, this problem has never been fully resolved. Moreover, currently international attention, in becoming focused on maritime migrants, has lost stowaways from its sight.

In 1957, the International Convention relating to Stowaways was adopted in Brussels, however due to lack of sufficient ratifications by state parties it has still not come into force (and it is unlikely to do so).⁶⁶ Further attempts to regulate this phenomenon were reflected in the amendments⁶⁷ to the International Convention on Facilitation of Maritime Traffic, 1965 (FAL '65),⁶⁸ however, due to the fact that they introduced several obligations on the shipping industry, they were not welcomed with enthusiasm. In general,

⁶⁴ Gard AS, *Gard Guidance on Stowaways*, p. 4 (available at: <http://www.gard.no/Content/13385148/Guidance%20on%20stowaways.pdf> [last access: 7 March 2017]).

⁶⁵ For example, from February 2007 to February 2008 the average number of days spent on board by stowaways was 4.7 days (the longest period was 174 days). The majority of stowaways did not stay on board more than 20 days. IMO Facilitation Committee, *Formalities Connected with the Arrival, Stay and Departure of Persons*, 36th session, 2 July 2010 (FAL 36/6), p. 2.

⁶⁶ Walters, William, "Bordering the Sea: Shipping Industries and the Policing of Stowaways", *Borderlands e-journal*, vol. 7, no. 3, 2008, p. 4.

⁶⁷ Resolution FAL.7(29), *Adoption of Amendments to the Convention on Facilitation of International Maritime Traffic, 1965, as Amended*, adopted on 10 January 2002.

⁶⁸ The International Convention of Facilitation of Maritime Traffic, 1965 (FAL '65) was adopted on 9 April 1965 and came into force on 5 March 1967. As of 24 February 2017 it has been ratified by 118 states (which is 93.78% of the world tonnage) (available at: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20of%20Treaties.pdf> [last access: 5 March 2017]).

the shipping industry has been burdened with the intrusive management of all formalities related to the disembarkation and return of stowaways. This management includes not only the arrangement of all formalities, but also costs pertaining to the detention and return to country of departure, and in many cases, financial penalties charged by port authorities for bringing illegal passengers to its harbours (reaching a few thousand dollars per person).

According to maritime insurers, stowaways cost the shipping industry approximately 20 million USD only in 2008.⁶⁹ Within recent years, the potential cost of disembarkation and repatriation of a stowaway varied between 20,000-30,000 USD (*per capita*). In situations where more than one stowaway has been found on a ship, the cost of their disembarkation could reach 100,000 USD (this is caused by the fact that in typical cases two security guards are required to escort each stowaway during the process of repatriation).⁷⁰ Substantial costs are also related to the mandatory medical examinations and health checks of stowaways (especially in cases when they originate from countries where life-threatening diseases occur).⁷¹

Even though, the shipping industry pays the price for dealing with the stowaway problem, it is not the shipping industry which is responsible for it. One needs to understand that commercial vessels are just a source of transportation for stowaways (as in the case of all maritime migrants) and port authorities are the ones responsible for the protection and security of cargo and port facilities. As analysis of provisions of the ISPS Code⁷² exceeds the scope of consideration in this article, it is important to mention that stowaways, in order to embark on a ship, need to cross port facilities, which

⁶⁹ Available at: <https://www.lloydslist.com/11/sector/insurance/article34420.ece> (last access: 8 March 2017).

⁷⁰ Gard AS, *Gard Guidance on Stowaways*, p. 4 (available at: <http://www.gard.no/Content/13385148/Guidance%20on%20stowaways.pdf> [last access: 7 March 2017]).

⁷¹ When the West African Ebola virus epidemic broke out in 2013, ships arriving with stowaways from the high-risk areas encountered huge delays due to very careful health checks. Glynn-Williams, Andrew, "Stowaways and Migrants – The Effect on the Shipping Industry", *Maritime Risk International* (available at: <https://www.i-law.com/ilaw/doc/view.htm?queryString=migrants&sort=date&sort=date&searchType=advanced-search&se=0&id=372573&searched=true> [last access: 8 March 2017]).

⁷² The International Ship and Port Facility Security (ISPS) Code provides detailed maritime and port security-related requirements (it entered into force under SOLAS chapter XI-2, on 1 July 2004) (available at: http://www.imo.org/en/ourwork/security/guide_to_maritime_security/pages/solas-xi-2%20isps%20code.aspx [last access: 8 March 2017]).

should be properly secured and such trespassing should not be possible. Therefore, in the case when stowaways manage to embark on a ship, the primary responsible party for this is the port authority (and only secondary the vessel).

Although, according to IMO statistics the yearly number of stowaways caught or identified has been constantly decreasing since its peak in 2008,⁷³ it appears very unlikely that it reflects the *statu quo*, especially due to the maritime migration crisis in Europe. In times when maritime migrants decide to cross the Mediterranean Sea in unseaworthy boats, paying high prices for such trips to many illegal carriers, it seems very unlikely that many of them would not attempt to travel as stowaways. In reality, many incidents involving stowaways remain unreported by Member States to the IMO (according to recommended practice contained in the FAL '65 Convention, public authorities should report all incidents involving stowaways to the Secretary General of the IMO). Additionally, many stowaways may simply not become discovered by crews, thus the yearly number of stowaways may be much higher.

In this context, it is important to also mention another aspect of this situation: the rights and protection of stowaways. The lack of a fully-effective procedure ensuring their fast disembarkation results also in a violation of a stowaway's rights.

At present, on the 60th anniversary of the adoption of the Brussels Convention relating to Stowaways, as the maritime migration crisis has been reaching its peak, the international community together with the shipping industry remain at a stalemate.⁷⁴ The lesson which should be learnt from previous years is that the lack of an effective solution (when required), will come back with a vengeance.⁷⁵

⁷³ IMO, *Reports on Stowaway Incidents: Annual Statistics for the Year 2008* (FAL.2/Circ.113), 30 June 2009, p. 1.

⁷⁴ Although many international regulations related to stowaways have been adopted, for example, Ghana's port authorities (from Tema and Tokaradi ports) in April 2016 banned disembarkation of non-Ghanaian stowaways in its ports (available at: <http://www.safety4sea.com/disembarkation-of-stowaways-banned-in-ghana/> [last access: 7 March 2017]). Ghana has been a state party to the Convention FAL since November 1965 (available at: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202017.pdf> [last access: 7 March 2017]).

⁷⁵ It is not unusual in international relations that internal problems of a country —when not properly addressed— rapidly become problems of the whole international community. An

VI. THE EUROPEAN UNION'S REACTION

The tragic event of the 3 October 2013, when a boat carrying on board almost 500 maritime migrants capsized and sank near the Italian island Lampedusa (and as a tragic result the sea took 360 lives) was a “wake-up call” for the international community. In response to this maritime disaster, the Italian Government launched a huge search and rescue operation *Mare Nostrum* to avoid more casualties in the future.⁷⁶ This Italian operation (with financial support from the European Union) was conducted by the Italian Navy and the Italian Air Force. Although *Mare Nostrum* seemed to be an effective operation (around 150,000 migrants arrived safely to Europe)⁷⁷ it was terminated after a year, because it was simply too expensive (the monthly budget of the operation was approx. 10 million euros).⁷⁸

The successor (however not a replacement) of *Mare Nostrum* has been the joint operation *Triton*, launched by the European Border and Coast Guard Agency (FRONTEX) in cooperation with the Italian government in November 2014.⁷⁹ *Triton* has much smaller financial assets (approx. 2.9 million euros per month)⁸⁰ and it also involves commercial vessels, as the activities of *Triton* are in general limited to border patrols and surveillance.⁸¹ After the

emblematic example is the phenomenon of piracy in the region of the Horn of Africa —affecting the majority of the world’s countries— due to the internally unstable political situation in Somalia (classified as a falling state). Geiss, Robin and Petrig, Anna, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, Oxford, Oxford University Press, 2011, p. 17.

⁷⁶ Borelli, Silvia and Stanford, Ben, “Troubled Waters in the Mare Nostrum: Interception and Push-Backs of Migrants in the Mediterranean and the European Convention on Human Rights”, *Uluslararası Hukuk ve Politika – Review of International Law and Politics*, Ankara, vol. 10, 2014, p. 65.

⁷⁷ Available at: <https://www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor> (last access: 8 March 2017).

⁷⁸ Available at: <http://www.ilsole24ore.com/art/notizie/2013-10-15/1-operazione-mare-nos-trum-costera-10-milioni-mese-114452.shtml?uuid=ABB1VqW> (last access: 8 March 2017).

⁷⁹ Available at: http://europa.eu/rapid/press-release_MEMO-14-566_en.htm (last access: 3 August 2017).

⁸⁰ *Idem*.

⁸¹ Thus, the operation *Triton* has been criticized as insufficient. Naegeli, Erika, “Mare Europaeum: Is Operation Triton Enough?”, *Foreign Affairs Review*, December 2014 (available at: <http://foreignaffairsreview.co.uk/2014/12/mare-triton/> [last access: 9 March 2017]).

maritime Coordination Rescue Center (RCC), responsible for the region, is informed by border patrols (vessels and aircrafts) coordinated by FRONTEX about the detection of boats carrying migrants, the RCC can contact commercial vessels in the vicinity of the incident.⁸² Simply due to this point, provisions of the SAR '79 Convention are applicable and commercial vessels need to, as it was discussed earlier in this article, render assistance to those in distress at sea. And the story repeats itself.

VII. CONCLUSIONS: IS THIS A SARAMAGO NOVEL?

In 2008 José Saramago⁸³ published the well-known book *The Elephant's Journey*. In his magnificent narration—based on true facts—Saramago depicts the inherent problems of transporting an elephant given as a present from King João III of Portugal to the Archduke Maximilian from Lisbon to Vienna. Besides being a marvelous display of Saramago's narrative capabilities the book can also be viewed as a metaphor of the effort to overcome a seemingly impossible problem. Do we have in maritime migration a problem worthy of Saramagian proportions?

The problem of migration is a complex phenomenon influencing human lives and affecting many branches of human activities. People from extreme poverty and war zones search for better lives for themselves and their children. The international community and international organizations should always respect human rights and protect the most vulnerable. But this needs to happen with an inter-country collaborative approach and shared responsibilities of member states of the United Nations and the European Union.

In the case of the maritime migration crisis in Europe discussed in this article, the situation has been unbalanced. The non-state private actor—the shipping industry—has been burdened with an enormous number of legal, financial and moral obligations, which has been unprecedented in modern times.

⁸² European Commission, *How does Frontex Joint Operation Triton Support Search and Rescue Operations?* (available at: http://www.mam-prawo.eu/images/materialy/frontex_joint_operation.pdf [last access: 8 March 2017]).

⁸³ 1998 Nobel Prize Laureate in Literature.

Commercial vessels, and therefore seafarers, as a forefront of the crisis are directly affected by it, yet they lack any legal protection. This results in a growing legal “grey sphere” and causes many doubts. Who should bare the legal (and moral) responsibility if any of the migrants die in a rescue operation? What is going to happen in the case of maritime disaster, for example a collision, and the necessity of evacuating hundreds of migrants together with crew from a vessel carrying them (in a situation with insufficient life-saving equipment)?⁸⁴ What if a seafarer gets infected with a life-threatening disease as a result of rescuing migrants?⁸⁵ These and many other questions remain unanswered and it is unlikely it will be possible to answer them in the foreseeable future. But what is quite clear is the fact that international regulations are not adjusted to the current crisis. Not only conventions from the scope of maritime law, but also human rights treaties together with the Refugee '51 Convention were never designed for situations which have been occurring on the Mediterranean Sea. Moreover, coastal states are not legally obligated to receive migrants rescued at sea, maritime operations coordinated by the European Union, firstly were too expensive (*Mare Nostrum*), and currently have placed a huge part of the responsibilities back again on the shipping industry (*Triton*). Addressing these problems would require amending many international legal treaties.

Supposing that the shipping industry would remain heavily engaged in these mass rescue operations, the SOLAS '74 Convention would need to be amended to require vessels to carry more additional equipment (e.g., suits protecting seafarers from life-threatening diseases and additional lifesaving equipment for potential migrants). Amendments to the STCW Convention⁸⁶ would need to oblige seafarers to undertake training in the management of rescue operations of boat people, and, for example, adjustments

⁸⁴ It is important to realize that the amount of lifesaving equipment (which is necessary in case of maritime disasters) is limited and its amount is adjusted to the number of crew and passengers on board. Therefore, if as a result of a rescue operation tens or hundreds of maritime migrants embark a ship there will not be enough safety equipment for them.

⁸⁵ At present, commercial vessels are equipped with proper personal protective wear in terms of fire and water, but do not have this in the case of biological disease.

⁸⁶ The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) adopted on 7 July 1978 entered into force on 28 April 1984. As of 24 February 2017 it has been ratified by 162 states (which is 99,20% of the world tonnage) (available at: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20of%20Treaties.pdf> [last access: 6 September 2017]).

to the SAR '79 Convention would need to oblige states to accept maritime migrants in their harbors. Additional days of leave should also be provided to seafarers participating in rescue operations of migrants (amendments to the MLC 2006 Convention).⁸⁷ Alternatively, the obligation of acceptance of maritime migrants rescued by commercial vessels could constitute an amendment to the Refugee '51 Convention, as it needs to be remembered that their disembarkation is crucial (prolonged presence of maritime migrants on board commercial vessels is a direct violation of migrants' and seafarers' rights and thus should not be acceptable in any case).

The aforementioned proposals intend to present only a scope of the problem, but the conclusion which derives from them shows that again the burden of the maritime migration crisis would be borne mostly by the shipping industry. All proposed ideas would require more and more money invested by the shipping industry, which eventually would be reflected in an increase in all prices (affecting all of us as 90% of the world's trade is carried by ships).⁸⁸ It is also very unlikely that states would accept the strict obligation of receiving maritime migrants as it would heavily affect their sovereignty.

Therefore, the most possible solution, in light of the presented analysis and considerations, presupposes financial and strategic contributions of the member states of the European Union and the United Nations to the development of countries producing the highest numbers of migrants. Therefore, a preventive approach should be taken by the international community, which would result in building a better world for people from the regions affected by poverty and war. Only in this way, would the financial resources invested by the international community make a real difference (costly maritime operations do not solve the problem at all). Furthermore, the rights of seafarers would not be violated, the shipping industry would feel substantial relief, the sovereignty of coastal states would not be endangered and to whole nations and new generations of countries in crisis (not only maritime migrants, being just a small group affected by war and poverty) a better future would be provided. "In sum, and in a few words: Not only compassion but responsibility; not only individual state responsibility

⁸⁷ The Maritime Labour Convention adopted on 23 February 2006 entered into force on 20 August 2013. As of 9 March 2017 it has been ratified by 81 states (which is 91% of the world tonnage) (available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::p11300_instrument_id:312331 [last access: 6 September 2017]).

⁸⁸ Available at: <https://business.un.org/en/entities/13> (last access: 9 March 2017).

but collective responsibility; not only the Refugee Convention but the International Covenants and the U.N. Charter; not only UNHCR but the Human Rights Committee and, if necessary, the U.N. Security Council”.⁸⁹

VIII. BIBLIOGRAPHY

- AKGÜNDÜZ, Yusuf *et al.*, “The Impact of Refugee Crises on Host Labor Markets: The Case of the Syrian Refugee Crisis in Turkey”, *Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labor: Discussion Paper Series*, Bonn, no. 8841, 2015.
- BECERRA, Manuel, *Derecho internacional público*, Mexico City, UNAM, Instituto de Investigaciones Jurídicas, 1991.
- BLANCHFLOWER, David *et al.*, “The Impact of the Recent Migration from Eastern Europe on the UK Economy”, *Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labor: Discussion Paper Series*, Bonn, no. 2615, 2007.
- BORELLI, Silvia and STANFORD, Ben, “Troubled Waters in the Mare Nostrum: Interception and Push-Backs of Migrants in the Mediterranean and the European Convention on Human Rights”, *Uluslararası Hukuk ve Politika – Review of International Law and Politics*, Ankara, vol. 10, 2014.
- CHETAİL, Vincent, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law”, in RUBIO-MARIN, Ruth (ed.), *Human Rights and Immigration*, Oxford, Oxford University Press, 2014.
- CLAPHAM, Andrew, *Human Rights in the Private Sphere*, Oxford-Clarendon, Oxford University Press, 1993.
- DARLING, Gerald and SMITH, Christopher, *LOF 90 and the New Salvage Convention*, London, Lloyd’s of London Press, 1991.
- DE BRABANDERE, Eric, “Non-State Actors, State-Centrism and Human Rights Obligations”, *Leiden Journal of International Law*, Leiden, vol. 22, no. 1, 2009.
- DILLER, Janelle, *In Search of Asylum: Vietnamese Boat People in Hong Kong*, Washington, Indochina Resource Action Center, 1988.

⁸⁹ Henkin, Louis, “Introduction. Refugees and their Human Rights”, *Fordham International Law Journal*, New York, vol. 18, no. 4, 1994, p. 1081, cited in Chetail, Vincent, *op. cit.*, p. 72.

- ENGLE, Eric, “Third Party Effect of Fundamental Rights (*Drittwirkung*)”, *Hanse Law Review*, Bremen, vol. 5, no. 2, 2009.
- GEISS, Robin and PETRIG, Anna, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, Oxford, Oxford University Press, 2011.
- GLYNN-WILLIAMS, Andrew, “Stowaways and Migrants – The Effect on the Shipping Industry”, *Maritime Risk International* (available at: <http://bit.ly/2evEnW3> [last access: 8 March 2017]).
- HENKIN, Louis, “Introduction. Refugees and their Human Rights”, *Fordham International Law Journal*, New York, vol. 18, no. 4, 1994.
- HESSBRUEGGE, Jan, “Human Rights Violations Arising from Conduct of Non-State Actors”, *Buffalo Human Rights Law Review*, New York, vol. 11, 2005.
- IMO, *Reports on Stowaway Incidents: Annual Statistics for the Year 2008* (FAL.2/ Circ.113), 30 June 2009.
- JARDÓN, Luis, “The Interpretation of Jurisdictional Clauses in Human Rights Treaties”, *Anuario Mexicano de Derecho Internacional*, Mexico City, vol. XIII, 2013.
- LIVI-BACCI, Massimo, *A Short History of Migration*, Cambridge-Malden, Polity, 2012.
- LLAIN ARENILLA, Shirley, “Violations to the Principle of Non-Refoulement under the Asylum Policy of the United States”, *Anuario Mexicano de Derecho Internacional*, Mexico City, vol. XV, 2015.
- ŁOPUSKI, Jan, “Prawo morskie: zagadnienia ogólne”, in ŁOPUSKI, Jan (ed.), *Prawo morskie*, Bydgoszcz, Branta, 1996, vol. I.
- MŁYNARSKA-SOBACZEWSKA, Anna and RADZIEWICZ, Piotr (eds.), *Horyzontalne oddziaływanie Konstytucji Rzeczypospolitej Polskiej oraz Konwencji o ochronie praw człowieka i podstawowych wolności*, Warsaw, Biuro Trybunału Konstytucyjnego, 2015.
- NAEGELI, Erika, “Mare Europaeum: Is Operation Triton Enough?”, *Foreign Affairs Review*, December 2014 (available at: <http://foreignaffairsreview.co.uk/2014/12/mare-triton/> [last access: 9 March 2017]).
- ORTEGA VELÁZQUEZ, Elisa, “La consolidación histórica de la migración irregular en Europa: leyes y políticas migratorias defectuosas”, *Anuario Mexicano de Derecho Internacional*, Mexico City, vol. XIV, 2014.
- PAPASTAVRIDIS, Efthymios, *Rescuing Migrants at Sea: The Responsibility of States under International Law* (available at: <https://ssrn.com/abstract=1934352> [last access: 21 February 2017]).

- PEERS, Steve *et al.*, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, vol. 3: *EU Asylum Law*, Boston-Leiden, Brill, 2015.
- PESTANA, Ines, “Tolerated Stay: What Protection Does it Give?”, *Forced Migration Review*, Oxford, vol. 40, August 2012.
- STĘPIEŃ, Barbara, “Aktualny problem: blindziarze – nielegalni pasażerowie na statkach. Refleksja na temat znaczenia Konwencji FAL”, in PERKOWSKI, Maciej *et al.* (eds.), *Człowiek i prawo międzynarodowe. Księga dedykowana Profesorowi Bogdanowi Wierzbickiemu*, Białystok, Temida 2, 2014.
- STĘPIEŃ, Barbara, “Problemas actuales: polizones-pasajeros ilegales a bordo de embarcaciones. Reflexiones en torno al Convenio FAL”, *Revista del Instituto Federal de Defensoría Pública*, Mexico, no. 23, June 2017.
- STĘPIEŃ, Barbara, *Prawo międzynarodowe publiczne a bezpieczeństwo żeglugi morskiej*, Gliwice, JBS, 2016.
- TREVISANUT, Seline, “Le Cap Anamur: profiles de droit international et de droit de la mer”, *Annuaire du Droit de la Mer*, Paris, vol. 9, 2004.
- TREVISANUT, Seline, “The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection”, in VON BOGDANDY, Armin and WOLFRUM, Rudiger (eds.), *Max Planck Yearbook of United Nations Law*, Leiden-Boston, vol. 12, 2008.
- WAGNER, Markus, “Non-State Actors”, *Max Planck Encyclopedia of Public International Law*, Heidelberg, 2017.
- WALTERS, William, “Bordering the Sea: Shipping Industries and the Policing of Stowaways”, *Borderlands e-journal*, vol. 7, no. 3, 2008.
- ZAREI, Mohammad and Safari, Azar, *The Status of Non-State Actors under the International Rule of Law: A Search for Global Justice* (available at: <http://bit.ly/1EYkLjd> [last access: 20 February 2017]).