

# Saving lives in the Mediterranean

## A legal analysis of Aquarius-like incidents

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1 United Nations High Commissioner on Refugees (UNHCR), *Desperate Journeys. Refugees and migrants arriving in Europe and at Europe's borders*, Report, August 2018, available at: <https://data2.unhcr.org/en/documents/download/65373>. The most common countries of origin of migrants crossing the Mediterranean from January 2018 are Syria, Iraq and African countries like Eritrea, Guinea, Mali, Morocco and Tunisia.

2 See F. Ippolito & S. Trevisanut (eds.), *Migration in the Mediterranean. Mechanisms of International Cooperation*, Cambridge: Cambridge University Press 2016; P. Cafaro, 'Migration by sea: a "search and rescue" emergency and a big challenge for the Italian Coast Guard', in G. Cataldi, *A Mediterranean perspective on migrants' flows in the European Union: protection of rights, intercultural encounters and integration policies*, Napoli: Editoriale Scientifica 2016, p. 309-316.

3 For further references see V. Moreno-Lax & E. Papastavridis (eds.), 'Boat Refugees' and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights, Leiden/Boston: Brill 2016.

4 *Minister for Immigration and Multicultural Affairs & Others v. Vadarlis ("Tampa Appeal")*, [2001] FCA 1329, Australia: Federal Court, 17 September 2001, for comments see M. White, 'Tampa incident: shipping, international and maritime legal issues', *Australian Law Journal* 2004, p. 101-113.

5 'Oceanic Viking Sri Lankans "all refugees"', *ABC News* 16 December 2009, available at: [www.abc.net.au/news/2009-12-16/1180702](http://www.abc.net.au/news/2009-12-16/1180702).

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### 1 Introduction: Mapping the issue

According to data recorded by the United Nations High Commissioner for Refugees (UNHCR), in 2018, 63,193 people including refugees and other migrants arrived by sea in Italy, Greece, Spain and Cyprus, while more than 1,500 are estimated dead or missing.<sup>1</sup> While the interception of boats packed with migrants ('boat people' or 'boat refugees') has become a daily routine in the last decade in the Mediterranean region,<sup>2</sup> irregular migration by sea is neither a new nor solely a Mediterranean phenomenon.<sup>3</sup> It is worth mentioning, among others, the *Tampa*<sup>4</sup> and *Oceanic Viking*<sup>5</sup> cases involving Australia, or the Haitian crises involving the United States.<sup>6</sup> Irregular migratory flows are also common in the Red Sea, where Somalis and Ethiopians attempt to reach Yemen, but recently it has become also a route for Yemenis going in the opposite direction.<sup>7</sup> Nonetheless, the recent case of Aquarius,<sup>8</sup> a rescue vessel with the flag of Gibraltar (as of 20 August 2018 with the flag of Panama), operated by a German NGO (SOS Méditerranée) in cooperation with Médecins Sans Frontières (MSF) which performed Search and Rescue (SAR)<sup>9</sup> operations in the Central Mediterranean, ignited political debates full of hatred<sup>10</sup> and imposed a renewed thorough legal analysis of the phenomenon. The SAR operations are aimed at rendering assistance to persons in distress or lost at sea, regardless of their nationality or status or of the circumstances in which they were found.<sup>11</sup>

While the interception of boats packed with migrants has become a daily routine in the last decade in the Mediterranean region, the recent case of Aquarius imposed a renewed thorough legal analysis of the phenomenon

In June 2018, after rescuing 629 migrants from overcrowded boats in the Mediterranean, the Aquarius was refused access to Italian ports alleging that its operators were helping migrant smugglers. Italian authorities also prohibited disembarkation of the rescued migrants on its territory, calling on Malta to allow disembarkation as the Aquarius allegedly passed by the port of La Valletta before continuing its route towards Italy. Malta, in turn, denied any responsibility.<sup>12</sup> This episode raises a number of legal issues about the management of maritime borders of the EU Member States, human rights violations at sea, State responsibility for disembarkation and access to asylum procedures in the EU, the obligations under international law of the coastal state in whose SAR zone the rescue operation took place, the state coordinating the SAR operation, the flag state (if any) of the rescuing vessel, etc. It is then crucial to answer the questions of how the existing legal tools are

addressing those issues and of whether those tools are actually adequate to efficiently manage such situations. This will allow, on the one hand, enhancing SAR capacity and border management in the EU maritime space and, on the other hand, emphasising that, despite the legal complexity, incidents like those of the Aquarius, or more recently of the Mission Lifeline<sup>13</sup> and the Sea-Watch,<sup>14</sup> do not fall into a judicial ‘no man’s land’, as media tried to suggest.<sup>15</sup>

Therefore, the identification of the applicable legal regimes, as well as of their possible limits, enables the design of new or alternative approaches to Aquarius-like incidents, which will hopefully and ultimately result in the better protection of the life of migrants in distress at sea, and improve governance of migratory flows. Consequently, this article will first provide an overview of the existing legal framework, particularly focusing on rules and obligations stemming from the law of the sea, human rights law and EU law. The gaps and weaknesses of the existing legal framework will be highlighted here. Second, building on the identified gaps and weaknesses, we will suggest through a normative analysis a legal toolbox to address Aquarius-like incidents. In our concluding remarks, we will emphasise once more that the phenomenon of irregular migration by sea does not unfold in a legal vacuum and that better border and migration management calls for a more effective implementation of the existing legal framework.

## 2 Assessing the existing legal framework

The phenomenon of boats in the Mediterranean is illustrative of the challenges stemming from the applicability of different, sometimes complementary, sometimes diverging legal regimes to SAR operations.<sup>16</sup> While the duty to render assistance, which is a specific feature of SAR operations, has been primarily developed within the law of the sea,<sup>17</sup> it is inherently linked with the broader framework of international human rights law. Moreover, the fact that the Mediterranean Sea marks the southern external border of the EU, calls into question the possible application of the EU law to SAR operations. Consequently, the key

tenets of these three legal regimes will be shortly presented and analysed in order to flag out existing obligations and unfold discrepancies or hermeneutical flaws.

## Today, the duty to render assistance is recognized as a principle of customary law. The duty thus binds all states

*a) SAR operations and the law of the sea*  
The duty to render assistance at sea is set out by Article 98 of the United Nations Convention on the Law of the Sea (LOSC)<sup>18</sup> and detailed in two main treaties: the 1974 Convention on the Safety of Life at Sea (SOLAS Convention)<sup>19</sup> and the 1979 Search and Rescue Convention (SAR Convention).<sup>20</sup> As a result of its repetition in treaty and domestic law, and in the light of state practice, even if not always uniform,<sup>21</sup> today the duty to render assistance is recognized as a principle of customary law.<sup>22</sup> The duty thus binds all states, even those which are not a party to the above-mentioned conventions.

The SAR Convention in particular aims to create an international system for coordinating rescue operations that guarantees their effectiveness and safety.<sup>23</sup> States have declared SAR zones for which they assume responsibility and they can also conclude SAR agreements to jointly manage SAR regions. Pursuant to the current legal framework,<sup>24</sup> the coastal state responsible for the search and rescue region/zone in which the SAR operation took place shall exercise ‘primary responsibility’ for ensuring such co-ordination and co-operation occurs, so that the ‘survivors assisted are disembarked from the assisting ship and delivered to a place of safety’.<sup>25</sup> This does not include a right of entry into the territory of this state by the rescued persons or a right of access to the ports of the coastal state. It however requires that the coastal state carries out the SAR operations and brings them effectively to an end, i.e., not to leave the rescued persons (whatever their status) at sea.

Consequently, in the Aquarius case, Italy, as coordinating state of the SAR operation, did not have an obligation to allow access to its territory to either the

*et al. v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155; 113 S. Ct. 2549; 125 L.Ed. 2d 128; 61 U.S.L.W. 4684; 93 Cal. Daily Op. Service 4576; 93 Daily Journal DAR 7794; 7 Fla. Law W. Fed. S 481, United States Supreme Court, 21 June 1993.

- 7 For more recent data see International Forced Migration, *Irregular migration by sea*, January 2016, available at [www.fmreview.org/destination-europe/migration-by-sea](http://www.fmreview.org/destination-europe/migration-by-sea). See also statistics available from the Missing Migrants Project of the International Organization for Migration (IOM) at: <https://missingmigrants.iom.int/>.
- 8 See for example BBC Newsround, ‘Aquarius: What’s happening to the migrants on the rescue ship?’, BBC 12 June 2018 [www.bbc.co.uk/newsround/44452893](http://www.bbc.co.uk/newsround/44452893); BBC News, ‘Italy migrants: Who is responsible for helping out at sea?’, BBC 17 June 2018 [www.bbc.com/news/world-44458441](http://www.bbc.com/news/world-44458441); S. Jones, ‘Aquarius refusal was betrayal of European values, says charity boss’, *The Guardian* 17 June 2018, [www.theguardian.com/world/2018/jun/17/aquarius-refusal-was-betrayal-of-european-values-says-charity-boss](http://www.theguardian.com/world/2018/jun/17/aquarius-refusal-was-betrayal-of-european-values-says-charity-boss); BBC News, ‘The Aquarius: Migrant taxi service or charitable rescuers?’, BBC 23 June 2018 [www.bbc.com/news/world-europe-44581764](http://www.bbc.com/news/world-europe-44581764).
- 9 The expression Search and Rescue (SAR) is commonly used to describe rescue operation at sea in accordance with the Convention on Search Rescue (1405 UNTS No. 23489).
- 10 See, e.g. G. Laganà, ‘What crisis? Political panic over Aquarius, migration helps no one’, *Euronews* 15 June 2018, available at: [www.euronews.com/2018/06/15/what-crisis-political-panic-over-migration-helps-no-one-view](http://www.euronews.com/2018/06/15/what-crisis-political-panic-over-migration-helps-no-one-view). See also A. Gattini, A. Miron, B. Taxil, S. Trevisanut, ‘Aquarius’: Non, l’Italie n’est pas seule responsable’, *Le Monde* 18 June 2018; S. Jones, *The Guardian* 17 June 2018.
- 11 S. Trevisanut, ‘Search and Rescue Operations at Sea’, in: A. Nollkaemper & I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge: Cambridge University Press 2017, p. 426-449.
- 12 For more factual references see also M. Fink, K. Gombeer & J. Rijpma, ‘In search of a safe harbour for the Aquarius: the troubled waters of international and EU law’, *EU Immigration and Asylum Law and Policy*, 9 July 2018, available at: <http://eumigrationlawblog.eu/in-search-of-a-safe-harbour-for-the-aquarius-the-troubled-waters-of-international-and-eu-law/>.
- 13 See, e.g., C. Stephen, ‘Italy bars two more refugee ships from ports’, *The Guardian* 16 June 2018, [www.theguardian.com/world/2018/jun/16/italy-bars-two-more-refugee-ships-from-ports](http://www.theguardian.com/world/2018/jun/16/italy-bars-two-more-refugee-ships-from-ports); ‘Migrant rescue ship Lifeline docks in Malta after days at sea’, *BBC News* 27 June 2018, [www.bbc.com/news/world-europe-44636556](http://www.bbc.com/news/world-europe-44636556).
- 14 ‘EU nations reach deal on stranded migrants, Malta announces’, *BBC News*



- 9 January 2019, [www.bbc.com/news/world-europe-46808509](http://www.bbc.com/news/world-europe-46808509).
- 15 See, e.g., NOS, "Nederlands reddingschip zit in juridisch niemandsland", 22 June 2018, available at: <https://nos.nl/artikel/2237902>.
- 16 For references see, *inter alia*, H. del Valle, 'Search and Rescue in the Mediterranean Sea: Negotiating Political Differences' *Refugee Survey Quarterly* 2016, p. 22-40.
- 17 See in particular S. Trevisanut, 'Recognizing the Right to be Rescued at Sea', *Ocean Yearbook* 2017, p. 139-154.
- 18 *International Legal Materials* (21) 1982, p. 1276 ff.; 1833 UNTS No. 31363.
- 19 1184 UNTS No. 1861, spec. Chapter V.
- 20 See above footnote 9.
- 21 The content of the obligation is still debated. In particular, the disagreement focuses on the obligations of the coastal state in whose SAR zone the rescue operation takes place and on the place where the rescued persons can disembark. See the debate between Mediterranean states (namely, Italy, Malta and Spain) within the IMO; IMO, 'Measures to protect the safety of persons rescued at sea. Compulsory guideline for the treatment of persons rescued at sea', submitted by Spain and Italy (13 February 2009) FSI 17/15/1; IMO, 'Measures to protect the safety of persons rescued at sea, Comments on document FSI 17/15/1', submitted by Malta (27 February 2009) FSI 17/15/2, both available at

vessel or the rescued migrants, but it had an obligation to find a place of safety for them. It thus had an obligation to negotiate with neighbouring countries to terminate the SAR operation in the fastest and safest way possible. If no agreement is reached in a reasonable amount of time, the responsibility to disembark the rescued persons falls on the SAR state; in this case, it fell on Italy. Without (at all) sharing the positions and the statements expressed by the Italian government during the Aquarius incident, it is important to stress here that Italy has taken up the role of coordinating SAR operations in the Central Mediterranean counting on the fact that it will receive due support and assistance by other states. The coordination can only work if there is cooperation. The system relies on the cooperation of states in rescuing persons in distress at sea and in finding places of safety where to disembark them. The Aquarius and Aquarius-like incidents unfortunately show a lack of cooperation in this respect. Moreover, the simultaneous application of the SAR regime with EU

law, specifically with the Dublin system, places the SAR state in a very difficult situation, as will be highlighted below in section 3.

### Aquarius-like incidents raise concerns owing to the controversial human rights jurisdiction at sea

#### *b) International human rights law on the high seas*

Aquarius-like incidents raise concerns owing to the controversial human rights jurisdiction at sea.<sup>26</sup> In particular, as regards the Mediterranean context, it is pivotal to determine whether a situation falls within the notion of State jurisdiction, as accepted by the European Court of Human Rights (ECtHR) in order to establish whether any of the rights enshrined in the European Convention on Human Rights (ECHR), including the right to life (Art. 2) or the prohibition of torture (Art. 3) have been violated



by a State party.<sup>27</sup> The latter provision operationalises within the ECHR the principle of *non-refoulement*, which constitutes the cornerstone of international refugee law.<sup>28</sup> This principle prohibits the removal of a person to a territory or frontiers of a territory where their life or freedom would be threatened. The duty of *non-refoulement* is a part of customary law and is therefore binding on all States.

The ECHR does not contain any specific provision concerning its application at sea, nonetheless the ECtHR has addressed the issue in a number of cases. In particular, the question arises whether on the high seas<sup>29</sup> States may be considered to exercise jurisdiction and thus be potentially held responsible for any human rights violations.<sup>30</sup> In relation to migratory flows and SAR operations, the ECtHR addressed the issue in the *Hirsi* case, in which the Court established that the protection against *refoulement* under Article 3 ECHR applies extraterritorially, provided that State officials were physically present and thereby exercised effective control over the individuals seeking protection.<sup>31</sup>

However, it is not clear how State jurisdiction could be established when State agents are not physically present on the high seas or have not entered in physical contact with the individuals. In the case of *Aquarius*, Italy gave instructions to the rescuing vessel not to enter the Italian territorial waters. In case the vessel had disobeyed these instructions, the situation would have clearly been within the jurisdiction of Italy. Likewise, if Italian State officials had sailed to the high seas to prevent the *Aquarius* from approaching the Italian territorial waters, they would have exercised effective control over the migrants and triggered State responsibility. By contrast, it seems particularly challenging to claim that the instructions not to navigate towards the Italian coasts could drag the *Aquarius* within the Italian jurisdiction.

Some useful considerations can be drawn from the case of *Women on Waves v. Portugal*, in which the ECtHR noted that the use of a war vessel by Portugal to stop an NGO ship to enter the territorial waters could play a deterrent effect and could be sufficient to determine the applicability of the ECHR.<sup>32</sup> The diffi-

culty to establish an effective control of State agents in the interceptions of migrant boats on high seas is a pathological element as it can result in circumventing international obligations towards asylum seekers.

## It is not clear how State jurisdiction could be established when State agents are not physically present on the high seas or have not entered in physical contact with the individuals

In this connection, it is worth reiterating that in *Hirsi* the ECtHR established that an effective control stems from a *de jure* and *de facto* exercise of authority on individuals by State agents on high seas. The judgment has nonetheless left unanswered the question whether a *de facto* control can be established based on any sort of psychological control on boat refugees caused by an order not to enter the territorial waters or to redirect the route of navigation. In such circumstances, even without any physical coercion, it is clear that actions like addressing boat refugees with warning shots or orders not to enter the territorial waters may have an impact that can even result in psychological coercion. No case law at the European or international levels has raised the issue yet. Nevertheless, a recent lawsuit filed in the ECtHR could offer a precious opportunity for the Court to elaborate on which forms of control could complement or expand the *Hirsi* doctrine. The case concerns the Italian involvement in Libyan pull-back policies in the Mediterranean. The lawsuit, brought by the UK-based Global Legal Action Network (GLAN) is based on the account of 17 survivors of a sinking boat who were returned to Libya in November 2017 after the Libyan coastguard intervened in an NGO vessel's attempt to rescue them.<sup>33</sup> Pursuant to a controversial Memorandum of Understanding signed in February 2017,<sup>34</sup> the Italian authorities funded, trained, and equipped the Libyan coastguard. The Application received by the Strasbourg Court is a rare opportunity to reflect on the human

<http://docs.imo.org>. For a comment on this issue, see: S. Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?', *International Journal of Marine and Coastal Law* (25) 2010, p. 523-542; P. Mallia, 'The MV Salamis and the State of Disembarkation at International Law: The Undefinable Goal', *ASIL Insights* (18) 2014, Issue 11, [www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal](http://www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal).

- <sup>22</sup> UN Commission on International Law, 'Commentary on Draft Article 12 of the United Nations Convention on the High Seas' (1956) *UN Doc A/3179*. Many have then supported the customary nature of the obligation; see C.J. Colombos, *International Law of the Sea*, London: Longman Green & Co. 1954, p. 304; D.P. O'Connell, *The International Law of the Sea*, Oxford: Clarendon Press 1982, P. 813-814. See also, R. Barnes, 'Refugee Law at Sea', *International and Comparative Law Quarterly* (53) 2004, p. 47-77, at p. 49; E. Papastavridis, *The Interception of Vessels on the High Seas, Contemporary Challenges to the Legal Order of the Oceans*, Oxford: Hart Publishing 2013, at p. 294; Trevisanut, *International Journal of Marine and Coastal Law* 2010, at p. 527.
- <sup>23</sup> SAR Convention Annex Chapter 3.
- <sup>24</sup> The SOLAS and SAR Conventions were both amended in 2004 (respectively, IMO resolution MSC.153 (78), 20 May 2004, and IMO resolution MSC.155 (78), 20 May 2004) in order to clarify the responsibility of the SAR states in the management of SAR operations. In the Mediterranean context, it is worth noticing that Malta has not yet ratified the 2004 amendments.
- <sup>25</sup> SOLAS Convention Chapter V/33 art. 4.1-1 and SAR Convention Annex Chapter 3.1.9, emphasis added.
- <sup>26</sup> For further references see A. Fischer-Lescano, T. Löhr & T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', in: V. Chetail (ed.), *International Law and Migration. Volume I* (International Law Series 12), Cheltenham: Edward Elgar Publishing, p. 460-500.
- <sup>27</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5.
- <sup>28</sup> More broadly on the principle of *non-refoulement* in international human rights law, see C.W. Wouters, *International Legal Standards for the Protection from Refoulement*, Antwerpen: Intersentia 2009.
- <sup>29</sup> The term 'high seas' refers to the seas beyond the national jurisdiction of any state. This vast portion of the oceans is characterized by the fact that no state can submit any part of it to its sovereignty (Art. 89 LOSC) and that, except in specifically provided exceptions, vessels are submitted to the exclusive jurisdiction of the flag state (Art. 92 LOSC).

30 See E. Papastavridis, 'European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Un-chartered Waters?', in: M. Fitzmaurice & P. Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights Rights: Legal and Practical Implications*, Leiden: Brill/Nijhoff 2012, p. 117.

31 ECtHR 23 February 2012, 27765/09 (*Hirsi Jamaa and Others v. Italy*).

32 ECtHR 3 May 2009, 31276/05 (*Women on Waves and Others v. Portugal*).

33 For a more detailed account of the facts of the case see, M. Baumgärtel, 'High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan "Pull-back" Policies to the European Court of Human Rights', *EJIL Talk*, 14 May 2018, [www.ejiltalk.org/high-risk-high-reward](http://www.ejiltalk.org/high-risk-high-reward).

34 For an unofficial English version of the Memorandum, see the translation provided by the Association on Legal Studies on Immigration (ASGI), available at: [www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf](http://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf). For references see A. Palm, 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?', *EU Immigration and Asylum Law and Policy*, 2 October 2017, available at: <http://eumigrationlawblog.eu/the-italy-libya-memorandum>.

35 For more references see Fink, Gombeer & Rijpma 2018.

36 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) 863/2007 of the European Parliament and of the Council, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC, *OJ* 2016 L 251/1.

37 Regulation (EU) 2016/1624, Art. 4 and Preamble 11 respectively.

38 Regulation (EU) 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2014 L 189/93.

39 Fink, Gombeer & Rijpma 2018.

40 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* 2016 L 77/1.

41 CJEU (Grand Chamber) 5 September 2012, Case C-355/10 (*European Parliament v Council of the European Union*).

42 Document available at: [www.unhcr.org/publications/brochures/450037d34](http://www.unhcr.org/publications/brochures/450037d34).

43 See above footnote 24.

rights implications of pullback policies, by which European States, such as Italy, outsource to countries like Libya actions that will be in contrast to ECHR obligations. Also, the case will constitute a valuable opportunity to expand the scope of *non-refoulement* on high sea and define the responsibilities of European States.

### c) *The applicability of EU law to SAR operations*

The existing legal framework encompasses a set of difficulties as regards the legal obligations stemming from the applicability of EU law to SAR operations. The European Commission has, in fact, consistently emphasised that SAR operations do not fall within the EU competences.<sup>35</sup>

Nonetheless, the Regulation establishing the European Border and Coast Guard ('Frontex') adopted in 2016<sup>36</sup> includes SAR operations for persons in distress at sea in line with relevant international law instruments as a component of the European Integrated Border Management (EIBM). The Preamble to the Regulation emphasises that one of the key roles of Frontex is 'to provide technical and operational assistance in the support of search and rescue operations for persons in distress at sea'.<sup>37</sup> Accordingly, SAR operations become relevant under EU law to the extent that they arise during border surveillance operations at sea that are coordinated by Frontex. In this connection and pursuant to the Sea Borders Regulation, Member States participating in Frontex operations cooperate with the responsible Maritime Rescue Coordination Centre to identify a place of safety and ensure speedy disembarkation of the rescued persons.<sup>38</sup>

As a consequence, when a rescue operation is not launched within Frontex border surveillance operations, the Sea Borders Regulation does not apply and, as a result, it is difficult to ascertain whether the situation falls within the scope of EU law. As it has been noted,<sup>39</sup> the key question is whether, pursuant to the Schengen Border Code, the general provisions on entry in the Schengen zone<sup>40</sup> find application beyond the Member States' territory, specifically when Member States' units patrol the external maritime borders. This delicate issue

of the territorial scope of the Schengen Border Code was raised before the Court of Justice of the EU a few years ago but the Court unfortunately decided to not address it in that case.<sup>41</sup>

### 3 Searching for a suitable legal toolbox

The simultaneous application of the relevant legal regimes might cause some contrast and might lead to some political dead-ends. The Aquarius incident exemplifies this situation. This incident is not the first and will most certainly not be the last of this kind. In order to manage those situations, some regulatory tools exist, even though they have not been very successful so far. Over the years, the main international institutions involved in the matter, namely UNHCR, International Organization for Migration (IOM) and International Maritime Organization (IMO), have closely cooperated to develop guidelines and operational tools for the stakeholders. It is essential to take in due account such guidelines to develop a suitable toolbox for Aquarius-like incidents.

### The simultaneous application of the relevant legal regimes might cause some contrast and might lead to some political dead-ends. The Aquarius incident exemplifies this situation

One of the major results of the cooperation between the UNHCR and the IMO was the publication in 2006 of a leaflet entitled *Rescue at Sea, A guide to principles and practice as applied to migrants and refugees*.<sup>42</sup> This document incorporates in particular the 2004 amendments to the SAR and SOLAS conventions.<sup>43</sup> It emphasised the specific measures and precautions that the rescuing vessel shall adopt when there are refugees or asylum seekers among the rescued migrants. It then recalled the duty of the captain of the rescuing unit to protect asylum seekers, to inquire about their presence on board, to eventually communicate it to the UNHCR and to

disembark them only when all guarantees of protection for the personal safety of the asylum seekers, including the principle of *non-refoulement*, have been confirmed.

Moreover, in 2011 the meeting *Refugees and Asylum-Seekers in Distress at Sea – how best to respond?* was held in Djibouti. The meeting aimed at discussing with governments and other stakeholders, such as the IMO and UNHCR, about possible cooperation mechanisms in order to share burdens and responsibilities related to distress at sea situations involving refugees and asylum seekers.<sup>44</sup> The discussion was based on a background paper prepared by the UNHCR<sup>45</sup> in which the agency presented possible tools for organising and enhancing cooperation. The discussions focused on two tools in particular: a Model Framework for Cooperation and Mobile Protection Response Teams. The Model Framework mirrors the efforts within the IMO concerning a *Regional agreement on concerted procedures relating to the disembarkation of persons rescued at sea for the Mediterranean region*.<sup>46</sup>

The Mobile Protection Response Teams are supposed to be temporary teams which would include experts, with different backgrounds, from several governments, the UNHCR, the IMO, other international organizations, and non-governmental organizations. These teams could be established on a stand-by basis and deployed, on request, to support and develop host government capacity in reception and processing of rescued persons upon arrival.<sup>47</sup> Both tools thus target the treatment of refugees and asylum seekers from the moment of the disembarkation.

The UNHCR also suggested the development of Standard Operating Procedures (SOPs) for shipmasters in the event of a distress at sea situation involving refugees and migrants.<sup>48</sup> Those procedures are meant to supplement the 2006 leaflet. The background paper interestingly attempts to provide a definition of distress situation that would trigger SAR obligations:

'SAR activities should be initiated wherever there are indications that a vessel or the conditions of the people on board do not allow for safe travel, creating a risk that people may perish at sea. Relevant factors include overcrowding, poor conditions of the vessel, or lack of necessary equipment and expertise.'<sup>49</sup>

This definition is an important attempt by the UNHCR to contribute to the existing legal framework by offering a harmonised interpretation of the material scope of application of the SAR system. Moreover, the SOPs would ideally be incorporated in 'industry best practices' in conjunction with the International Chamber of Shipping.<sup>50</sup> To the knowledge of the present authors, such a development has not occurred yet.

### The EU legal framework is not currently suitable to either prevent or address the many incidents that involve boat refugees in the Mediterranean

Ultimately, it is worth emphasising that, apart from implementing existing obligations, there is a regulatory gap that needs to be bridged in EU law. The latter regime has at present limited relevance to address Aquarius-like incidents, even though the context in which such incidents occur is exacerbated by the lack of safe channels of arrival into the EU.<sup>51</sup> The EU Asylum System, which finds its cornerstone in the Dublin Regulation,<sup>52</sup> currently discourages Member States to accept responsibility for asylum applications. As is known, the main criterion to allocate responsibility for an asylum application is a geographical one, which therefore exposes frontline States, especially Greece and Italy, to an excessive burden.<sup>53</sup> As Advocate General Sharpston highlighted, 'the whole system of providing protection for asylum seekers and refugees is predicated on the burden lying where it falls'.<sup>54</sup> As a result, the EU legal framework is not currently suitable to either prevent or address the many incidents that involve boat refugees in the Mediterranean.

While the reform of the Dublin Regulation lays in a stalemate,<sup>55</sup> the European Council has proposed the establishment of 'controlled centres' within the territory of EU Member States, as a complement to the 'regional disembarkation platforms' to be established in third countries. In these controlled centres 'those who are saved, according to international law, should be taken charge of, on the

44 The Summary Conclusions and other related documents from the Djibouti Meeting are available at: [www.refworld.org/pdfid/4ede0d392.pdf](http://www.refworld.org/pdfid/4ede0d392.pdf).

45 UNHCR, *Background Paper: Refugees and Asylum-Seekers in Distress at Sea – how best to respond? Expert Meeting in Djibouti, 8-10 November 2011*, October 2011, available at: [www.refworld.org/docid/4ec211762.html](http://www.refworld.org/docid/4ec211762.html).

46 IMO Facilitation Committee, 37th session, FAL 37/6/1, 1 July 2011.

47 IMO Facilitation Committee, 37th session, FAL 37/6/1, 1 July 2011 at p. 59.

48 UNHCR, *Background Paper: Refugees and Asylum-Seekers in Distress at Sea*, Annex D.

49 UNHCR, *Background Paper: Refugees and Asylum-Seekers in Distress at Sea*, Annex D.

50 Djibouti meeting, Summary Conclusions, par. 17.

51 For a broader discussion, see V. Moreno-Lax, *Accessing Asylum in Europe: Extra-territorial Border Controls and Refugee Rights Under EU Law*, Oxford: Oxford University Press 2017.

52 Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L 180/31-180/59, 29 June 2013.

53 See in particular M. Fullerton, 'Asylum Crisis Italian Style: The Dublin Regulation Collides With European Human Rights Law', *Harvard Human Rights Journal* 2016, p. 57-134.

54 CJEU, Case C-179/11 (*Cimade and GISTI*), Advocate General's Opinion, ECLI:EU:C:2012:298, Judgment of the Court (Fourth Chamber), 27 September 2012, ECLI:EU:C:2012:594, par. 83.

55 In this regard see F. Maiani, 'The reform of the Dublin system and the dystopia of "sharing people"', *Maastricht Journal of European and Comparative Law* 2017, p. 622-645.

basis of a shared effort'.<sup>56</sup> These centres would serve the same scope as current hotspots in Greece and Italy, namely to separate irregular migrants from protection seekers. In any case, provided that these centres 'will be on a voluntary basis, without prejudice to the Dublin reform', it is not clear what will be their added value.<sup>57</sup>

It is definitely essential that the EU fills in the existing regulatory gaps which renders the EU asylum system inaccessible. Nonetheless, an effective reform should be able to overhaul the current Dublin system and suggest a model of cooperation which is fair to the Member States but also and mainly to the many individuals who risk their life in pursuit of asylum.

#### 4 Concluding remarks

In an attempt to identify a suitable toolbox likely to address the increasing number of incidents involving boat refugees in the Mediterranean, this article has flagged the tensions stemming from the simultaneous applications of three legal regimes, namely law of the sea, human rights law and EU law.

Despite the need to enhance efforts for the development of more effective legal instruments, especially in EU law, it is important to stress that political cooperation is key. As emphasised by Goodwin-Gill, what is lacking at present is 'a vision, a strategy, a sense of the need to operate and cooperate within the rule of law, and a sense of purpose over the long-term'.<sup>58</sup>

56 European Council Conclusions, 28 June 2018, par. 8.

57 For further references see F. Maiani, "Regional Disembarkation Platforms" and "Controlled Centres": Lifting the Drawbridge, Reaching out Across The Mediterranean, or Going Nowhere?", in: *EU Immigration and Asylum Law and Policy*, 17 June 2018, <https://eumigrationlawblog.eu/regional-disembarkation>.

58 G. Goodwin-Gill, 'Setting the Scene: Refugees, Asylum Seekers, and Migrants at Sea – the Need for a Long-term, Protection-Centred Vision', in: Moreno-Lax & Papastavridis 2016, p. 22.

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