

Building Walls at Sea: An Assessment of the Legality of the Greek Floating Barrier

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ABSTRACT

In January 2020, against the backdrop of the Mediterranean refugee crisis, Greece announced its intention to install a floating barrier in the maritime passage between Turkey and Lesbos as a measure to deter the flow of asylum seekers arriving by sea. This article analyses the implications and assesses the legality of installing a floating barrier in light of the law of the sea, human rights law, and refugee law.

1. INTRODUCTION

Seeking asylum is not a novel phenomenon. Humans have always been a migrating species and, in turn, providing asylum to those in distress has always been understood as an essential element of altruism and human morality.¹ Since 2011, a mass influx of asylum seekers has occurred in Europe, due in part to the escalation of armed conflicts and ongoing violence in the Middle East and Africa.² Faced with this humanitarian crisis, many States, instead of consistently living up to their ethical and legal

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¹ Linda Rabben, *Sanctuary and Asylum: A Social and Political History* (University of Washington Press 2016) 27–29.

² United Nations High Commissioner for Refugees (UNHCR), ‘Operational Data Portal, Refugee Situations: Mediterranean Situation’ <<https://data.unhcr.org/en/situations/mediterranean>> accessed 19 March 2021.

obligations to offer refuge, have gradually started closing their borders,³ barring the entry of asylum seekers into their territories and thus effectively denying them access to asylum procedures⁴ and justice.⁵ The inaccessibility of terrestrial routes has led to an increase in the use of Mediterranean sea routes. These maritime passages have proven deadly, costing the lives of approximately 15,850 asylum seekers since 2015.⁶ Despite this alarming death toll among asylum seekers arriving by sea, receiving Mediterranean States have chosen to react with indifference and concealed aggression,⁷ gradually backing away from their search and rescue obligations,⁸ denying the disembarkation of rescued asylum seekers,⁹ and even engaging in pushbacks.¹⁰

- ³ Agence France-Presse, 'Hungary Closes Border to Refugees as Turkey Questions EU Deal to Stem Crisis' *The Guardian* (17 October 2015) <<https://www.theguardian.com/world/2015/oct/17/hungary-closes-border-to-refugees-as-turkey-questions-eu-deal-to-stem-crisis>> accessed 19 March 2021; 'Migrant Crisis: Hungary's Closed Border Leaves Many Stranded' (*BBC News*, 15 September 2015) <<https://www.bbc.com/news/world-europe-34260071>> accessed 19 March 2021.
- ⁴ Simone Marinai, 'The Action of Greece and Spain against Irregular Migration by Sea' in Angela Del Vecchio (ed), *International Law of the Sea: Current Trends and Controversial Issues* (Eleven International Publishing 2014) 29–58.
- ⁵ Sergio Carrera and Roberto Cortinovis, 'Search and Rescue, Disembarkation, and Relocation Arrangements in the Mediterranean: Justicing Maritime Border Surveillance Operations' in Sergio Carrera and Marco Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union* (Routledge 2020).
- ⁶ UNHCR, *Refugee Situations: Mediterranean Situation* (n 2).
- ⁷ Schatz and Fantinato observe that 'coastal States in the Mediterranean ... have begun to take measures against vessels and crews engaged in SAR [search and rescue] operations, the legality of which ... is often questionable'. Valentin Schatz and Marco Fantinato, 'Post-Rescue Innocent Passage by Non-Governmental Search and Rescue Vessels in the Mediterranean' (2020) 35 *The International Journal of Marine and Coastal Law* 740, 742.
- ⁸ See evidence of these practices in, eg, 'The Left-to-Die Boat' (*Forensic Architecture*, 11 April 2012) <<https://forensic-architecture.org/investigation/the-left-to-die-boat>> accessed 19 March 2021; 'Shipwreck at the Threshold of Europe, Lesvos, Aegean Sea' (*Forensic Architecture*, 19 February 2020) <<https://forensic-architecture.org/investigation/shipwreck-at-the-threshold-of-europe>> accessed 19 March 2021.
- ⁹ See the *Aquarius* incident, discussed in Melanie Fink and Kristof Gombeer, 'The Aquarius Incident: Navigating the Turbulent Waters of International Law' (*EJIL:Talk! Blog of the European Journal of International Law*, 14 June 2018) <<https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/>> accessed 19 March 2021; Efthymios Papastavridis, 'The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?' (*EJIL:Talk!*, 27 June 2018) <<https://www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/>> accessed 19 March 2021.
- ¹⁰ 'Pushback' refers to the interception of persons and their direct pushback outside the borders of the State. See generally Katerina Drakopoulou, Alexandros Konstantinou, and Dimitris Koros, 'Border Management at the External Schengen Borders: Border Controls, Return Operations, and Obstacles to Effective Remedies in Greece' in Carrera and Stefan (eds) (n 5).

Greece, one of the major receiving Mediterranean States,¹¹ has been no stranger to these practices.¹²

On 24 January 2020, the Greek Ministry of Defence announced the initiation of a public procurement tender for the supply, installation, technical support, and maintenance of a 2,700-metre-long non-military floating barrier designed to deter the incoming refugee flows¹³ of the Eastern Mediterranean sea route.¹⁴ The exact purpose and coordinates of the placement of the barrier were not made clear.¹⁵ The government indicated only that the barrier was intended to function as a border control measure to prevent the entry of asylum seekers into Greek territory, and as a law enforcement measure to tackle maritime smuggling in the maritime area north-east of Lesbos.¹⁶

Regardless of the particularities of the location and the purposes of the barrier, general State practice provides that floating barriers are not meant to be used as migration control measures. To the author's knowledge, of the 168 parties to the United

¹¹ UNHCR, *Refugee Situations: Mediterranean Situation* (n 2).

¹² See generally Drakopoulou, Konstantinou, and Koros (n 10); UNHCR, 'UNHCR Calls on Greece to Investigate Pushbacks at Sea and Land Borders with Turkey' (12 June 2020) <<https://www.unhcr.org/news/briefing/2020/6/See33a6f4/unhcr-calls-greece-investigate-pushbacks-sea-land-borders-turkey.html>> accessed 19 March 2021. On 28 January 2021, the Syria Justice and Accountability Centre (SJAC) filed with the Office of the Prosecutor an application to open an investigation against Greece for alleged crimes against humanity due to, among other things, its practices at sea. See SJAC, 'The SJAC Calls on ICC Prosecutor to Investigate Crimes against Humanity Committed by Greece against Refugees' (28 January 2021) <<https://syriaaccountability.org/updates/2021/01/28/sjac-calls-on-icc-prosecutor-to-investigate-crimes-against-humanity-committed-by-greece-against-refugees/>> accessed 19 March 2021.

¹³ Hellenic Republic, Ministry of National Defence, Contracts – Tenders [The No 02/20 Invitation to Participate in Negotiation, for the Supply of Floating Protection Systems (FPS) to Cover an Urgent Need Due to Unforeseen Facts for the Contracting Authority, due to Imperative and Urgent Need to Deter Increased Refugees Flows] (27 January 2020) <<https://diavgeia.gov.gr/search?advanced=true&query=ada:%22CE%A11%CE%9316-%CE%A1%CE%A76%22&page=0>> accessed 19 March 2021.

¹⁴ Asylum seekers cross the Mediterranean by three main routes: the Western Mediterranean route from North Africa to Spain, the Central Mediterranean route from North Africa to Italy and Malta, and the Eastern Mediterranean from Turkey to Greece and Cyprus. Until 2014, the busiest route was the Central Mediterranean; however, since 2014, due to the growing number of Syrian refugees, and the knowledge that the passage from Turkey towards Greece or Cyprus was relatively safer, there has been an overwhelming increase in flows on the Eastern Mediterranean route. See Caitlin Katsiaficas, 'Asylum Seeker and Migrant Flows in the Mediterranean Adapt Rapidly to Changing Conditions' (*Migration Policy Institute*, 22 June 2016) <<https://www.migrationpolicy.org/article/asylum-seeker-and-migrant-flows-mediterranean-adapt-rapidly-changing-conditions>> accessed 19 March 2021.

¹⁵ The Greek Ministry of Defence indicated only that the barrier would be installed in the maritime area north-east of Lesbos. See Hellenic Republic, Ministry of National Defence (n 13).

¹⁶ Γιακουμής Ευάγγελος 'Πώς σχεδιάζει η κυβέρνηση το μέτρο των πλωτών φραγμάτων στο Προσφυγικό' [Giakoumis Evangelos, 'How Does the Government Plan to Implement the Measure

Nations Convention on the Law of the Sea (UNCLOS),¹⁷ only Singapore has installed floating barriers in order to control irregular migration by sea,¹⁸ while among States not parties to UNCLOS, none have been reported as using floating barriers for this purpose. Only two States, Israel and the United States, neither of them parties to UNCLOS, have extended cement walls in their internal waters to halt the movement of persons.¹⁹ Both this sparse practice and the Greek tender have been criticized.²⁰

of the Floating Barriers’] (*CNN Greece*, 31 January 2020) <<https://www.cnn.gr/politiki/story/205921/pos-sxediazai-i-kyvernisi-to-metro-ton-ploton-fragmaton-sto-prosfygiko>> accessed 5 May 2020; Manos Logothetis, Special Secretary of First Reception, Ministry of Citizen Protection Greece <<https://www.youtube.com/watch?v=lv0jF2tLS6E>> accessed 18 March 2021. See Hellenic Republic, Ministry of National Defence (n 13).

¹⁷ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). The 168th party to UNCLOS is the European Union.

¹⁸ Maritime and Port Authority of Singapore, ‘Port Marine Notice No 036 of 2020: Installation of Floating Sea Barrier off Sentosa Cove’ in ‘Singaporean Notices to Mariners, Monthly Edition No 7, 1 July 2020’.

¹⁹ Israel has built a 200-metre sea barrier as an extension of its barricade around the Gaza Strip. See ‘Revealed: First Images of Israel’s Sea Barrier Blockading Gaza’ (*Middle East Monitor*, 6 August 2018) <<https://www.middleeastmonitor.com/20180806-revealed-first-images-of-israels-sea-barrier-blockading-gaza/>> accessed 19 March 2021. The United States extended its barricade in San Diego, California, at the border with Mexico, 300 feet into the water. See Marty Graham, ‘US Ocean Fence Aims to Curb Smuggling from Mexico’ (*Reuters*, 7 February 2012) <<https://www.reuters.com/article/us-usa-mexico-fence-idUSTRE81628Y20120207>> accessed 19 March 2021.

²⁰ The Greek announcement has been criticized by European officials, the Greek coast guard, and international civil society. For criticisms by European officials, see Sarantis Michalopoulos, Interview with David Sassoli, President of the European Parliament (Mega Channel Television News, Greece, 19 February 2020). European Commission officials have emphasized the need to respect human rights and refugee law norms, as well as the principles of necessity and proportionality. See European Commission, ‘Midday Press Briefing from 30/01/2020’ (January 2020) <<https://audiovisual.ec.europa.eu/en/video/I-183932>> accessed 19 March 2021; Erik Marquardt and others, ‘Question for Written Answer E-000800/2020 to the Commission: Plans by the Greek Government to Construct a Floating Barrier in the Mediterranean’ (10 February 2020) <https://www.europarl.europa.eu/doceo/document/E-9-2020-000800_EN.pdf> accessed 19 March 2021.

In autumn 2019, when the Greek government consulted the national coast guard about its plan to purchase and install the barrier, the latter indicated that the positioning of a barrier would create navigational hazards, increase the likelihood of shipwrecks, and effectively facilitate the operation of smugglers in the area. See Γιάννης Σουλιώτης, ‘Τα σενάρια για το πλωτό φράγμα’ [Yiannis Souliotis, ‘Scenarios for the Floating Barrier’] *Kathimerini* (28 August 2020) <<https://www.kathimerini.gr/1093664/article/epikairothta/ellada/ta-senaria-gia-to-plwto-fragma>>

While the Greek government has made no official announcement, the national media report that reaction against the barrier has led the government to abandon its plan, at least for the time being.²¹ The relevant practice, the reaction against the barrier, and the government's lack of action in proceeding with the installation highlight the unsuitability of the proposed measure. However, the imminent risk of a semi-permanent blockade of the Eastern Mediterranean route on the Greek side, if the plan for a floating barrier were to be revived at a future time and enforced, would set a negative precedent in Mediterranean asylum policy, and calls for an assessment of the legality of this kind of barrier under international law.

Given the uncertainties around the placement of the barrier – its purpose, location, and even its actualization – this article builds an analysis on the assumption that if the barrier were to go ahead, it would be positioned in the Greek territorial sea,²² and it assesses the barrier's legality both as a prevention and as a law enforcement measure. On that basis, the article first examines the legality of the barrier under the general umbrella of the law of the sea framework (part 2). Sections 2.1.1 and 2.1.2 examine the legality of the barrier in connection with coastal States' rights and obligations under the UNCLOS territorial sea regime and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Migrant Smuggling Protocol),²³ and section 2.1.3 examines the legality of the barrier in connection with the search and rescue obligations of coastal States under UNCLOS, the Search and Rescue Convention (SAR Convention), and the Safety of Life at Sea Convention

accessed 19 March 2021. A shorter version of this article (in English) is also available: <<https://www.ekathimerini.com/news/256311/new-use-being-sought-for-floating-sea-barrier/>> accessed 11 May 2022.

For criticisms by international civil society, see Amnesty International, 'Greece: "Floating Wall" to Stop Refugees Puts Lives at Risk' (30 January 2020) <<https://www.amnesty.org/en/latest/news/2020/01/greece-floating-wall-to-stop-refugees-puts-lives-at-risk/>> accessed 19 March 2021; 'Barriers Won't Stop Migrants Fleeing, Says UNHCR as Greece Wants Floating Fence in Aegean' (*Screenocean Reuters*, 13 February 2020) <<https://reuters.screenocean.com/record/1455664>> accessed 19 March 2021.

²¹ The Greek media report that the (purchased) barrier will not be used as initially envisaged at the border between Greece and Turkey, but may be used by the coast guard in anti-pollution training and exercises. See Γιώργος Παγούδης, 'Εξώκειλε στα ρηχά το πλωτό φράγμα' [Giorgos Pagoudis, 'The Floating Barrier Protruded into Shallow Waters'] (*EfSyn*, 29 August 2020) <https://www.efsyn.gr/ellada/koinonia/257571_exokeile-sta-riha-ploto-fragma> accessed 10 May 2022.

²² The geomorphological character of Lesbos's north-east shores and the proximity of the Turkish coast indicate that Greece can only place the barrier in its territorial sea.

²³ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (Migrant Smuggling Protocol).

(SOLAS Convention).²⁴ Given the ‘road-blocking’ function of the barrier against persons seeking asylum or international protection, the article also examines the legality of the barrier in connection with the human rights and refugee law obligations of coastal States (part 3), in particular the right to life (section 3.1), the right to seek asylum (section 3.2), and the prohibition on *refoulement* (section 3.3). Using these separate but interlocutory regimes to provide a comprehensive assessment of the barrier measure, it is concluded that the installation of a floating barrier as a measure to deter incoming asylum seekers arriving by sea is incompatible with Greece’s international obligations.

2. IMPLICATIONS UNDER THE LAW OF THE SEA: THE TERRITORIAL SEA REGIME AND SEARCH AND RESCUE OBLIGATIONS OF THE COASTAL STATE

As already mentioned, if Greece were to proceed with the placement of the barrier, it would most likely position it in its territorial sea. This means that, as Greece is a State party to UNCLOS, the legality of the barrier must first be assessed under the territorial sea regime of UNCLOS. The gist of this regime rests on a balanced compromise between the authority of coastal States and the navigational rights of flag States. Because of the proximity of the territorial sea to the territory of coastal States, UNCLOS guarantees to coastal States a high level of control over this maritime area by extending their sovereignty ‘to an adjacent belt of sea ... the territorial sea.’²⁵ In turn, by obliging coastal States to exercise this sovereignty in accordance with ‘this Convention and [] other rules of international law’,²⁶ it reassures flag States that their navigational rights will be respected. To this effect, coastal States, indeed, are allowed to safeguard their internationally recognized essential interests, but this sovereignty of coastal States over the territorial sea is not absolute,²⁷ nor inherent in the zone.²⁸ Rather, it is a sovereignty that is extended over the territorial sea as a matter of international law by virtue of States’ sovereignty over land²⁹ and, as such, it is subject to the limitations provided by UNCLOS and other rules of international law.³⁰ The principal limitation that UNCLOS imposes on the sovereignty of coastal States is the right of foreign vessels to exercise innocent passage and, consequently, the duty of coastal States to respect it.³¹

²⁴ International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR Convention); International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention).

²⁵ UNCLOS (n 17) art 2(1).

²⁶ *ibid* art 2(3).

²⁷ William K Agyebeng, ‘Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea’ (2006) 39 *Cornell International Law Journal* 371.

²⁸ Richard Barnes, ‘Territorial Sea and Contiguous Zone’ in Alexander Proelß (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft 2017) 270–71.

²⁹ *ibid*.

³⁰ UNCLOS (n 17) art 2(3).

³¹ Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2019) 95.

2.1 The character of the passage and the rights and obligations of coastal States in the territorial sea

The right of innocent passage provides that the ships of all States enjoy, in principle, the right to navigate – ‘continuous[ly] and expeditious[ly]’³² – through the territorial sea, to traverse it, or to proceed to or from the internal waters of the coastal State.³³ Under article 19, passage is defined as innocent ‘so long as it is not prejudicial to the peace, good order or security of the coastal State.’³⁴ This provision indicates that, in principle, the passage of vessels is to be presumed innocent unless a positive act prejudicial to ‘the peace, good order or security of the coastal State’ takes place in the territorial sea.³⁵ The activities which, for the purposes of UNCLOS, are considered prejudicial to ‘the peace, good order or security of the coastal State’ are exemplified in paragraph 2 of the same article. Section (g), indeed, mentions ‘the loading or unloading of any ... person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State’ as one of the activities that render the passage non-innocent.³⁶ However, considering that vessels carrying asylum seekers are not *per se* violating immigration laws and regulations but rather are facilitating persons in need of international protection in the exercise of their right to seek asylum or international protection, the characterization of their passage calls for a more detailed examination.

Accordingly, in light of article 19, the passage of vessels carrying asylum seekers and/or irregular migrants can acquire the following four alternative characterizations: (a) the passage of a vessel carrying irregular migrants intending to unload them in violation of the immigration laws and regulations of the coastal State is regarded as non-innocent; (b) the passage of a vessel carrying irregular migrants and asylum seekers passing through the territorial sea without intending to unload or load them in the coastal State should be regarded as innocent;³⁷ (c) the passage of a vessel carrying both asylum seekers and irregular migrants intending to unload them in the coastal State in violation of its immigration laws and regulations is usually regarded as non-innocent; and (d) the passage of a vessel carrying solely asylum seekers, even if it intends to unload them in the coastal State, should be regarded as innocent. Admittedly, the latter

³² UNCLOS (n 17) art 18(2). Ships that do not navigate ‘continuously and expeditiously’, ie that do not engage in passage, cannot claim a right of innocent passage if not covered by the exceptions of para 2. See Erik J Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998) 196. Such ships are subject to the enforcement jurisdiction of the coastal State. See Barnes (n 28).

³³ UNCLOS (n 17) art 18.

³⁴ *ibid* art 19.

³⁵ Donald R Rothwell, ‘Coastal State Sovereignty and Innocent Passage: The Voyage of the *Lusitania Expresso*’ (1992) 16 *Marine Policy* 427.

³⁶ UNCLOS (n 17) art 19(2)(g).

³⁷ Solène Guggisberg, ‘Le Trafic Illicite de Migrants en Mer’ in Efthymios D Papastavridis and Kinderley N Trapp (eds), *La Criminalité en Mer* (Brill Nijhoff 2014); Efthymios Papastavridis, ‘The EU and the Obligation of Non-Refoulement at Sea’ in Francesca Ippolito and Seline Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2016).

characterization – of the passage of a vessel carrying asylum seekers as innocent – is contested.³⁸ Also, Greece, in order to defend its decision to install the floating barrier, would most likely argue that the passage of vessels carrying asylum seekers towards its coasts is non-innocent. However, contrary to the prevailing line of thought, it is submitted that the passage of asylum seekers is to be considered innocent. The act of entering a State to seek asylum should not be considered or treated as an unlawful act, nor as an act ‘contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.’³⁹ Although there is no right to be granted asylum in international law,⁴⁰ and although the right to enter a State by virtue of seeking asylum is still contested,⁴¹ under the 1951 Convention relating to the Status of Refugees (Refugee Convention),⁴² the Charter of Fundamental Rights of the European Union (EU Charter),⁴³ and even under the Schengen Borders Code,⁴⁴ States have, at the same time, the positive obligation to

³⁸ Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Brill Nijhoff Publishers 2010) 51.

³⁹ UNCLOS (n 17) art 19; Violetta Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against Fragmentary Reading of EU Members States’ Obligations Accruing at Sea’ (2011) 23 *International Journal of Refugee Law* 174.

⁴⁰ Violetta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 338.

⁴¹ Tullio Scovazzi, ‘The Particular Problems of Migrants and Asylum Seekers Arriving by Sea’ in Laura Westra, Satvinder Juss, and Tullio Scovazzi (eds), *Towards a Refugee Oriented Right of Asylum* (Routledge 2015) 211; Gregor Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’ (2005) 17 *International Journal of Refugee Law* 542, 547–48. Noll notes that ‘[n]either a homogeneous state practice nor a corresponding *opinio juris* can be made out to support a right to access territory in order to seek asylum’, but that the *non-refoulement* principle ‘could be described as a right to transgress an administrative border’. In a similar manner, Papastavridis (n 37) 240, relying on Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007) 215–16, stresses that the principle of *non-refoulement* ‘requires States to admit asylum seekers at least temporarily in order to determine their status, while it precludes removal before status determination has been carried out’. Hathaway argues that under the *non-refoulement* principle, States have an implied duty to admit refugees. See James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 302.

⁴² See, in particular, Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) arts 31–33.

⁴³ Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (EU Charter) art 18.

⁴⁴ 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) [2016] OJ L77, art 4; Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational co-operation co-ordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2010] OJ L111/20, preamble, para 3. The Council observes that ‘measures taken in the course of the surveillance operation should be proportionate to the objectives pursued and fully respect fundamental rights and the rights of refugees and asylum seekers including, in particular, the prohibition of refoulement.’

provide physical access to international protection and the negative obligation to neither *de jure* penalize⁴⁵ nor *de facto* hinder the act of entering a State in order to request international protection.⁴⁶ Asylum seekers, when entering a State, even when doing so irregularly, are exercising their right to seek asylum⁴⁷ and are essentially performing an act that is exempted from being regarded and treated as a violation of immigration and criminal laws. Therefore, it is submitted that the passage of vessels carrying asylum seekers should also be considered an indispensable element of the act of exercising the right to seek asylum⁴⁸ and, for this reason, it should, in principle, be presumed innocent and should not be hampered.⁴⁹ Admittedly, on this point, the counterargument could be made that the innocence of the passage is based on a *post facto* assessment of the status of the persons on board, which accordingly renders the presumption of innocence non-applicable. However, since the refugee crisis in the Mediterranean has been ongoing since 2015, and since the vessels carrying asylum seekers are overcrowded dinghies that cannot be confused with vessels engaging in any other type of activity, their passage must be presumed innocent unless proven otherwise.

2.1.1 *The legality of the floating barrier if the passage is innocent*

Even if the passage is presumed innocent, Greece might argue that the placement of the barrier is a legitimate exercise of its rights as a coastal State to regulate innocent passage under article 21 of UNCLOS. However, even under this justification, the legality of the barrier remains questionable.

Article 21 of UNCLOS provides to coastal States the right to ‘adopt laws and regulations ... relating to innocent passage through the territorial sea, in respect of ... (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.’⁵⁰ Thus, coastal States indeed enjoy prescriptive and enforcement jurisdiction in respect of the exercise of innocent passage⁵¹ in order to, *inter alia*, prevent the violation of their immigration laws. The exercise of this right, however, must strike a balance between the legitimate interests of coastal States and the right of innocent passage.⁵² In this respect, coastal States are allowed to restrictively enact and enforce laws regarding innocent passage and then determine ad hoc whether

⁴⁵ Refugee Convention (n 42) art 31.

⁴⁶ Geoff Gilbert, ‘Editorial’ (2006) 18 *International Journal of Refugee Law* 487, 488. Gilbert notes that ‘preventing a refugee from accessing the status determination procedures within a State can be the equivalent of *refoulement*’.

⁴⁷ Roman Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5 *Duke Journal of Comparative and International Law* 1.

⁴⁸ Jane McAdam and Kate Purcell, ‘Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum’ (2008) 27 *Australian Year Book of International Law* 87; Goodwin-Gill and McAdam (n 41) 370–71.

⁴⁹ UNCLOS (n 17) art 24.

⁵⁰ *ibid* art 21(1).

⁵¹ Kari Hakapää and Erik J Molenaar, ‘Innocent Passage: Past and Present’ (1999) 23 *Marine Policy* 131.

⁵² Barnes (n 28) 202.

the passage exercised is innocent or not,⁵³ and accordingly – on the basis of this ad hoc determination – take individual enforcement measures against vessels abusing or violating innocent passage. Thus, although article 21 recognizes the right of coastal States to take preventive action, this right is not so broad as to allow the imposition of arbitrary and across-the-board material restrictions (such as a barrier) on the exercise of innocent passage.⁵⁴ The aim of article 21 is to allow the coastal States to safeguard principally the safety of navigation and subsequently their other essential interests. Consequently, the installation of a 2,700-metre-long floating barrier, that, according to the Greek coast guard, would impede and endanger navigation⁵⁵ in a perilous maritime passage⁵⁶ – crossed each year by more than 10,000 asylum seekers on often unseaworthy and overcrowded vessels⁵⁷ – cannot be justified under article 21. Furthermore, as barriers function to restrict the passage of all ships generally (without an ad hoc assessment of the character of the passage) the designation of this specific barrier seems to have disregarded the particular circumstances of the area – the density of the traffic and the precariousness of the waters. Most importantly, since there are indications that this barrier rather than safeguarding navigation would magnify its risks, its placement is considered impermissible under article 21.

2.1.2 *The legality of the floating barrier if the passage is non-innocent*

In practice, many incoming vessels will not be carrying solely asylum seekers and will not intend simply to pass through the territorial sea. Often, vessels may not be engaging in passage, and/or they may be carrying both asylum seekers and irregular migrants, and/or they may be controlled by smugglers (operating individually or as members of larger organized criminal groups). For these reasons, and although it has been argued here that the passage of vessels carrying asylum seekers in principle must be presumed to be innocent, this section assesses the legality of the floating barrier as a measure against non-innocent passage.

Before assessing its legality under the rights of protection of coastal States, it is submitted that a floating barrier that generally impedes the passage of all ships – innocent or otherwise – in the territorial sea of a State is incompatible with the duties of the coastal State under article 24 of UNCLOS. A barrier is of such material structure that it will render the passage of all ships either impracticable or even impossible in a given

⁵³ Schatz and Fantinato (n 7).

⁵⁴ Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers 2007) 39–43.

⁵⁵ Souliotis (n 20).

⁵⁶ Missing Migrants Project, International Organization for Migration, ‘Mediterranean’ <<https://missingmigrants.iom.int/region/mediterranean>> accessed 19 March 2021. As has been observed, when taking into account the official figures of the deaths of irregular migrants, it is likely that the true numbers exceed those reported. See Thomas Spijkerboer, ‘Wasted Lives: Borders and the Right to Life of People Crossing Them’ (2017) 86 *Nordic Journal of International Law* 1. Owing to the nature of irregular migration, these deaths often go unreported by the migrants and/or by States.

⁵⁷ UNHCR, *Refugee Situations: Mediterranean Situation* (n 2).

area.⁵⁸ This general hampering of innocent passage is incompatible with the obligations that Greece owes generally to flag States in its territorial sea. Furthermore, along with the expected violation of the obligations that Greece owes to the ships of all States in general, the barrier would likely also exceed the rights of the coastal State under article 25 of UNCLOS. The material structure of a barrier is of a kind that, even if the barrier succeeded in restricting only the passage of asylum seekers and/or irregular migrants, it would still be a measure that falls outside the scope of article 25 of UNCLOS.⁵⁹

Under article 25(1), UNCLOS grants coastal States the right⁶⁰ to take ‘necessary steps’ in order to prevent non-innocent passage⁶¹ and, in paragraph 3 of the same article, it even allows them to temporarily suspend innocent passage in specified areas if this is deemed essential for the protection of their security.⁶² UNCLOS does not specify which measures are to be considered as ‘necessary steps’ in order to prevent non-innocent passage. Accordingly, it has been accepted that the particularization of these ‘necessary steps’ has been left to the practice of the States concerned and it is rooted in the customary law of enforcement.⁶³ The relevant State practice is diverse⁶⁴ and suggests that coastal States enjoy broad discretion under article 25(1).⁶⁵ Even so, the right of coastal States is not absolute. As it is provided by the general principle of safety of life at sea and is explicitly illustrated by the use of the word ‘necessary’,⁶⁶ the exercise of this right is constrained and must conform to the general legal standards of enforcement at sea.⁶⁷ On that account, despite the broad discretion that coastal States enjoy under article 25(1), the legality of the barrier as a non-entry measure can still be questioned.

⁵⁸ Barnes (n 28) 220. A deviation of the primary voyage of commercial ships can involve severe financial costs. See generally in connection with search and rescue operations, Richard L Kilpatrick Jr and Adam Smith, ‘Balancing the SAR Responsibilities of States and Shipmasters’ in Valsamis Mitsilegas, Violeta Moreno-Lax, and Niovi Vavoula (eds), *Securitisng Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Brill Nijhoff 2020).

⁵⁹ Mark Pallis, ‘Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes’ (2002) 14 *International Journal of Refugee Law* 329, 357. Pallis submits that ‘a “necessary step” would be to establish whether or not the asylum seekers meet the refugee definition’.

⁶⁰ Barnes (n 28) 223.

⁶¹ UNCLOS (n 17) art 25(1).

⁶² *ibid* art 25(3).

⁶³ Ivan A Shearer, ‘Problems of Jurisdiction and Law Enforcement against Delinquent Vessels’ (1986) 35 *The International and Comparative Law Quarterly* 320; Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer 2006) 217.

⁶⁴ Molenaar (n 31) 249. The ‘logical first step’ is the verification of the character of the passage. See Barnes (n 28) 223–25. Subsequent measures are usually warning, warning shots, stopping, boarding, inspection, detention, institution of proceedings, diversion, and expulsion. See Yang (n 63) 218.

⁶⁵ Molenaar (n 32) 249; Barnes (n 28) 223–25; Yang (n 63) 217.

⁶⁶ UNCLOS (n 17) art 25(1).

⁶⁷ Shearer (n 63) and Molenaar (n 32) 249 explicitly refer to necessity and proportionality. Yang (n 63) refers to necessity, proportionality, non-discrimination, and reasonableness. Barnes (n 28) 225 specifies that ‘efforts should be made to ensure human life is not endangered, and that forcible measures do not go beyond what is reasonable and necessary’.

The use of the phrase ‘necessary steps’ subjects the right of the coastal State to take preventive measures to the requirement of necessity. Notably, neither UNCLOS nor its court and tribunals have given clear guidance as to the meaning and scope of necessity under UNCLOS. The International Tribunal for the Law of the Sea (ITLOS), in the *M/V ‘Virginia G’* case, when dealing with the interpretation of article 73 of UNCLOS and the term ‘necessary’, did not clarify its meaning or its assessment standards.⁶⁸ Judge Paik, in his separate opinion in the same case, criticized the Tribunal’s omission in not providing a standard of review for the determination of necessity,⁶⁹ and introduced a balancing test based on the interpretation of necessity under general international law.⁷⁰ Although this test was developed and used in the context of article 73, it is submitted that – owing to its general international law origin – it has a broader application than the mere confines of article 73 of UNCLOS, and can also be used to determine ‘necessary steps’ under article 25(1). On that account, ‘necessary steps’ under article 25(1) are to be understood as the measures that are essential for the prevention of non-innocent passage and its objectives.⁷¹ Thus, these are measures: (a) that safeguard the essential interests of the coastal State and cannot be substituted by any alternative measure, and (b) whose implementation does not violate the protected rights and interests of other States or individuals.⁷²

On that basis, however, the Greek floating barrier cannot qualify as a ‘necessary step’. First, as already mentioned, the barrier would generally hamper passage in the territorial sea. Secondly, under the Refugee Convention and the EU Charter (article 18), Greece has the obligation to respect the right to seek asylum and to provide access to the persons seeking it. Thirdly, it is expected that the placement of the floating barrier would increase deaths at sea.⁷³ Fourthly, the barrier is expected to be ineffective for

⁶⁸ *M/V ‘Virginia G’ (Panama v Guinea-Bissau)* (Judgment) [2014] ITLOS Rep 4, paras 255–71; Lan Ngoc Nguyen, ‘The Contribution of UNCLOS Dispute Settlement Bodies to the Development of the Law of the Sea’ (PhD thesis, University of Cambridge 2019) 28–29.

⁶⁹ *M/V ‘Virginia G’ (Panama v Guinea-Bissau)* (Judgment) [2014] ITLOS Rep 194, Separate Opinion of Judge Paik, para 1.

⁷⁰ *ibid* para 9: ‘The term “necessary” or notion of necessity is employed in a great number of areas of international law to address the relationship between an objective a State intends to seek and the means the State chooses to achieve that objective. The term “necessary” in such a context requires that measures taken must not merely be such as tend to achieve the objective but must be “necessary” for that purpose [(*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*) (Judgment) [1986] ICJ Rep 14, para 282)]. Thus if there is a choice between several appropriate measures, the least onerous (to other protected interests) and equally effective (in achieving the intended objective) needs to be chosen.’

⁷¹ As understood in the context of UNCLOS (n 17) art 19.

⁷² *M/V ‘Virginia G’* (n 69) Separate Opinion of Judge Paik, para 9: ‘necessity attempts to balance two conflicting interests at play: namely, preserving the freedom of a State to achieve the objective it seeks through means of its choosing, and restraining the State from choosing means that would unduly infringe the protected rights or interests of another entity, be it an individual or a State. The notion of necessity understood this way can be characterized essentially as a “balancing test”’.

⁷³ Souliotis (n 20).

the control and regulation of incoming vessels.⁷⁴ And finally, the essential interests of Greece are not threatened by the incoming asylum seekers and migrants. Admittedly, the scope and content of what constitutes an essential State interest are subjective and dependent on the particularities of a State and its people. However, it is not convincing that a developed State, and a Member of the European Union, would be threatened by the entry of persons in need of international protection. Moreover, even if it were accepted that the essential interests of Greece would be threatened by incoming asylum seekers, it would have to be acknowledged that the barrier could be replaced by alternative, safer, more effective measures.⁷⁵

Despite the incompatibility of the barrier with the requirements of article 25(1), Greece, in order to defend its installation, might rely on paragraph 3 of the same article, which permits the conditional temporary suspension of innocent passage. Paragraph 3 indeed permits the coastal State to ‘without discrimination ... suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of [the coastal State’s] security’.⁷⁶ This means that the coastal State is allowed to suspend innocent passage only if this suspension is: (a) non-discriminatory, (b) temporary, (c) in a specified area of the territorial sea, and (d) essential for the security of the coastal State. However, the first issue that arises under this paragraph is that this restriction should not be imposed by a physical barrier. Considering the fundamental principles of safety of life at sea and the prevention of collisions, it is highly unlikely that the placement of a physical barrier 6 nautical miles offshore, in a perilous maritime area with dense traffic, can be a permissible means to suspend passage under article 25(3). Passage restrictions at sea – contrary to restrictions on land – owing to the special nature and risks of maritime space have to respect a certain high threshold of safety and, for this reason, they usually take the form of immaterial routing rather than physical roadblocking. Moreover, even if the placement of a physical barrier could be considered a permissible measure under article 25(3), again, the suspension of passage would have to cumulatively meet the specific conditions provided by paragraph 3. To this end, Greece declared in its tender that the barrier was envisaged to stay in place for at least four years.⁷⁷ Admittedly, UNCLOS does not clarify the extent of the term ‘temporary’ but, certainly, a measure designed to last at least four years cannot be considered temporary.⁷⁸ In addition to its lasting character, the barrier cannot be considered essential for Greece’s security. Commonly, State security involves the protection of sovereignty, power, and the political and economic independence of a State, and although its exact scope and content are largely dependent on the circumstances and the definition that each individual State gives to it, it cannot be accepted

⁷⁴ *ibid*; Sassoli (n 20).

⁷⁵ *ibid*.

⁷⁶ UNCLOS (n 17) art 25(3).

⁷⁷ Hellenic Republic, Ministry of National Defence (n 13).

⁷⁸ Most temporary suspensions of passage last a few days or a few months. See the relevant notifications in Division for Ocean Affairs and the Law of the Sea, United Nations Office of Legal Affairs, ‘Suspension of Innocent Passage’ <https://www.un.org/Depts/los/convention_agreements/innocent_passages_suspension.htm> accessed 18 October 2021.

that the security of Greece is, in actuality, threatened by incoming asylum seekers.⁷⁹ Even if it were accepted that incoming asylum seekers constituted a security threat against Greece, the suspension of passage by a physical barrier would not be ‘essential’ for Greece’s protection. The Greek coast guard has affirmed that the barrier is an inadequate and ineffective measure.⁸⁰ Furthermore, it cannot be accepted that a measure that increases navigational risk and disregards the principle of safety of life at sea is a measure essential or suitable for the protection of a coastal State, as it is evident that more appropriate measures exist. Finally, the entry of a vessel into the territorial sea, similarly to the entry into the land territory of a State and the physical contact with the border, triggers the application of the Refugee Convention and human rights treaties.⁸¹ Therefore, a physical barrier that *de facto* impedes the application of refugee law and human rights law is in conflict with the obligations of the coastal State under these regimes and, absent any real imminent peril, cannot be justified.

It therefore follows that as two of the conditions set out by article 25(3) are not met, the placement of the floating barrier is incompatible with the rights and obligations of coastal States under this provision. Importantly, however, it should be stressed that the claim by Greece, and by other States, that restricting the access of asylum seekers to international protection is essential for the protection of their security is a polarizing assertion based on xenophobic and incendiary narratives.⁸² Certainly, scholars have identified that these narratives highlight a common policy trend that gradually regularizes the treatment of incoming asylum seekers and migrants as threats to the security of States.⁸³ However, this policy trend is based on distorted interpretations of States’ rights

⁷⁹ Pallis (n 59).

⁸⁰ See Souliotis (n 20): ‘The reaction from the headquarters of the coast guard was not very warm, with the leadership and the relevant executives appearing reluctant to include the floating barrier in their operational planning. Apart from the risk of causing shipwrecks, its placement on the Greek–Turkish sea border is predicted to serve the traffickers, who from the very next day would direct the boats over the floating barrier, forcing the coast guard to rescue the passengers ... In addition to the officers of the coast guard, who had expressed their opposition to the prospect of purchasing the barrier last autumn, it is believed that navy officials also conveyed objections to the prospect of the barrier’s utilization.’ (This English translation from the original Greek text is provided by the author.)

⁸¹ Barnes takes the opposite view and argues that entry into the territorial sea or presence at its edge should not be considered to trigger State obligations under the Refugee Convention as this ‘may render it practically impossible for coastal States to control illegal migration’. See Richard Barnes, ‘The International Law of the Sea and Migration Control’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010) 121–25.

⁸² For a detailed analysis of the construction of these narratives, see generally Gemma M Gloninger, ‘From Humanitarian Rescue to Border Security: Managing Migration in the Central Mediterranean’ (2019) 21 *European Journal of Migration and Law* 459. On the Greek paradigm, see Giorgos Karyotis, ‘Securitization of Migration in Greece: Process, Motives, and Implications’ (2012) 6 *International Political Sociology* 390.

⁸³ Natalie Klein, ‘Assessing Australia’s Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants’ (2014) 15 *Melbourne Journal of International Law* 414.

and obligations⁸⁴ which reproduce a socially disturbing rhetoric and, more importantly, in practice legitimize measures that result in human rights violations.⁸⁵ Therefore, any claim that assimilates asylum seekers and migrants with threats against State security should be dismissed at the outset. Accordingly, the legitimization of a measure such as the floating barrier that poses a clear and very real risk to life at sea should not be permitted under false pretences.

Furthermore, as Greece has implied that the barrier constitutes a measure taken in its effort to suppress migrant smuggling,⁸⁶ even if the requirements of article 25 were met, the barrier's placement would also contravene article 225 of UNCLOS, which provides that: 'In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel.'⁸⁷

Although this provision is included in Part XII of UNCLOS, which regulates the 'Protection and Preservation of the Marine Environment', owing to its reference to the exercise of enforcement powers generally under UNCLOS, it is considered to have a general application.⁸⁸ Article 225 imposes on States, *inter alia*, the obligation to refrain from implementing measures and operations that endanger the safety or increase the risks of navigation for vessels.⁸⁹ Therefore, as the floating barrier would pose severe risks to navigation, its installation would effectively violate the general obligation of States to refrain from undertaking such measures. Additionally, on that point, both ITLOS and the Annex VII Arbitral Tribunals have clarified that enforcement measures must adhere to the context-sensitive standards⁹⁰ of proportionality,⁹¹ necessity, and reasonableness.⁹² Yet, as already mentioned, it is expected that the floating barrier would not only increase the number of deaths in the Mediterranean, but would also be ineffective for

⁸⁴ See generally Thomas Gammeltoft-Hansen, 'The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill 2016). McAdam and Purcell (n 48) 88 note '[t]he Howard government's failure (deliberate or otherwise) to distinguish between the discretionary nature of migration control ... and the obligatory character of refugee protection.'

⁸⁵ See generally Bethany Hastie and François Crépeau, 'Criminalising Irregular Migration: The Failure of the Deterrence Model and the Need for a Human Rights-Based Framework' (2014) 28 *Journal of Immigration, Asylum and Nationality Law* 213.

⁸⁶ Hellenic Republic, Ministry of National Defence (n 13).

⁸⁷ UNCLOS (n 17) art 225.

⁸⁸ *M/V 'Virginia G'* (n 68) para 373; *M/T 'San Padre Pio' (Switzerland v Nigeria)* (Provisional Measures) [2019] ITLOS Rep 2018–2019, Separate Opinion of Judge ad hoc Petrig) para 4.

⁸⁹ Vasco Becker-Weinberg, 'Duty to Avoid Adverse Consequences in the Exercise of the Powers of Enforcement' in Proelß (ed) (n 28) 1534–37.

⁹⁰ Joshua Paine, 'The Judicial Dimension of Regime Interaction beyond Systemic Integration' in Seline Trevisanut, Nikolaos Giannopoulos, and Rozemarijn Roland Holst (eds), *Regime Interaction in Ocean Governance: Problems, Theories and Methods* (Brill Nijhoff 2020) 207–08.

⁹¹ Richard Barnes, 'Refugee Law at Sea' (2004) 53 *International & Comparative Law Quarterly* 47.

⁹² *The Duzgit Integrity Arbitration (Malta v São Tomé and Príncipe)* (Annex VII Arbitral Tribunal 2014) paras 207–10; *The Arctic Sunrise Arbitration (Netherlands v Russia)* (Annex VII Arbitral

its purpose.⁹³ Therefore, the risk the placement of the barrier would pose, coupled with its anticipated ineffectiveness, fails to meet the standards of proportionality, necessity, and reasonableness required by article 225 of UNCLOS.

Irrespective of the incompatibility of the barrier with the general framework of UNCLOS, the barrier can also be examined, and perhaps might also be justified, under the umbrella of the Migrant Smuggling Protocol, which applies to the regulation of vessels controlled by organized crime groups and smugglers.⁹⁴

It must be highlighted that the barrier does not suffice as an enforcement measure under the Migrant Smuggling Protocol. Enforcement measures under the Protocol must be taken ad hoc, against individual suspected vessels, and not *a priori*, permanently, across the board, or arbitrarily against any vessel in the exercise of passage through a specific area. Thus, although article 8 of the Protocol provides a non-exhaustive list of relevant enforcement measures, the barrier – owing to its obstructive and generic function – cannot be considered an enforcement measure for the purposes of the Protocol. Consequently, under the Protocol, the barrier could only be justified as a preventive measure. To this end, indeed, article 11 of the Protocol obliges States to ‘strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants’. However, under article 11, States do not have a free hand regarding the measures that they are encouraged to adopt. According to the nature of their borders and the availability of means,⁹⁵ States are exhorted in article 11 to enhance their border control in such a way as to prevent and detect the smuggling of persons. Thus, the preventive measures under article 11 are supposed to take into account the particular circumstances of the borders and, most importantly, to assist the prevention of smuggling. A maritime blockade that semi-permanently, across the board, and arbitrarily restricts the exercise of passage through a specific area does not serve or assist the prevention or detection of smuggling. Such a border control measure either forces smugglers to adopt new routes or – as the Greek coast guard has indicated – encourages smugglers to direct the vessels over the barrier⁹⁶ and, by forcing the coast guard to the rescue of persons in distress, practically assists the smugglers to flee the scene. Moreover, the barrier is not only incompatible with article 11, but also with article 19

Tribunal 2014) paras 222–24. Moreover, both ITLOS and an Annex VII tribunal have confirmed that ‘[a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law’. See *M/V ‘SAIGA’ (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) [1999] ITLOS Rep 10, para 155; *M/V ‘Virginia G’* (n 68) para 359; *The Arctic Sunrise Arbitration (Netherlands v Russia)* (Annex VII Arbitral Tribunal 2014) para 191.

⁹³ Sassoli (n 20).

⁹⁴ Migrant Smuggling Protocol (n 23) art 2.

⁹⁵ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press 2007) 358.

⁹⁶ Souliotis (n 20).

of the Protocol. Article 19 is a safeguard provision that provides that the adoption and enforcement of measures under the Protocol should not affect the application of:

rights, obligations, and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein. ... The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

In the event that the barrier functioned to close the maritime border, rather than to control it, it is highly likely that it would give rise to the violation of numerous obligations under both human rights law and refugee law (as will be explained in more detail in part 3). Hence, the barrier is also considered incompatible with the legal framework for the suppression of smuggling.

2.1.3 *The legality of the floating barrier in light of search and rescue obligations*

One final aspect of the general framework of the law of the sea that needs to be addressed is the obligations of coastal States in respect of the search and rescue of vessels in distress. Even if it were accepted that the barrier constituted a legitimate exercise of the powers of the coastal State or a permissible measure under UNCLOS and the Migrant Smuggling Protocol, in order to give it a green light it would still be necessary to assess how its implementation would affect the duty of the coastal State to render assistance.⁹⁷

In its article 98, UNCLOS imposes upon States the duty to search and rescue vessels in distress on the high seas. This obligation is considered customary and, accordingly, it has also been implemented in more specialized instruments, namely the SAR and the SOLAS conventions. Moreover, although the UNCLOS territorial sea regime does not include a provision that explicitly recognizes the duty to render assistance, this omission is considered to be a mere technical oversight,⁹⁸ and most commentators agree that search and rescue obligations weigh upon States in all maritime zones, including the territorial sea.⁹⁹

Although the duty to render assistance binds both coastal and flag States, it imposes different obligations on each. Coastal States have the due diligence obligation¹⁰⁰ under article 98(2) of UNCLOS to 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements

⁹⁷ Mallia (n 38) ch 6, 'Humanitarian Obligations', 102.

⁹⁸ *ibid* 101–02; Barnes (n 91) 52.

⁹⁹ *ibid*; Pallis (n 59).

¹⁰⁰ Francesca de Vittor and Massimo Starita, 'Distributing Responsibility between Shipmasters and the Different States Involved in SAR Disasters' (2019) 28 *The Italian Yearbook of International Law* 77.

cooperate with neighbouring States for this purpose'.¹⁰¹ This obligation of coastal States to establish, operate, and maintain adequate and effective search and rescue services has also been entrenched in the SAR and SOLAS conventions. Article 1 of the SAR Convention obliges States 'to adopt all legislative or other appropriate measures necessary to give full effect to the Convention',¹⁰² while regulation 15(a) of Chapter V of the SOLAS Convention provides that '[e]ach Contracting Government undertakes to ensure that any necessary arrangements are made ... for the rescue of persons in distress at sea round its coasts'.¹⁰³ A joint reading of these three provisions highlights three essential elements of the scope of this due diligence obligation: (a) the phrases 'establish and maintain',¹⁰⁴ 'to adopt all legislative or other ... measures',¹⁰⁵ and 'ensure that ... arrangements are made'¹⁰⁶ indicate that coastal States, in addition to activating search and rescue operations after the occurrence of distress, should also have acted to design and, subsequently, to properly implement a framework for the assistance and rescue of people in distress prior to the occurrence of distress; (b) the terms 'adequate',¹⁰⁷ 'appropriate',¹⁰⁸ and 'necessary'¹⁰⁹ indicate that this framework has to meet a certain threshold of care, befitting the special circumstances of navigation around each coastal State; and finally (c) the terms 'effective',¹¹⁰ 'full effect',¹¹¹ and 'ensure'¹¹² indicate that coastal States under this due diligence obligation also have an obligation of result, which imposes upon them the duty not only to design and implement an appropriate framework, but also to design and use it in such a way that it effectively serves its purpose to the maximum extent possible. Therefore, under all three instruments, coastal States have the duty not only to provide assistance *ex post* distress but also *ex ante* to design an appropriate framework and adopt measures that meet a certain high threshold.

This threshold is determined by the circumstances of navigation in the waters adjacent to the coastal State and by the standards of appropriateness, reasonableness, and effectiveness. Consequently, depending on the particular circumstances of navigation in a specific area, a coastal State under this due diligence obligation may even be obliged to abstain from adopting measures that interfere with navigation, if these measures could risk hindering rescue operations, increasing the possibility of the occurrence of distress, or even decreasing the effectiveness of rescue operations.¹¹³ In view of these

¹⁰¹ UNCLOS (n 17) art 98(2); Seline Trevisanut, 'Is There a Right to be Rescued at Sea? A Constructive View' (2014) 4 Questions of International Law 3.

¹⁰² SAR Convention (n 24) art 1.

¹⁰³ SOLAS Convention (n 24) ch V, reg 15(a).

¹⁰⁴ UNCLOS (n 17) art 98(2).

¹⁰⁵ SAR Convention (n 24) art 1.

¹⁰⁶ SOLAS Convention (n 24) ch V, reg 15(a).

¹⁰⁷ UNCLOS (n 17) art 98(2).

¹⁰⁸ SAR Convention (n 24) art 1.

¹⁰⁹ SOLAS Convention (n 24) ch V, reg 15(a).

¹¹⁰ UNCLOS (n 17) art 98(2).

¹¹¹ SAR Convention (n 24) art 1.

¹¹² SOLAS Convention (n 24) ch V, reg 15(a).

¹¹³ Seline Trevisanut, 'The Principle of *Non-Refoulement* and the De-Territorialization of Border Control at Sea' (2014) 27 Leiden Journal of International Law 661.

considerations, it is submitted that if Greece were to install the barrier, it would probably violate its due diligence obligations in respect of the duty to render assistance. The maritime area between Turkey and Lesbos is considered a potentially dangerous navigation area, with dense traffic; the Greek coast guard has acknowledged that the placement of a floating barrier in that passage would likely increase maritime incidents.¹¹⁴ In other words, it is anticipated that the barrier would create further distress at sea, potentially hinder search and rescue operations, and increase the possibility of these operations failing. On that account, the placement of the barrier would contravene Greece's obligations under UNCLOS, the SAR Convention, and the SOLAS Convention.

This brief assessment of the Greek barrier indicates that, if it were to be used as a measure to deter incoming asylum seekers and irregular migrants, Greece would effectively risk violating multiple provisions of UNCLOS and other instruments that regulate the conduct of States at sea. Still, in view of the object and purpose of the measure, the most severe implications are likely to be those that would emerge in connection with Greece's obligations under human rights and refugee law. Accordingly, the following part now assesses the legality of the floating barrier with respect to the major human rights and refugee law obligations.

3. HUMAN RIGHTS AND REFUGEE LAW IMPLICATIONS: THE RIGHT TO LIFE, THE RIGHT TO SEEK ASYLUM, AND THE PRINCIPLE OF NON-REFOULEMENT

When it comes to measures of border control and migration regulation, States tend to be quite resourceful and innovative. In relation to these matters, the European Court of Human Rights (ECtHR) has explicitly recognized that States have the right to control the entry of aliens into their territory¹¹⁵ and to 'put arrangements in place at their borders designed to allow access to their national territory only to persons who fulfil the relevant legal requirements'.¹¹⁶ However, the ECtHR has clarified that all these arrangements must conform to, respect, and fulfil the obligations of States under the European Convention on Human Rights (ECHR).¹¹⁷ Therefore, although the ECtHR has acknowledged that States have a right to control the entry of aliens into their territory, Greece's declaration that the barrier is designed to halt the flows of asylum seekers arriving by sea (indicating that Greece, contrary to its international legal obligations, intends to *de facto* prejudice the asylum applications of asylum seekers arriving by sea) renders the purpose – the basis of the adoption – of the barrier legally questionable at the outset. Moreover, the fact that the barrier would be placed at sea rather than on land does not absolve Greece from its obligations under human rights and refugee law. In this connection, the ECtHR has stressed that:

¹¹⁴ Souliotis (n 20).

¹¹⁵ *Hirsi Jamaa v Italy* App No 27765/09 (ECtHR, 23 February 2012) para 113; *ND and NT v Spain* App Nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 167.

¹¹⁶ *ND and NT* (n 115) para 168.

¹¹⁷ *Hirsi Jamaa* (n 115) para 179; *ND and NT* (n 115) para 170. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (European Convention on Human Rights) (ECHR).

the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.¹¹⁸

ITLOS, too, has affirmed that States within the law of the sea framework are ‘required to fulfil their obligations under ... human rights law’,¹¹⁹ verifying that, although human rights and refugee law are separate and autonomous legal regimes, they interact with the law of the sea regime.

States, however, especially in the context of maritime border control, have been reluctant to accept the extraterritorial application of their obligations in connection with the rights of asylum seekers and irregular migrants,¹²⁰ and judicial assessment of the relevant States’ practices has encountered obstacles.¹²¹ The main obstacle has proven to be the fulfilment of the precondition of State jurisdiction, which is indispensable for the applicability of human rights and refugee law. Yet, in the case of the Greek barrier, the issue of State jurisdiction does not pose any significant problems. Greece would most likely place the barrier in its territorial sea where, under article 2 of UNCLOS, it enjoys sovereignty and therefore also continuous and exclusive control,¹²² and *de jure* and *de facto* fulfils the jurisdictional threshold for the application of human rights and refugee law obligations.¹²³ Moreover, as Greece is a State party to the ECHR, the ICCPR, the

¹¹⁸ *Hirsi Jamaa* (n 115) para 178, citing *Medvedyev v France* App No 3394/03 (ECtHR, 29 March 2010) para 81.

¹¹⁹ *M/V ‘Louisa’ (Saint Vincent and the Grenadines v Spain)* (Judgment) [2013] ITLOS Rep 4, para 155.

¹²⁰ Andreas Fischer-Lescano, Tillmann Löhr, and Timo Tohidipur ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ (2009) 21 *International Journal of Refugee Law* 256.

¹²¹ See accordingly *Medvedyev* (n 118) paras 62–67; *Hirsi Jamaa* (n 115) paras 70–82; Efthymios Papastavridis, ‘European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?’ in Malgosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff Publishers 2012) 122–26; Efthymios Papastavridis, ‘The European Convention of Human Rights and Migration at Sea: Reading the Jurisdictional Threshold of the Convention under the Law of the Sea Paradigm’ (2020) 21 *German Law Journal* 417, characterizing it as the Achilles heel; Thomas Gammeltoft-Hansen, ‘Extraterritorial Migration Control and the Reach of Human Rights’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 113.

¹²² The ECtHR set four alternative criteria: (a) the territorial principle, (b) State agent authority and control, (c) effective control over an area, (d) the legal space (‘espace juridique’) of the Convention. See *Al-Skeini v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011) paras 130–50.

¹²³ For the applicability of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 107–12; United Nations Human Rights Committee (HRC), ‘CCPR General Comment No 23: Article 27 (Rights of Minorities)’, UN doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) para 4; Mallia (n 38) ch 6, ‘Humanitarian Obligations’, 88.

European Union, and the Refugee Convention, it must be noted at the outset that the placement of the barrier would be expected to generate numerous implications across human rights, EU primary law, and refugee law. However, as all these issues cannot be substantially covered in a single article, the following sections focus on assessing the legality of the floating barrier in connection with the right to life, the right to seek asylum, and the principle of *non-refoulement*.

3.1 The legality of the floating barrier in connection with the right to life

The right to life is a right of paramount importance,¹²⁴ occupying a principal position in numerous international and regional legal instruments.¹²⁵ Although in these instruments, and especially in the ECHR and the ICCPR, the right to life has been drafted in differing terms, its content and scope have been delineated in a similar manner by the ECtHR and the ICCPR Human Rights Committee (HRC).¹²⁶

Article 2(1) of the ECHR provides that: ‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law’. It thus imposes four main obligations on States: (a) the duty to protect everyone’s right to life by law,¹²⁷ (b) the duty not to deprive unlawfully the life of a person, (c) the duty to protect life, either by preventing death when the risk is imminent¹²⁸ or by taking ‘appropriate steps within its internal legal order to safeguard the lives of those within its jurisdiction’,¹²⁹ and (d) the duty to investigate deaths.¹³⁰ Each of these obligations has been interpreted by the ECtHR as entailing a number of requirements based on the context in which State authority is exercised.¹³¹ Under the duty to protect life, the ECtHR has identified the obligations of States to: (a) establish a legal framework supported by a law enforcement machinery that protects the lives of the persons in their jurisdiction;¹³² (b) take ‘the level of safeguards required’¹³³ to protect the lives of persons; and

¹²⁴ William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 117; HRC, ‘General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life’, UN doc CCPR/C/GC/36 (30 October 2018) para 2.

¹²⁵ See eg ECHR (n 117) art 2; ICCPR (n 123) art 6; EU Charter (n 43) art 2.

¹²⁶ Elizabeth Wicks, ‘The Meaning of “Life”: Dignity and the Right to Life in International Human Rights Treaties’ (2012) 12 Human Rights Law Review 199.

¹²⁷ ECHR (n 117) art 2(1).

¹²⁸ Christoph Grabenwarter, ‘Article 2: Right to Life’ in Christoph Grabenwarter (ed), *European Convention on Human Rights: Commentary* (Bloomsbury Publishing 2013) 16.

¹²⁹ *Makaratzis v Greece* App No 50385/99 (ECtHR, 20 December 2004) para 57; *Kiliç v Turkey* App No 22492/93 (ECtHR, 28 March 2000) para 62; *Osman v United Kingdom* App No 23452/94 (ECtHR, 28 October 1998) para 115.

¹³⁰ Hannah Russell, *The Use of Force and Article 2 of the ECHR in Light of European Conflicts* (Bloomsbury Publishing 2017) 15.

¹³¹ *ibid.*

¹³² Wicks (n 126).

¹³³ *Makaratzis* (n 129) para 71.

(c) avoid the ‘real and immediate risk to life which they knew’.¹³⁴ Moreover, the ECtHR has clarified that for a violation of the right to life to arise, it is not necessary that death occur; the mere act of putting a person’s life at risk can result in a violation of the said right¹³⁵ provided, however, that ‘the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life.’¹³⁶

When the barrier is assessed in light of these criteria, it seems probable that a violation of the right to life would occur. First, as has already been noted, the legitimacy of the barrier as a non-entry measure is questionable. Secondly, it is highly likely that the barrier would either lead to more deaths and/or to more life-threatening incidents in the area. That risk alone may not suffice for a violation of the right to life to be established. However, when the risk to life is assessed against the background of: (a) the already significant death toll in the Mediterranean; (b) the circumstances of the passage in that particular area (most of the persons crossing are asylum seekers, more than 25 per cent of them are children, this maritime area has dangerous currents and the vessels used for the crossing are fragile and overcrowded);¹³⁷ and (c) because the Greek authorities are well aware of all these life-threatening circumstances,¹³⁸ it is expected that the type and the degree of risk that the barrier would cause would lead to a violation of the duty to protect life. Furthermore, even if the barrier were to be considered a legitimate enforcement measure in principle, again, the special circumstances and dangers of this particular passage would give rise to a violation of the right to life. The function of the barrier is such that the harm it risks causing to the lives of persons is far greater than the interests it is intended to protect. Therefore, its placement would effectively exceed the principles of proportionality and necessity and lead to a violation of the right to life.

In a similar manner, the barrier, if installed, would likely also lead to a violation of the right to life under the ICCPR. Although the ICCPR articulates the right to life more broadly than the ECHR, providing that ‘[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life,’¹³⁹ the HRC has followed an interpretation of the right analogous to that of the ECtHR. Under the ICCPR, the right to life has been understood to also comprise both negative and positive obligations, which requires States not to arbitrarily deprive life,¹⁴⁰ on the

¹³⁴ *ibid.*

¹³⁵ *ibid* paras 55–56.

¹³⁶ *Kiliç* (n 129) para 63.

¹³⁷ According to UNHCR and the International Organization for Migration (IOM), ‘[b]etween January and April 2020, 16% of those crossing the Mediterranean Sea were adult women and 25% were children. The ratio of women and children has decreased by 1% and 2% respectively, compared to 2019. The ratio of women and children among arrivals in Greece is much higher as compared to Italy and Spain.’ See UNHCR and IOM, ‘COVID-19 and Mixed Population Movements: Emerging Dynamics, Risks and Opportunities’ (14 May 2020) <https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2020/06-15/Joint_UNHCR_IOM_paper_EN.pdf> accessed 19 March 2021.

¹³⁸ *Souliotis* (n 20).

¹³⁹ ICCPR (n 123) art 6(1).

¹⁴⁰ *ibid.*

one hand, and to respect, ensure, and protect the lives of persons, on the other.¹⁴¹ The obligation not to deprive life has been understood broadly as also involving the ‘foreseeable and preventable life-terminating harm or injury, caused by an act or omission,’¹⁴² without necessarily resulting in the loss of life.¹⁴³ The HRC has defined the notion of ‘arbitrariness’ more broadly than the corresponding notion of ‘unlawfulness’ found in the ECHR. ‘Arbitrariness’ has been interpreted so as to include ‘elements of inappropriateness, injustice, lack of predictability and due process of law as well as elements of reasonableness, necessity and proportionality.’¹⁴⁴ In respect of the duty to protect life, the HRC has stressed that States have the obligation to take protective measures against ‘all reasonably foreseeable threats,’¹⁴⁵ especially in respect of ‘persons in vulnerable situations whose lives have been placed at particular risk because of specific threats.’¹⁴⁶ Accordingly, when the vulnerability of asylum seekers attempting to cross by sea from Turkey to Lesbos and the imminent threat posed to their lives is taken into account, together with the fact that the barrier is expected to put the lives of persons seeking international protection at serious, inappropriate, and unjustified risk that could have been avoided, it is concluded that either under the obligation not to arbitrarily deprive life and/or under the obligation to respect the lives of persons in article 6 of the ICCPR, the placement of the floating barrier would probably result in a violation of the right to life.

Furthermore, in the context of search and rescue operations of asylum seekers and irregular migrants, the HRC has found that the failure to promptly respond to a distress call can constitute a violation of the due diligence obligation to take protective measures against ‘all reasonably foreseeable threats’ under article 6(1) of the ICCPR,¹⁴⁷ even if the distress occurs within the search and rescue area of another State.¹⁴⁸ Thus, this development, in combination with the fact that the barrier would likely also either delay or even impede search and rescue operations, reveals that its installation could also in this way lead to a violation of article 6(1) of the ICCPR.

3.2 The legality of the floating barrier in connection with the right to seek asylum

The basic guarantees of refugee protection were first firmly established by the 1951 Refugee Convention.¹⁴⁹ Since then, refugee protection has expanded and has been

¹⁴¹ *ibid.*

¹⁴² HRC, General Comment No 36 (n 124) para 6.

¹⁴³ *ibid* para 7.

¹⁴⁴ *ibid* para 12.

¹⁴⁵ *ibid* para 18.

¹⁴⁶ *ibid* para 23.

¹⁴⁷ *ibid* para 18. See also HRC, Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 3042/2017, UN doc CCPR/C/130/D/3042/2017 (27 January 2021) paras 8.2–8.5. The Committee found Italy responsible for violating its due diligence obligation owing to its failure to promptly respond to the distress call of a capsized vessel in the search and rescue area of Malta.

¹⁴⁸ HRC (n 147).

¹⁴⁹ Erika Feller, ‘International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future’ (2001) 83 *International Review of the Red Cross* 581.

complemented by human rights instruments.¹⁵⁰ Contemporary refugee protection has gradually become ‘an amalgam of principles drawn from both refugee law and the [human rights] Covenants’¹⁵¹ in which the Refugee Convention constitutes a subset of a wider framework of international protection.¹⁵² The right to seek asylum and the principle of *non-refoulement* are key components of this framework. The right to seek asylum, however, as opposed to the well-grounded theoretical construction of the principle of *non-refoulement* (which is discussed in the following section), is a rather elusive right.¹⁵³ The ECHR, the ICCPR, and the Refugee Convention, in contrast to the European Charter¹⁵⁴ and the Universal Declaration of Human Rights,¹⁵⁵ do not entail a specific provision on the right to asylum.¹⁵⁶ Nevertheless, the right to seek asylum from persecution has been recognized and developed by the case law as deriving, respectively, from the prohibition on inhuman and degrading treatment and collective expulsion, the prohibition on torture, and the prohibition on *refoulement*.¹⁵⁷ In practice, the right to seek asylum has been understood to entail the right of the individual to flee his or her own State in order to request protection from persecution in third States and the obligation of third States to provide and not to obstruct access to asylum procedures by persons within their jurisdiction requesting asylum.¹⁵⁸ Consequently, the Greek barrier, which would physically bar the entry and/or the navigation of vessels further into the territorial sea, thus *de facto* denying access to asylum procedures, would likely first lead to a violation of the right to seek asylum.¹⁵⁹

The obligation of a State to provide access to asylum procedures arises from the moment that the person seeking asylum comes under the State’s jurisdiction and/or its *de jure* and *de facto* control. Therefore, if the barrier were to be installed in the territorial sea of Greece – where Greece enjoys sovereignty – and if it were to physically obstruct access to any asylum procedure, it is expected that, by the installation of the barrier, Greece would actively violate the right to seek asylum. However, the potential violation of the right to seek asylum is only one aspect of the legal issues that would arise. The barrier would not only *de facto* suspend access to asylum procedures but, subsequently, it would push back the incoming vessels. This function of the barrier would also give

¹⁵⁰ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 5.

¹⁵¹ Hathaway (n 41) 9; *ibid* 11.

¹⁵² McAdam (n 150) 5.

¹⁵³ Goodwin-Gill and McAdam (n 41) 358.

¹⁵⁴ EU Charter (n 43) art 18.

¹⁵⁵ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR) art 14.

¹⁵⁶ *Hirsi Jamaa* (n 115) para 114.

¹⁵⁷ Terje Einarsen, ‘The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum’ (1990) 2 *International Journal of Refugee Law* 361; Salvatore Fabio Nicolosi, ‘Re-Conceptualizing the Right to Seek and Obtain Asylum in International Law’ (2015) 4 *International Human Rights Law Review* 303.

¹⁵⁸ Goodwin-Gill and McAdam (n 41) 358.

¹⁵⁹ Hathaway (n 41) 282 observes that ‘[b]lunt barriers can serve much the same end as border closures’.

rise to legal implications in connection with the principle of *non-refoulement*, which are discussed in the following section.

3.3 The legality of the floating barrier in connection with the principle of *non-refoulement*

Today, the principle of *non-refoulement* imposing upon States the obligation not to ‘expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his (or her) life or freedom would be threatened’¹⁶⁰ is considered the core safeguard in respect of the international protection of asylum seekers.¹⁶¹ First developed under the 1951 Refugee Convention, and later gradually incorporated in multiple international and regional legal instruments,¹⁶² *non-refoulement* has come to be regarded as a principle of customary international law.¹⁶³ Although in contemporary refugee and human rights law its scope and content overlap,¹⁶⁴ they are not identical under each legal regime.¹⁶⁵

The principle of *non-refoulement* enshrined in article 33 of the Refugee Convention has been understood as a rule with the twofold aim to protect refugees from being exposed to the risk of persecution if returned to their country of origin or any other third State,¹⁶⁶ and to establish the intermediate protection of asylum seekers, pending their formal recognition as refugees.¹⁶⁷ This has led commentators to argue that, under the principle of *non-refoulement*, States not only have the obligation not to expel or reject asylum seekers at their borders, but also the *de facto* duty to admit them until their

¹⁶⁰ Refugee Convention (n 42) art 33(1).

¹⁶¹ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011) 44.

¹⁶² See eg Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3; EU Charter (n 43) art 19; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 22; implied under ECHR (n 117) art 3; ICCPR (n 123) art 7.

¹⁶³ As to the scope and content of the principle of *non-refoulement*, see Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press 2003); Rebecca M Wallace, ‘The Principle of Non-Refoulement in International Refugee Law’ in Chetail and Bauloz (eds) (n 121); Trevisanut (n 113); Papastavridis (n 37). Others argue that it could even be regarded as a *jus cogens* norm. See Jean Allain, ‘The *Jus Cogens* Nature of *Non-Refoulement*’ (2001) 13 *International Journal of Refugee Law* 533.

¹⁶⁴ UNHCR, ‘The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis’ (1990) <<https://www.unhcr.org/4ca34be29.pdf>> accessed 18 October 2020.

¹⁶⁵ Anja Klug and Tim Howe, ‘The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle to Extraterritorial Interception Measures’ in Ryan and Mitsilegas (eds) (n 81) 70–71.

¹⁶⁶ UNHCR, *The Refugee Convention 1951* (n 164); Hathaway (n 41) 301.

¹⁶⁷ McAdam and Purcell (n 48).

status is determined.¹⁶⁸ By the same token, this obligation not to expel has a broad *ratione loci* application, as it is considered to be applicable – similarly to obligations of States arising under human rights law – whenever a State is exercising jurisdiction or effective control, irrespective of whether this occurs at sea or in the territory of the State.¹⁶⁹ However, its *ratione personae* application is more restricted. Under the Refugee Convention, the principle of *non-refoulement* is applicable only to refugees and asylum seekers (irrespective of whether they are recognized as such by the receiving State, as the act of recognition is merely declaratory and not constitutive) and not to all persons seeking international protection. Under human rights instruments, however, both the material scope and the personal scope of the principle are broader.¹⁷⁰ There, *non-refoulement* has been understood to stem from the obligation to protect persons from torture and inhuman and degrading treatment because of their rejection or expulsion from a receiving State.¹⁷¹ Thus, under the human rights regime, the principle permits no derogation and is generally applicable, covering not only refugees but, more generally, all persons whose life, freedom, and fundamental human rights are at risk.¹⁷² Yet, despite these nuanced differences of the principle under these two distinct but complementary legal regimes,¹⁷³ the principle of *non-refoulement* imposes on States the absolute obligation not to ‘expel or return [(“refouler”)]’ a person ‘in any manner whatsoever’. This means that, under the principle of *non-refoulement*, both the rejection or the expulsion that directly leads to persecution or human rights violations, as well as the transfer or – as a matter of fact – the pushback to a third State from where there is a risk of being returned to the country of origin, is prohibited.¹⁷⁴

As already observed, the barrier would not only bar the entry of incoming vessels but would also push them back to the high seas or to any other State, where there is a risk that the persons on board would be subjected to inhuman or degrading treatment. This means that the placement of the barrier risks leading to a violation of the principle of *non-refoulement*. First, a barrier at sea functions differently than a barrier on land. Owing to the constant motion of the water, waves, and currents, barriers in the water do not simply stop vessels. They automatically push them back. This, indeed, may not always be the case for large vessels but it certainly would be the case for dinghies, which usually carry asylum seekers. Secondly, similarly to the obligation to provide access to asylum procedures, the duty of the State not to return comes into existence from the

¹⁶⁸ *ibid*; James C Hathaway and Thomas Gammeltoft-Hansen, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53 Columbia Journal of Transnational Law 235; Papastavridis (n 37).

¹⁶⁹ Goodwin-Gill and McAdam (n 41) 246; *Hirsi Jamaa* (n 115) Concurring Opinion of Judge Pinto de Albuquerque.

¹⁷⁰ Moreno-Lax (n 40) 268.

¹⁷¹ Judge Pinto de Albuquerque argues that the threshold is lower: the protection of persons from ‘serious harm or violation of their fundamental human rights’. See *Hirsi Jamaa* (n 115) Concurring Opinion of Judge Pinto de Albuquerque.

¹⁷² *ibid*. See also McAdam (n 150).

¹⁷³ Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press 2016) 96; Moreno-Lax (n 39) 263.

¹⁷⁴ See generally *MSS v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011).

moment the asylum seeker or the person in need of international protection presents him- or herself at the border.¹⁷⁵ From this, it follows that the State is prohibited from pushing him or her back.¹⁷⁶ At sea, however, the limits of the territorial sea are essentially the borders of the coastal State. Thus, the coastal State should not hinder the entry of vessels carrying asylum seekers into its territorial sea once they arrive at the maritime border, or expel them to territories where a risk of persecution or violation of the fundamental human rights of the asylum seekers exists. Such a hindrance would give rise to a violation of the principle of *non-refoulement*.¹⁷⁷ Consequently, as the floating barrier would serve not only to stop vessels from entering the Greek territorial sea but also to push them back either to the high seas – effectively endangering the lives and health of the people on board and potentially leading to their torture and inhuman or degrading treatment – or towards any third State – where, again, there would be a risk that these persons would be subjected to torture and/or inhuman and degrading treatment – the placement of the barrier cannot be considered compatible with the obligation of *non-refoulement*.

4. CONCLUSION

This assessment of the floating barrier proposes that its use as a measure to deter incoming refugee flows would be incompatible with Greece's international obligations. The character of the barrier is so out of place that it constitutes an impermissible measure across the law of the sea, human rights law, and refugee law. Within the context of human rights and refugee law, it should be evident that a measure that bars access to asylum procedures and effectively puts the lives of persons in danger cannot be justified. Within the context of the law of the sea, unfortunately, this is not yet universally accepted. Still, the sea is not a black hole where States are discharged from their international obligations. At sea, human rights, as well as fundamental considerations of humanity,¹⁷⁸ are not only applicable but are equally mandatory for States, and the placement of a floating barrier in the middle of a dangerous maritime passage cannot be permitted under the international legal framework.

For the time being, the international community has refused to support the barrier and Greece seems to have abandoned the plan. Whether Greece – or any other receiving State – has accepted once and for all that a floating barrier is not an appropriate measure for maritime border control and migration regulation remains to be seen. There is no doubt that Greece – like other receiving Mediterranean States – is in a dire situation. However, this situation is certainly not the result of the incoming

¹⁷⁵ Papastavridis (n 37).

¹⁷⁶ See generally *Hirsi Jamaa* (n 115) Concurring Opinion of Judge Pinto de Albuquerque; *ND and NT* (n 115).

¹⁷⁷ 'As far as the territorial sea is concerned, two behaviors can particularly violate the obligations deriving from the principle in its meaning of non-rejection at the frontier: the refusal of entry into the territorial sea and the denial of access into the port or of disembarkation.' Seline Trevisanut, 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection' (2008) 12 *Max Planck Yearbook of United Nations Law* 205, 222.

¹⁷⁸ *M/V 'SAIGA' (No 2)* (n 92).

flows of persons seeking international protection and it cannot legitimize the placement of potentially life-threatening barriers at sea. Solutions lie in the enhancement of cooperation and burden sharing, not in indifference and hostile border controls.