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The Future of the Oceans

The Role of Human Rights Law and International Environmental Law in Shaping the Law of the Sea

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1. Introduction

The law which regulates the use of the oceans is one of the oldest branches of international law. It is consequently deeply rooted in traditional understandings of foundational principles, such as sovereignty and territory. Notwithstanding this, the law of the sea has developed and was codified in the second half of the twentieth century, keeping in mind the necessary interaction of the legal regime with changing circumstances, in particular with technological developments and the emergence of international environmental law. The multiplication of activities and of users at sea, however, emphasizes the importance of the legal framework which is required to not only interact with environmental law, but increasingly to interact with refugee and human rights law.

The interaction with refugee and human rights law is, however, more difficult than with environmental law because, for instance, the law of sea is particularly state-centric and marginally deals with the 'human' element of maritime activities.[1] On the one hand, the 1982 Law of the Sea Convention (LOSC)[2] contains no mentions of 'human rights' and only a few of its provisions concern the treatment of individuals submitted to states' authority (eg the duty to render assistance in Article 98 LOSC). On the other hand, the LOSC contains treaty-based mechanisms of interaction with international environmental law (eg the so-called 'rules of reference' in Part XII of the LOSC).

The present contribution will compare the LOSC/international environmental law interaction with the LOSC/human rights law interaction in order to identify the factors and pathways that facilitate or hinder the impact of environmental law and human rights law on the LOSC. This analysis aims to offer tools to better

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[1] For general discussion about the place of humans in the law of the sea, see *inter alia* Irini Papanicolopulu, *International Law and the Protection of People at Sea* (OUP 2018).

[2] United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (hereafter LOSC).

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understand how international environmental law and refugee law have impacted the law of the sea and are shaping the future of the oceans. In particular, the chapter will show how the field has been transformed through the activities of alternative paths, at a time when the traditional lawmaking processes stalled. In this regard, the chapter showcases the importance of the multilateral pathway (through the resolutions and decisions of international organizations and treaty bodies), the bureaucratic pathway (by means of explanatory instruments adopted by the international organizations and diplomatic conferences), and the private authority pathway (by virtue of activities of professional associations and organizations).[3]

I will then focus on two case studies: the legal framework of search and rescue (SAR) operations which is anchored in a specialized treaty system (namely, the 1979 SAR Convention[4]) but has developed and changed through the action of United Nations High Commissioner for Refugees (UNHCR);[5] and the legal framework applicable to offshore energy projects, which is characterized by the participation of multiple and diverse actors, by sectoral and geographical fragmentation, and by unconventional lawmaking.[6]

2. Protecting Humans in Search and Rescue Operations

2.1 The International Legal Framework of Search and Rescue Services

The duty to render assistance at sea is set out in Article 98 LOSC as follows:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

[3] Nico Krisch and Ezgi Yildiz, 'The Many Paths of Change in International Law: A Frame' in Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford University Press 2023).

[4] International Convention on Maritime Search and Rescue (opened for signature 27 April 1979, entered into force 22 June 1985) 1405 UNTS 119 (hereafter SAR Convention).

[5] Some of the arguments presented in the second part of this chapter are an updated and revised version of parts of the chapter Seline Trevisanut, 'The Contribution of the UNHCR to Ocean Governance' in David Joseph Attard (ed), *The IMLI Treatise on Global Ocean Governance,* vol 2: *UN Specialized Agencies and Global Ocean Governance* (OUP 2018) 243–57.

[6] Unconventional lawmaking in the law of the sea encompasses a broad spectrum of lawmaking processes and actors; it includes not only lawmaking processes beyond states but also beyond international cooperation. Unconventional lawmaking encompasses different ways actors (state and non-state, public and private) which operate at the international level are developing standards of behaviour to regulate varied maritime activities, beyond traditional top-down lawmaking, beyond the structures of the Law of the Sea Convention. For a detailed analysis of those processes, see Natalie Klein (ed), *Unconventional Lawmaking in the Law of the Sea* (OUP 2022). Some of the arguments presented in the second part of this chapter are an updated and revised version of parts of the chapter Seline Trevisanut, 'Unconventional Lawmaking in the Offshore Energy Sector: Flexibilities and Weaknesses of the International Legal Framework' in ibid 163–83.

(a) to render assistance to *any person found at sea* in danger of being lost;
(b) to *proceed with all possible speed to the rescue of persons in distress*, if informed of their need of assistance, in so far as such action may reasonably be expected of him; [. . .] (emphasis added)

Before the adoption of the LOSC, two other international treaties had codified the content of the duty to render assistance: the 1974 Convention on the Safety of Life at Sea (SOLAS Convention) and the 1979 Search and Rescue Convention (SAR Convention). The latter was brought about in the wake of instances of non-rescue at sea during the Indochinese crisis and aimed at clarifying the need to identify the recipient of the obligation actually to perform the rescue operations and the consequences of their performance. As a result of its repetition in treaties and domestic legislation, and in the light of state practice, even if not always uniform,[7] today the duty to render assistance is recognized as a principle of customary law.[8]

The SAR Convention aims to create an international system for coordinating rescue operations that guarantees their effectiveness and safety. States parties are thus invited to conclude SAR agreements with neighbouring states to regulate and coordinate SAR operations and services in an agreed maritime zone. Such agreements are designed technically and operationally to implement the obligation set out in Article 98(2) LOSC, which provides that, where needed, neighbouring states should cooperate through regional agreements to promote and maintain adequate and effective SAR services.[9] Such agreements also diminish the risk of non-rescue incidents. Moreover, they represent an economic advantage for the contracting

[7] The content of the obligation is still debated. In particular, the disagreement focuses on the obligations of the coastal state in whose SAR zone the rescue operation takes place, and on the place where the rescued persons can disembark. See the debate between Mediterranean states (namely, Italy, Malta, and Spain) within the IMO; IMO, 'Measures to protect the safety of persons rescued at sea, Compulsory guideline for the treatment of persons rescued at sea', submitted by Spain and Italy (13 February 2009) FSI 17/15/1; IMO, 'Measures to protect the safety of persons rescued at sea, Comments on document FSI 17/15/1', submitted by Malta (27 February 2009) FSI 17/15/2. For a comment on this issue, see Patricia Mallia, 'The MV Salamis and the State of Disembarkation at International Law: The Undefinable Goal' (May 2014) 18 *ASIL Insights* <www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal> accessed 17 June 2022; Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 International Journal of Marine and Coastal Law 523.

[8] UN Commission on International Law, 'Commentary on Draft Article 12 of the United Nations Convention on the High Seas' (1956) UN Doc A/3179. Many have then supported the customary nature of the obligation; see, inter alia, Richard Barnes, 'Refugee Law at Sea' (2004) 53 International and Comparative Law Quarterly 49; Efthymios Papastravidis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing 2013) 294; Trevisanut, 'Search and Rescue Operations' (n 6) 527.

[9] Art 98(2) LOSC states: 'Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.'

parties to the extent that they can share the costs arising from organizing and carrying out SAR operations.

Carrying out rescue operations at sea, however, does not exhaust the duty to render assistance, which extends to the disembarkation of the rescued persons in a place of safety. Sea-borne migration and related humanitarian crises have strikingly highlighted this point. The Maritime Safety Committee (MSC) of the IMO adopted two resolutions that amended both the SOLAS[10] and SAR Conventions,[11] and which entered into force on 1 July 2006. Consequently, pursuant to Article 4.1-1 of Chapter V/33 of the SOLAS Convention and Chapter 3.1.9 of the Annex of the SAR Convention, the coastal state responsible for the search and rescue region in which the SAR operation took place shall exercise 'primary responsibility' to ensure that the 'survivors assisted are *disembarked* from the assisting ship and delivered to *a place of safety*' (emphases added). According to the MSC Guidelines,[12] a 'place of safety' means a location where the rescue operations can be considered as completed. In accordance with Principles 6.13 and 6.14 of the Guidelines, the rescue unit can be the place of safety, but only provisionally. In fact, the text insists on the role that the flag state and the coastal state should play in substituting for the master of the rescuing vessel.

Moreover, pursuant to the same guidelines, the state in whose SAR zone the operation took place has the duty to provide or, at least, to secure a place of safety for the rescued persons (Principle 2.5). This Principle does not include a right of entry into the territory of this state by the rescued persons or a right of access to the ports of the coastal state by the rescuing unit. It simply requires that the coastal state carries out the SAR operations and brings them effectively to an end, ie by not leaving the rescued persons (whatever their status)[13] at sea or in any other unsafe situation. Keeping in mind that the MSC Guidelines are not binding, Principle 2.5 suggests that the coastal state has a 'residual obligation' of allowing disembarkation on its own territory when it has not been possible to do so safely anywhere else.[14] This has been clarified by the IMO Facilitation Committee (FAL), which adopted

[10] MSC.153 (78) 20 May 2004.

[11] MSC.155 (78) 20 May 2004.

[12] MSC.167 (78) 20 May 2004.

[13] The issue concerning the denial of disembarkation by coastal states was mainly raised in instances where irregular migrants and asylum-seekers were among the rescued persons. On the issue see, inter alia, 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; Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23 International Journal of Refugee Law 443; Efthymios Papastravidis, '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* (CUP 2015) 236; Seline Trevisanut, 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection' (2008) 12 Max Planck Yearbook of United Nations Law 205–46.

[14] For a contrary opinion, see Papastravidis, *The Interception of Vessels* (n 7) 299.

the 'Principles relating to administrative procedures for disembarking persons rescued at sea'[15] in January 2009. Principle 3 establishes that: '[i]f disembarkation from the rescuing ship *cannot be arranged swiftly elsewhere*, the Government responsible for the SAR area *should accept the disembarkation of the persons rescued* in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support' (emphasis added).

The fact that the FAL had to intervene clearly indicates that the 2004 amendments to the SAR and SOLAS Conventions have been insufficient to enhance the safety of persons rescued at sea and to clarify the content of the applicable legal obligations. The MSC Guidelines and the FAL Principles set out how these amendments should be implemented, but these suggestions have not yet been taken up in practice.

2.2 The UNHCR and the Development of the Search and Rescue Legal Framework

The UNHCR has had a fundamental influence in the recognition of the customary nature of the obligation to render assistance at sea. The Indochinese crisis gave the decisive impetus for the adoption of an international legal framework in the field of rescue at sea, with the adoption of the Search and Rescue (SAR) Convention and the Safety of Life at Sea (SOLAS) Convention. In particular, the adoption of the SAR Convention in 1979 is closely linked to the adoption of the resettlement programmes discussed above and the beginning of the cooperation between the IMO and the UNHCR.

2.2.1 The Indochinese crisis

The UNHCR's action consisted of promoting initiatives and giving support to the existing multilateral cooperation programmes that dealt with the rescue and resettlement of refugees found at sea. This mode of action took shape in particular with the management of the 'boat people' crisis stemming from the Vietnam War.[16] The United Nations were involved in the reconstruction process following the Peace Treaty of Paris of 1973, but the fate of the boat people took an international significance only in the second half of the 1970s.[17]

Considering thatthe UNHCR can only operate on the territory of states that have authorized it and does not have its own means to intervene at sea, the agency could

[15] FAL.3/Circ.194, 22 January 2009.

[16] Lakshamana Chetty, 'Resolution of the Problem of Boat People: The Case of a Global Initiative' [2001] ISIL Yearbook of International Humanitarian and Refugee Law 144ff .

[17] ibid 145ff.

then only intervene once the migrants had reached the country of destination or of transit. However, at that time, the main recipient countries, namely Thailand, Malaysia, and Singapore, were not parties to the 1951 Geneva Convention or the 1967 Protocol. The UNHCR interventions were therefore aimed at getting the attention of states parties to the Refugee Convention, which were likely to provide support and aid for the construction and management of camps.

In connection with, and in addition to, the humanitarian emergency, other problems emerged: to determine who should intervene on the high seas to rescue migrants, and what were the areas of competence and responsibility of the interested states. The then High Commissioner, Hartling, emphasized: 'we must not ask a drowning man how he came to be in those straits. Still less is there time to question if he has relatives abroad, is bilingual, skilled or physically or mentally handicapped. Asylum, at least temporarily, must be given immediately and durable solutions […] must be devised in response to humanitarian needs, needs that are surely self-evident.'[18]

The mixed composition of the migratory flows and their increasing number generated strong hostility among the public in recipient countries. Instances of non-rescue and denials of disembarkation multiplied. The intergovernmental conference held in Geneva in July 1979 made it clear that the crisis could not be solved within the UNHCR because the agency did not have, and still does not have, competence in the field of navigation, specifically for rescue operations. In Geneva, the UNCHR then called the parties to cooperate, in a spirit of solidarity, and presented a programme to that effect.

The focal point of the 1979 conference was temporary asylum, which implied a subsequent multilateral cooperation programme on resettlement of refugees.[19] In 1979, the DISERO (Disembarkation Resettlement Offers) programme was created and provided a first solution to the refusal of disembarkation by destination states.[20] Participating states undertook to accept a predetermined quota of refugees/displaced persons in order to encourage vessels to perform their rescue obligations by guaranteeing them entry and disembarkation. Unfortunately, the practice of ignoring vessels in distress continued. The main issue for rescuing vessels was the economic cost of rescue operations. A rescue operation often implied a variation of the navigational route, with consequent loss of time and, thus, consequent economic loss.

[18] Opening Statement by the United Nations High Commissioner for Refugees, in Consultative Meeting with Interested Governments on Refugees and Displaced Persons in South East Asia (Geneva 11–12 December 1978) <www.unhcr.org/en-us/admin/hcspeeches/3ae68fce4c/opening-statement-mr-poul-hartling-united-nations-high-commissioner-refugees.html> accessed 17 June 2022.

[19] Sten A Bronée, 'The History of the Comprehensive Plan of Action'(1993) 5 International Journal of Refugee Law 534.

[20] 'Problems Related to the Rescue of Asylum-Seekers at Sea', EC/SCP/42 <www.unhcr.org/excom/scip/3ae68cbc20/problems-related-rescue-asylum-seekers-sea.html> accessed 17 June 2022.

In 1982, the Working Group of Government Representatives on the Question of Rescue and Asylum Seekers at Sea issued an appeal to the flag states to encourage vessels flying their flag to carry out rescue operations on the high seas and to adhere to the DISERO programme.[21] The problem of so-called 'flags of convenience' or 'open-registry countries' then emerged.[22] On the same occasion, the Working Group suggested that the master of the ship, in the fulfilment of his or her obligations, 'should not be in any way held liable for undertaking rescue'. This disclaimer did not, however, solve the problem of the economic cost of rescue operations. The following year, the UNHCR proposed the *Guidelines for the Disembarkation of Refugees*,[23] in which the agency took an active role both at the operational and financial levels:

> On request, UNHCR will reimburse shipowners for costs, which are specially related to the care of refugees rescued at sea, not exceeding US$ 5 per refugee. Furthermore, UNHCR can reimburse shipowners for expenditures incurred in connection with disembarkation of refugees […], reimbursement of such incidental expenditures should not exceed US$ 5,000 per ship. […] Expenses incurred by shipowners, as a direct consequence of rescue […] cannot be covered by this programme.

The same document contained a Proposal for a Scheme for the Rescue at Sea Resettlement Offers that sought to respond to another concern of flag and port states, namely the resettlement of rescued refugees. Within the RASRO (Rescue at Sea Resettlement Offers) programme the flag state could ask for an anticipated funding of the costs linked to the arrival of refugees/displaced persons and to their subsequent integration. At the same time, the coastal states would receive resettlement guarantees in exchange for authorizing disembarkations. The RASRO programme became operational on 1 May 1985,[24] and fifteen states participated therein.[25]

The UNHCR also continued its dialogue with shipowners and masters expanding the project to the reimbursement of their costs associated with rescuing

[21] 'Report on the Meeting of the Working Group of Government Representatives on the Question of Rescue of Asylum Seekers at Sea held in Geneva 5–7 July 1982 (24 August 1982).

[22] On the issue of flag of convenience and open-registry state see, inter alia, Dr Ademuni-Odeke, 'An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law' (2005) 36 Ocean Development and International Law 339; Doris König and others, 'Flags of Convenience' [2009] Max Planck Encyclopedias of International Law.

[23] UNHCR, 'Problems Related to the Rescue of Asylum-Seekers in Distress at Sea' (1 September 1983) Annex 1 <www.unhcr.org/excom/scip/3ae68ccf8/problems-related-rescue-asylum-seekers-distress-sea.html> accessed 17 June 2022.

[24] 'Report of the United Nations High Commissioner for Refugees' (1 August 1986) UN Doc A/41/12, para 92.

[25] Australia, Canada, Denmark, Finland, France, Greece, Japan, New Zealand, Norway, the Netherlands, the United Kingdom, Spain, the US, Sweden, and Switzerland.

boat people (the *Rescue at Sea Reimbursement Project*).[26] It also intensified its cooperation with the International Maritime Organization (IMO), which, after reaching an agreement with the UNHCR in December 1984, put at the disposal of the latter an expert to assist in matters relating to rescue at sea.[27] Despite the significant contribution of the DISERO and RASRO programmes in managing and reducing the number of arrivals, the countries of first asylum continued to express their concerns and voiced the need to find definitive solutions to the problem. The central point of the debate remained the issue of resettlement. In June 1989, the International Conference on Indochinese Refugees was held in Geneva. It marked a worldwide breakthrough in the management of one of the most important migratory crises, thanks in particular to the adoption of the Comprehensive Plan of Action (CPA).[28] The CPA outlined the role which the UNHCR can play in facilitating and organizing international cooperation for the management of irregular migration by sea. During the Indochinese crisis, the UNHCR deeply influenced the way in which cooperation took place and the content and fulfilment of any agreements concluded between the countries involved, including the cooperation in the field of search and rescue at sea.

2.2.2 Interinstitutional dialogue and normative developments

The IMO is one of the first institutions with which the UNHCR signed a memorandum of understanding. Cooperation between the two agencies dates back to 1970.[29] These fifty years have allowed the development of the conventions mentioned above and subsequent amendments of principles and standards aimed at facilitating rescue operations at sea in compliance with refugee law and, more generally, human rights law. Following this policy goal, and according to the comprehensive approach to the migratory phenomenon inaugurated with the CPA, the UNHCR has organized in close collaboration with the IMO a series of meetings specifically devoted to the rescue at sea of migrants between 2002 and 2014.

One of the major results of the cooperation between the UNHCR and the IMO was the publication in 2006 of a leaflet entitled *Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees*.[30] This document incorporates in particular the 2004 amendments to the SAR and SOLAS Conventions. It emphasized the specific measures and precautions that the rescuing vessel shall adopt

[26] UNHCR, 'Problems Related to Rescue of Asylum Seekers at Sea' (8 July 1985) para 8 <www.unhcr.org/excom/scip/3ae68cbc20/problems-related-rescue-asylum-seekers-sea.html> accessed 17 June 2022.

[27] UN Doc A/41/12 (n 23) para 139.

[28] As mentioned, the CPA mainly dealt with settlement issues and will thus not be analysed in depth here. For further information on the CPA, see, inter alia, Bronée (n 18); Chetty (n 15).

[29] Executive Committee, 'Follow-up to ECOSOC Resolution 1995/56, Information Note on the Development of Operative Memoranda of Understanding' (4 January 1996) EC/46/SC/CRP.8, 2.

[30] IMO/UNHCR, 'Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees' <www.unhcr.org/publications/brochures/450037d34/rescue-sea-guide-principles-practice-applied-migrants-refugees.html> accessed 17 June 2022; the leaflet was updated in 2015.

when there are refugees or asylum-seekers among the rescued migrants. It then recalled the duty of the captain of the rescuing unit to protect asylum-seekers, to inquire about their presence on board, eventually to communicate it to the UNHCR, and to disembark them only when all guarantees of protection for the personal safety of the asylum-seekers, including the principle of *non-refoulement*,[31] have been confirmed. The document clearly incorporates the Guidelines developed by the IMO MSC concerning the interpretation of the 2004 amendments to the SAR and SOLAS Conventions. Principle 6.17 of the MSC Guidelines provides: 'The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.'[32]

A meeting on 'Refugees and Asylum-Seekers in Distress at Sea—How Best to Respond?' was held in Djibouti in 2011. The meeting aimed to discuss with governments and other stakeholders, such as the UNHCR, possible cooperation mechanisms in order to share burdens and responsibilities related to distress at sea situations involving refugees and asylum-seekers.[33] The discussion was based on a background paper prepared by the UNHCR[34] in which the agency presented possible tools for organizing and enhancing cooperation. The discussions focused on two tools in particular: a model framework for cooperation and mobile protection response teams. The model framework builds upon the experience of the UNHCR during the Indochinese crisis and tries to repeat the success of the CPA.[35] It also mirrors the efforts within the IMO concerning a Regional Agreement on Concerted Procedures Relating to the Disembarkation of Persons Rescued at Sea for the Mediterranean region.[36]

The mobile protection response teams are supposed to be temporary teams which would include experts, with different backgrounds, from several governments, the UNHCR, other international organizations, and non-governmental organizations. These teams could be established on a stand-by basis and deployed, on request, to support and develop host government capacity in the reception and processing of rescued persons upon arrival.[37] Both tools thus target the treatment of refugees and asylum-seekers from the moment of the disembarkation.

The UNHCR also suggested the development of standard operating procedures (SOPs) for shipmasters in the event of a distress at sea situation involving refugees

[31] ibid.

[32] See above (n 11).

[33] The Summary Conclusions and other related documents from the Djibouti meeting are available at <www.refworld.org/pdfid/4ede0d392.pdf> accessed 17 June 2022.

[34] UNHCR, 'Background Paper: Refugees and Asylum-Seekers in Distress at Sea—How Best to Respond? Expert Meeting in Djibouti, 8–10 November 2011' (October 2011) <www.refworld.org/docid/4ec211762.html> accessed 17 June 2022.

[35] Anja Klug, 'Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing' (2014) 26 International Journal of Refugee Law 1.

[36] IMO Facilitation Committee, 37th session, FAL 37/6/1, 1 July 2011.

[37] ibid 59.

and migrants.[38] Those procedures are meant to supplement the 2006 leaflet elaborated by the UNHCR in cooperation with the IMO. The background paper interestingly attempts to provide a definition of a distress situation that would trigger SAR obligations:

> SAR activities should be initiated wherever there are indications that a vessel or the conditions of the people on board do not allow for safe travel, creating a risk that people may perish at sea. Relevant factors include overcrowding, poor conditions of the vessel, or lack of necessary equipment and expertise.[39]

This definition is an important attempt by the UNHCR to contribute to the existing legal framework by offering a harmonized interpretation of the material scope of application of the SAR system. Moreover, the SOPs would ideally be incorporated in 'industry best practices' in conjunction with the International Chamber of Shipping (ICS).[40] In 2015, the ICS published the second edition of *Large Scale Rescue Operations at Sea, Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons*,[41] which is intended to be complementary to the IMO/UNHCR *Rescue at Sea* leaflet.[42] However, the 2015 ICS Guidance does not specify any rule of conduct for the members of the crew in case refugees or asylum seekers are rescued. To the contrary, it affirms that 'the Master has no authority, obligation or responsibility for listening to, acting upon or communicating information concerning the legal status of rescued persons or applications for asylum'.[43]

Last but not least came the High Commissioner's 2014 Dialogue on Protection at Sea.[44] This meeting addressed many of the challenges that the never-ending migratory and humanitarian crisis in the Mediterranean poses. It consisted of a key element of the UNHCR's two-year *Global Initiative on Protection at Sea*.[45] The main goal of the Global Initiative is to support states in order to:

> reduce loss of life at sea, as well as exploitation, abuse and violence experienced by people travelling irregularly by sea, and […] establish protection-sensitive responses to irregular mixed migration by sea.[46]

[38] UNHCR, 'Background Paper: Refugees and Asylum-Seekers in Distress at Sea' (n 33).
[39] ibid.
[40] Djibouti meeting, Summary Conclusions, para 17.
[41] ICS, *Large Scale Rescue Operations at Sea* (2nd edn, 2015) 3 <https://www.ics-shipping.org/wp-content/uploads/2015/01/large-scale-rescue-at-sea-min.pdf> accessed 17 June 2022.
[42] IMO/UNHCR (n 29).
[43] ICS (n 40).
[44] Seventh High Commissioner's Dialogue on Protection Challenges (Geneva 10–11 December 2014) <www.unhcr.org/high-commissioners-dialogue-on-protection-challenges-2014.html> accessed 17 June 2022.
[45] UNHCR, High Commissioner's Dialogue on Protection Challenges: Protection at Sea, Global Initiative on Protection at Sea (Geneva 1 May 2014) <www.unhcr.org/5375db0d9.html> accessed 17 June 2022.
[46] ibid 1.

The UNHCR has once again affirmed the importance of the SAR regime, encouraged compliance with it, and repeated the need for further cooperation, in particular at the regional level.[47] At the 2014 meeting, the UNHCR together with the IMO, the International Organization for Migration (IOM), the Office of the United Nations High Commissioner for Human Rights, and the UN Office on Drugs and Crime (UNODC) issued a *Joint Statement on Protection at Sea in the Twenty-First Century*. In this document, the UN bodies once more draw attention to how the many lives lost at sea are challenging the 'time-honored tradition of rescue at sea enshrined in international law', which applies 'regardless of the migration status of the persons in distress at sea'.[48] Once again, the UNHCR affirmed the customary nature of the duty to render assistance and the need to interpret this obligation within its normative context,[49] which includes refugee law and human rights law when dealing with migrants at sea.

3. Protecting the Environment in Offshore Energy Operations

The implementation and the development of the law of the sea are tightly interlinked with technological development. The legal framework needs to be both highly specialized and at the same time flexible. The specialization[50] is guaranteed by the sectoral fragmentation at the global level and the geographical fragmentation at the regional level. The flexibility is pursued through unconventional lawmaking by international organization and treaty bodies at both global and regional levels.

3.1 Sectoral and Geographical Fragmentation

The offshore energy sector has considerably expanded in the last thirty years. Commentators talk about an 'offshorization'[51] of energy production. The expansion

[47] ibid 2. See also UNHCR, High Commissioner's Dialogue on Protection Challenges: Protection at Sea, Background Paper (Geneva 11 November 2014) <www.unhcr.org/5464c3dc9.html> accessed 17 June 2022.

[48] Joint Statement on Protection at Sea in the Twenty-First Century (Geneva 10 December 2014) <www.unhcr.org/news/press/2014/12/548825d59/unhcr-iom-imo-unodc-ohchr-joint-statement-protection-sea-twenty-first-century.html> accessed 17 June 2022.

[49] Art 31(3)(c) of the Vienna Convention on the Law of Treaties ((opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331) provides that, when interpreting a treaty: 'There shall be taken into account, together with the context: … (c) Any relevant rules of international law applicable in the relations between the parties.'

[50] '[S]pecialisation accommodates various needs and concerns if the states engage in international law-making, and states perceive that their individual positions are better respected in these special regimes that in a global one'; Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 Michigan Journal of International Law 858–59.

[51] Tarik Dahou, 'La politique des espaces maritimes en Afrique. Louvoyer entre local et global' (2009) 116 Politique africaine 10.

of the sector multiplied the risks associated with this activity, in particular when we consider the increased exploitation of deep-water resources. The Deepwater Horizon disaster in April 2010[52] is of course a clear example of the risks associated with deep water oil and gas exploitation. No framework convention regulates the offshore energy sector. The legal framework developed in a fragmented manner following a problem-based approach at the global level and a geographical approach at the regional level.

3.1.1 The sectoral fragmentation at the global level

The LOSC contains a series of obligations, which set out the jurisdictional framework for conducting offshore energy activities and for the protection of the marine environment. Pursuant to Articles 60 and 80, coastal states have exclusive rights to authorize the construction and exclusive jurisdiction over installations in respectively their exclusive economic zone (EEZ) and continental shelf. The Convention also contains a series of obligations for the protection of the marine environment in Part XII.[53]

Article 208 LOSC specifically regulates the prevention, reduction, and control of the pollution from seabed activities subject to national jurisdiction, for instance the pollution generated by the offshore oil and gas industry located in the EEZ or continental shelf. Coastal states are required to adopt laws, regulations and measures that 'shall be no less effective than *international rules, standards and recommended practices and procedures*' (Article 208.3, emphasis added).[54] Moreover, states, 'acting especially through *competent international organizations or diplomatic conference*, shall establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment referred to in paragraph l' (Article 208.5, emphasis added). This provision builds an important 'bridge' between the LOSC and other relevant normative sources, which are not necessarily generated from treaties but derive

[52] The Deepwater Horizon was a mobile offshore drilling unit that was operated at a depth of more than 1,500m in the Gulf of Mexico. Following an explosion in April 2010, killing eleven crew members, the rig sank, and an oil spill affected more than 1,000km of coastline Ruwantissa Abeyratne, 'The Deepwater Horizon Disaster—Some Liability Issues' (2010) 35 Tulane Maritime Law Journal 125.

[53] See the general obligations in arts 192–94 LOSC; for a recent interpretation of those articles in relation to the construction of installations and artificial islands, see Permanent Court of Arbitration, *The South China Sea Arbitration* (*The Republic of Philippines v The People's Republic of China*) (Award) [2016] PCA Case 2013-19, 175, paras 983ff.

[54] The LOSC does not define concepts such as 'international rules', 'standards', and 'recommended practices and procedures', which also remain vague in practice. See, inter alia, Bernard Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991–92) 24 New York University Journal of International Law and Politics 109ff; Seline Trevisanut, 'La Convention des Nations Unies sur le droit de la mer et le droit de l'environnement: développement intrasystémique et renvoi intersystémique' in Hélène Ruiz Fabri and Lorenzo Gradoni (eds), *La circulation des concepts juridiques: le droit international de l'environnement entre mondialisation et fragmentation* (Société de législation comparée 2009) 416.

from the work of relevant actors, such as international organizations, diplomatic conferences, and professional associations.[55]

The integration within the LOSC of future developments in the field of environmental protection is also guaranteed by Article 237 LOSC which consists of a specific compatibility clause between the Convention and obligations deriving from other agreements on the protection and preservation of the marine environment. This provision facilitates the application of the LOSC in the relevant normative context and of environmental law instruments in the context of marine environment protection.[56] Many international instruments are relevant here: those tackling a particular source of pollution and its consequences,[57] and those regulating wider questions relevant for the protection of the environment. For instance, the United Nations Framework Convention on Climate Change (UNFCCC) and the 1992 Convention on Biological Diversity (CBD) apply in areas under the jurisdiction of the coastal state, ie its territorial waters, continental shelf and EEZ, and integrate principles such as precaution and sustainable development in the context here analysed.

The duty to perform an environmental impact assessment (EIA) is one of the restrictions to the way in which states treat their natural resources.[58] EIA can be defined as:

> a governmentally controlled procedure by which scientific assessment is made—together with public participation—of the proposed activity the impacts of which may be harmful. Its goals include improving the quality of the information to enable decision-makers to make better decisions from the viewpoint of the environment and raise in general the level of public participation in environmental decision-making.[59]

To perform an EIA in relation to any activity that might have consequences for the environment is now considered an obligation of customary nature.[60] The LOSC

[55] Catherine Redgwell, 'Mind the Gap in the GAIRS: The Role of Other Instruments in LOSC Regime Implementation in the Offshore Energy Sector' in Nigel Bankes and Seline Trevisanut, *Energy from the Sea: An International Law Perspective on Ocean Energy* (Brill Nijhoff 2015) 40.

[56] Trevisanut, 'La Convention des Nations Unies' (n 53) 414ff.

[57] See eg the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter (opened to signature 29 December 1972, entered into force 30 August 1975) 1046 UNTS 138 (hereafter London Dumping Convention) and the Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (opened to signature 7 November 1996, entered into force 24 March 2006) 36 ILM 1 (hereafter 1996 London Protocol).

[58] Richard Barnes, *Property Rights and Natural Resources* (Hart 2009) 234–40.

[59] Timo Koivurova, 'Could the Espoo Convention Become a Global Regime for Environmental Impact Assessment and Strategic Environmental Assessment?' in Robin Warner and Simon Marsden (eds), *Transboundary Environmental Governance. Inland, Coastland and Marine Perspective* (Ashgate 2012) 326.

[60] *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Judgment) [2010] ICJ Rep 14 [205]ff; ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Advisory Opinion) [2011], ITLOS Reports 2011, p 10, para 145.

provides for the direct obligation[61] to conduct an EIA and of monitoring in Articles 204, 205, and 206. The latter in particular provides that, when states have 'reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment'. States are also supposed to monitor the risks and effects of pollution resulting from activities under their jurisdiction (LOSC Article 204) and to communicate the results of such assessment and monitoring (LOSC Article 205).

Under the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), parties have a duty to require an EIA in order to 'prevent, reduce and control significant adverse transboundary environmental impact from proposed activities'[62] and must establish procedures which permit public participation. Pursuant to the Espoo Convention Guidance, a non-binding instrument adopted by the meeting of the parties in 2004,[63] the domestic EIA procedure should include the necessary provisions so that:

> (a) the public is informed on any proposals relating to an activity with potential adverse environmental impacts in cases subject to an EIA procedure in order to obtain a permit for a given activity; (b) the public in the areas likely to be affected is entitled to express comments and opinions on the proposed activity when all options are open before the final decision on this activity is made; […] (d) in making the final decision on the proposed activity, due account is taken of the results of the public participation in the EIA procedure.[64]

The 2003 Protocol on Strategic Environmental Assessment (SEA)[65] to the Espoo Convention allows the public to be involved in the decision-making process earlier than in general EIA procedure. An SEA involves:

> the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its

[61] 'It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law'; ITLOS, *Responsibilities and obligations of States* (n 59) para 145.

[62] Art 2(1) of the Convention on Environmental Impact Assessment in a Transboundary Context (opened for signature 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309 (hereafter Espoo Convention).

[63] Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context, Decision III/8, Report of the Third Meeting (13 September 2004) ECE/MP.EIA/6, Annex VIII.

[64] ibid para 14.

[65] Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (opened for signature 21 May 2003, entered in force 10 July 2010) 2685 UNTS 140 (hereafter SEA Protocol).

> preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.[66]

The Espoo Convention and its SEA Protocol enhance the transparency in the performance of the assessment and monitoring obligations by opening those procedures to non-state actors. They thus enhance the safety of oil and gas operations by guaranteeing better control over the planned and performed activities, thanks to the participation of unconventional actors. Their reach is however limited to transboundary situations. The existing regional instruments take diverse approaches to the conduct of EIAs.

3.1.2 The geographical fragmentation at the regional level

Four regional sea conventions have a protocol or annex specifically dedicated to offshore activities. First, Annex III on the Prevention and Elimination of Pollution from Offshore Sources to the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) contains an obligation to use 'best available techniques' and 'best environmental practices' (Article 2) and a specific provision on the management of disused installations and pipelines (Article 5). The latter article was modified by the OSPAR Decision 98/3 on the Disposal of Disused Offshore Installations,[67] which requires the full removal of any disused equipment.

Secondly, Annex VI on the Prevention of Pollution from Offshore Activities to the Helsinki Convention on the Protection Marine Environment of the Baltic Sea Area[68] also invites contracting parties to make use of best available techniques and practices. Annex VI contains then a very detailed provision on environmental impact assessment and monitoring (Regulation 8). Moreover, '[i]n order to monitor the consequent effects of the exploitation phase of the offshore activity studies [. . .] shall be carried out *before* the operation, at *annual intervals* during the operation, and *after* the operation has been concluded.'[69] Regulation 8 is, at the moment, the most detailed international provision regulating EIAs in the offshore oil and gas sector.

[66] Art 2(6) SEA Protocol (n 64).

[67] Commission of the Convention for the Protection of the Marine Environment of the North-East Atlantic (22–23 July 1998) OSPAR 98/14/1-E, Annex 33.

[68] The Helsinki Convention had been amended many times since 1992. Any reference made in the present text refers to the last version as in force in 2008, and as available on the website on the Baltic Marine Environment Protection Commission—Helsinki Commission (HELCOM) at <www.helcom.fi> accessed 17 June 2022. Annex VI of the Helsinki Convention concerns the prevention of pollution from offshore activities and its text is available at <www.helcom.fi/about-us/convention/annexes/annex-vi> accessed 17 June 2022.

[69] Emphasis added.

Thirdly, the Offshore Protocol to the Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution[70] consists of a quite detailed instrument which aims at covering the complete life cycle of offshore operations. In setting a number of mandatory requirements for the authorization procedure (Articles 4–7), the protocol focuses on the role of both authorizing states and the industry, ie the operator, in assessing the environmental impact of a planned activity, in monitoring it, and in reacting to possible emergencies.[71] The central role of the industry is also evident in Section IV of the Protocol on safeguards, namely on safety measures, contingency plans, and emergency response (Articles 15–21). The Mediterranean Action Plan,[72] adopted within the framework of the Offshore Protocol, aims in particular at encouraging the adoption of further safety measures at the regional level, in the time frame of 2016–24.[73] In relation to the development of regional standards and guidelines, the document emphasizes the need of common rules for EIAs,[74] highlighting in this way the shortcomings of the global legal framework and the crucial importance of such a procedure.

Fourthly, the Offshore Protocol to the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, unfortunately, does not contain a clear and general obligation of environmental impact assessment as it allows contracting parties not to require such an assessment before a new activity starts. When a contracting state decides not to request an EIA, it 'shall consider' performing a survey of the marine environment (Article IV.2). Contracting parties then have a wide margin of discretion under this instrument, which is, however, limited by the global legal framework analysed above.

3.2 Unconventional Lawmaking by the IMO and Global Treaty Bodies

Many international institutions participate in the development of the legal framework at the global and regional levels, and they often do so by adopting soft law instruments and by dialoguing with the stakeholders of the relevant economic sector. Soft law instruments[75] have mainly been adopted in order to set common

[70] UNEP(OCA)/MED IG.4/4 <https://wedocs.unep.org/rest/bitstreams/2336/retrieve> accessed 17 June 2022.

[71] Seline Trevisanut, 'The Role of Private Actors in the Offshore Energy Industry' (2014) 29 International Journal of Marine Coastal Law 645.

[72] Mediterranean Offshore Action Plan in the framework of the Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, UNEP(DEPI)/MED IG.22/28 <https://wedocs.unep.org/rest/bitstreams/8381/retrieve> accessed 17 June 2022.

[73] ibid 214.

[74] ibid 220.

[75] See in particular the instruments elaborated by the IMO, which has taken the lead in recent years concerning the elaboration of standards and best practice related to the offshore industry, eg IMO,

standards in the field of safety and pollution control. At the global level, the IMO has in particular taken the lead concerning both the treatment of disused installations and pollution by dumping. It has elaborated some guidelines for the removal of installations[76] and is the depositary of the London Dumping Convention.[77] However, its role in the development of the regulatory framework in relation to the offshore oil and gas industry has raised some criticism.[78]

The IMO mandate, as amended, includes 'the general adoption of the highest practicable standards in matters concerning *maritime safety* […] and prevention and control of *marine pollution from ships*'.[79] Notwithstanding this, the IMO Legal Committee has pointed out: 'while pollution directly arising from exploration/exploitation is however not of direct concern of IMO, the Organization may contribute to the establishment of international regulations.'[80] The IMO Legal Committee, in particular, supports the development of guidance for states in their effort to conclude arrangements at the bilateral and regional level on liability and compensation issues connected to transboundary pollution damage, resulting from offshore oil exploration and exploitation.[81] Not all IMO contracting parties, however, support what they perceive as an unjustified extension of the IMO mandate.[82] This undermines the 'generally accepted' character of the rules and standards which the organization elaborates.

General acceptance needs then to be assessed on the basis of the subsequent practice of states. Within the London Dumping system, Lyons for instance suggests that, unlike the 1972 London Convention, its 1996 Protocol does not yet qualify as a global rule under the LOSC because it has gained general acceptance only in some regions of the world.[83] This also suggests that the 1996 Protocol may be regarded as generally accepted international rules and standards (GAIRS) in

Guidelines for safety zones and the safety of navigation around offshore installations and structures, SN.1/Circ.295, 7 December 2010.

[76] IMO, Res A.672 (16) of 19 October 1989.

[77] London Dumping Convention (n 56).

[78] Some states and some commentators have raised several points of criticism about the role of the IMO in the development of rules and standards concerning offshore installations. The details of such debate are beyond the scope of the present chapter. For a critical voice, refer to J Ashley Roach, 'International Standards for Offshore Drilling' in Myron H Nordquist and others (eds), *The Regulation of Continental Shelf Development, Rethinking International Standards* (Martinus Nijhoff 2013) 107.

[79] Convention on the International Maritime Organization (opened for signature 6 March 1948, entered into force 17 March 1958) 289 UNTS 3 (emphasis added).

[80] See 'Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization' (19 January 2012) IMO Doc LEG/Misc.7 Annex, 18.

[81] See IMO Doc LEG 99/14, 24 April 2012, para 13.16.

[82] Roach (n 77) 105. See also Aldo Chircop, 'The International Maritime Organisation' in Donald R Rothwell and others (eds), *The Oxford Handbook of The Law of the Sea* (OUP 2015) 429.

[83] Youna Lyons, 'The New Offshore Oil and Gas Installation Abandonment Wave and the International Rules on Removal and Dumping' (2014) 29 International Journal of Marine and Coastal Law 506, 510. For an opposing view, see Alexander Proelss, *United Convention on the Law of the Sea, A Commentary* (OUP 2017) 464.

some areas of the world where the majority of relevant states have ratified it; so as regional GAIRS and not global rules. The 1996 Protocol could also fall within the definition of best environmental practices, as required by some regional instruments analysed above, namely the OSPAR and Helsinki Conventions.

Aside from the IMO, the treaty bodies of the CBD[84] have played an important role in the regulation of the offshore energy sector, specifically concerning the EIA procedures. As already mentioned, EIA obligations are a cornerstone of the legal regime. If the Espoo Convention is regarded as a potential global standard, it remains a regionally born instrument which applies to transboundary contexts. The CBD Convention and further developments concerning its Article 14 are thus important pieces of the regulatory mosaic.

Article 14 of the CBD provides for an international obligation to submit to EIA procedure any activity which might significantly impact biodiversity, internally or transboundary.[85] In order to support the integration of biodiversity considerations in EIA procedures, the Conference of the Parties (COP) of the CBD adopted in 2006 the Voluntary Guidelines on Biodiversity-inclusive Impact Assessment.[86] The lawmaking powers of COPs within multilateral environmental agreements are highly debated and beyond the scope of the present chapter.[87] What is important here is the assessment of the normative value of the non-binding instrument which is the outcome of the decision-making process. Although not formally binding, the 2006 Voluntary Guidelines are considered to have 'high normative value because they have been negotiated under the auspices of the CBD and adopted by the [COP]'.[88] Of less normative value are, for instance and according to Craik, the Draft Guidance on biodiversity-inclusive strategic environmental assessment.[89] The SEA Draft Guidance 'was not "adopted" by the parties, but rather the document produced by the Secretariat was "endorsed", indicating agreement with the content but an unwillingness to give the document greater normative status'.[90] The instruments adopted by the parties through the COP and, thus, whose content was 'subscribed' by the parties could even amount to 'subsequent agreements by

[84] Convention on Biological Diversity (opened for signature 5 June 1992, entered into force on 29 December 1993) 1760 UNTS 79 (hereafter CBD).

[85] For a detailed analysis of art 14 CBD, see, inter alia, Neil Craik, 'Biodiversity-Inclusive Impact Assessment' in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law*, vol III (Edward Elgar 2017) 431–44.

[86] COP 8 Decision VIII/28, <www.cbd.int/decision/cop/?id=11042> accessed 17 June 2022.

[87] COPs do not possess international legal personality and are not considered international organizations. Whether their lawmaking powers can be justified on the basis of the theory of 'implied powers' is thus contested. For a treatise of the issue, see, inter alia, Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' [2002] Leiden Journal of Internatioal Law 1; Francesca Romanin Jacur, *The Dynamics of Multilateral Environmental Agreements, Institutional Architectures and Law-Making Processes* (Editorial Scientifica 2013) 161ff.

[88] Craik (n 84) 436.

[89] CBD Executive Secretary (2006), Voluntary guidelines on biodiversity-inclusive impact assessment, Annex II, UN Doc UNEP/CBD/COP/8/27/Add.2.

[90] Craik (n 84) 437–38.

which the underlying treaty is interpreted in the sense of Art. 31.1(a)' of the Vienna Convention on the Law of Treaties.[91] Moreover, the 2006 Voluntary Guidance benefits from the external support of other guideline documents with a similar content, such as the resolutions of the Ramsar Convention COP 2008[92] and the Convention on Migratory Species COP 2002.[93] They 'operate collectively to reinforce the principles associated with biodiversity-inclusive impact assessment'[94] and, consequently, increase each other's normative value.

Unconventional lawmaking also allows linking biodiversity-inclusive EIA with human rights law. Consider the International Finance Corporation Performance Standards and related guidance notes,[95] the UN Guiding Principles on Business and Human Rights,[96] or the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises.[97] These instruments are also relevant for the offshore energy industry, when considering the impact of the sector on indigenous and local communities. Unconventional lawmaking here allows the circumvention of the lack of will about SEA outside the regional context of the Espoo Convention.

3.3 Unconventional Lawmaking by Regional Seas Treaties Bodies

The regional seas treaties play an important role in regulating the offshore energy sector in the absence of a specialized global instrument. The institutional framework is however very diverse, in line with the very different levels of integration in the respective regions and does impact the lawmaking processes.

The OSPAR Commission and the Helsinki Commission (HELCOM) are strong treaty bodies which can also adopt binding decisions. but which also make extensive use of non-binding instruments to regulate in particular the protection of the marine environment. A clear example is the OSPAR Guidance on Environmental

[91] Georg Nolte, 'Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings', Third Report for the ILC Study Group on Treaties over Time (2012).

[92] Ramsar Convention Conference of the Parties, 'Environmental Impact Assessment and Strategic Environmental Assessment: updated scientific and technical guidance' (28 October–4 November 2008) Res X.17, Annex.

[93] Convention on Migratory Species Conference of the Parties, 'Impact Assessment and Migratory Species' (18–24 September 2002) Res 7.2.

[94] Craik (n 84) 436.

[95] See in particular Performance Standard 6 on Biodiversity Conservation and Sustainable Management of Living Natural Resources <www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps6> accessed 17 June 2022.

[96] Available at <www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 17 June 2022.

[97] Available at <http://mneguidelines.oecd.org/guidelines/> accessed 17 June 2022.

Considerations for Offshore Windfarm Development.[98] The OSPAR Guidance complements the relevant obligations of the Espoo Convention,[99] offering valuable guidelines on the minimum content of EIAs for all stages of the life of offshore wind farms, from location to decommissioning. Also, the HELCOM Recommendation 18/2 on Offshore Activities[100] reiterated that, in case of offshore oil and gas exploitation activities, it is necessary for states to assess the environmental status of the area in which the project is proposed to be located before any activity takes place. While the requirements set out under Annex VI should apply as a minimum standard, the Recommendation highlights that when the nature of the area so requires, states must apply more stringent requirements.

Little has so far come out of the Barcelona and Kuwait Conventions' treaty bodies, which do not have the same institutional features as the OSPAR Commission and the HELCOM. The Kuwait Convention and its Protocols are implemented by the Regional Organization for the Protection of the Marine Environment (ROPME).[101] The ROPME is in charge of developing guidelines for assisting contracting states; however, no guideline is available on the ROPME official website. It seems that the ROPME has not so far exercised its drafting functions.

In the Mediterranean context, the institutional framework of the Barcelona Convention consists of several bodies,[102] including a Meeting of the Parties (MOP) and the Barcelona Convention Offshore Oil and Gas Group (BARCO OFOG), the latter created in 2014. The BARCO OFOG is a technical body for the exchange of best practices, knowledge, and experiences between its members to assist the parties in promulgating international rules, standards, and recommended practices and procedures pursuant to Article 23 of the Barcelona Offshore Protocol.[103] The periodic examination and review of the Offshore Action Plan, adopted by the MOP in 2016, has also been assigned to it.[104] The Offshore Action Plan aims at operationalizing the harmonization of regional practices in the implementation of the Mediterranean Offshore Protocol, considering 'relevant existing standards

[98] OSPAR Guidance on Environmental Considerations for Offshore Wind Farm Development, ref no 2008-3.

[99] Similarly, wind farms are also included in the amended Annex of the Espoo Convention (n 61).

[100] HELCOM Recommendation 18/2, adopted 12 March 1997, Attachment a.

[101] The ROPME was created in 1979 pursuant to art XVI of the Kuwait Convention. According to the information available on its official website <http://ropme.org/1_WhoWeAre_EN.clx#> accessed 17 June 2022, '[t]he main objective of ROPME is to coordinate efforts of the eight Member States towards protection the marine and coastal environment and ecosystems in the ROPME Sea Area against marine pollution and stressors that might be induced from developmental activities or/and other drivers of change'.

[102] For a complete overview of the Barcelona Convention bodies, see <www.unenvironment.org/unepmap/who-we-are/governing-and-subsidiary-bodies> accessed 17 June 2022.

[103] Decision IG.21/8 (2014), Follow up Actions regarding the Offshore Action Plan, UNEP/MED. IG.21/9, Annex.

[104] Decision IG/22/3 (2016), Mediterranean Offshore Action Plan in the framework of the Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, DOC UNEP/MED IG.22.

and guidelines in this field'.[105] One of the outputs of the Action Plan is the adoption by the MOP of the 2019 Mediterranean Offshore Guidelines and Standards on the Disposal of Oil and Oily Mixtures.[106] The normative value of the Guidelines relies on two arguments, invoked by the document itself. First, the Barcelona MOP adopted the Guidelines pursuant to specific objectives of the Action Plan, and thus pursuant to a mandate agreed upon by the contracting parties.[107] Secondly:

> [t]his guidance has been derived from international best practices as outlined by organisations and institutions such as the Secretariat of the Convention for the Protection of the Marine Environment of the North-east Atlantic (OSPAR), International Finance Corporation (IFC)/World Bank and the International Association of Oil and Gas Producers (IOGP), as well as from countries with mature oil and gas industry with well-developed regulatory frameworks, such the UK, Norway, the Netherlands and the US.[108]

As mentioned above concerning the guidelines adopted by some global treaty bodies, the cross-referencing reinforces the principles enshrined in the guidelines, each increasing the other's normative value.

3.4 Unconventional Lawmaking by Unconventional Actors

The expansion of the offshore sector has buttressed the role of private actors at the international level. They are increasingly involved in the implementation and enforcement of international rules, but also in lawmaking processes. On the one hand, civil society—in particular local communities—can actively impact the decision-making process thanks to their participation rights, guaranteed, inter alia, by the Aarhus Convention[109] and the Espoo Convention.[110] On the other hand, private actors financially involved in the activities—for example investors and insurance companies—bear (indirect) obligations under specific international

[105] ibid s II.2.2, specific objectives 7 and 8, 220ff.

[106] Decision IG.24/9 (2019), Mediterranean Offshore Guidelines and Standards: (a) Common Standards and Guidance on the Disposal of Oil and Oily Mixtures and the Use and Disposal of Drilling Fluids and Cuttings; (b) Common Standards and Guidelines for Special Restrictions or Conditions for Specially Protected Areas (SPA) within the Framework of the Mediterranean Offshore Action Plan, UNEP/MED IG.24/22, 471ff.

[107] Decision IG.24/9 (2019) 471–72.

[108] ibid 476.

[109] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental matters of the United Nations Economic Commission for Europe (opened for signature 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

[110] Espoo Convention (n 61).

instruments, such as the above-mentioned Barcelona Offshore Protocol[111] and the IMO Removal Guidelines.[112]

The latter element is particularly problematic because international law does not have 'teeth' to directly act against private actors, and private actors might disguise reality through self-regulation.[113] For instance, before the Deepwater Horizon incident, BP had a very good reputation concerning the environmental standards of the company; it was considered a safe company. After the incident, the BP National Commission continued to encourage 'self-regulation and co-regulation following the example of other economic sectors, such as fisheries, chemical industry, nuclear power industry'.[114] It justified this approach by affirming that governments cannot compete with private-sector salaries for the most talented experts.[115] '[S]elf-regulation is an instrument whose very rationale is versatility; it can be portrayed as nonlaw, as soft law, and even as law. Thus, the character of regulation becomes decisive, not the content of the rules.'[116] However, self-regulation should not become 'a substitute of government but serves as an important supplement to government oversight'.[117]

'[F]irms are no longer simply accountable under local law, but to international norms and standards, such as those promulgated by International Labour Organization (ILO), the Universal Declaration of Human Rights (UDHR), and corporate best practices.'[118] In the offshore energy sector, this is not as straightforward. Companies have developed a 'green sensibility' and invested in 'greening' their image by declaring their respect for international law obligations. Several oil and gas companies have adopted, in particular since the Deepwater Horizon disaster, codes of conduct where they affirm their recognition of international norms for the protection of the marine environment.[119] The internal codes of conduct are

[111] Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil to the Convention for the Protection of the Mediterranean Sea Against (opened for signature 14 October 1994, entered into force 24 March 2011) 2742 UNTS 77 (hereafter Barcelona Offshore Protocol).

[112] IMO, Guidelines and Standards for the Removal of Offshore Installations and Structures (n 76).

[113] '[E]ntity self-generated standards empower them to manage the data-driven construction of their reality'; Larry Catá Backer, 'Transparency and Business in International Law: Governance between Norm and Technique' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 499.

[114] BP National Commission, 'Industry's Role in Supporting Health, Safety and Environmental Standards: Options and Models for the Offshore Oil and Gas Sector', Staff Working Paper No 9 2.

[115] ibid.

[116] Katja Creutz, 'Law versus Codes of Conduct: Between Convergence and Conflict' in Jan Klabbers and Touko Piiparinen (eds), *Normative Pluralism and International Law, Exploring Global Governance* (CUP 2013) 167.

[117] BP National Commission, Final Report, ch 8 'Safety and Industry' (2011) 234.

[118] World Bank Group, 'Corporate Social Responsibility Practice. Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains' (October 2003) 1.

[119] See, inter alia, BP, 'Our Code, Our Responsibility' <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/who-we-are/our-code-our-responsibility.pdf> accessed 17 June 2022; Total, 'Code of Conduct, Our Values in Practice' <https://totalenergies.com/sites/g/files/nytnzq121/files/atoms/files/total_code_of_conduct_va_0.pdf> accessed 17 June 2022; Shell, 'General Business Principles' <www.shell.com/about-us/our-values/_jcr_content/par/relatedtopics.stream/1643027598

certainly not binding but they can produce normative effect. In fact, they consist of a sort of declaration that the company is aware of the existing legal framework and could be considered as relevant practice when assessing the content of the applicable due diligence obligations. Moreover, the codes of conduct, as relevant practice, can consist of 'best available practice', thus feeding the international legal framework and clarifying the meaning of certain obligations.

The codes of conduct are also relevant for 'corporate ocean responsibility' (COR), namely an ocean-focused corporate social responsibility (CSR) initiative. There is no agreed definition of COR or CSR. According to the World Bank, CSR is '[t]he commitment of business to contribute to sustainable economic development working with employees, their families, the local community, and society at large to improve their quality of life, in ways that are both good for business and good for development'.[120] Accordingly, COR could be defined as the commitment of business to contribute to the sustainable use of the oceans working with employees, their families, local communities, and society at large to improve the quality of the oceans, in ways that are good for business, for development, and for the environment. The COR legal framework is composed of different categories of standards and 'embodies non-binding general principles of responsible conduct and technical guidelines […] directly addressing business operators, and those formally addressing States with recommendations to be complied with by private operators'.[121] Similarly to CSR, COR aims to fill in the details of international legal principles, either conventional or customary, that provide for the protection of common concerns, such as the environment, and focusing the private companies' attention on the needs of the society in which they operate. It can thus play an important role in preventing pollution and environmental disasters by pushing companies to put in place the necessary prevention mechanisms. It can also be a tool for mitigating damage and compensating losses once a disaster has occurred.[122]

Private actors in the offshore energy sector are not only individual companies, but also professional associations. In the US, for instance, the American Petroleum Institute (API) has played a dominant role in developing safety standards. But it has also regularly resisted 'agency rulemakings that government regulators believe would make those operations safer', and has favoured 'rulemaking that promotes industry autonomy from government oversight'.[123] At the EU level, the pressure exercised by some representatives of the industry, such as Oil and Gas

209/6b4a23c6d8b47b0fd3e8e3b9fe955e59431f9c83/shell-general-business-principles-2014.pdf> accessed 17 June 2022.

[120] World Bank Group (n 117).

[121] Angelica Bonfanti and Francesca Romanin Jacur, 'Energy from the Sea and the Protection of the Marine Environment: Treaty-Based Regimes and Ocean Corporate Social Responsibility' in Bankes and Trevisanut (eds) (n 54) 73–74.

[122] ibid 78ff.

[123] BP National Commission (n 116) 225.

UK,[124] contributed to changing the proposed instrument from a regulation to a directive.[125]

Professional associations play different roles in the international legal framework. They can guarantee a certain level of safety. The Offshore Pollution Liability Association (OPOL),[126] for instance, is a private agreement between certain European states[127] and the major participants in their offshore industries. Most participating states now require applicants for offshore exploration, exploitation, and pipe-laying licences to be a party to OPOL. Industry is also important in order to collect high-quality and comprehensive data to ensure science-based standard-setting.[128] The International Regulators' Forum (IRF) is a group of offshore health and safety regulators for the oil and gas industry, created in order to promote information sharing and collaboration through joint programmes. The participants in the IRF Global Offshore Safety are: Australia (National Offshore Petroleum Safety Authority); Brazil (National Agency of Oil, Gas and Biofuels); Canada (Canada Newfoundland and Labrador Offshore Petroleum Board & Canada-Nova Scotia Offshore Petroleum Board); Netherlands (State Supervision of Mines); New Zealand (Department of Labour); Norway (The Petroleum Safety Authority); United Kingdom (Health and Safety Executive); and United States (Bureau of Ocean Energy Management Regulation and Enforcement). The Forum is a very important network for the exchange of information and the collection of data. However, it consists of very different administrations, with different mandates and priorities, at different regulatory levels, and with different expertise. Consequently, the type and the quality of data might diverge. There is no guarantee of coherence at the domestic level concerning the standard-setting activity that such a network generates.[129]

[124] 'We [Oil and Gas UK] believe the EC would best achieve its goal through a properly worded Directive, instead of Regulation. […] A properly worded Directive would encourage member states which do not currently achieve the recognised high standards present in the North Sea, to do so in a way which blends with their established legislation. This would protect the existing strong safety regime in the UK, minimise disruption to operators and regulators and eliminate the additional risk that the Regulation presents'; Oil and Gas UK, Proposed Regulation on Offshore Safety <www.oilandgasuk.co.uk/ProposedEURegulation.cfm> accessed 17 June 2022.

[125] For a comment, see Lorenzo Schiano di Pepe, 'Offshore Oil and Gas Operations in the Mediterranean Sea: Regulatory Gaps, Recent Developments and Future Perspective' in Juste Juste Ruiz and Valntin Bou Franch (eds), *Derecho del mar y sostenibilidad ambiental en el Mediterráneo* (Tirant Lo Blanch 2014) 379.

[126] Under the Offshore Pollution Liability Agreement (concluded on 4 September 1974), operating companies agree to accept strict liability for pollution damage and the cost of remedial measures with only certain exceptions, up to a maximum of US $250,000,000 per incident. Within this limit there may also be included the cost of remedial measures undertaken by the party to OPOL involved in the incident. For more information, see <www.opol.org.uk> accessed 17 June 2022.

[127] The European states in which OPOL applies are: United Kingdom and Northern Ireland (including Isle of Man), Denmark (including Faroe Islands and Greenland), Germany, France, Ireland, the Netherlands, and Norway.

[128] BP National Commission, 'Collecting High Quality, Objective, Comprehensive Data' Staff Working Paper No 18, 2011.

[129] Trevisanut, 'The Role of Private Actors' (n 70).

Another interesting and recent example is the International Renewable Energy Agency (IRENA). According to Article 2 of IRENA's Statute, its objective is to promote the adoption and sustainable use of all forms of renewable energy, including marine renewable energy. It does not have the competence to issue legally binding standards on the operation of marine renewables but can be a starting point for providing advice and monitoring in relation to policy, capacity building, and collaboration, and it can function as a clearing house for research and best practices used in different regions.[130] In that sense, the IRENA, in collaboration with renewable energy professional associations, such as the International Electrotechnical Commission (IEC), has collected renewable energy standards and relevant patents.[131] Furthermore, it has published renewable energy technology briefs relating to ocean thermal energy conversion, salinity gradient energy, and tidal and wave energy.[132] While these briefs outline the environmental impact of marine renewable energy activities, they are not aimed at providing for environmental standards to inform the due diligence standard of states in regulating and monitoring those activities. Consequently, none of these documents provides any international standards within the meaning of Article 208 LOSC.

The IRENA collaborates with specialized professional associations in the development of standards of operation specifically tailored for offshore renewable energy devices.[133] In general, these standards are not legally binding on either states or the industry. However, their embeddedness in the international legal framework can upgrade their normative impact on state or industry conduct. Depending on their institutional source and the form and procedure by which they are adopted, these legally non-binding pronouncements may become relevant as interpretative guidance or standard of proof that a state has (or has not) shown due diligence.

4. Conclusion

The 'LOSC was never intended to be a "one stop shop" for the regulation of all offshore activities.'[134] As a framework convention, it accommodates necessary

[130] Glen Wright, 'The International Renewable Energy Agency: A Global Voice for the Renewable Energy Era?' [2011] Renewable Energy Law and Policy Review 267.

[131] 'Irena Platform Supports Renewable Energy Innovation, Quality and Collaboration', see IRENA website: <www.irena.org/newsroom/pressreleases/2015/Jul/New-IRENA-Platform-Supports-Renewable-Energy-Innovation-Quality-and-Collaboration> accessed 17 June 2022.

[132] IRENA Ocean Energy Technology Briefs <www.irena.org/publications/2014/Jun/IRENA-Ocean-Energy-Technology-Briefs> accessed 17 June 2022.

[133] IRENA (2013) 'International Standardization in the Field of Renewable Energy' <www.irena.org/-/media/Files/IRENA/Agency/Publication/2013/Inventory_renewable_energy_standards.pdf?la=en&hash=9E18027869BB956421143C768963EE945FAE7926> accessed 17 June 2022.

[134] Catherine Redgwell, 'The Never Ending Story: The Role of GAIRS in UNCLOS Implementation in the Offshore Energy Sector' in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016) 184.

changes and developments, either by explicitly referring to external sources of law (ie the GAIRS) or by using generic terms. In the latter case, the ICJ affirmed that, 'where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning'.[135] The Convention was negotiated more than forty years ago and has been in force for twenty-eight years at the time of writing. Many of the other treaties mentioned have also come to a certain maturity phase in their lives and have changed over time through a combination of pathways.

Three pathways of change[136] are mainly relevant here. First, the multilateral pathway highlights the role of international organizations and treaty bodies in adopting resolutions and decisions, which have complemented and, sometimes, changed the meaning of certain obligations. Some prime examples are the resolutions of the UNHCR ExCom in relation to the content of the duty to render assistance.

Secondly, the importance of the bureaucratic pathway assuredly emerges from the analysis of the explanatory instruments adopted by the competent international organizations and diplomatic conferences. Change is buttressed here through guidelines and handbooks, which encourage best practices and can crystallize in GAIRS to ultimately become binding through the transformative mechanism of the LOSC rules of reference. This can clearly be observed in the guidelines of the COPs of the CBD and of the Espoo Convention in relation to the duty to conduct an EIA and the content of the relevant procedures.

Thirdly, and lastly, the private authority pathway plays a key role in the offshore energy sector, in the absence of one competent international organization and because of the scattered legal framework. This pathway is well known and established in the traditional sector of oil and gas extraction, through the self-regulation of the industry and the key role played by professional associations and organizations (eg ICS, OPOL, IRF). The growing sector of renewable energy production seems to follow in the footsteps of the oil and gas industry, but in a more centralized, and maybe coherent way, through the IRENA.

If the LOSC was never to be a ' "one stop shop" for the regulation of all offshore activities',[137] much of its evolution is now removed from the traditional lawmaking processes and states are no longer uniquely in charge of its further development. Those pathways are shaping the future of the oceans.

[135] *Dispute regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) (Judgment) [2009] ICJ Rep 213 [66].

[136] Krisch and Yildiz (n 2).

[137] Redgwell, 'The Never Ending Story' (n 133) 184.