INTRODUCTION

The Arab Spring recently highlighted the problem of migrants at sea and the shortcomings of the international legal framework. Indeed, due to the social uprisings in Tunisia and Libya, thousands of people tried to reach Europe by sea. This is a dangerous journey, as these asylum seekers often travel in unseaworthy vessels. As a result of the Arab Spring, it is estimated that more than 1,500 people drowned or went missing while attempting to cross the Mediterranean to reach Europe in 2011. [FN1] These events are a reminder of the extreme actions that desperate people will take. The international community is aware that this problem has to be tackled as soon as possible in order to prevent further loss of life.

This article first deals with the current international legal framework concerning migrants at sea and its shortcomings. Second, we take a look at how Malta interprets the existing obligations. Third, recent developments within the International Maritime Organization (IMO) on the Draft Regional Agreement for the Mediterranean Basin - an agreement hoping to solve the problem of disembarking migrants at sea in the Mediterranean - will be highlighted. Finally, we will discuss how Malta - a small State of only 316 km² - influences the content of the agreement and how this island itself is being affected by it.

THE UNDEFINABLE DEFINED - DISTRESS, RESCUE AND PLACE OF SAFETY

A. Between Duty And Discretion

It is a legal obligation for shipmasters and States under customary international law, [FN2] as well as under Articles 58(2) and 98(1) of the 1982 Law of the Sea Convention (LOSC), to render assistance to persons in danger of being lost and to proceed with all possible speed to the rescue of persons in distress. Although the LOSC only mentions this duty in the exclusive economic zone (EEZ) and on the high seas, [FN3] a State cannot rely on its sovereign powers to disregard this obligation in its territorial sea. [FN4] As assistance must be given to any person, [FN5] the obligation applies regardless of the persons' nationality or status or the circumstances in which they are found. [FN6] Therefore, migrants cannot be excluded from
Although there is a duty to assist persons in danger of being lost, only a distress situation requires a rescue. There is a variety of acts that may constitute assistance, for example to tow the vessel to safety, extricate a grounded vessel, fight a fire aboard a ship, provide food and supplies, embark crewmen aboard to replace the tired or the missing, secure aid or assistance from other nearby ships, or simply stand-by to provide navigational advice. The 1989 International Convention on Salvage (Salvage Convention) also mentions this general duty to provide assistance.

The actual distress phase is defined by the International Convention on Maritime Search and Rescue (SAR Convention) as: “A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.” Exactly when a situation requires immediate assistance can be subject to different interpretations according to which State is handling the situation. For some States the vessel must really be on the point of sinking. However, the International Law Commission stated that - although a situation of distress may at most include a situation of serious danger - it is not necessarily one that jeopardizes the life of the persons concerned. In contrast, for other States it is sufficient for the vessel to be unseaworthy. MORENO-LAX even suggests that unseaworthiness per se entails distress.

Council Decision 2010/252/EU adopted additional guidelines that must be respected by European Member States during search and rescue situations at sea. When deciding whether a vessel is in distress, search and rescue units should take all relevant elements into account, in particular:

(a) the existence of a request for assistance; (b) the seaworthiness of the ship and the likelihood that the ship will not reach its final destination; (c) the number of passengers in relation to the type of ship (overloading); (d) the availability of necessary supplies (fuel, water, food, etc.) to reach a shore; (e) the presence of qualified crew and command of the ship; (f) the availability of safety, navigation and communication equipment; (g) the presence of passengers in urgent need of medical assistance; (h) the presence of deceased passengers; (i) the presence of pregnant women or children; and (j) the weather and sea conditions.

Thus - according to these guidelines - although unseaworthiness is certainly an element to take into consideration when assessing the situation, it does not automatically imply a distress situation. Indeed, every situation is different and whether persons at sea are in distress or not will depend on the specific circumstances. Therefore, an assessment can only be made on a case-by-case basis. Although the definition of distress is quite vague, it is essential that shipmasters and States have the discretion to take all relevant elements into account in order to decide whether persons are in distress. However, one element that is indisputable is that the existence of an emergency should not be exclusively dependent on, or determined by, an actual request for assistance.

B. The SAR Convention To The Rescue

Every flag State must require the master of a ship flying its flag to proceed with all possible speed to the rescue of persons in distress when informed of their need of assistance. Coastal States shall establish adequate and effective search and rescue services (for example, through the creation of a Rescue Coordination Centre or RCC) and, where circumstances so require, cooperate with neighbouring States for this purpose. The basic elements for a search and rescue service are a legal framework, the assignment of a responsible authority, the organization of available resources, communication facilities, coordination and operational functions and processes to improve the service including planning, domestic and international cooperative relationships and training.
Rescue can be described as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.” [FN21] Until the adoption of the SAR Convention, there was actually no international system covering search and rescue operations. Consequently, in some areas there was a well-established organization able to provide assistance promptly and efficiently, whereas in other areas there was nothing at all. The SAR Convention thus aims at developing an international search and rescue plan. As a result, no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a search and rescue organization and - when necessary - by co-operation between neighbouring search and rescue organizations. [FN22]

Basically, the world’s oceans are divided into 13 search and rescue areas, in each of which the countries concerned have delimited search and rescue regions for which they are responsible. [FN23] States must ensure that sufficient Search and Rescue Regions (SRR) are established within each sea area. These regions should be contiguous and - as far as practicable - not overlap. [FN24] Each SRR shall be established by agreement among the parties concerned. [FN25] The delimitation of an SRR is not related to, and shall not prejudice, the delimitation of any boundary between States. [FN26]

Parties are required to ensure the closest practicable coordination between maritime and aeronautical services. [FN27] The International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual) - which was jointly published by IMO and the International Civil Aviation Organization (ICAO) - provides guidelines for a common aviation and maritime approach to organizing and providing search and rescue services. [FN28] For the moment, *94 several States in the Mediterranean have unilaterally declared a SRR. However, there is no regional agreement yet on the coordination among them. [FN29]

C. Place Of Safety: A Guarantee For A Safe Place?

Rescue implies that persons in distress have to be delivered to a place of safety. [FN30] The IMO Guidelines on the Treatment of Persons Rescued at Sea state that a place of safety can be defined as a location where rescue operations are considered to terminate, where the survivors' safety or life is no longer threatened, basic human needs (such as food, shelter and medical needs) can be met and transportation arrangements can be made for the survivors' next or final destination. [FN31] Disembarkation of asylum-seekers recovered at sea, in territories where their lives and freedom would be threatened, must be avoided [FN32] in order to prevent the violation of the non-refoulement principle. [FN33] Also Council Decision 2010/252/EU [FN34] stated that the non-refoulement principle should be respected. [FN35]

The Government responsible for the SRR in which survivors were recovered will be responsible for providing a place of safety, or ensuring that such a place of safety is provided. [FN36] Although an assisting ship may only serve as a temporary place of safety, [FN37] there is no actual duty for States to disembark *95 the persons rescued. [FN38] Both the International Convention on Safety of Life at Sea (SOLAS Convention) and the SAR Convention state that States must arrange for the disembarkation of persons rescued at sea as soon as reasonably practicable. [FN39] In other words, a State can refuse disembarkation onto its own territory or make this dependent on certain conditions. [FN40]

Ironically, the ‘place of safety’ provision often hinders migrants from being brought to a safe place in an efficient way. Because there is no clear disembarkation duty, persons rescued at sea can spend weeks on a ship at sea before a State allows them to go ashore. [FN41] On 11 July 2011, the Almirante Juan de Borbón - a Spanish frigate participating in NATO Operation Unified Protector - rescued 114 migrants from drowning in the Mediterranean. After the vessel left Libya, the engine broke down and the persons on board drifted for two days without food or water. When the warship was informed about their condition, they provided immediate assistance. On 13 July 2011, a man and his pregnant wife were brought to Malta for medical
Spain agreed to receive a 10-month-old baby. However, Spain, Italy and Malta all refused to accept disembarkation onto their territory. Malta stated that NATO was responsible for the problem. Eventually, the migrants were transferred to Tunisia on 16 July 2011. [FN42] This was a violation of the non-refoulement principle because some of the asylum-seekers were of Tunisian origin and there is political turmoil in the country.

The fact that the Government of the SRR in which the survivors were recovered is responsible for providing a place of safety, or ensuring that such a place of safety is provided, means that migrants in distress at sea are sometimes ignored or brought to the SRR of another State. Indeed, States know that they will not only be responsible for providing assistance, but also for the place of safety. In March 2011, a boat carrying 72 migrants spent 16 days drifting in the Mediterranean after it had left Tripoli destined for Italy. *96 Migrants stated that several ships and even a NATO aircraft carrier ignored their pleas for help. The out-of-fuel ship eventually washed up on a western Libyan beach. Only 11 people survived while the others had died of thirst and starvation at sea. [FN43] There are even testimonies of asylum-seekers that the Greek Coast Guard, for example, tows ships carrying migrants into the Turkish SRR. [FN44]

Although recent international and European soft law initiatives do focus on a real disembarkation duty, they also put too much burden on the coastal States. Indeed, the 2009 IMO Guidelines on Principles Relating to Administrative Procedures for Disembaroking Persons Rescued at Sea mention that if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SRR should accept the disembarkation. [FN45] Similarly, Council Decision 2010/252/EU states in its guidelines regarding disembarkation that priority should be given to the third country from where the ship carrying the persons departed, or through the territorial waters or SRR through which that ship transited. [FN46] If this is not possible, priority should be given to disembarkation in the Member State hosting the surveillance operation at sea. [FN47] Without any prior agreement on burden-sharing between States, the life of many migrants is being jeopardized. It is estimated that for every 100 people safely landing after a dangerous journey in the Mediterranean, 5 people drown without leaving any trace. [FN48] However, some States fear that clarifying obligations and solving the problem through burden-sharing would produce an enormous pull factor, thus encouraging migrants to come to Europe by sea. [FN49]

*97 III

MALTA - A DISTINCT VIEW ON MIGRANTS AT SEA?

A. Setting The Scene

Malta is a small island of only 316 km². Nevertheless, in some ways Malta has a bigger stake in the Mediterranean than most of the other coastal States. It is an island State with an important fishing industry, a high level of tourism, and other marine-related industries such as shipbuilding and ship repair. Therefore, Malta is clearly one of the Mediterranean’s most ocean-dependent States. As a result, maritime affairs - especially those of a political kind - are followed keenly by the Maltese people. [FN50] Due to its population density, the island feels under pressure from migrants arriving by boat across the Mediterranean. [FN51]

Malta is a party to the 1982 LOSC [FN52] and is thus bound by the legal obligations therein. Although Malta accessed the 1974 SOLAS Convention on 8 August 1986 and the 1979 SAR Convention on 24 September 2002, [FN53] it has not yet signed the 2004 SOLAS and SAR Amendments. On 22 December 2005, the IMO received a communication from the Ministry of Foreign Affairs of Malta declaring that Malta
“is not yet in a position to accept these amendments.” [FN54] The Armed Forces of Malta (AFM) are responsible for the search and rescue operations. The Department of Civil Aviation (DCA) operates jointly with the AFM in the event of an aeronautical incident. [FN55] Although there is a certain amount of discretion in deciding whether a person is in distress, the AFM has been accused of not fulfilling their duty, by for example only helping persons who are actually requesting assistance. [FN56]

*98 B. Coping With An Enormous SRR

In 2001, COMSAR/Circ.27 invited States to submit all details concerning the current availability of their SAR services as well as the exact coordinates of their SRR. [FN57] Malta submitted this information on 30 September 2005. [FN58] Although Malta is only a small country, it claimed a maritime SRR that coincides with the Malta Aeronautical SRR and the Malta Flight Information Region (FIR). [FN59] Since the country ‘inherited’ an enormous Flight Identification Region (FIR) from Great Britain, Malta is now responsible for a region that amounts to 250,000 km². Toward the west, the Maltese SRR almost reaches the territorial waters of Tunisia. Toward the east, it nearly stretches to Crete. Moreover, toward the north, Malta claimed part of the same area as Italy. This is reflected on the map which was attached to SAR.8/Circ.3. [FN60] For example, the Italian island of Lampedusa is both part of the Maltese and the Italian SRR. Migrants coming from the North African coast and crossing the Mediterranean to reach Italy, have to pass through the Maltese SRR.

Although Italy is pressuring Malta to give up part of this vast area, this is definitely not an option for the Maltese government. One of the reasons is that this area is connected to the lucrative income the island derives from its Flight Information Region (FIR), as the size of the latter is bound to the SRR. Malta earns millions of euros a year from air traffic control charges on aircraft using the area. In addition, there are rumours that Malta thinks the SRR could be an asset when delimiting its continental shelf. [FN61] Indeed, Malta's maritime boundary system is only partially delimited [FN62] and there are strong indications of oil and gas resources in the areas between Tunisia and Malta on the one hand, and Sicily and Malta on the other. [FN63] However, the SAR Convention is very clear on this issue. It states that the delimitation of the SRR is not related to, and shall not prejudice, the delimitation of any boundary between States. [FN64]

*99 But is Malta actually able to operate this unilaterally declared SRR? First of all, the unilateral declaration of the Maltese SRR is subject to the principle of good faith. This principle creates a need to ensure compliance with unilateral commitments. [FN65] However, the SAR Convention only asks States to coordinate search and rescue services in the area under their responsibility. Thus, there is no obligation for States to do this individually as they can act in cooperation with other States. [FN66]

For example, on 6 April 2011, Malta informed the Italian Maritime Rescue Coordination Centre of the presence of a boat in distress, 45 miles from the Italian island of Lampedusa. As Maltese patrol boats were temporarily unavailable, Italian search and rescue assets were shipped to the area. The boat - which had departed from the Libyan port of Zuara - carried some 300 persons who were fleeing the north coast of Africa in search of a better life. However, that type of vessel normally only held a maximum of 40 people. Moreover, the engine was severely damaged, which made it impossible to manoeuvre the boat. Over 250 migrants were lost after their vessel capsized due to flooding. Eventually, only 52 persons could be saved by the Italian Coast Guard. [FN67]

The fact that Italy was asked to deal with the rescue does not mean that Malta did not live up to its obligations under the SAR Convention. However, is the Maltese coordination efficient enough if 250 migrants are lost? Moreover, due to an overlap of the Maltese and the Italian SRR, there can be a delay in deciding who is responsible, thus jeopardizing the lives of migrants in distress. Although the SAR Convention mentions
that overlaps have to be avoided as far as practicable, [FN68] it also states that SRR's should be established by agreement among parties. [FN69] That has not been the case up until today.

*100 C. Humanitarian Aspect

According to Malta there is a safe place in terms of search and rescue, and in terms of humanitarian law. [FN70] However, as Malta did not sign the 2004 SOLAS and SAR Amendments, and as it does not accept the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, it does not recognize the link between the two concepts which was established in these instruments. Malta does not accept any link between the responsibility for the search and rescue, and the responsibility for providing a place of safety or ensuring that such a place of safety is provided.

Nevertheless, the Council Decision 2010/252/EU also mentions that no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement. [FN71] However, these guidelines are only applicable with regard to the surveillance of the sea external borders in the context of operational cooperation coordinated by Frontex, the European Agency for the management of operational cooperation at the external borders of the Member States. [FN72] This means that when Malta is acting outside a Frontex surveillance operation, these guidelines will not be applicable. Due to the 2012 ECtHR judgment in HirsJamaa and Others v. Italy, the principle of non-refoulement will be applicable when a State has continuous and exclusive control over persons. [FN73]

It is however understandable that Malta wants to separate the two concepts as the country is situated at the frontline of European border controls. The Dublin II Regulation is regarded as unfavourable for Malta as the Member State responsible for an asylum claim will be the State through which the asylum seeker first entered the European Union. Therefore, the country considers burden-sharing a crucial element. [FN74] De Blouw believes that the modification of the Dublin Regulation is the first and most important step to eradicating human rights abuses in Southern Europe as this could lessen the immigration burden on coastal Mediterranean Member States. [FN75] To help Malta to cope with the migration problem, EUREMA (European *101 Relocation Malta) - a pilot project for intra-EU re-allocation of beneficiaries of protection from Malta - was launched in July 2009. It was co-funded by the EU under the ERF and supported by IOM and UNHCR. Its objectives are the implementation of the principle of solidarity among States, the identification of resettlement solutions for people in need and the improvement of the situation for those who remain in Malta. However, this project is not a solution to the negative impact of the Dublin II Regulation. [FN76]

IV

A TAILOR-MADE SOLUTION FOR THE MEDITERRANEAN

A. From An International To A Regional Approach

1. A Slow Start

At the meeting of the IMO Sub-Committee on Radio Communications and Search and Rescue (COMSAR) in March 2010, the United States stated that the discussions between Mediterranean countries concerning rescue and disembarkation of migrants at sea represent a regional problem requiring a regional solution. However, Italy, Malta and Spain expressed their disappointment that other countries seemingly did
not recognize that the problem was more than simply a **regional** one. Indeed, other parts of the world are also confronted with similar difficulties and, even more importantly, ships of all flags are currently involved in the resulting rescue operations. Therefore, the IMO Secretary-General proposed to develop a pilot project for a **regional** solution in the Mediterranean. If this project works, it could be applied in other parts of the world. [FN77]

One of the primary concerns of the IMO is the integrity of the search and rescue and, consequently, the safety of life at sea regime. [FN78] Therefore, the IMO wants to prevent incidents which cause loss of life at sea from recurring. [FN79] COMSAR launched the idea of developing a pilot project for a **regional** solution in the Mediterranean in March 2010. On the one hand, the system of rescuing migrants in the Mediterranean Basin has to be improved. *102 On the other hand, these persons also have to be disembarked at a place of safety in accordance with the SAR and SOLAS Conventions. [FN80] If the project works, it could be extended to other parts of the world experiencing similar situations. [FN81]

Meanwhile, the IMO is even waiting to take steps on the international level - for example amending the Facilitation Convention [FN82] - until the results of this **Regional Agreement** are ready. [FN83] In May 2010 the IMO Secretary-General made available his good offices to take this matter forward for informal consultations with a group of interested parties. [FN84] A first **draft** of the Terms of Reference for such a consultation group was established by the IMO Secretariat in co-operation with interested parties, including Italy, Malta and Spain. [FN85]

A first meeting of the consultation group was held under the auspices of, and chaired by, the IMO Secretary-General on 28 July 2010. It was attended by representatives from Italy, Malta, Spain and the IMO Secretariat. The meeting agreed upon the Terms of Reference for the group and finalized a list of issues to be discussed in the development of a **Regional Agreement** on concerted procedures relating to the disembarkation of persons rescued at sea. The IMO Secretariat prepared a **draft** for this **Regional Agreement** which was tabled for the parties concerned to consider and to comment. [FN86] However, the delegations of Italy, Malta and Spain requested an extension of the target completion date to 2012 because there has not been sufficient progress made. [FN87] Indeed, a second meeting had to be postponed due to the non-availability of delegations. [FN88] Italy requested that the consultation group of interested parties should be extended to the other relevant **regional** institutions, for instance the European Union, in order to avoid the stalling of future consultations due to the non-availability of delegations. [FN89]

*103 2. *Arab Spring - A Speed Up

In 2011, States however realized that the situation in the Mediterranean region had deteriorated over the months following the first meeting. The urgency of making progress on the issue was stressed, as a consequence of a wave of social uprisings affecting the northern part of the African continent, resulting in a massive migration by sea towards Europe. [FN90] In March 2011, NATO warships as well as aircraft started patrolling the approaches to Libyan territorial waters as part of ‘Operation Unified Protector.’ As called for in United Nations Security Council Resolution 1973, [FN91] their purpose was to reduce the flow of arms, related material and mercenaries to Libya. This operation is part of the broad international effort to protect civilians in Libya from the violence committed by the Gaddafi regime. [FN92]

However, there were growing signs that Gaddafi’s regime was trying to force a migration crisis to use as a weapon against his NATO enemies. [FN93] Indeed, according to the International Organisation for Migration (IOM), some migrants stated that they were forced onto boats by Libyan troops and police. Migrants who were brought to safety on the Italian island of Lampedusa said they witnessed a boat - carrying between 500 and 600 people - sink off the Libyan coast. Although some of the persons were able to swim to the
shore, it is not clear how many migrants survived. After seeing what had happened to the first boat, many of the migrants - who had been waiting on land to take another boat - changed their mind about making the sea journey to Italy. However, they claim that Libyan soldiers and officials forced them onto a waiting boat by firing their guns indirectly. [FN94]

On 6 April 2011, a second meeting - again under the auspices of and chaired by the IMO Secretary-General - was held to further this debate. It was once again attended by representatives from Italy, Spain and the IMO Secretariat. [FN95] On that same day over 250 migrants were lost after their vessel*104 capsized in the Mediterranean Sea, which proved again how urgent this matter was. [FN96] The Terms of Reference were reviewed and accepted. [FN97] It was concluded that the development of the Regional Agreement was to:

1. establish and strengthen co-operation among Parties to enable them to cope with incidents involving persons rescued at sea;
2. establish a system of communication between the countries in the region to exchange information on the movement of persons by sea;
3. ensure the safety of persons rescued at sea, pending a decision as to the place where such persons will be safely delivered, taking into account the prevailing weather and other conditions, including the safety of the delivering ships and the capacity of the places where they are delivered to provide care as may be necessary under the circumstances;
4. arrange that delivery of persons takes place without undue delays to the rescuing ships which should be allowed to promptly proceed to their destination once the delivery operation is over; and
5. promote co-operation for the delivery of persons rescued at sea to a port of a place of safety. [FN98]

The meeting then prepared the draft text for the Regional Agreement to be used as a basis for consideration at a future meeting. [FN99] It was agreed that the group should be expanded to include other interested parties concerned in the region, such as relevant regional and international organizations. [FN100] Malta stated that it was unable to attend the second meeting and that it did not completely agree with the outcome of that meeting. While they had no difficulties with the essence of the Terms of Reference, Malta believed that the text needed to be revised in the interest of clarity and consistency. Moreover, Malta had reservations on both the expansion of the consultation group and the draft text of the Regional Agreement. The country therefore proposed another meeting to discuss all these issues. [FN101]

The third meeting of the consultation group was held on 15 June 2011. That meeting further developed the Terms of Reference and discussed a draft Regional Agreement on concerted procedures relating to the disembarkation of persons rescued at sea. It was also agreed that the consultation group*105 should be expanded. [FN102] As a first expansion step, all of the Mediterranean countries were invited through Circular letter No. 3203 of 18 August 2011. This regional meeting is being held back-to-back with the parallel celebration of the World Maritime Day in Rome on 12 October 2011. The ultimate goal here will be the development of a Regional Agreement in the form of a Memorandum of Understanding (MoU) on concerted procedures relating to the disembarkation of persons rescued at sea. [FN103] At COMSAR 16, it was considered beneficial - in order to make significant progress towards finalizing the draft Regional MoU - to hold informal consultations among interested parties to agree on some of the more contentious issues and associated draft texts before organizing the next regional formal meeting. Accordingly, informal consultations were held at IMO Headquarters on 21 February 2012. Some of the most contentious aspects were discussed and agreements reached on sensitive subjects and the draft text of the Regional MoU was improved accordingly. However, after some discussion, taking into account that the work on this matter was still in progress, COMSAR decided to invite the MSC to extend the target completion year to 2013. MSC has agreed to postpone the deadline to 2013. [FN104]

A MoU is a well-accepted legal instrument in international law and practice, and is identified as “an in-
formal but nevertheless legal agreement” between two or more parties. [FN105] Whether this MoU is meant to be binding is not clear at the moment. However, a soft law agreement would not necessarily be a negative factor. Hard and soft law are used as alternatives, and can interact in complementary ways. Legal positivists tend to favor hard law as it refers to legal obligations of a formally binding nature; soft law refers to duties that are not formally binding but may nonetheless lead to binding hard law. Rationalists, in contrast, contend that hard and soft law have distinct attributes that States choose for different contexts, and thus can build upon each other. Lastly, constructivists maintain that State interests are formed through socialization processes of interstate interaction which hard and soft law can facilitate. Therefore, constructivists often favor soft law instruments for their capacity to generate shared norms and a sense of common purpose and identity, without the constraints raised by concerns over potential litigation. [FN106]

Regardless of their views about the strengths and weaknesses of hard and soft law, all three schools examine how hard and soft law can serve as mutually supporting complements to each other. [FN107] Moreover, soft law can sometimes be more effective than hard law. Whether a law is effective goes beyond looking at implementation or compliance to determine whether an international norm - whatever its source in domestic or international law - achieves its policy objective. [FN108] A rule is deemed effective when it leads to certain behaviour which may or may not meet the legal standard of compliance. [FN109] The development of a soft law framework has been successfully applied to address gaps in international law in the past. [FN110] Barnes states that - consistent with the general trend towards the use of soft law instruments - new legal initiatives concerning migrants at sea are most likely to take the form of non-binding measures. [FN111]

B. From An Interagency To A Maritime Approach

During the meetings, it was stressed that the development of a Regional Agreement should be restricted to purely maritime matters. [FN112] Although the competences of the IMO only extend to the search and rescue part at sea and to the provision of a place of safety afterwards, [FN113] it is definitely a shift in view towards the issue. Indeed, William O’Neil - the former IMO Secretary-General - stated in 2001 that the implementation of measures for safety at sea would not suffice since the problem of migrants at sea is not solely a maritime issue. In a situation involving asylum-seekers, certain principles of refugee law and human rights must be respected. [FN114] As a result, an Interagency Group was set up in July 2002 to deal with the problem of migrants at sea. [FN115] The IMO, the United Nations High Commissioner for Refugees (UNHCR), the United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS), the United Nations Office on Drugs and Crime (UNODC), the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the International Organization for Migration (IOM) are all participating in this Interagency Group. Countries outside the region have also been invited to future meetings. [FN116]

It is clear that past developments did not occur in the isolation of particular fields of law, but with a considerable degree of cooperation between international organizations and experts from across a number of fields. This integrated approach must thus continue. [FN117] The International Tribunal for the Law of the Sea affirmed in the M/V Saiga Case that considerations of humanity must apply to the Law of the Sea as they do in other areas of international law. [FN118] As Treves correctly stated:

The Law of the Sea and the law of human rights are not separate planets rotating in different orbits. Instead, they meet in many situations. Rules of the Law of the Sea are sometimes inspired by human rights considerations and may or must be interpreted in light of such considerations. [FN119]

Even the IMO itself recognizes this. In April 2011, the IMO stated that the problem is not entirely in IMO's hands, as political developments - due to the Arab Spring - had exacerbated the situation beyond its
competence. [FN120]

*108 IV

MALTA AND THE REGIONAL AGREEMENT: A MUTUAL IMPACT

A. The influence of Malta on the Regional Agreement

Why did the IMO suddenly shift towards a purely maritime approach? One of the reasons could be that they definitely wanted Malta to be part of the agreement. As Malta does not accept a link between the maritime and the humanitarian elements of the problem, the country could have restraints due to the fact that the agreement could contain similar provisions as incorporated in the 2004 SOLAS and SAR Amendments and the IMO Guidelines on the Treatment of Persons Rescued at Sea. It was indeed remarkable that Malta was absent during the second meeting of the consultation group in April 2011. The problem is that if Malta is not willing to negotiate, or decides not to be part of the MoU, there would simply not be an efficient agreement. Since Malta has an enormous SRR, it is of utmost importance that Malta is included. Including Malta in the agreement would ensure coordination between the several SRRs in the Mediterranean.

It is also essential that any agreement include a system of burden-sharing, especially if other countries want Malta to cooperate. However, a few problems arise in this respect. First, some European States fear that clarifying obligations and solving the problem through burden-sharing would produce an enormous pull factor, thus encouraging migrants to come to Europe by sea. [FN121] Second, the United States of America has begun to play a small yet important role in resettling refugees from Malta in order to reduce the burden for this country. [FN122] Yet, since this agreement is a regional one, this kind of burden-sharing cannot be included. Third, burden-sharing clearly goes beyond a purely maritime approach.

B. The Influence of the Regional Agreement on Malta

On the one hand, the Regional Agreement is positive for Malta, since a system of burden-sharing could be established. On the other hand, Malta *109 could be obliged to accept certain provisions in the 2004 SOLAS and SAR Amendments and the IMO Guidelines on the Treatment of Persons Rescued at Sea. Moreover, due to the agreement Malta could be forced to give up part of its SRR.

However, if Malta takes part in this new agreement it would definitely improve its reputation. Indeed, for the moment Malta does not have a very good reputation concerning the treatment of migrants at sea. First, the reputational theory in international law - as part of the rational choice theory - will be explained. Second, this theory will be applied to Malta.

I. The reputational theory

Guzman introduced the reputational theory in international law by stating that reputation plays a very important role in compliance. He identified three factors which enhance the compliance of States with international law, namely reciprocity, retaliation and reputation. [FN123] Reciprocity works best in bilateral situations: if one of the two cooperating States refuses to comply with a legal norm, the other may react in the same way. Consequently, both States lose the benefit of cooperation. However, reciprocity does not work in all cases. For example norms that concern human rights cannot be based on a reciprocal basis since reciprocal behaviour would not affect the violating State at all. [FN124]
The second factor is the possibility of retaliation. A State may punish another State for non-compliance. However, imposing a sanction on another State may be very costly for the punishing State. Moreover, in multilateral situations States have an incentive to free-ride and to hope that another State will punish the violator. Therefore, Guzman stipulates that the third factor - reputation - is the most important one. A State's calculus over the reputational costs of non-compliance is thus the primary factor for explaining a State's compliance with international law.

This theory is based upon the assumption that States are rational, self-interested actors. States want to cooperate with other States when it makes them better off. Nonetheless, States need a "good" reputation as this allows them to make more credible promises. As a result of this reputation for cooperativeness, States may be able to extract higher returns in exchange for their cooperation. A reputational theory must take into account the fact that not all agreements are the same. Lipson is convinced that the more formal and public the agreement - for example a treaty - the higher the reputational costs of non-compliance. Moreover, the more uncertain a performance standard (e.g. vague terms in the treaty), the less clear it is that a State's behaviour is violating that standard.

However, Guzman's reputational theory does not explain why States enter into treaties. Indeed, as a State's reputation is influenced by its compliance with legal obligations, reputational forces become relevant after a State has accepted legal obligations. Therefore, reputational harm can only occur if a legal obligation already exists. Nevertheless, Geisinger and Stein suggest that reputation also plays a role in treaty formation. A State will enter into a treaty when the benefits it receives outweigh the costs of entry and compliance. Indeed, compliance with international law is only one of the many dimensions by which States are judged. Hence, it is important to differentiate between the global standing of the State - or global public opinion - and the State's reputation for compliance with international law.

For example, the refusal to take on a legal obligation could influence the popular perception of the State more than a violation of legal obligations. Brewster illustrates this by giving the example of the United States' refusal to join the Kyoto Protocol on Global Climate Change. This is widely perceived to have hurt the reputation of the United States. On the other hand, violations of international law might sometimes even improve the popular perception of States. Although the NATO bombing of Serbia to stop the ethnic cleansing in the former Yugoslavia was a violation of international law, the Independent International Commission on Kosovo used the term "illegal but legitimate" to describe the bombing of Serbia.

Therefore, Brewster puts forward a distinction between 'legality reputation' and 'reliability reputation.' A legality reputation implies strict compliance with legal commitments, while a reliability reputation entails commitment to the goals of the regime. For instance, a State can completely fulfil its legal obligations but still develop a reputation for being unreliable. Similarly, the two types of reputations will have different effects on States' decision making. The United States withdrew from the ABM Treaty in 2001. Although this withdrawal was completely legal - the United States gave the notice required by the terms of the treaty - many States criticized the United States for not upholding international goals of arms limits. A reputation for legal compliance can thus be maintained as long as the State acts in accordance with the treaty's terms. However, actions that are formally in compliance with a treaty regime might nonetheless signal that a State is unreliable. By contrast, a reliability reputation might permit some violations of the agreement. Which kind of reputation is better will be often context specific. If the treaty is very specific, then a reputation for strict legal compliance might be better.

2. Reputation - An incentive for change?
Assuming Malta is a rational, self-interested State, its reputation will be important in both treaty compliance and treaty formation. We start by taking a look at the current international obligations of Malta, namely the rescue of persons in distress and the establishment of an efficient SRR. As both legal provisions are vague, we cannot say that Malta is not in compliance with its obligations. Indeed, there is a certain amount of discretion in deciding when a person is in distress. It is also not strictly forbidden to have a disproportionate SRR that overlaps with other countries. Therefore, Malta’s “legality reputation” remains intact.

But what about Malta’s ‘reliability reputation?’ Until now, Malta was able to keep this reputation quite high. This is a result of the particular circumstances, namely a small island being flooded by migrants and not getting enough help from other countries. This is also the reason why Malta’s refusal to join the 2004 SOLAS and SAR Amendments, and the IMO Guidelines on the Treatment of Persons Rescued at Sea, did not harm its reputation in such a way that it felt under pressure to actually subscribe to these obligations. Indeed, Malta officially declared “that it is not yet in a position to accept these amendments.” [FN138] It thus seems that Malta does want to accept these amendments, but that it simply cannot do so because of the current situation.

However, Malta cannot invoke these arguments to avoid negotiating the new Regional Agreement. After the absence of Malta during the second meeting of the consultation group, the country stated that they would be available for future meetings. [FN139] Indeed, Malta feels pressure to cooperate in order to find a solution to the problems arising from the Arab Spring.

The 2004 SOLAS and SAR Amendments and the IMO Guidelines on the Treatment of Persons Rescued at Sea were drafted after the Tampa incident in 2001. The captain of the Norwegian container ship Tampa rescued 438 asylum seekers from drowning in international waters between Christmas Island (Australia) and Indonesia. The master of the ship first headed towards Indonesia, but this elicited threats from some of the migrants, who insisted on being taken to Christmas Island. As the captain wanted to enter Australian territorial waters, Australian Special Air Services intercepted and boarded the ship. The whole incident gave rise to a very complex international political situation.

Malta’s interest in acceding to the Conventions may have changed now that Malta is facing similar issues in the Mediterranean Sea. Thus, Malta’s reputation is without any doubt at stake.

V

CONCLUSION

The Arab Spring highlighted once more the problem of migrants at sea. Due to the increased loss of life in the Mediterranean in 2011, the negotiations on the Draft Regional Agreement on concerted procedures relating to the disembarkation of persons rescued at sea in the Mediterranean Basin were speeded up. Malta plays an important role in this agreement due to its enormous SRR. One of the problems that should be tackled is the coordination between the several SRRs in the Mediterranean. Also, a system of burden-sharing has to be part of the agreement. If the Regional Agreement meets part of the concerns Malta has, it could go beyond addressing purely maritime matters to include provisions on human rights and humanitarian law. Indeed, if Malta wants to avoid losing its ‘good’ reputation it should accept that the law of the sea is not isolated from other parts of the law. On the one hand the draft MoU contains certain elements that are negative for Malta, such as the provision that the primary responsibility rests with the Government responsible for the respective SRR, and the definition of what constitutes a distress phase. On the other hand, the draft MoU is positive for Malta as it takes into consideration the respective capacities of a State.
when providing a place of safety and the particular circumstances of the case. Finally, States have to cooperate in providing a suitable place of safety, taking into account relevant factors, risks and circumstances, particularly when the number of survivors exceeds the capacity of the responsible State.

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[FN3]. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC). Article 98(1) LOSC states: “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: (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; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.”


[FN5]. LOSC, Article 98(1).


[FN8]. International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996), 1953 UNTS 194. Article 10 stipulates: “(1) Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea. (2) The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1. (3) The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.” Before the Brussels Salvage Convention of 1885 there were no formal international conventions that addressed rendering assistance at sea. In 1897, the Comite Maritime International (CMI) held its first international conference in Brussels to advance issues regarding collisions and salvage, as well as the duty to render assistance at sea. As a result, the new text of the Brussels Convention on Salvage was signed on 23 September 1910. In 1989, the IMO concluded the International Convention on Salvage, which replaced the 1910 Brussels Convention.

22 June 1985) 405 UNTS 97 (SAR Convention).

[FN10]. SAR Convention, Annex Chapter 1 para. 1.3.13.


[FN12]. INTERNATIONAL LAW COMMISSION, ILC Yearbook Vol. II Part II (1979), 135, para. 10, available at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1979_v2_p2_e.pdf. Although this definition was given during the discussions on the concept of ‘distress’ as one of the grounds for excluding wrongfulness with regard to the Draft Articles on State Responsibility, the definition is often being used to describe the situation of distress of persons at sea. See for example: RICHARD BARNES, ‘Refugee Law at Sea’ 53 Int'l & Comp. L.Q. 47 (2004), 60.


[FN16]. Id. Annex Part II para. 1.3.

[FN17]. Id. Annex Part II para. 1.4.

[FN18]. LOSC, Article 98(1).


[FN20]. SAR Convention, Annex Chapter 2 para. 2.1.2.

[FN21]. Id. Annex Chapter 1 para. 1.3.2.


[FN24]. Id. para. 2.1.3.

[FN25]. Id. para. 2.1.4.

[FN26]. Id. para. 2.1.7.

[FN27]. Id. para. 2.4.


[FN30]. SAR Convention, Annex Chapter 1 para. 1.3.2.


[FN32]. Id. para. 6.17.


[FN35]. Id. Preamble para. 10.


[FN37]. Id.

[FN38]. See for example: KILLIAN S. O’BRIAN, ‘Refugees on the High Seas: International Refugee Law

[FN39]. SOLAS Convention, Chapter V Regulation 33; SAR Convention, Chapter 3 para. 3.1.9.


[FN47]. Id. Annex Part II para. 2.1.


[FN52]. Malta accessed the convention on 26 June 1996.

[FN53]. IMO, ‘Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions’ (11 August 2011), available at: http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%20202011.pdf.

[FN54]. Id.


[FN57]. COMSAR/Circ.27, ‘Data Format for a New Combined SAR.2 and SAR.3 Circular Concerning Information on the Current Availability of SAR Services’ (12 October 2001), para. 4.


[FN59]. Id.

[FN60]. Id. Annex 4, 7.


[FN65]. INTERNATIONAL LAW COMMISSION, ‘Ninth Report on unilateral acts of States’ (6 April 2006), Doc. A/CN.4/569/Add.1, para. 12, available at: http://daccess-dds-ny.un.org/doc/UNDOA/GEN/N06/300/32/PDF/N0630032.pdf?OpenElement; INTERNATIONAL LAW COMMISSION, ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,’ para. 1, available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf. The declaration can be regarded as a unilateral act stricto sensu as it is not part of a treaty relationship. Although the declaration was made during a meeting within the IMO (the depositary of the SAR Convention), it was not officially registered by the Secretary-General in the context of the SAR Convention.


[FN67]. LEG 98/14, ‘Report of the Legal Committee on the work of its ninety-eighth session’ (18 April

[FN68]. SAR Convention, Annex Chapter 2 para. 2.1.3.

[FN69]. Id. para. 2.1.4.


[FN72]. Id. Preamble para. 11.


[FN80]. Id.


[FN85]. Id. para. 14.20.

[FN87]. Id. para. 10.5.

[FN88]. Id. paras. 10.4.4 and 10.6.

[FN89]. Id. para. 10.6.


[FN95]. MSC 89/INF.23, ‘Measures to protect the safety of persons rescued at sea’ (12 April 2011), para. 4.

[FN96]. Id. para. 5.

[FN97]. Id. para. 6.


[FN99]. Id. para. 7.

[FN100]. Id. para. 8.


[FN102]. FAL 37/6/1, ‘Formalities Connected with the Arrival, Stay and Departure of Persons - Measures to Protect the Safety of Persons rescued at Sea,’ para. 10.

[FN103]. FAL 37/INF. 5, ‘Address of the Secretary-General at the Opening of the Thirty-Seventh Session of the Facilitation Committee’ (5 September 2011), 3-4.

[FN104]. COMSAR 16/17, ‘Report to the Maritime Safety Committee’ (23 March 2012), para. 10.3 and 10.4.


[FN106]. GREGORY C. SHAFFER & MARK A. POLLACK, ‘Hard vs. Soft Law: Alternatives, Comple-
ments, and Antagonists in International Governance,’ 94 Minn. L. Rev. 706 (2010), 707-708.

[FN107] Id.


[FN109] Compliance as a concept merely identifies a conformity between a legal rule and behaviour. However, it does not draw a causal linkage between these two. For example, compliance may occur without implementing legislation. On the other hand, it is also possible that a State may not be in compliance with international law, even with implementing legislation in place. See: KAL RAUSTIALA, ‘Compliance & Effectiveness in International Regulatory Cooperation,’ 32 Case W. Res. J. Int’l L. (2000), 398: JOSE E. ALVAREZ, ‘Why Nations Behave,’ 19 Mich. J. Int’l L. 303 (1998), 305.


[FN124]. Id. at 65.

[FN125]. Id. at 66.

[FN126]. Id. at 379-391.

[FN127]. Id. at 34.


[FN131]. Id. at 1138.


[FN133]. Id.

[FN134]. Id, at 240.


[FN138]. IMO, ‘Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs Sdepositary or other functions’ (11 August 2011), available at: http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%20202011.pdf.

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