

Session 5: International Law Relating to Liability and Insurance

Migration by Sea: Questions of State Responsibility and Liability



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Overview

1. The International Legal Framework: Principal International Obligations
2. Basic Principles of State Responsibility
3. Potential State Responsibility in the Context of Migration by Sea

1. International Legal Framework: Principal Relevant International Obligations

a) International Human Rights Obligations and International Refugee Law

b) Obligation to provide assistance

c) Obligations relating to compensation for salvors

Obligations under Refugee and International Human Rights Law

- Right to life (e.g. Article 2 ECHR)
- Prohibition of refoulement (Art. 33, 1951 Geneva Convention) and equivalent obligations under international human rights law
- Prohibition of collective expulsion (Art. 4 of Protocol 4, ECHR)

However, to extent that migrants are upon the high seas, applicability of human rights obligations dependant upon extra-territorial applicability

- Art. 1, ECHR: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

Cf. *Hirsi Jamaa and others v. Italy* (App. No. 27765/09), ECtHR, Judgment of 20 February 2012 [GC]

Obligation to provide assistance to those in distress:

Relevant provisions:

- Art. 11, **Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea**, Brussels, 23 September 1910 [Brussels Convention]
- Art. 98, **UN Convention on the Law of the Sea**, Montego Bay, 10 December 1982; 1834 UNTS 397 [UNCLOS]
- Regulation 33, Ch. V, Annex, **International Convention for the Safety of Life at Sea**, London, 1 November 1974; 1184 UNTS 278 and Annex (as subsequently amended) [SOLAS]
- Art. 10, **International Convention on Salvage**, London 28 April 1989; 1953 UNTS 194
- Paragraph 2.1.10, Ch 2, Annex, **International Convention on Maritime Search and Rescue**, Hamburg, 27 April 1979, and Annex, as amended by resolutions of the Maritime Safety Committee of the IMO: MSC.70 (69), adopted on 18 May 1998 (1998 Amendments) and MSC.155 (78), adopted on 20 May 2004 (2004 Amendments) [SAR]

Obligation to provide assistance to those in distress:

Character and content of the obligations:

- Certain provisions formulated as imposing a general duty under international law directly on the master of a vessel to provide assistance to those in distress

[see Art. 11, Brussels Convention; Regulation 33, Ch. V, Annex to SOLAS; Art. 10(1), International Convention on Salvage 1989];

- All relevant instruments impose obligations upon States parties to take the necessary measures to ensure the obligation of masters to provide assistance, in particular by adoption of legislation

[see Art. 12, Brussels Convention; Art 98, UNCLOS; Art. I, SOLAS; Art. I, SAR and Regulation 2.1.10 Ch. 2, Annex; Art. 10(2) International Convention on Salvage 1989]

Obligation to provide assistance to those in distress: Brussels Convention 1910

Article 11

Every master is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost.

[...]

Article 12

The High Contracting Parties, whose legislation does not forbid infringements of the preceding Article, bind themselves to take or to propose to their respective legislatures the measures necessary for the prevention of such infringements.

[...]

Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, Brussels, 23 September 1910

Obligation to provide assistance to those in distress:

Character and content of the obligations:

- Certain provisions formulated as imposing a general duty under international law directly on the masters of vessels to provide assistance to those in distress
[see Art. 11, Brussels Convention; Regulation 33, Ch. V, Annex to SOLAS; Art. 10(1), International Convention on Salvage 1989];
- All relevant instruments impose obligations upon States parties to take the necessary measures to ensure the obligation of masters to provide assistance, in particular by adoption of legislation
[see Art. 12, Brussels Convention; Art 98, UNCLOS; Art. I, SOLAS; Art. I, SAR and Regulation 2.1.10 Ch. 2, Annex; Art. 10(2) International Convention on Salvage 1989]

Obligation to provide assistance to those in distress: UNCLOS

Article 98

Duty to render assistance

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:
 - (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;[...]
2. 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.

Obligation to provide assistance: SAR 1979

Article I:

The Parties undertake to adopt all legislative or other appropriate measures necessary to give full effect to the Convention and its Annex, which is an integral part of the Convention.

Annex, Chapter 2:

2.1.10 Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979, and Annex, as amended by resolutions of the Maritime Safety Committee of the IMO: MSC.70 (69), adopted on 18 May 1998 (1998 Amendments) and MSC.155 (78), adopted on 20 May 2004 (2004 Amendments).

Obligation to provide assistance: SOLAS 1974

Annex, Chapter V: Safety of Navigation

Regulation 33: Distress Situations: Obligations and procedures

1. The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. [...]

1.1 Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. [...]

International Convention for the Safety of Life at Sea and Annex (SOLAS), London, 1 November 1974; 1184 UNTS 278 (as subsequently amended)

Obligations relating to compensation for salvors

Character of obligations:

- Brussels Convention and the 1989 Convention impose obligations upon States to adopt legislation or otherwise ensure that the relevant principles are applicable within their legal systems to resolve claims for remuneration for salvage

Obligations relating to compensation for salvors: Brussels Convention 1910

Article 1

Assistance and salvage of seagoing vessels in danger [...] are subject to the following provisions [...]

[See also Articles 7 and 8, and the role of the [domestic] courts in supervision of salvage agreements and fixing remuneration.]

Obligations relating to compensation for salvors: International Convention on Salvage (1989)

Article 2 Application of the Convention

This Convention shall apply whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party.

[See also Arts. 22 and 24 as to the powers of the tribunal having jurisdiction over the claim for remuneration in respect of interim payments/security and interest on sums due.]

Obligations relating to compensation for salvors:

- In principle, no remuneration due for saving human life, although entitlement to share of the remuneration where salvage of human life is ancillary to salvage of the vessel or its cargo [or, under the 1989 Convention, prevention/minimization of damage to the environment]:
 - Art. 9, Brussels Convention 1910;
 - Art. 16, International Convention on Salvage 1989;

Article 16 (Salvage of persons), International Convention on Salvage 1989

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.
2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment.

Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, Brussels, 23 September 1910; International Convention on Salvage, London 28 April 1989; 1953 UNTS 194

Basic Principles of State Responsibility

Articles on the Responsibility of States for Internationally Wrongful Acts (2001) ('ARSIWA')

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Basic Principles of State Responsibility

Articles on the Responsibility of States for Internationally Wrongful Acts (2001) ('ARSIWA')

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

Basic Principles of State Responsibility

Commentary to Article 2, ARSIWA

“the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure”

Ref: Commentary to Article 2, paragraph (9), *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001); ILC Yearbook [2001] vol. II(2), at 36.

3. Potential State Responsibility

1. Human rights obligations owed to migrants

- claims by individual migrants or their relatives
- in theory, inter-State claims

2. Failure to enact/enforce laws imposing duty on masters to provide assistance or implementing rules as to remuneration for salvage

- in theory, inter-State claims, including by flag State;
- at most, likely to result in a declaration of breach of obligation;

3. Potential State Responsibility

3. Claim by or on behalf of owners/charterers of ships for losses suffered due to provision of assistance?

- no claim solely for complying with obligation to provide assistance;
- potential inter-State claim for failure of an SAR state to adopt legislation in conformity with treaty obligations in relation to salvage?
 - must have salvaged the vessel, rather than merely saving life;
 - causation problems as regards any claim for compensation.