



REGIONAL SUPPORT OFFICE
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Protecting migrants at sea: a practical guide to fulfilling international obligations



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Protecting migrants at sea: a practical guide to fulfilling international obligations

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Snapshot of *Protecting migrants at sea: A practical guide*

Purpose: This publication is intended as a tool to complement and support practical application of the International Organization for Migration (IOM) publication, *Protection of Migrants at Sea* (IOM, 2018). It is comprised of two interrelated parts.

- **Part I: Guidance Note:** Part I offers guidance to government agencies in the operationalization of their international legal obligations to protect migrants at sea. It identifies and acknowledges the practical challenges of responding in contexts of international maritime migration, where human rights law and the law of the sea intersect, including responding to cases involving asylum seekers, unaccompanied migrant children, victims of trafficking in persons and others who are accorded special protection in international law.
- **Part II: Practical Scenarios:** Part II offers Practical Scenarios for discussion and consideration, for users to adapt as appropriate in exploring the application of the laws and principles discussed in the Guidance Note. Scenarios are offered in the context of Search and Rescue, Interception / Interdiction as well as Disembarkation to a place of safety and cooperation. Brief responses to the questions presented for each scenario are offered in Section 2 of Part II.

Target audience: This publication is offered to government stakeholders at both the policy and the operational levels who are responsible for fulfilling States' international legal obligations to protect migrants at sea, or non-states actors who are supporting States to fulfil those obligations, including through the provision of technical assistance and capacity building.

Methodology: The insights offered in this Practical Guide are drawn from roundtable discussions held on 5-6 November 2019 in Istanbul, Turkey. That event, hosted by Bali Process Regional Support Office (RSO), brought together international legal experts to discuss continuing questions that were identified by the initial IOM publication, *Protection of Migrants at Sea* (IOM, 2018). The practical, fictional scenarios offered in Part II of this tool were piloted at that roundtable meeting, and framed interactive discussions on maritime interception (including of migrant smuggling ventures), as well as search and rescue (including the challenges associated with disembarking rescued persons to a 'place of safety').

PART I

GUIDANCE NOTE

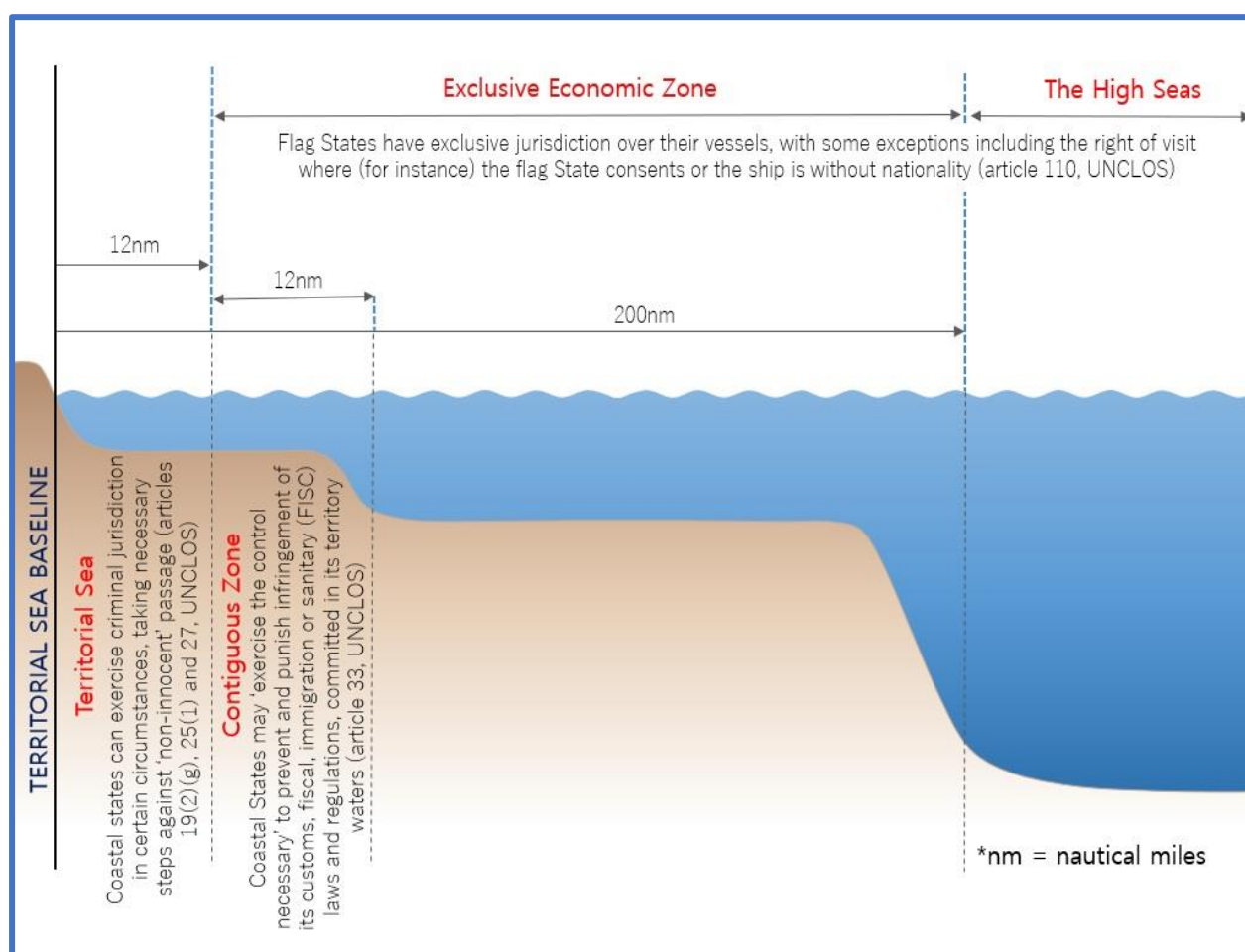
PART I. GUIDANCE NOTE

1. Jurisdiction and maritime zones

For more information:

- See *Protection of Migrants at Sea* (IOM, 2018) pp.3 - 18.

In the maritime context, the maritime zone in question and the flag of the vessel concerned determine jurisdiction, or the right to exercise authority. The United Nations Convention on Law of the Sea (UNCLOS) determines maritime zones; the territorial waters are those belonging to a coastal State, meaning the level of authority that a State is able to exercise over a vessel is generally dependent on its relative proximity to its coastline. The further out to sea a vessel is, the more likely it is to fall under the exclusive jurisdiction of the flag State. Generally on the high seas, jurisdiction follows the flag, except in limited cases where vessels are engaged in piracy, transport of slaves, unauthorized broadcasting and drug trafficking.



Graphic 1: Maritime zones according to UNCLOS

Practical challenge: the limitations of flag state responsibility

A ship's flag demonstrates its 'nationality'. Nationality is generally what determines legal responsibility for what happens on board, including crimes that may take place.¹ Flag States have near total responsibility over vessels flying their flag: "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag"². Significantly, in relation to protection of migrants at sea, article 94(3) of UNCLOS requires that every State "shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to: the construction, equipment and seaworthiness of ships; the manning of ships, labour conditions and the training of crews, taking in to account the applicable international instruments, the use of signals, the maintenance of communications and the prevention of collisions." Flag States are responsible too for ensuring that ships flying its flag are manned by persons with appropriate qualifications, including being "fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea" (article 94(4)(c)).

UNCLOS contains no accountability mechanism in cases where a flag State fails to meet these obligations. Exercising jurisdiction at sea is challenging. In practice, many flag States simply fail to exercise their obligations to persons on board vessels flagged to them. Private companies that operate large commercial vessels that transport most of the world's maritime trade are usually flagged to only a small number of States, including Panama, Marshall Islands and Liberia.³ Given the limited capacity of many States to exercise enforcement jurisdiction at sea, the vessels are largely expected to self-regulate, which they often fail to do. In reality, many of the flagged vessels encountered on the seas today are 'flags of convenience', being a flag of a State that avoids ratifying international treaties or does not enforce its legal obligations for vessels flying its flag.⁴ Given the high costs associated with maritime law enforcement, particularly for vessels operating at a distance from the flag State, many flag States are unlikely to implement the monitoring and enforcement responsibilities that would result in better protection for migrants at sea.

In reality, many of the vessels used to transport migrants are not flagged to any State. This fact, depending on the circumstances, may raise possibilities for States to take action in relation to them, including actions to save lives at sea.

¹ For more on flag state jurisdiction, see Richard A Barnes, 'Flag States' in Donald R Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) pp.304-324.

² Article 94, United Nations Convention on Law of the Sea

³ <https://lloydslist.maritimeintelligence.informa.com/LL1125024/Top-10-flag-states-2018>

⁴ The Fair Practices Committee of the International Transport Workers' Federation maintains a list of registries listed as flags of convenience, which as at June 2020 includes 35 countries.

Table 1: Jurisdiction in maritime zones

Maritime Zone	Jurisdiction
Territorial sea / territorial waters Up to a maximum of 12 nautical miles from the coastal State's baseline (usually the low water line), or from the straight baselines connecting the outermost points of the low water lines.	- Coastal State: Sovereignty - Other States: Right of innocent passage (article 17, UNCLOS)
Contiguous Zone An area beyond territorial sea, up to 24 nautical miles from the same baseline from which the territorial sea is measured.	- Coastal State: can prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations (article 33, UNCLOS) - Other States: Freedom of navigation of all ships and exclusive jurisdiction of flag State.
Exclusive Economic Zone (EEZ) An area claimed beyond territorial sea not extending beyond 200 nautical miles from baseline from which the territorial sea is measured.	- Coastal State: sovereign rights and jurisdiction over marine resources (article 56, UNCLOS) - Other States: Freedom of the high seas (articles 58, UNCLOS)
High Seas All parts of the sea not included in the internal waters, territorial sea, contiguous zone or exclusive economic zone.	All States: Freedom of high seas (article 87, UNCLOS), meaning exclusive jurisdiction of the flag state



2. Interception / Interdiction

For more information:

➤ See *Protection of Migrants at Sea* (IOM, 2018) pp.31-67.

Regardless of whether it occurs territorially or extraterritorially, a State which intercepts a vessel at sea is understood to have taken ‘effective control’ of the vessel, thereby triggering State jurisdiction over the migrants concerned, including obligations under human rights law, humanitarian law and refugee law, by way both of treaty and, for states which may not be party to a specific international agreement, by customary law.⁵

International law offers States opportunities to intercept or interdict vessels that are or have been engaged in activities contrary to immigration law. The *Smuggling of Migrants Protocol* does not provide a distinct legal basis for interception but offers a cooperative framework for States Parties to use in intercepting vessels suspected of smuggling of migrants. It requires States to designate a central authority to respond to flag state verification and consent to act (article 8(6)). States can exercise the right of visit over vessels flying its flag, or vessels without nationality, where there are reasonable grounds to suspect the vessel is engaged in migrant smuggling, and over foreign flagged vessels if the flag State grants permission take appropriate measures against the suspect vessel. Such measures include boarding, search and, if evidence of migrant smuggling is found, ‘appropriate measures’ as authorized by the flag State in accordance with domestic and international law (article 8). The Smuggling Protocol creates no obligation on the flag State to authorize interception on the grounds of suspected migrant smuggling, nor does it provide further guidance on what constitute ‘appropriate measures’.⁶

No additional measures are allowed under the Smuggling Protocol without flag State authorization, except, as specified in article 8(5), “those necessary to relieve imminent danger to lives, or on the basis of bilateral or multilateral agreements.” The Smuggling Protocol also articulates that where a State takes measures against a vessel in accordance with article 8, it shall “ensure the safety and humane treatment of the persons on board” (article 9(1)(a)). Fulfilment of this requirement may necessitate a range of measures, including upholding the rights of any children

⁵ United Nations Human Rights Committee (HRC), General Comment No. 31 of 26 May 2004 (Nature of the General Legal Obligation Imposed on States Parties to the Covenant). Available from www.refworld.org/docid/478b26ae2.html. Also see: United Nations Committee Against Torture (CAT), General Comment No. 2 of 24 January 2008 (Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment - Implementation of Article 2 by States parties).

⁶ In the case of *Harabi Hani*, final appeal judgment (20 August 2014) No. 36052/2015, the Italian Supreme Court of Cassation found that ‘appropriate measures’ permit coercive action against both the suspected vessel and persons found on board a vessels suspected of statelessness and migrant smuggling, effectively finding migrant smuggling to be an exception to the requirement for a jurisdictional basis for interdiction, but it did not clarify its reasoning for this decision. See: Thea Coventry, ‘Appropriate Measures at Sea: Extraterritorial Enforcement Jurisdiction over Stateless Migrant Smuggling Vessels’ *Maritime Safety and Security Law Journal Issue 7/2019-20*, Special Issue on the EU and Maritime Security, p.27.

on board by addressing their special needs, and also assessing to the needs of other vulnerable individuals such as pregnant women, the elderly, or people who may be injured and in need of urgent medical attention.

States may negotiate bilateral agreements to render responses to such situations more predictable. Here the extent of any rights to interdict vessels and take further action will depend upon the specific terms of the agreement. For instance, the United States currently has bilateral agreements in place with the Bahamas and the Dominican Republic and diplomatic notes / operational procedures in place with Haiti and Cuba. The Agreement between the United States and the Dominican Republic (2003) authorizes the US to board and search Dominican flagged vessels on the high seas and to detain suspect vessels if evidence of migrant smuggling is found. It also allows for US ship-riders on board Dominican vessels, and allows the US to pursue vessels into Dominican Republic waters and vice-versa.⁷ While such agreements can facilitate operational cooperation at sea, they do not permit parties to avoid their duty to respect the principle of *non-refoulement*, or otherwise to reduce their obligations to uphold the basic human rights of persons on-board who may be refugees or persons at risk of being tortured upon removal.⁸ Importantly, the principle of *non-refoulement* is widely considered a principle of customary international law that binds all States regardless of whether they are signatories to the Refugees Convention.⁹ The 2003 US-Dominican Republic agreement prohibits return of persons to a State where the person has a well-founded fear of persecution or there are substantial grounds for believing that the person would be in danger of being subject to torture.¹⁰ However, concerns have been raised about the 2017 Memorandum of Understanding between Italy and Libya for the purpose of ‘stemming irregular migration flows’ because of the absence of explicit reference to specific international human rights obligations.¹¹ In practical terms, human rights obligations continue to apply irrespective of what ad hoc agreements say or do not say in relation to them.

⁷ . Agreement between the United States of America and the Dominican Republic, Agreement signed at Washington May 20, 2003, Article 4.2, available at: <https://www.state.gov/wp-content/uploads/2019/02/03-0520-Dominican-Republic-Migration-and-Refugees-Misc-Agreement-5.20.2003.pdf>.

⁸ Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge, 2014) 99 referring to Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, at 4.

⁹ Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, UNHCR, 27 January 2007. Article 19(1) of the Smuggling of Migrants Protocol explicitly mentions the principle of *non-refoulement*.

¹⁰ Agreement between the United States of America and the Dominican Republic, Agreement signed at Washington May 20, 2003, Article 10, available at: <https://www.state.gov/wp-content/uploads/2019/02/03-0520-Dominican-Republic-Migration-and-Refugees-Misc-Agreement-5.20.2003.pdf>.

¹¹ Violeta Moreno-Lax, The Architecture of Functional Jurisdiction: Unpacking Contactless Control on Public Powers, *S.S. and Others v Italy*, and the ‘Operational Model’, *German Law Journal* (2020) 21, pp. 385-416, at pp.391-2.

Table 2: Grounds for interception in different maritime zones

Zone	Potential actions under UNCLOS
Territorial sea (to 12 nm) - Flag State: Innocent passage - Coastal State: sovereignty	Coastal State can: Take necessary measures to prevent non-innocent passage (art 25(1)) being passage that is prejudicial to peace, good order and security (art 19), which may include loading and unloading contrary to immigration laws (article 19(2)(g))
Contiguous zone (from 12 up to 24 nm) - Flag State: Freedom of the high seas - Coastal state: customs, fiscal, immigration, sanitary (FISC)	Coastal State can: ‘Exercise the control necessary’ to prevent and punish infringements of its customs, fiscal, immigration, sanitary laws and regulations committed within its contiguous zone or territorial waters (art 33) ‘Prevent’ (stop and board a vessel from entering territory where reasonable grounds to suspect intent to infringe laws, and ‘punish’ any outward bound vessel that has infringed laws.
EEZ (not beyond 200nm) and High Seas Flag State: Freedom of the high seas and exclusive jurisdiction	Freedom of the high seas and exclusive jurisdiction of the flag State (arts 58 and art 87), with exceptions including: Right of visit where: - Flag State consents - Ship is engaged in piracy (art 110(1)(a)) - Ship is engaged in the slave trade (art 110(1)(b)) - Ship is without nationality (article 110(1)(d)) Right of hot pursuit (article 111) - Where good reason to believe ship has violated laws / regulations of the coastal State - Pursuit ends where vessel enters its territorial waters of the flag State or those of a third State

2.1. High seas and exclusive economic zone

For more information:

➤ See *Protection of Migrants at Sea* (IOM, 2018) pp.46-58.

In the Exclusive Economic Zone and on the High Seas, States have the right to visit, with the consent of the flag State, if the ship is engaged in piracy (article 110(1)(a)) or the slave trade (article 110(1)(b)), or if it is without nationality. However, while these opportunities to take action against vessels exist in law, their use in practice to respond to situations in which people are being forced to work in a way that amounts to the slave trade, are yet to be tested.¹² Furthermore, article 99 of UNCLOS does not allow States to exercise enforcement jurisdiction on the high seas for the crime of slavery but requires the State to take effective measures to prevent and punish the transport of slaves on ships that are flagged to it. In relation to the smuggling of migrants, the Working Group on Smuggling of Migrants has advised States to establish jurisdiction over smuggling of migrants on the high seas involving un-flagged vessels to close the gap of potential impunity for criminals.¹³

Practical challenge: State seeks to extend prescriptive jurisdiction into the high seas

With mass maritime migration increasingly a point of concern for many governments around the world, States wishing to find solutions by attempting to exercise jurisdiction extraterritorially and into the high seas will find a legal obstacle in UNCLOS article 89: “No State may validly purport to subject any part of the high seas to its sovereignty.” Similarly, the Smuggling Protocol does not offer any basis on which to extend prescriptive jurisdiction into the high seas; if a State wishes to intercept a foreign flagged vessel on the high seas, it is required to seek permission from the flag State to do so. While Stateless vessels are not understood to have rights, freedoms or protections under international law, there remains some dispute about whether there must be some jurisdictional nexus with a flagless

¹² Some situations of trafficking in persons encountered in the maritime context may amount to situations of slavery. Slavery (cf. the slave trade) is a form of exploitation contained in the definition of trafficking in persons, defined in the 1926 *Convention to Suppress the Slave Trade and Slavery* as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” Slavery has been discussed as crimes of universal jurisdiction, effectively giving States power beyond their territorial waters.

¹³ Report on the meeting of the Working Group on Smuggling of Migrants held in Vienna from 18 to 20 November 2015, Recommendation 5, Section A, available at www.unodc.org/unodc/en/treaties/CTOC/working-group-on-the-smuggling-ofmigrants-2015.html

vessel for the State to be able to exercise enforcement jurisdiction.¹⁴ State practice indicates a developing exception to the requirement that there be a connection between the intercepting State and the flagless vessel.¹⁵

Practical challenges: bilateral or regional agreements extend jurisdiction

States which use bilateral agreements to exercise border control functions within the territorial waters of another State may attempt to extend their enforcement jurisdiction extraterritorially while concurrently relieving themselves of the responsibilities that would normally accrue as a result of the “effective control” principle. ‘Ship-rider’ agreements, which allow for law enforcement detachments from one State to board ships suspected of criminal activity in the waters of the cooperating State, are also not considered sufficient to discharge the responsibility of the flag State. In short, while bilateral and regional agreements are permitted by the international legal regime as an effective way of operationalizing cooperation requirements in treaties, any agreements that are put in place cannot contain terms that undermine human rights commitments, including the right to seek asylum, or that have the effect of doing so, for instance, by subjecting asylum seekers to the possibility of refoulement.¹⁶

¹⁴ Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge, 2014), pp.422-3, where the authors refer to the United States Court of Appeal and European Union Member states assertions that flagless vessels cannot invoke freedom of the high seas, and that any State can exercise jurisdiction against them. The alternative view, that enforcement action requires that there is a jurisdictional nexus or permissive rule (such as slave trading, piracy, or unauthorized broadcasting) has been asserted by scholars including *inter alia*, Barnes, Churchill and Lowe, Guilfoyle, Mallia and Moreno-Lax.

¹⁵ See Thea Coventry, ‘Appropriate Measures at Sea: Extraterritorial Enforcement Jurisdiction over Stateless Migrant Smuggling Vessels’ *Maritime Safety and Security Law Journal Issue 7/2019-20*, Special Issue on the EU and Maritime Security, p.15

¹⁶ Articles 16 and 17 of United Nations, International Law Commission, Report on the work of its fifty-third session (23 April - 1 June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth session, Supplement No. 10 (A/56/10) respectively refer to the obligation not to ‘aid or assist to facilitate’ nor to ‘direct or control’ the commission of an internationally wrongful act by another State.

Box: *S.S. and others v Italy* pending before the European Court of Human Rights

The facts involved in the case of *S.S. and others v Italy* (Application No. 21660/18) currently pending before the European Court of Human Rights, involve the interception/rescue of a dinghy of 150 migrants on the high seas by the Libyan Coast Guard (LCG). That vessel had left Tripoli on 5 November 2017 and began to capsize soon after. Distress calls received by the Maritime Search and Rescue Coordination Centre (MRCC) in Rome were communicated to all ships transiting the area including the *Sea Watch 3* and the *Ras Al Jadar* of the LCG. The latter arrived on scene first but did not immediately start to assist. Survivors reported that instead, the crew took photos and cursed at them, hit them with ropes while they were in the water, and caused waves that made people in the water, including a child, drift away. The LCG allegedly told the *Sea Watch 3* to stay away, saying it was in charge of the rescue. Nonetheless, the *Sea Watch 3* attempted to retrieve migrants in danger of being lost. In the confusion, some people climbed aboard the LCG vessel, and others tried to reach the *Sea Watch 3*. Crew members of the LCG vessel shouted and threw objects at them, causing the *Sea Watch 3* to retreat, and people to drift and drown. Those who made it on board the LCG vessel were tied up and beaten. Six managed to jump overboard and were subsequently rescued by the *Sea Watch 3*, which rescued a total of 59 survivors and took them to Italy. Those on board the LCG vessel were taken to Libya and abused in a camp, and subsequently were either returned to Nigeria or remain in Libya. These events take place against the backdrop of cooperative agreements in place, in which Italy (and the European Union) provide financial and other support to Libya to stop irregular migration into Europe. The case before the European Court of Human Rights raises questions about the extent to which a State, in this case Italy, maintains human rights obligations through collaboration with another State, or whether the person concerned were in the jurisdiction of Italy, for the purposes of article 1 of the European Convention on Human Rights.¹⁷

¹⁷ See, *inter alia*, Violeta Moreno-Lax, The Architecture of Functional Jurisdiction: Unpacking Contactless Control - on Public Powers, *S.S. and Others v Italy*, and the 'Operational Model', *German Law Journal* (2020) 21, pp. 385-416, at pp.389-90; Efthymios Papastavridis, The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm, *German Law Journal* (2020) 21, pp.417-435.



Practical challenge: Trafficking in persons or slavery encountered on the high seas

International law today offers little to justify interfering with a foreign-flagged vessel on the high seas, even in cases where crimes such as trafficking in persons or slavery are suspected. During the early 19th Century the slave trade in particular was considered as a crime of universal jurisdiction, allowing States to intercept and arrest vessels suspected of being involved in it. However, jurisdiction of the flag State quickly came to be the norm, with the possibility of visiting foreign ships to suppress the slave trade at sea only allowed where an international agreement was in place. This approach is confirmed in UNCLOS where the principle of flag-State sovereignty continues to hold. The notion that a State can exercise a ‘right to visit’ over vessels engaged in the slave trade on the high seas, lacks a sufficient normative basis to have settled as customary international law.¹⁸ UNCLOS does not provide universal jurisdiction for the slave trade (in the way it does for piracy, through article 100), but rather confirms that the flag State has jurisdiction: Article 99 reads “Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose.”¹⁹

¹⁸ Jean Allain, *The Law and Slavery* (Brill Nijhoff, 2013) 7-8; Jean Allain (ed), *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff, 2013) xi, 58

¹⁹ Jean Allain, *The Law and Slavery* (Brill Nijhoff, 2013) 7-9.

In practice, if a foreign flagged vessel on the high seas is suspected being involved in slavery, an intercepting State vessel could assert the right to visit under article 110 of UNCLOS but only in effect, to verify the nationality of the ship; UNCLOS allows no action in the event that the suspicions are confirmed.²⁰ Article 99 of UNCLOS makes clear that “any slave taking refuge on board the ship, whatever its flag, shall *ipso facto* be free.” Therefore a person who escapes a vessel and takes refuge on the visiting ship is free. The 1926 *Slavery Convention* may offer another option. If the flag State were to refuse on multiple occasions to allow interception for the purpose of protecting people on its vessels who are believed to be slaves, the flag State would likely be in breach of its international obligations to eradicate slavery in all its forms and would therefore attract criminal liability because slavery, unlike trafficking in persons, is contrary to a *jus cogens* norm. The 1926 *Slavery Convention* also allows for the creation of regional agreements, which could be used to address the perceived inadequacy of the current legal regime in maritime environments. To date, no such regional instruments have done so.²¹



²⁰ Jean Allain (ed), *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff, 2013) 99-102

²¹ Of note in the context of slavery, is the Inter-American Court of Human Rights decision of *López Soto and others v Venezuela* (2018) being the first decision in which a human rights court found a State responsible for slavery where it is perpetrated by private actors, owing to State's grave omission that effectively allowed the slavery to take place. The court recalled the positive duty of the State to prevent human rights abuses, including those committed by private actors, and in this case found that they failed to exercise due diligence to prevent slavery, being a violation of article 6 of the American Convention on Human Rights: Pact of San José Costa Rica" signed at San José, Costa Rica on 22 November 1969.

2.2. Contiguous zone

For more information:

➤ See *Protection of Migrants at Sea* (IOM, 2018) pp.59-60

In the **contiguous zone**, States may 'exercise the control necessary' to prevent and punish infringements of its customs, fiscal, immigration or sanitary laws and regulations, committed in its territory or territorial waters (article 33, UNCLOS). The opportunities to take action in the contiguous zone to protect migrants depends on the contents of the coastal State's customs, fiscal, immigration or sanitary laws and the extent to which they protect people, including those who are not citizens of the coastal State. In the context of mixed maritime migration, this power of control could be asserted as justification to stop and board a vessel from entering territory where there are reasonable grounds to suspect it intends to infringe immigration laws and to punish, through prosecution, outward bound vessels that have already breached such laws.

Practical challenge: States taking action to 'push back' vessels from the contiguous zone

If a vessel transporting irregular migrants were to enter the coastal State's contiguous zone, the coastal State could take preventive action provided that doing so did not interfere with the right to seek asylum of those onboard, or which otherwise interfered with the enjoyment of their human rights. Thus, a coastal State which attempted to 'push back' a vessel from its contiguous zone could be considered to have exercised 'effective control' over that vessel. As such, this could result in the coastal State breaching international law by interfering with the right to seek asylum. Some States have attempted to use water cannons as way of preventing such vessels from entering the contiguous zone in a way that avoids taking 'effective control'. While this action is arguably compliant with the letter of international law, it would more likely violate its spirit. Efforts of states to carry out 'contactless control' raise questions about the meaning of effective control, with no clear meaning available in international law.²² In the pending case of *S.S. and others v Italy* before the European Court of Human Rights, the applicants are arguing that Italy was exercising jurisdiction by proxy through the Libyan Coast Guard, thereby triggering its human rights obligations under the European Convention on Human Rights.²³

²² For more on the meaning of effective control, see Violeta Moreno-Lax, The Architecture of Functional Jurisdiction: Unpacking Contactless Control - on Public Powers, *S.S. and Others v Italy*, and the 'Operational Model', German Law Journal (2020) 21, pp. 385-416.

²³ See Violeta Moreno-Lax, The Architecture of Functional Jurisdiction: Unpacking Contactless Control - on Public Powers, *S.S. and Others v Italy*, and the 'Operational Model', German Law Journal (2020) 21, pp. 385-416.

2.3. Territorial sea

For more information:

- See *Protection of Migrants at Sea* (IOM, 2018) pp.60-67

The Coastal State enjoys sovereignty in the territorial sea. It can act to take necessary measures against **non-innocent passage** (article 25(1)). This is passage that which is prejudicial to 'peace, good order and security' (article 19) of the Coastal State. Coastal States can also lawfully exercise jurisdiction against a foreign-flagged vessel where the consequences of the vessel's crime extend to the coastal State, the crime disturbs peace of the Coastal State or good order of the territorial sea, or if the assistance of local authorities is requested by the shipmaster or diplomatic or consular officer of the flag State (article 27, UNCLOS). Of relevance in the context of migrants at sea, non-innocent passage includes the loading and unloading of a vessel's passengers contrary to immigration laws (article 19(2)(g)). However, a coastal State may not enforce its criminal laws against a vessel that is transiting "innocently" through its waters, even if it has recently completed the commission of, a crime before entering the territorial waters (article 27(1) and (5), UNCLOS).



Practical challenge: A vessel transporting migrants is passing through territorial seas

A vessel carrying irregular migrants that is transiting through the territorial waters of a coastal State can be considered ‘innocent’, provided that no attempt is made to disembark passengers or otherwise compromise the ‘peace, good order and security’ of the coastal State. Furthermore, an interpretation of UNCLOS cannot be made to extend the meaning of non-innocent passage to include this form of jurisdictional power.²⁴

The *United Nations Convention against Transnational Organized Crime* (UNTOC) and the *Protocol against the Smuggling of Migrants by Land, Sea and Air* (Smuggling Protocol) supplementing it, may serve as a basis for States party to it to intercept vessels believed to be engaged in smuggling of migrants without the authorization of the flag State, if it can be demonstrated that the migrant smuggling activity is transnational (which its passage through territorial waters would confirm) and involves an ‘organized crime group.’²⁵ However, article 4 of the UNTOC reaffirms that States party shall carry out their obligations in a manner consistent with principles of sovereign equality and territorial integrity of States, and that nothing in the UNTOC entitles States party to exercise jurisdiction in the territory of another State, or perform functions that are reserved exclusively for the authorities of that other State by its domestic law.

²⁴ For more on the interpretation of innocent passage, refer to R.R. Churchill and A.V Lowe, *The Law of the Sea*, (3rd ed., Juris Publishing, Manchester University Press, 1999) 83-85

²⁵ “Organized criminal group” is defined as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly a financial or other material benefit” (United Nations Transnational Organized Crime Convention, Article 2(a)). An offence is ‘transnational’ in nature if “(a) It is committed in more than one State; (b) It is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) it is committed in one State but has substantial effects in another State.” (United Nations Transnational Organized Crime Convention, Article 3(2)).

3. Search and rescue

States have an **international customary law obligation** to carry out search and rescue of people in distress or imminent danger. That obligation is codified in international treaties.

The duty to rescue in international law

The duty to rescue and render assistance to persons in distress at sea is enshrined in Article 98(1) of UNCLOS which requires both States and private vessels to:

- (a) Render assistance to any person found at sea in danger of being lost
- (b) Proceed with all possible speed to rescue persons in distress as far as one can reasonably expect; and
- (c) After a collision, render assistance to the other ship, its crew and its passengers and, where possible, inform the other ship of the name of his own ship, its port of registry, and the nearest port at which it will call.

The obligation is further codified in

- *Convention for Safety of Life at Sea* (SOLAS) (Chapter V, Regulations 7 and 33), and
- *Convention on Maritime Search and Rescue* (SAR)

Similar provisions are contained in the *International Convention on Salvage* of 1989, in relation to rendering assistance to any person in danger of being lost at sea (article 10).

The SAR Convention defines '**distress**' as a "a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance" (SAR Convention, 1.13). Shipmasters are given broad discretion in how they render assistance.

Table 3: Definitions relevant to Search and Rescue

Search	An operation, normally coordinated by a rescue coordination centre or a rescue sub-centre, using available personnel and facilities to locate persons in distress. Source: SAR Convention, Annex Chapter 1, 1.3.1.
Rescue	An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety. Source: SAR Convention, Annex Chapter 1, 1.3.2.

The established maritime tradition of search and rescue first emerged at a time when those rescued were largely fishermen or merchant seafarers who would be taken to the next port of call, from where they would return home. But some of the underlying assumptions of that time have broken down in the modern context of mass maritime migration. For example, the captain of a vessel that experiences serious mechanical failure in dangerous weather conditions on the high seas may be reluctant to acknowledge the situation as one of distress if the vessel is smuggling migrants and he fears discovery. International law does not clearly indicate who is responsible for deciding if a situation constitutes one of distress, and instead seems to expect that distress will be determined through a process of coordination and communication between concerned parties.

Other complications arise where migrants are instructed by smugglers to sabotage vessels to force rescue or who do not wish to return home or may not be able to, owing to the principle of *non-refoulement*. Rescued migrants may even force or threaten rescuers to take them to a particular destination, and risk being prosecuted for facilitating irregular migration in doing so. Mass maritime migration has also provoked questions about whether States can be held accountable (for instance, in national or other courts) for failing to respond to a situation of distress in a maritime area for which they are responsible.

While the challenges of upholding the duty to render assistance do not detract from the fundamental importance of doing so, present-day political realities are such that many States and other actors may be reticent to fulfil their obligations to people at sea. The result is that international law may be interpreted in a way that elevates State interests above the rights of migrants, to prevent persons from making asylum claims on their territory. While many States have entered into agreements to establish Search and Rescue Regions (SRRs), these agreements serve to identify the State responsible for *coordinating* search and rescue in a given maritime area; they do not obligate the coordinating State to carry out the search and rescue operation.

Consequently, there continues to be confusion about who is ultimately responsible for rescuing migrants at sea, between:

- The State responsible for the Search and Rescue Region (SRR)
- The State with the operational capacity to carry out the rescue, and
- The flag State of the nearest vessel that is able to rescue migrants.

The duty to rescue at sea applies in all maritime zones, and to ‘any person’ found to be in distress at sea, regardless of their nationality, legal status, or reason for being at sea. While the obligation is clear, it poses significant challenges in practice.



3.1. Duty to coordinate and cooperate

For more information:

- See *Protection of Migrants at Sea* (IOM, 2018) pp.75-83

The 1979 *Maritime Search and Rescue Convention* (SAR Convention) obligates States party to establish contiguous search and rescue regions (SRR) and rescue coordination centres (RCC) “to ensure that assistance is rendered to any person in distress at sea.” Each RCC is responsible for coordinating the rescue of vessels in distress or persons in danger of being lost at sea within its SRR. Since the adoption of the SAR Convention, the world has been divided into 13 search and rescue regions of responsibility, with the shape and size of each depending on *inter alia* ship density and patterns, resources, communications networks, and “by the agreement of the Parties concerned”²⁶. For this reason, a country’s Search and Rescue Region (SRR) may not match coastal state maritime zones. The SAR Convention further requires that States party to it establish rescue coordination centres (RCC).

A revised Annex was added to the SAR Convention Amendments in 1998 that entered into force in 2000 to clarify the organization and coordination of search and rescue services; require cooperation between States, operating procedures, and ship reporting systems.²⁷ Amendments made to the SAR Convention in 2004 added new paragraphs relating to the definition of ‘person in distress’ (chapter 2), assistance to ship masters to deliver persons rescued at sea to a place of safety (chapter 3), and rescue coordination centres initiating the process of identifying the most appropriate places for disembarking persons found in distress at sea (chapter 4).

²⁶ Article 2.1.4, International Maritime Organization (IMO), International Convention on Maritime Search and Rescue, 27 April 1979, 1404 UNTS.

²⁷ The International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual offers further detail.

Obligation to establish search and rescue centres: 1979 Search and Rescue Convention

Chapter 2: 2.1. Arrangements for provision and co-ordination of search and rescue services

2.1.1. Parties shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts. The notion of a person in distress at sea also includes persons in need of assistance who have found refuge on a coast in a remote location within an ocean area inaccessible to any rescue facility other than as provided for in the annex.

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.

Chapter 3: 3.1. Co-operation between States

3.1.1. Parties shall co-ordinate their search and rescue organizations and should, whenever necessary, co-ordinate search and rescue operations with those of neighbouring States.

3.1.2. Unless otherwise agreed between the States concerned, a Party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory of rescue units of other Parties solely for the purpose of search for the position of maritime casualties and rescuing the survivors of such casualties. In such cases, search and rescue operations shall, as far as practicable, be co-ordinated by the appropriate rescue co-ordination centre of the Party which has authorized entry, or such other authority as has been designated by that Party.

3.1.9. Parties 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, providing that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In the cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.

Practical challenge: Determining which States are responsible for search and rescue

Problems operationalizing legal obligations to coordinate rescue arise when States assume search and rescue responsibilities that stretch their operational capacities or when they encounter scenarios that challenge their policy interests, such as cases involving irregular migrants and asylum-seekers. Challenges also arise when States fail to cooperate, or disagree about their responsibilities.

In practice, the RCC that first becomes aware of a situation of distress maintains the coordination responsibility until it is able to transfer the responsibility to another State's RCC or the people at risk of being lost have reached a place of safety, irrespective of the SRR in which the distressed vessel is located.

Practical challenge: a vessel in distress is in the territorial waters of another State

The RCC that first becomes aware of a situation of distress remains responsible for coordinating response, even if the distressed vessel is located in the territorial waters of another State. In such a case, rather than direct its naval or other state vessels to render assistance, the RCC could request the assistance of, or requisition, a private vessel to carry out the rescue. This would mitigate the risk that the coastal State will misinterpret the intervention as an unlawful incursion into its territory. Article 18(2) of UNCLOS explains that for passage to be innocent, it must be continuous and expeditious, but can include 'stopping and anchoring' if necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. A foreign vessel that enters the territorial waters of another State for the purpose of executing rescue is not able to assert that it is exercising the right of innocent passage under article 19(2) of UNCLOS, and so may be vulnerable to criminal prosecution.²⁸ However, some experts point to exceptional circumstances that may preclude wrongfulness, for instance, under the *Law of State Responsibility*. It is therefore critical that the coordinating SRR continue to communicate the status of the operation and the actions being taken until the rescue operation has concluded.

²⁸ Also see: International Maritime Organization (IMO), International Convention on Maritime Search and Rescue, 27 April 1979, 1404 UNTS.: 3.1.3. Unless otherwise agreed between the States concerned, the authorities of a Party which wishes its rescue units to enter into or over the territorial sea or territory of another Party solely for the purpose of searching for the position of maritime casualties and rescuing the survivors of such casualties, shall transmit a request, giving full details of the projected mission and the need for it, to the rescue co-ordination centre of that other Party, or to such other authority as has been designated by that Party.

3.1.4 The competent authorities of Parties shall: .1 Immediately acknowledge the receipt of such a request; and .2 As soon as possible indicate the conditions, if any, under which the projected mission may be undertaken.

Practical challenge: non-state vessels involved in search and rescue

There is no obligation for an RCC to deploy government vessels to carry out search and rescue; they may utilize government or private vessels when coordinating search and rescue. Private vessels have a duty under article 98 of UNCLOS to respond to situations of distress if it is “reasonable” for them to do so. This would include responding positively to any instructions from the RCC. RCC instructions are not binding on the master of a private vessel flying a foreign flag; international law allows masters to determine ‘reasonableness’ and therefore they are permitted to decline instructions to involve their vessels in rescue provided they record in the ship’s log the reasons for refusal; and notify the search and rescue services accordingly.²⁹ Italian courts have held that the master of a private vessel can avoid criminal liability, if s/he were to disregard an order by an RCC to disembark those rescued in a state that s/he believes to be unsafe.³⁰ Neither could the master of a private vessel be held criminally liable for disembarking those rescued in the territory of an RCC which expressly prohibited such action if doing so was necessary to ensure the safety of those on board. Masters of private vessels owe the same human rights obligations to the rescued persons as if they were government officials, although it is less clear whether, in carrying out rescue, private vessels are acting as agents of the State.

NGO vessels are governed by their flag States and, even though they may present coastal States or SRR States with distinctive political challenges, they are otherwise no different to, and have the same rights and obligations as any private vessel.

²⁹ Safety of Life at Sea Convention, Chapter V, Regulation 33, on Distress situations: obligations and procedures: “If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization, to inform the appropriate search and rescue service accordingly.”

³⁰ For instance, on 17 January 2020, the Supreme Court of Cassation of Italy ruled that the arrest of Captain Carola Rackete, for docking at the port of Lampedusa, Sicily to disembark 42 rescued migrants, had been unwarranted. The Court confirmed that Captain Rackete was doing her duty to save lives, as required by UNCLOS.

Good practices for cooperation and coordination

- Regularly update agreements between national search and rescue (SAR) agencies;
- Put in place a diplomatic clearance exemption clause in bilateral SAR agreements, so as not to require clearance for a State's aircraft or vessels to enter territorial waters to respond to search and rescue incidents;
- Put in place regional and bilateral liaison arrangements for information-sharing (including a communication system that is manned 24/7) to settle operational difficulties and avoid disputes and standoffs;
- Put in place regional financial and logistical burden-sharing arrangements and mechanisms to allocate resources and facilities of third States to reduce the burden on coastal States responsible for a large SRR.
- Address maritime human trafficking, people smuggling and mixed migration in joint capacity building workshops and table-top exercises that foster relationship and network-building between States.

Sources: *Protection of Migrants at Sea* (IOM, 2018); *Mastering Maritime Security* (Safeseas, 2018).

3.2. Duty to respond to situations of 'distress'

For more information:

➤ See *Protection of Migrants at Sea* (IOM, 2018) pp.84-92

Article 98 of UNCLOS requires States to ensure all flagged vessels respond to situations of distress. However, international law does not clearly indicate who is responsible for deciding if a situation constitutes one of distress. In practice, what constitutes distress is determined by a process of coordination and communication between concerned parties, including the master of the afflicted vessel. According to IMO guidance, the shipmaster's assessment is a pivotal indicator to determine the reality and foreseeability of threats to life at sea.³¹ Indeed, the shipmaster, as the person responsible for safety and security of the vessel and its passengers is also responsible to determine when external assistance is required to ensure their safety and security.³² The *International Maritime Organization Guidelines on the Treatment of Persons Rescued at Sea* confirm that in some cases it may be advisable for the RCC to arrange for search and rescue or other personnel to visit the assisting ship to assess the situation on board, to help meet needs on board, or to facilitate safe and secure disembarkation of rescued persons.³³

³¹ IMO Guidelines on The Treatment of Persons Rescued at Sea (MSC 78/26/Add.2) [5.1.2], [5.1.5]-[5.1.6]).

³² SOLAS Regulation 34-1

³³ IMO Guidelines on The Treatment of Persons Rescued at Sea (MSC 78/26/Add.2) [6.11]).

Table 4: Phases of emergency set out in SAR Convention

Emergency phase Annex Chapter 1, 1.3.10.	A generic term meaning, as the case may be, uncertainty phase, alert phase or distress phase.
Uncertainty phase Annex Chapter 1, 1.3.11.	A situation wherein uncertainty exists as to the safety of a person, a vessel or a craft.
Alert phase Annex Chapter 1, 1.3.12.	A situation wherein apprehension exists as to the safety of a person, a vessel or other craft.
Distress phase Annex Chapter 1, 1.3.13.	A situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.

European Union law also offers guidance on factors that can be relevant in determining situations of distress. The *EU Sea Border Regulation* notes that the existence of a request for assistance is not the sole factor for determining distress, but that other factors may be relevant including:

- seaworthiness and likelihood of reaching final destination;
- number of persons on board in relation to the type and condition of the vessel;
- availability of necessary equipment and supplies such as fuel, water and food to reach shore;
- presence of a qualified crew and command of vessel;
- availability and capability of safety, navigation and communication equipment;
- presence on board of persons in urgent need of medical assistance; presence on board of deceased persons;
- presence on board of pregnant women or of children, the weather and sea conditions, including weather and marine forecasts.³⁴

³⁴ See: Regulation (EU) 656/2014 on the surveillance of the external sea borders in the context of operational cooperation coordinated by FRONTEX (EU Sea Border Regulation) [2014] OJ L 189, art 9(2)(f).

Practical challenge: State responsible for SRR does not respond to situation of distress

While a State that chooses not to respond to a situation of distress in its SRR maintains joint responsibility for the operation together with the coordinating State, there appear to be few legal options available to hold a non-responsive State accountable.³⁵ In the absence of liability clauses in international instruments, remedies could be sought from courts in the non-responsive State. Alternatively, actions could be taken to limit the SRR of a non-responsive State if a pattern of systematic non-responsiveness were to emerge.³⁶

Practical challenge: Rescue is refused by shipmaster of vessel in distress

The shipmaster has full responsibility for the vessel and if he or she declines to recognize a situation of distress on his vessel, there is no way of forcing rescue either of the vessel or of individual passengers onboard in international law. Domestic law may make a clear when and how the master has to act. This reality can pose challenges in protecting migrants at sea, for instance where the master of a vessel is a migrant smuggler, or is mistreating workers on board a vessel at sea. Here it must be noted that there is no minimum qualification or certification required for person to be considered a ‘master’ of a vessel.

In the event that the offer of rescue is refused by the master of a flagged vessel, the rescuing government vessel may exercise the right of visit to verify that the flag State registration information, during which time it may also better assess any situation of distress that may be in dispute. Should the visiting vessel then be confident in its assessment that the vessel or any of its passengers is in danger of being lost, or identifies criminal or other problematic practices or activities on-board, it must then request and receive authorization from the flag State for any further action it may wish to take to save lives. However, according to the Smuggling of Migrants Protocol, a State shall take no additional measures without the authorization of the flag State, “except those as necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.”³⁷

³⁵ A non-responsive State could be subject to a claim for breach of international obligations, though this would be difficult and unlikely.

³⁶ International Maritime Organization (IMO), International Convention on Maritime Search and Rescue, 27 April 1979, 1404 UNTS.: 2.1.4 “Each search and rescue region shall be established by agreement among Parties concerned. The Secretary-General shall be notified of such agreement.”

³⁷ Smuggling of Migrants Protocol, article 8(5).

Practical challenge: Persons rescued have protection needs

Migrant smugglers have been known to place migrants in situations to force their rescue, thereby exploiting the legal obligation of rescuing States not to return or *refoule* persons who has a risk of being subject to torture or another form of persecution upon their return. Regardless of whether a State characterizes an operation as 'rescue' or 'interception' on the high seas, the guiding principle is 'effective control.' If there is effective control, then the obligations of the rescuing / intercepting State to the passengers and crew remain the same and their rights must be protected.

In practice, this means that a rescuing State would be in breach of its obligations if it were to tow or otherwise transport the crew or passengers of another vessel to a State where rescued and disembarked persons would be unable to access fundamental rights including protection from torture, inhuman and degrading treatment and from *refoulement*. If there are asylum-seekers on board, an assessment of the credibility and functionality of the asylum system of a third State would also be required before they could be disembarked. The master of the rescuing vessel would also have a positive obligation to determine whether any of the rescued passengers has a fear of returning to their home country prior to determining place of disembarkation.

4. Disembarkation

For more information:

- See *Protection of Migrants at Sea* (IOM, 2018) pp.93-101

A rescue operation does not end until persons rescued are delivered to a **place of safety**, described by IMO Guidelines as a place where the rescued person's life is no longer threatened, their basic human needs (food, shelter, medical needs) can be met, and transportation to the next or final destination can be arranged.³⁸

In 2012, the European Court of Human Rights established in its *Hirsi Jamaa and Others v Italy* (Application No. 27765/09) decision the principle that a place of safety cannot include a State which is not party to the main international human rights instruments, including the 1951 Refugee Convention, nor can it include a place where treatment is likely to be inhumane or where conditions are poor such that they do not meet basic human rights standards. Neither should a vessel be considered a place of safety for the purpose of processing asylum claims because of the impracticality of being able to fairly adjudicate asylum claims in such an environment, including allowing for decisions to be appealed in the case of rejected claims. This does not preclude the possibility that refugee status determination may occur in a third State, or within a safe place (eg. refugee camp) in an otherwise unsafe country. Nor does it preclude the possibility that a vessel may be a place of safety before disembarkation can be achieved.³⁹

There is no obligation in international law to allow disembarkation. In practice, the existence of such an obligation would serve as a disincentive for States to carry out search and rescue, and would put the rescue regime into jeopardy. Accordingly, there is a need to decouple rescue obligations from disembarkation obligations, so as not to discourage rescue from taking place. At the same time, linking UNCLOS and IMO obligations may serve to provide some guidance. Put in other words, law of the sea considerations must be kept distinct from border control considerations.

³⁸ IMO Guidelines on the Treatment of Persons Rescued at Sea (2014) Guideline 6.12, 6.13 and 6.14.

³⁹ IMO Guidelines On The Treatment Of Persons Rescued At Sea (MSC 78/26/Add.2), 6.14: "A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination."

Box: Case study on balancing sovereign rights of states with the duty to render assistance

German Captain Carola Rackete was charged with contravening Italian Naval Code and the Italian Criminal Code, in relation to her activities while docking at the Italian port of Lampedusa to offload rescued migrants, in defiance of official instructions from Italian border authorities. In the first instance, the Court of Agrigento stressed that “the principle of the freedom of states to regulate the flows of entry into their national territory (expression of sovereignty)” should be in line with “the limits deriving from customary law and from the limits that the state undertakes by adhering to international treaties” among which are “the duty to render assistance to ships in difficulty and rescue persons at sea and the obligation, on the part of the state authorities, to provide first aid and assistance to foreigners who have entered, even irregularly the territory of the state.”⁴⁰ On 17 January 2020, Italy’s Supreme Court of Cassation, the highest court of appeal, acquitted Captain Rackete on all charges, finding that she was doing her duty to save lives as required by article 98 of UNCLOS, as well as the SOLAS and SAR Conventions.

Practical challenge: Nearest port of safety not willing to allow disembarkation

The primary responsibility for ensuring disembarkation of rescued persons and their delivery to a place of safety falls on the State responsible for search and rescue coordination.

Amendments to both SOLAS and SAR emphasize the need for States to cooperate in relieving private ships of survivors, but in practice, there have been situations of non-State vessels being refused a place of disembarkation, meaning that others have been deterred from carrying out rescues.

A State which has rescued a vessel in distress, regardless of maritime jurisdiction, has an obligation to provide assistance such as food, water, fuel, etc. to the point that those in distress are no longer at risk. International law requires that the State whose RCC has coordinated the rescue continue coordination until those rescued have found a “place of safety”, but rescue coordination does not create an obligation for the rescuing State to allow disembarkation on its own territory unless the State can be said to have exercised “effective control” over the vessel in distress or its passengers. If, however, the coordinating State’s Coast Guard vessel has transferred migrants onto the Coast Guard vessel, rather than simply providing them with food or fuel, then international law would consider those persons to be within the control of that State, thus triggering human rights obligations that would

⁴⁰ UNODC Case Law Database summary of Court of Agrigento decision of 2 July 2019; Italy’s Highest Court Rejects Charges against Rescue Ship, Maritime Executive 17 January 2020, available at: <https://www.maritime-executive.com/article/sea-rescue-captain-cleared-of-charges-for-unauthorized-port-entry>

prohibit any unnecessary delay in getting them to port. In attempting to resolve the issue of disembarkation, some States have argued that disembarkation should occur at the nearest available port while others have argued for the next port of call. The decision as to where rescued persons should be disembarked requires a balance to be struck between the sovereign right of States to determine who enters its borders, and its duties and obligations to rescued individuals.

Practical challenge: rescue at sea necessitates disembarkation of rescued persons

Decisions to rescue migrants at sea have been subject to political considerations in a way that decisions to rescue affluent passengers of cruise ships in distress are not. States may be concerned that upon effecting the rescue of a vessel carrying asylum-seekers, for example, they will be compelled by circumstance to allow disembarkation on their territory and thus will need to manage their asylum claims, possibly for a protracted period. This may involve considerable financial expenditure or antagonize local populations, especially in contexts where smuggling vessels carrying irregular migrants or asylum-seekers have been a consistent challenge.

In international law, there is no obligation for the rescuing vessel to disembark migrants who have been rescued at sea on the territory of its flag State. Once safety of life has been addressed, coastal States may determine how to deal with requests for assistance from vessels in distress, having regard to their own interests. The right to be rescued from a situation of distress at sea does not create a corresponding obligation of any State to allow entry to a particular port or into particular waters.

Practical challenge: flag State of vessel in distress is non-responsive

If the master of the rescuing vessel is of the view that a rescue is necessary to save a life or lives on board, and there is insufficient time in which to seek the permission of the flag State, or the flag State is not responsive to efforts to communicate, any action taken in the absence of such permission is a clear violation of the fundamental principle of flag State jurisdiction. This would be so, even if action were required on the high seas to save the life of someone in need of rescue, or even to prevent severe child abuse, or to prevent a murder from taking place. Indeed, even if the transport of slaves is suspected on the high seas, the rescuing vessel could at most exercise the right to visit but no further action is currently permitted under international law without the authorization of the flag State.

However, while the principle of flag state jurisdiction is a cornerstone principle of the law of the sea, masters of vessels who find themselves in such a predicament may wish to weigh this against the competing principle of primacy of life and act accordingly to effect a rescue. In such cases, if the flag State were to raise an

argument that rescue should not have been carried out without its prior permission, ‘distress’ could be invoked as a defence for interfering with the exclusive jurisdiction of the flag State.

5. Conclusion

International law of the sea contains significant gaps in protection for migrants at sea, leaving States in a position to self-regulate in fulfilling responsibility to people who fall within their maritime jurisdiction. States have also proven reluctant to expand their enforcement powers to protect people at sea. More often, the reverse has been true, with States not taking steps to leverage the law to protect migrants whose lives are in danger, but rather exploring the capacity of the law to be interpreted and applied in a way that avoids responsibility. This is particularly evident in the flagging system that has been used by flag States to generate revenue, rather than an opportunity to ensure the protection of those in need. It is also evident in the actions of States to avoid triggering responsibilities to people who have been rescued at sea.

Of key importance in the interpretation and application of international law in the maritime context is the primacy of life at sea.⁴¹ The law of the sea has emerged from a long tradition of maritime travel. Throughout the evolution of that law, safety of life at sea has remained the primary determinant of how law should be interpreted and applied. The challenges posed to that principle are increasingly complex in the current landscape of mass maritime movement, involvement of transnational organized criminals in facilitating it, and the diversified routes and methods used. Indeed, not all of the challenges of applying law in practice relate to political and pecuniary motives. Some international law evolved at a time where drafters did not foresee mass movements of people at sea at the hands of criminals who would profit from their movement, and take active steps to exploit the obligations set out for States therein.

But these challenges in no way diminish the primacy of safety of life at sea as the paramount consideration. The fundamental importance of upholding international law - including human rights, humanitarian law, refugee law, transnational criminal law and customary law alongside law of the sea - remain. It is hoped that States Parties will increasingly seize opportunities to leverage this framework and the norms and standards supporting it, towards fulfilling their obligations to protect migrants at sea.

⁴¹ See: UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (article 3); and UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 United Nations Treaty Series, vol. 999 (article 6)

PART II

PRACTICAL SCENARIOS

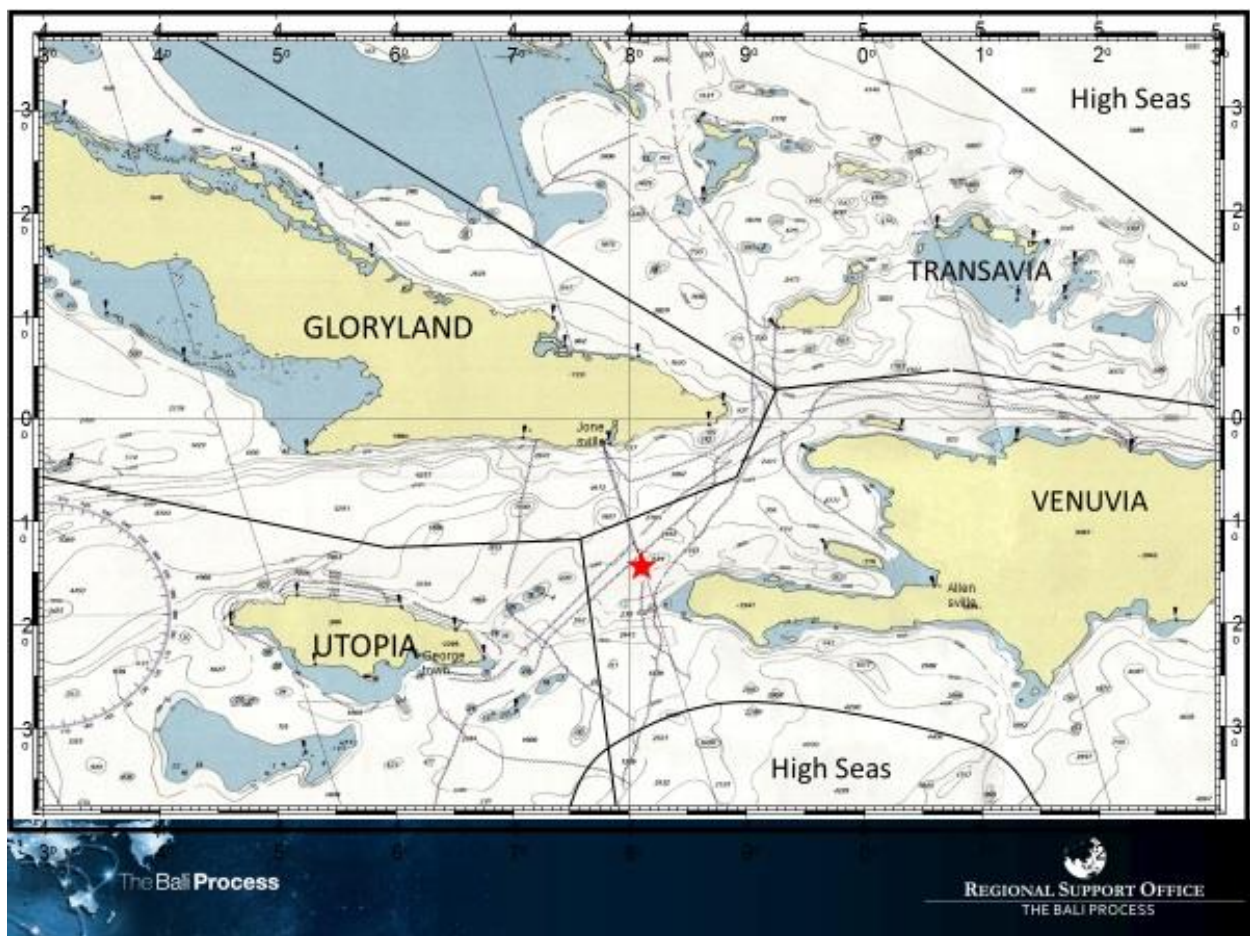
PART II. PRACTICAL SCENARIOS

Section 1. Discussion scenarios

Interception / Interdiction

Scenario 1a (15 minutes)

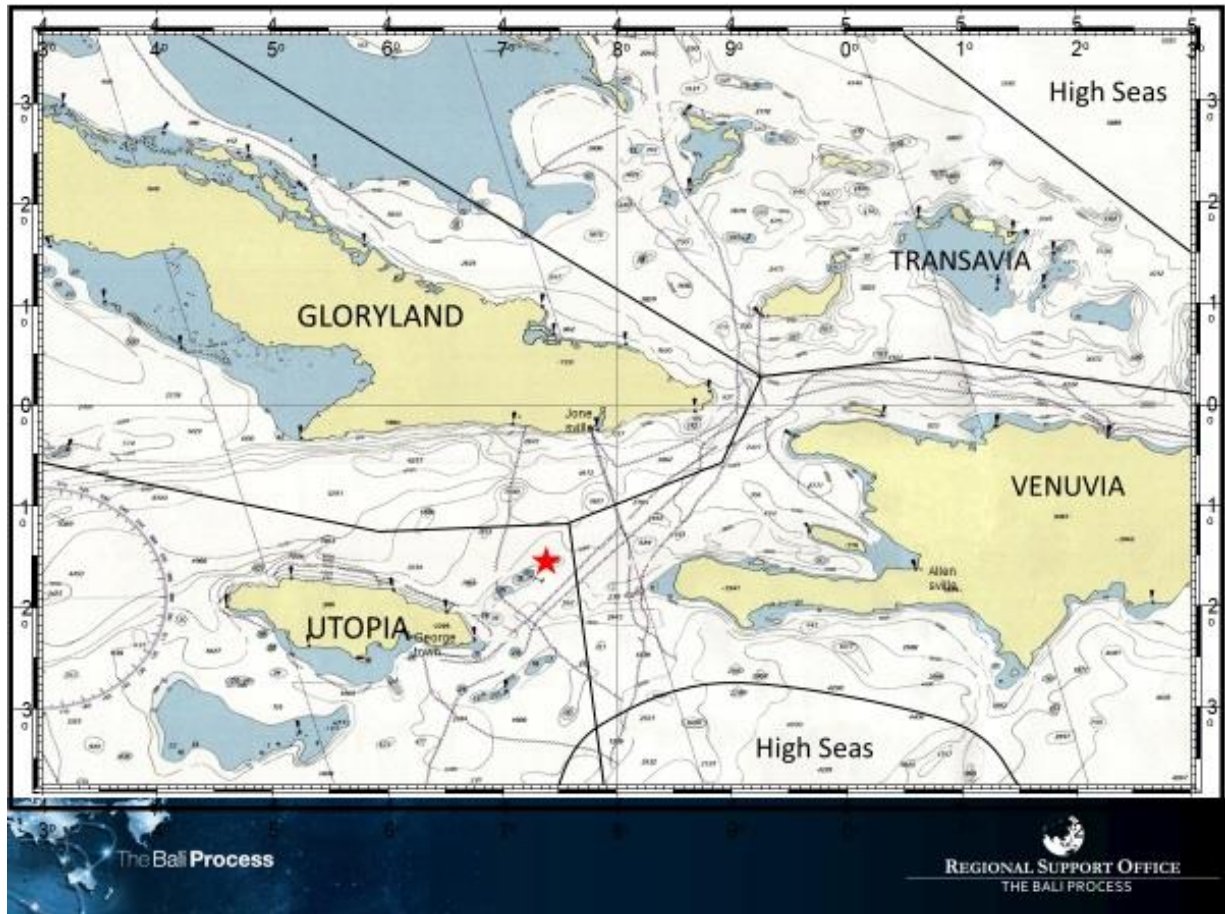
A vessel loaded with potential irregular migrants and asylum seekers is passing through the territorial waters of Venuvia towards Utopia.



- Does this constitute innocent passage or is it prejudicial to the peace, good order or security of Venuvia (art 19, UNCLOS)? Why?
- If this is occurring in the contiguous zone, what measures could be taken under UNCLOS (art 27) or the Smuggling Protocol (art 8) by Venuvia?

Scenario 1b (15 minutes)

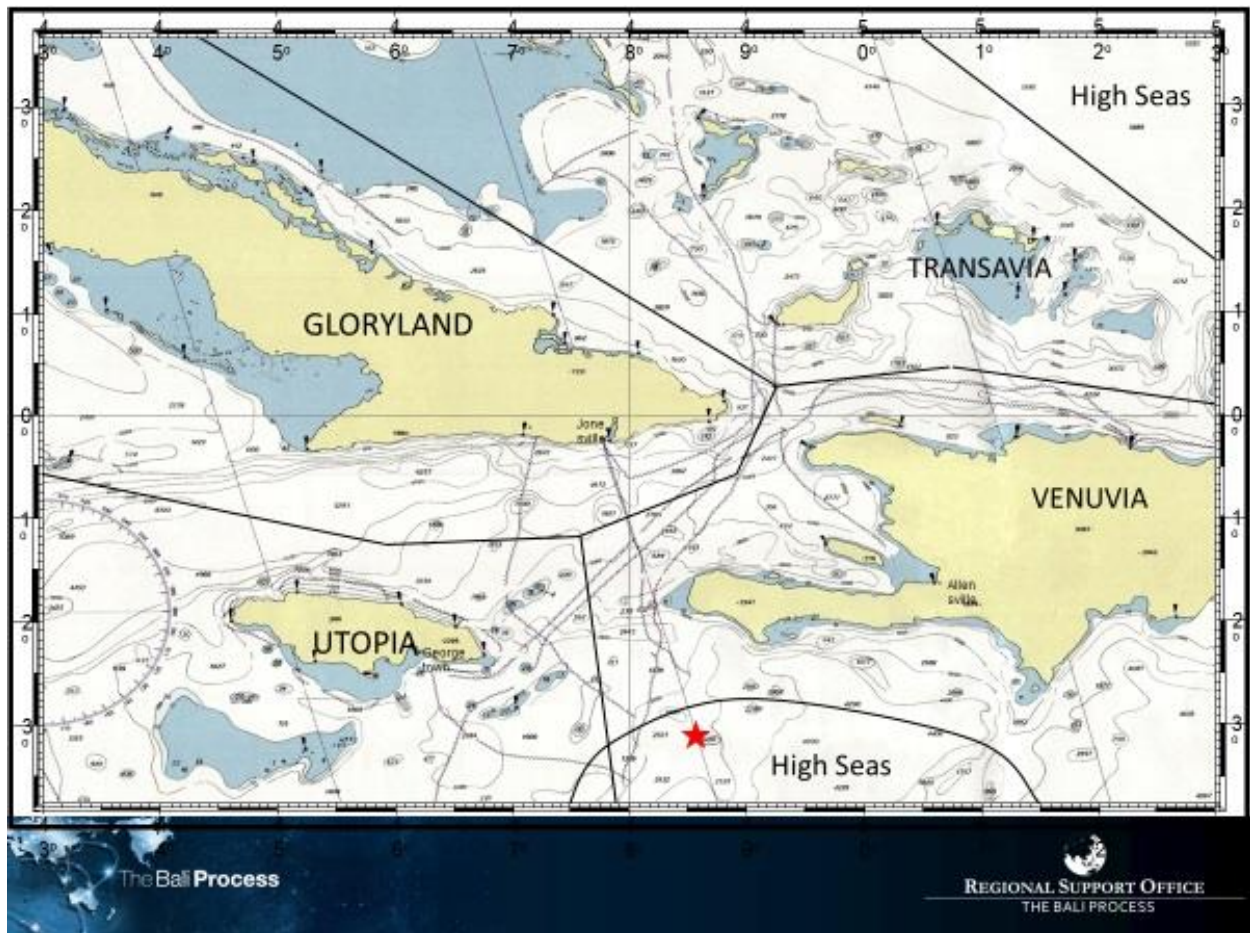
This vessel, containing irregular migrants and potential asylum seekers, enters Utopia's contiguous zone.



- What would constitute an infringement of Utopia's immigration laws (per article 33 of UNCLOS)? Would claiming asylum infringe immigration law?
- What can Utopia do to 'exercise the control necessary' to prevent infringements of its immigration laws? What can it not do (e.g. can it push back / tow back to high seas)?

Scenario 2a (15 minutes)

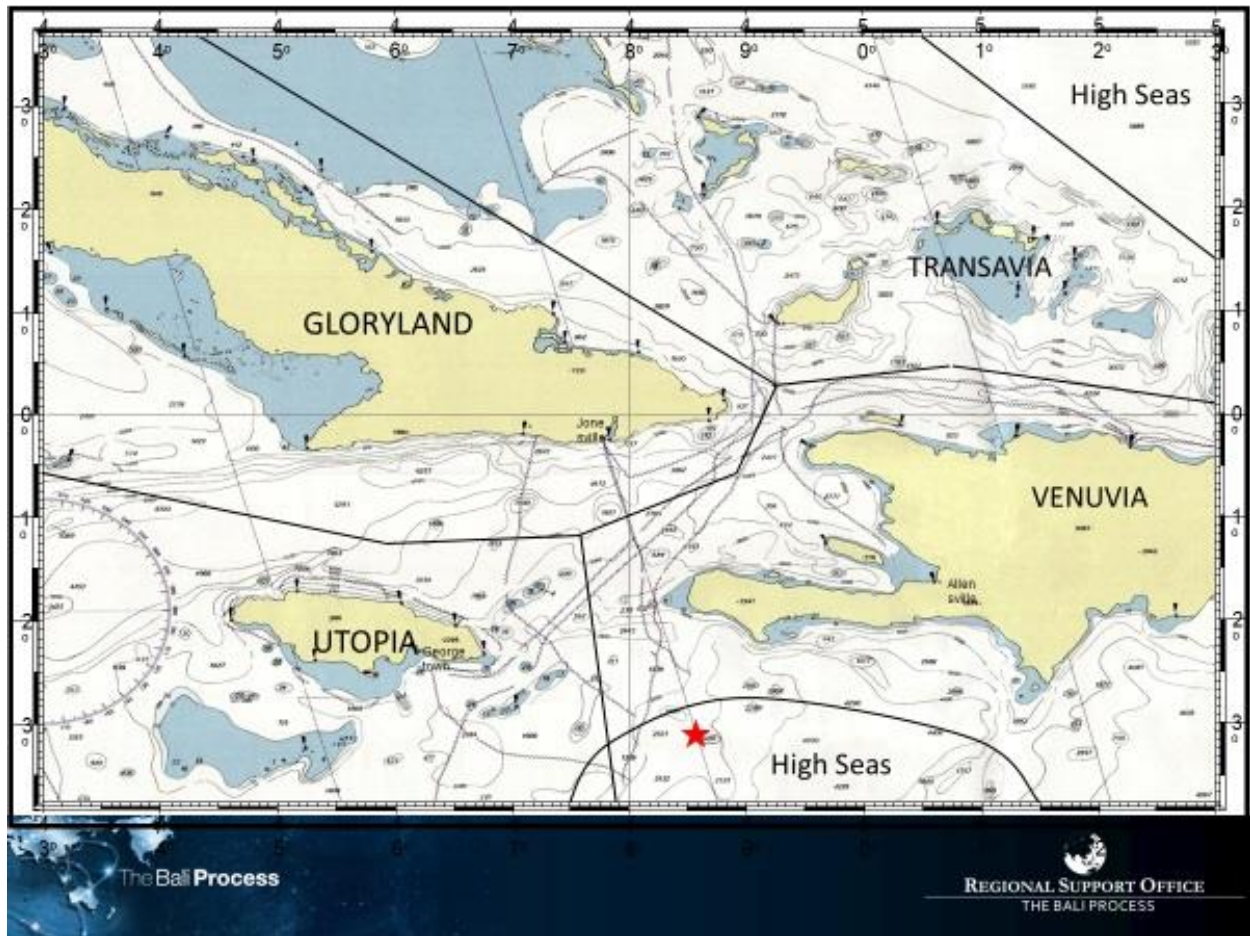
Utopia learns of a Transavian-flagged vessel on the high seas being used to smuggle migrants to Utopia. Utopia's 'Ocean Act' extends its maritime enforcement jurisdiction into the high seas.



- What basis / legitimacy, if any, does the Ocean Act have in international law?
- What international laws determine what Utopia can and cannot do in response?
- What relevance, if any do the principles of Use of Force and / or Rules of Engagement have in determining what actions Utopia can and cannot take?

Scenario 2b (15 minutes)

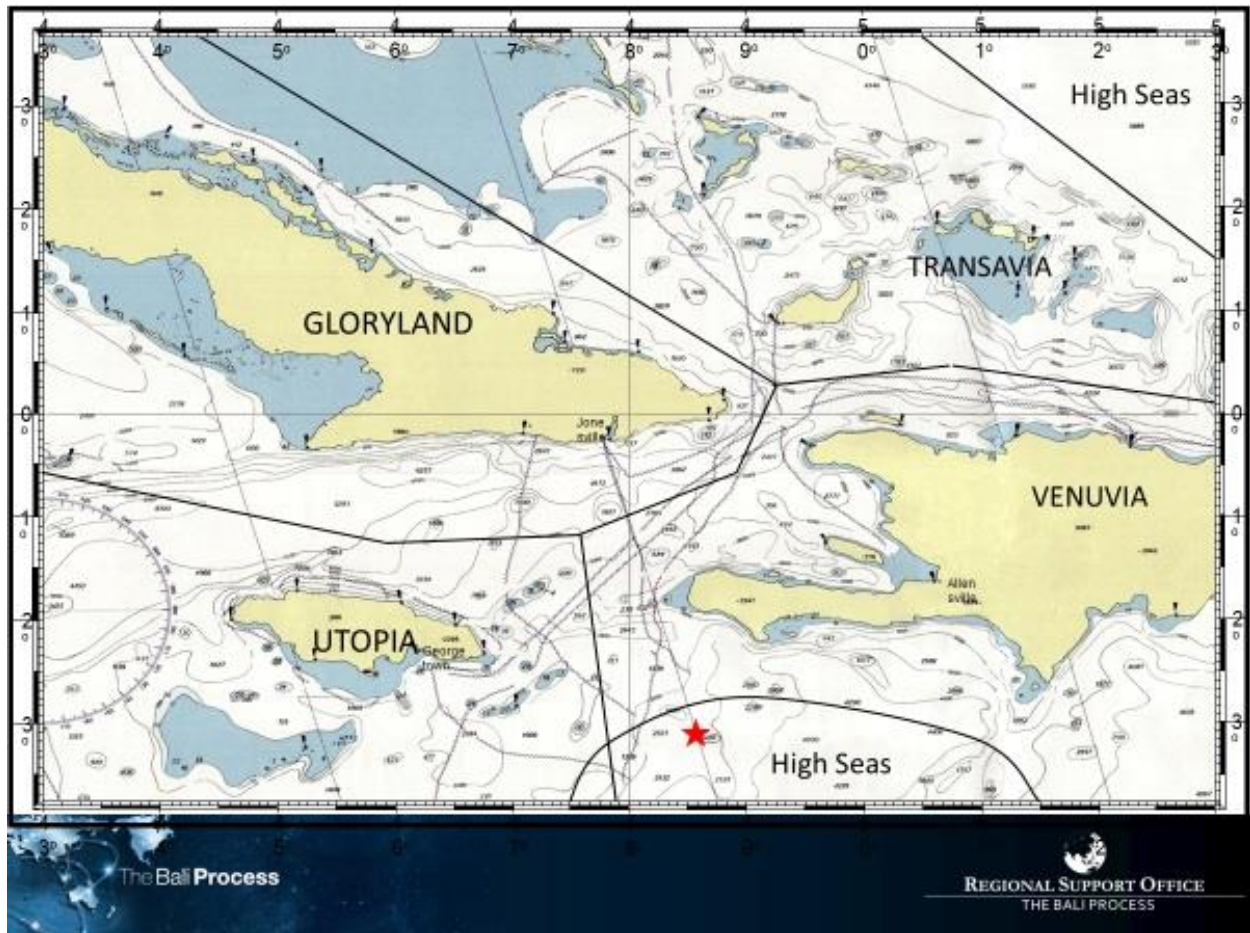
Transavia informs Utopia that it has de-flagged the smuggling vessel.



- What actions can Utopia take on the basis of Article 110 of UNCLOS? What actions, if any, *must* be taken?
- What actions can Utopia take in relation to the smuggling vessel, on the basis of the Smuggling of Migrants Protocol? What would constitute 'appropriate measures'?

Scenario 2c (15 minutes)

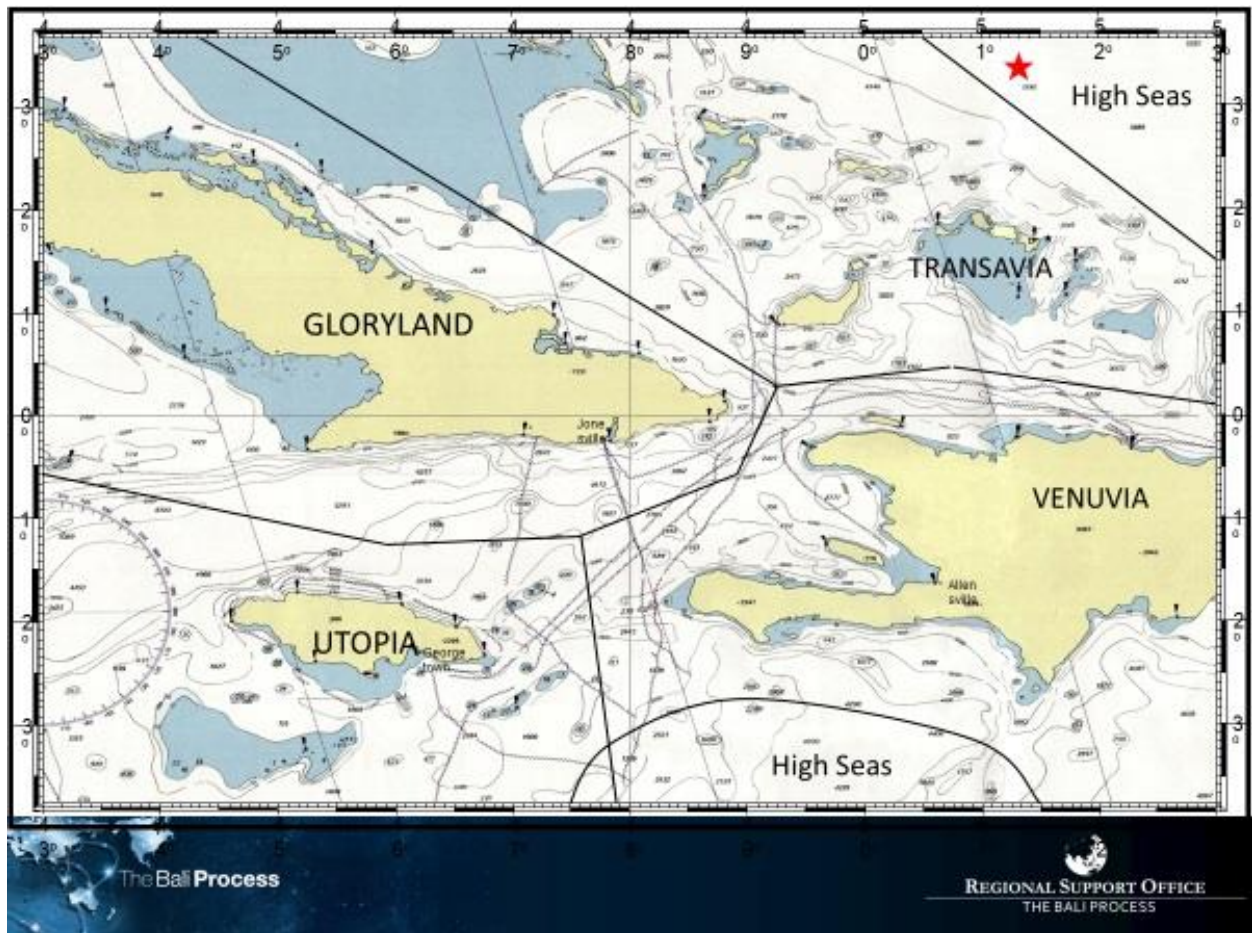
Transavia shares intelligence with Utopia that among the 64 passengers on the vessel are 2 men, 1 women and 1 child who are being trafficked.



- What actions could Utopia take in relation to this vessel?
- Under what circumstances, if any, *must* Utopia take action?

Scenario 3 (30 minutes)

A Gloryland navy ship receives intelligence that crew members on a nearby fishing vessel are enslaved migrant workers. The vessel is on the high seas and is flagged to Transavia

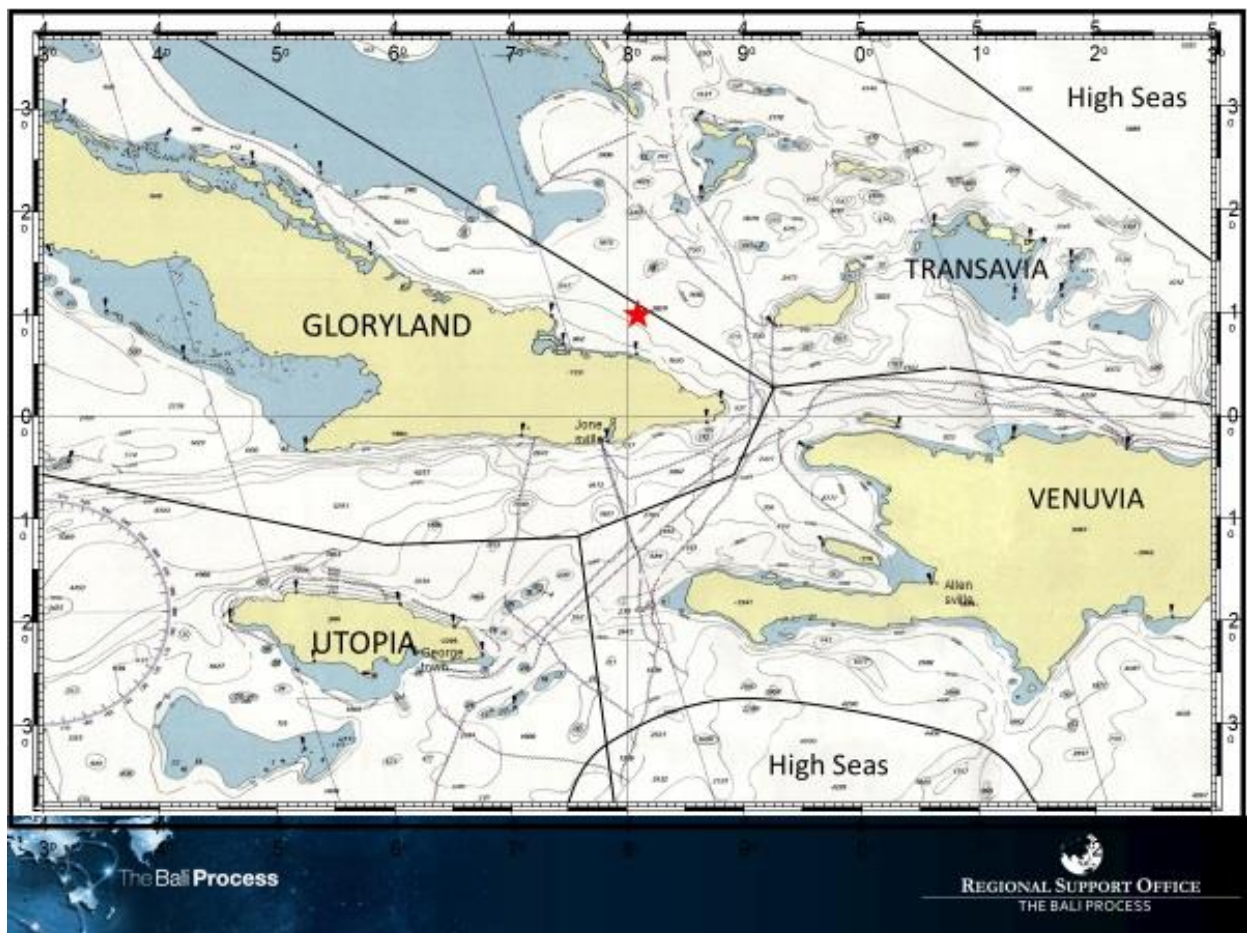


- Under what international law, if any, **could / must** Gloryland take action? What action? (e.g. UNCLOS, Slavery Convention, Trafficking Protocol, ICCPR, ILO Conventions, other?)
- At what point would this situation be one of 'distress'? Who's determination of distress would prevail (e.g. between Gloryland, Transavia, the captain, and the workers on board?)

Search and Rescue

Scenario 1a (20 mins)

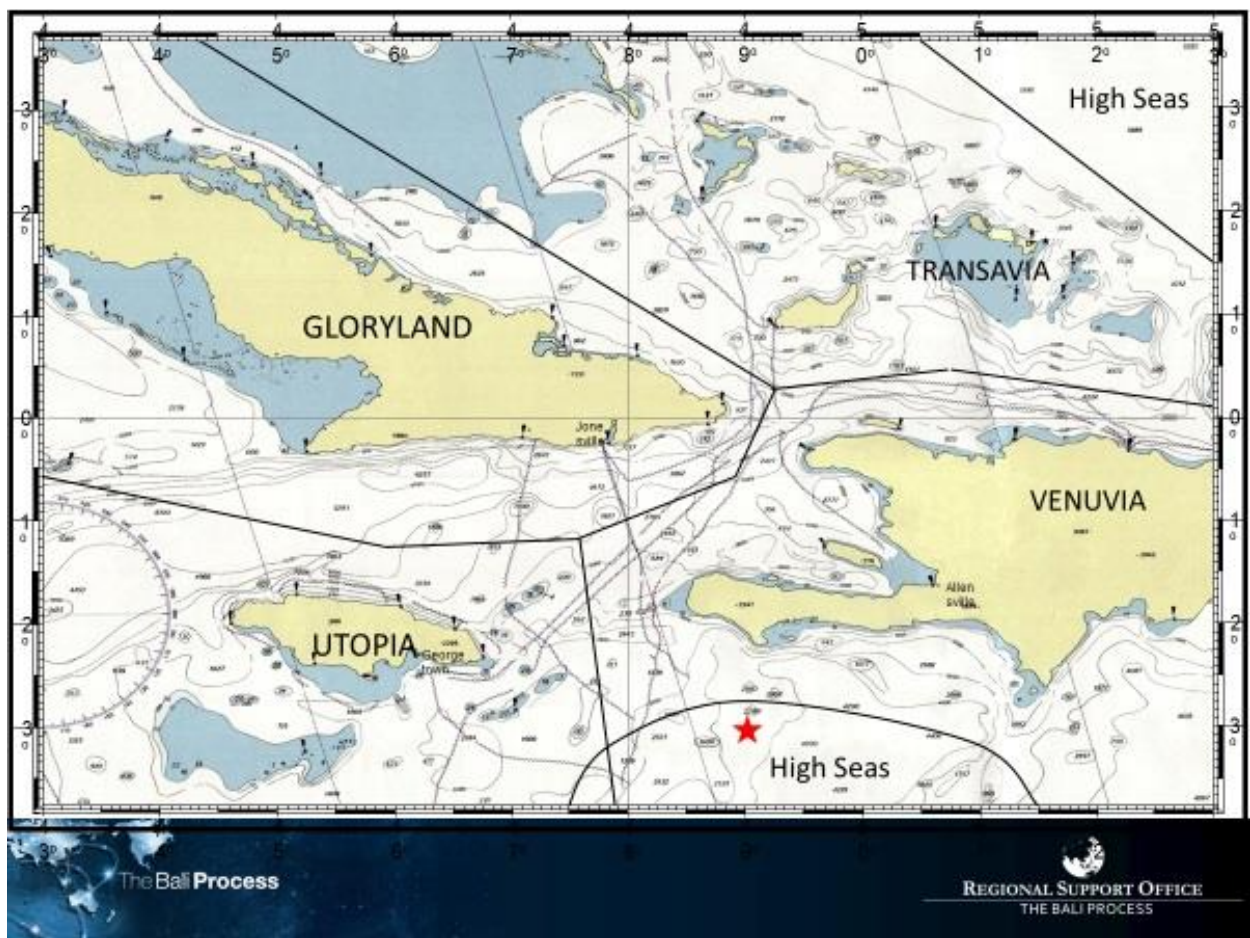
Allensville RCC receives a distress call from a foreign-flagged vessel within Gloryland's SRR. The vessel is believed to be transporting asylum-seekers. Jonesville RCC was notified but has not signalled that it intends to respond.



- If a rescue coordination centre calls on the RCC of another state to assist, where does the obligation lie?
 - Is a state which is aware of a situation of distress absolved of responsibility under international law if SAR is within the SRR of another state?
 - What if the vessel is within Gloryland's territorial sea?
- Who should be responsible for coordinating rescue when SAR authority does not take responsibility?
- How can accountability for failure to rescue be strengthened?

Scenario 1b (20 mins)

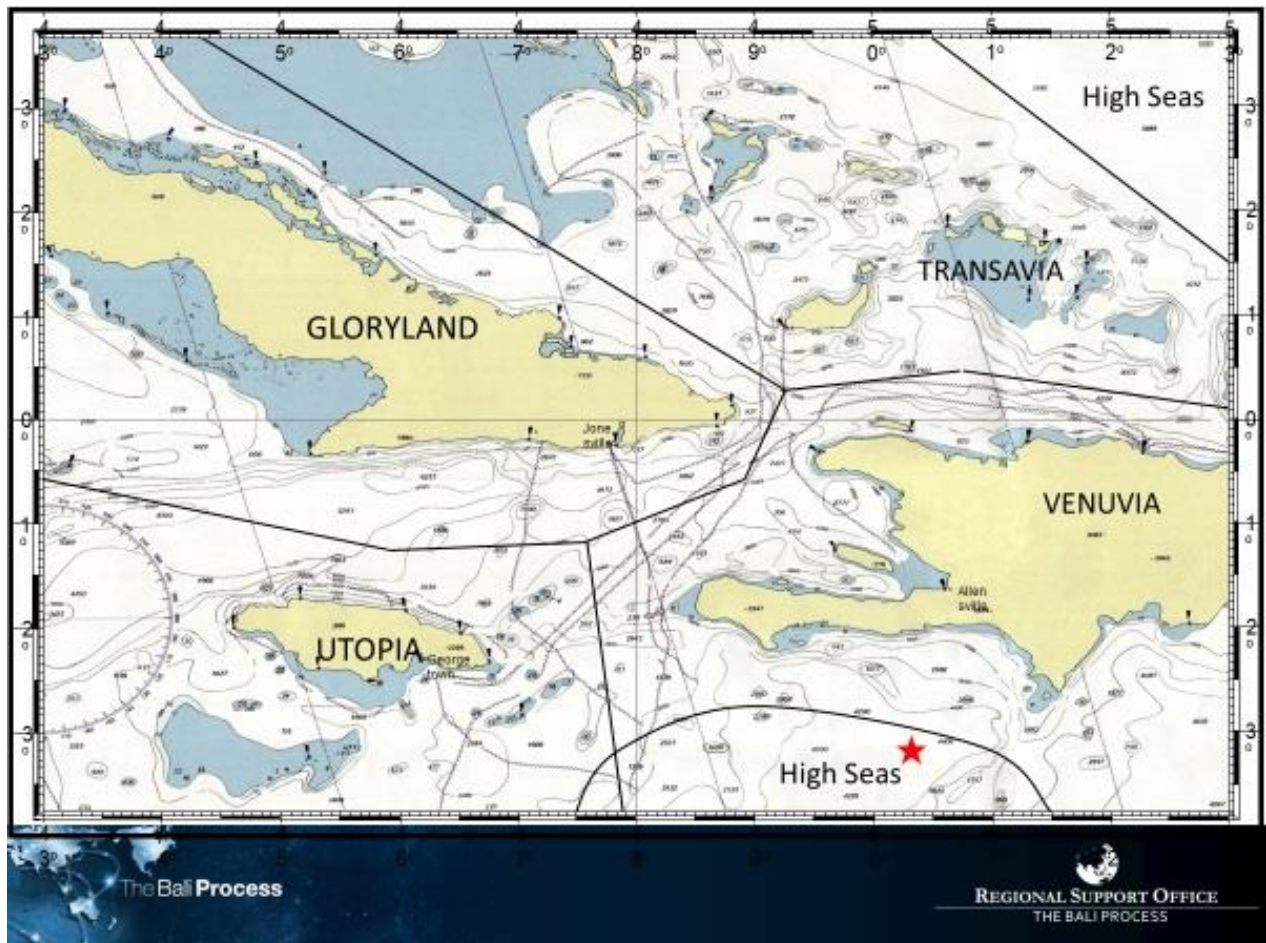
A Utopian police boat encounters an unflagged vessel within Venuvia SRR, on the high seas, carrying irregular migrants (possibly asylum seekers) from Bravoland towards Utopia. The Police Captain notifies Jonesville RCC that the vessel appears unseaworthy and receives authorization to tow it to the nearest port in Gloryland. The Police Captain leaves the passengers on their vessel and provides food and drinking water before towing them to Gloryland. Gloryland is not party to the 1951 Refugee Convention and has a policy of detaining irregular migrants in poor conditions.



- Is this a case of rescue or interception? Who has the authority to determine how this operation is characterized and on what basis?
- What obligations does Utopia owe to the migrants from Bravoland?

Scenario 1c (20 mins)

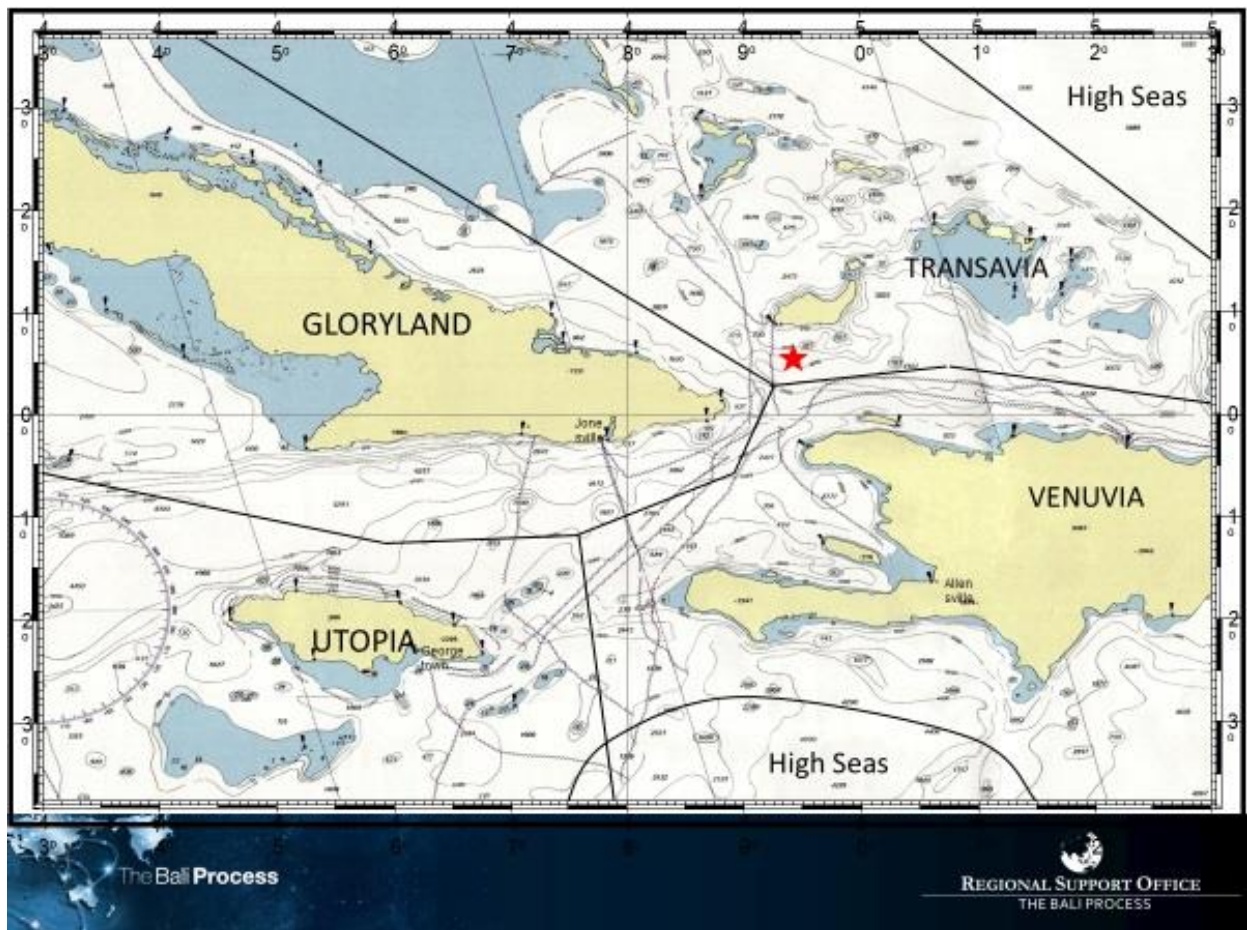
A Venuvian Coast Guard vessel encounters an overloaded foreign-flagged fishing trawler adrift in rough weather on the high seas. The captain suspects the passengers are irregular migrants and sees at least a dozen young children on board who appear malnourished or ill. His offer of assistance is refused by the master of the fishing vessel.



- On what basis, if any, can rescue be carried out?
- What is the intended scope of “any person found at sea in danger of being lost”?
- Does the obligation to assist imply:
 - a corresponding right to be rescued;
 - a corresponding obligation to be assisted?
- Would the obligation change if the Venuvian ship was a Government research vessel?

Scenario 1d (20 mins)

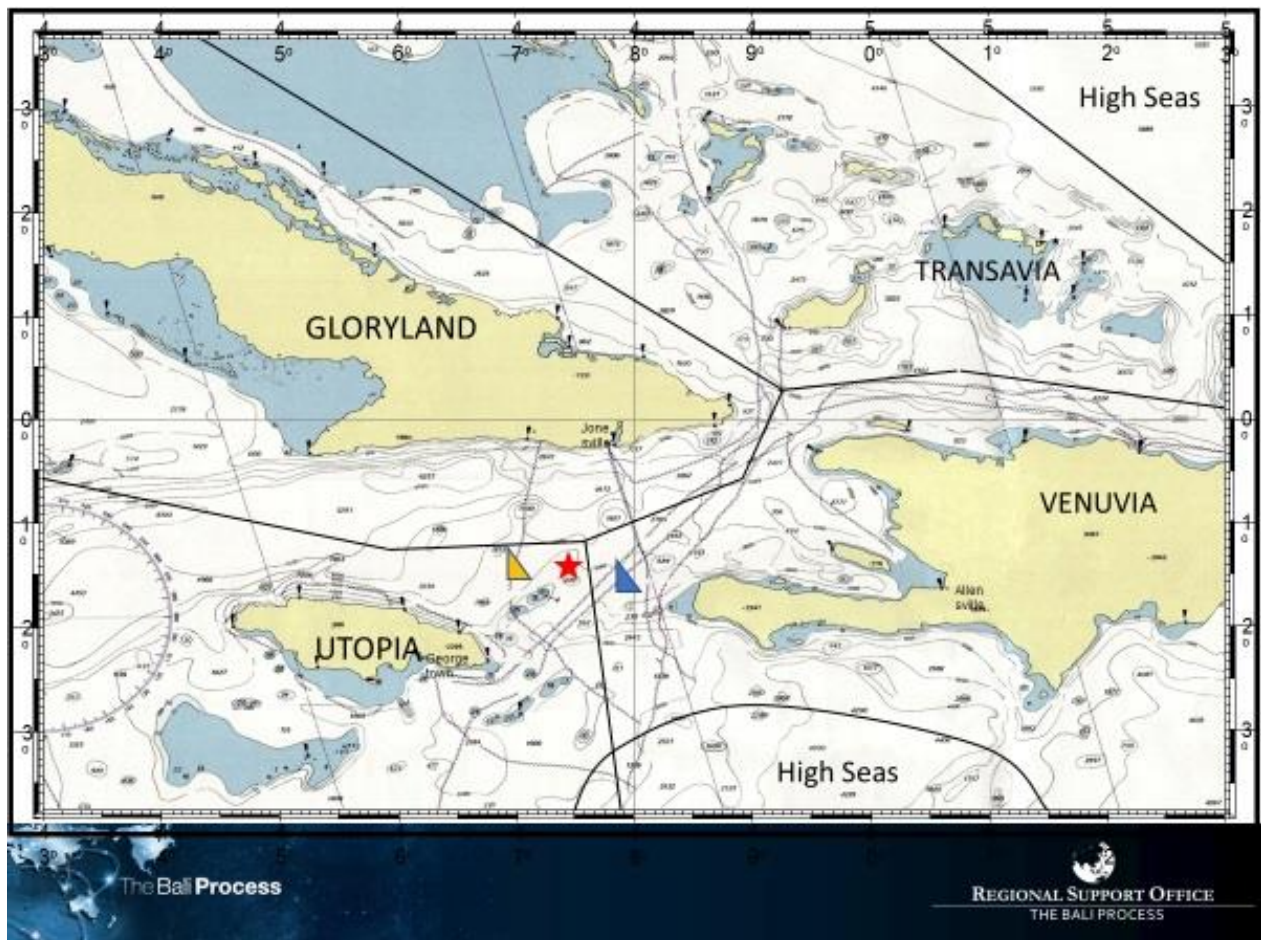
A merchant ship from Bravoland (a country that is far off the map), transiting Transavian waters and en route to Utopia, rescues 150 Transavian migrants from a sinking vessel. The migrants then engage in threatening behaviour and order the master to take them to Venuvia so they can seek asylum. RCC Allensville advises the master to take them to Gloryland.



- What is the extent of the obligations owed by a private vessel to those rescued, if any? When and how does that obligation end (if states are not cooperative)?
- Do Transavian diplomatic or consular authorities have a right to be notified of such situations involving their nationals? If so, with which actor does this obligation lie?
- Would the extent of the obligation to notify Transavian consular authorities change if the migrants decline to file asylum claims upon disembarkation in Gloryland?

Scenario 1e (20 mins)

A private vessel sets out from Transavia for Utopia. Upon reaching Utopia's SRR, but outside Utopia's territorial waters, the 50 asylum-seekers onboard crowd onto inflatable life rafts while the master sends a distress call to Georgetown RCC. Utopian and Venuvian private commercial vessels are both in the vicinity and capable of rescue. Georgetown RCC contacts the Venuvian-flagged private vessel and directs it to carry out SAR.

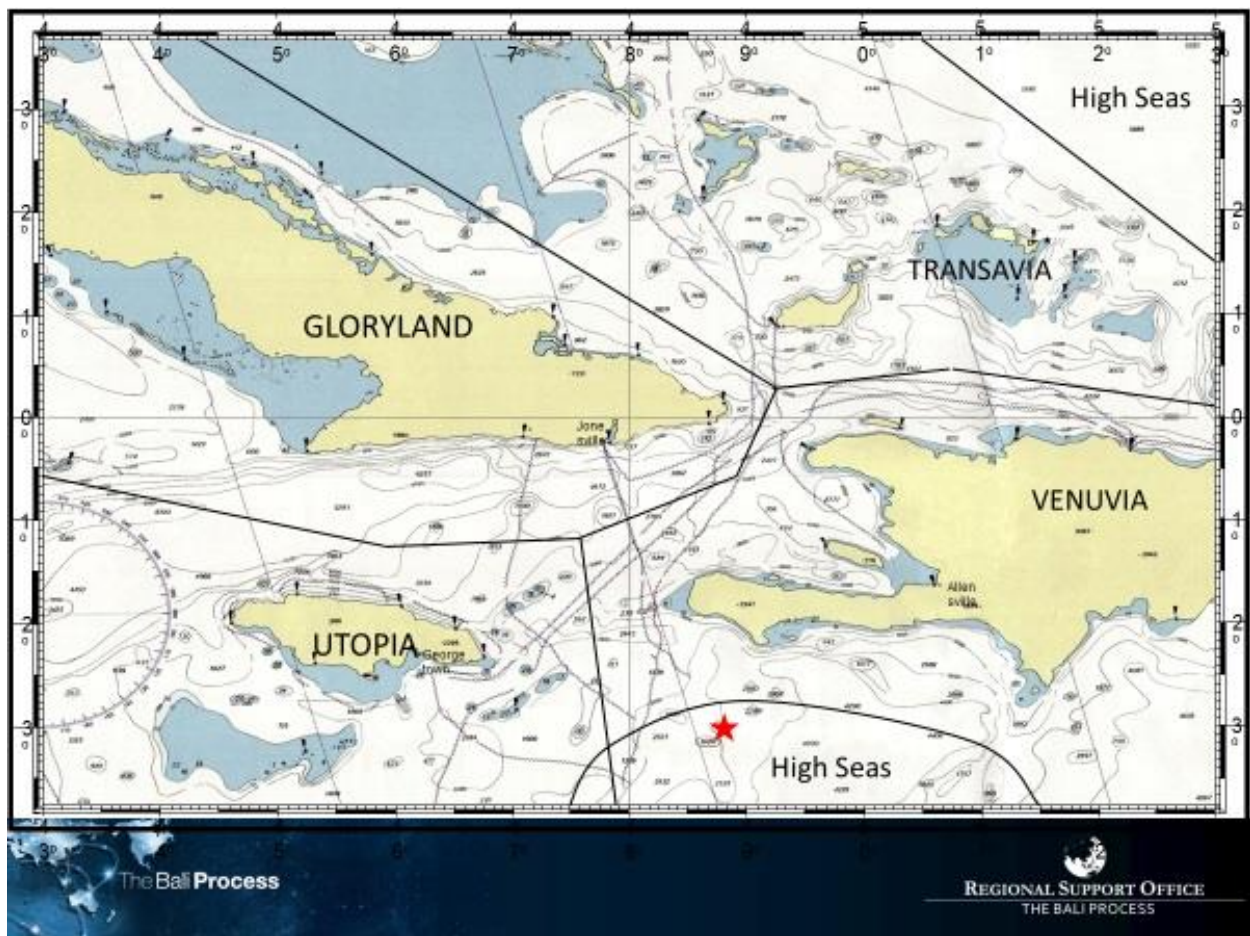


- Can a country, other than the flag state, issue binding instructions to a private vessel in the context of a SAR operation?
- On what basis can a private vessel refuse to comply with a request from an RCC in a search and rescue context?
- Do states have legal options to prevent situations where migrants put themselves in danger with the specific purpose of triggering rescue that are consistent with the letter and spirit of international law?

Disembarkation to a place of safety

Scenario 1a (20 minutes)

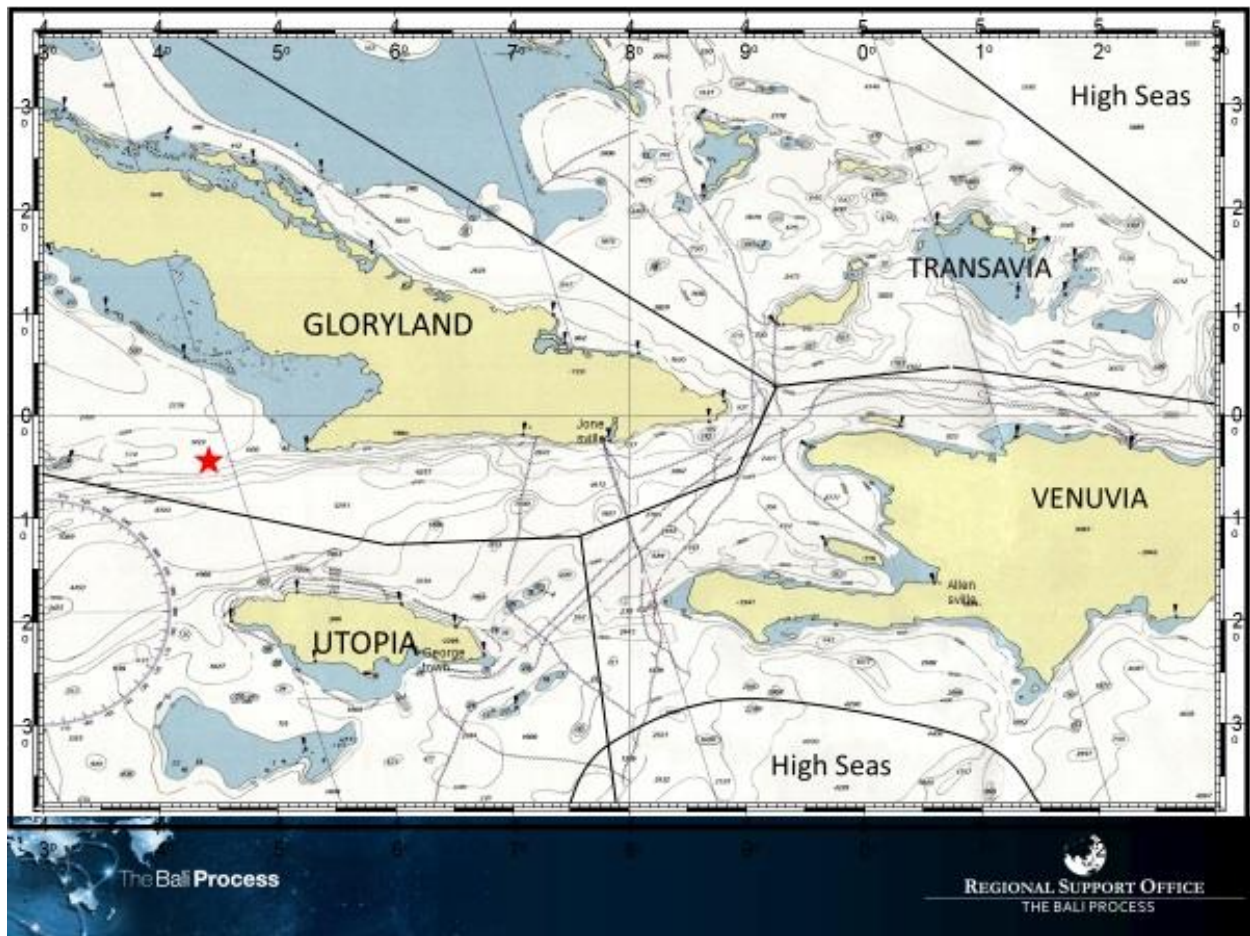
A Transavian private vessel is notified by RCC Allensville that it is nearest to a fishing boat in distress on the high seas. The private vessel rescues crew and passengers, including 10 Transavian asylum-seekers. Having reported the successful rescue to the RCC Allensville, the master requests permission to disembark the passengers. This is denied, first by Venuvia, and then by Gloryland and Utopia. Utopia indicates that it will prosecute the private vessel for migrant smuggling if it enters its territorial waters.



- Do coastal states, including those in whose SRR a vessel is rescued, have a legal obligation to allow disembarkation? On what grounds can they refuse a vessel attempting to disembark for humanitarian reasons?
- Given that all three states have refused, which actor carries the greater responsibility for disembarkation, and on what basis?
- Do rescuing vessels have a right of access to ports to seek refuge on the basis of *force majeure*?

Scenario 1b (20 minutes)

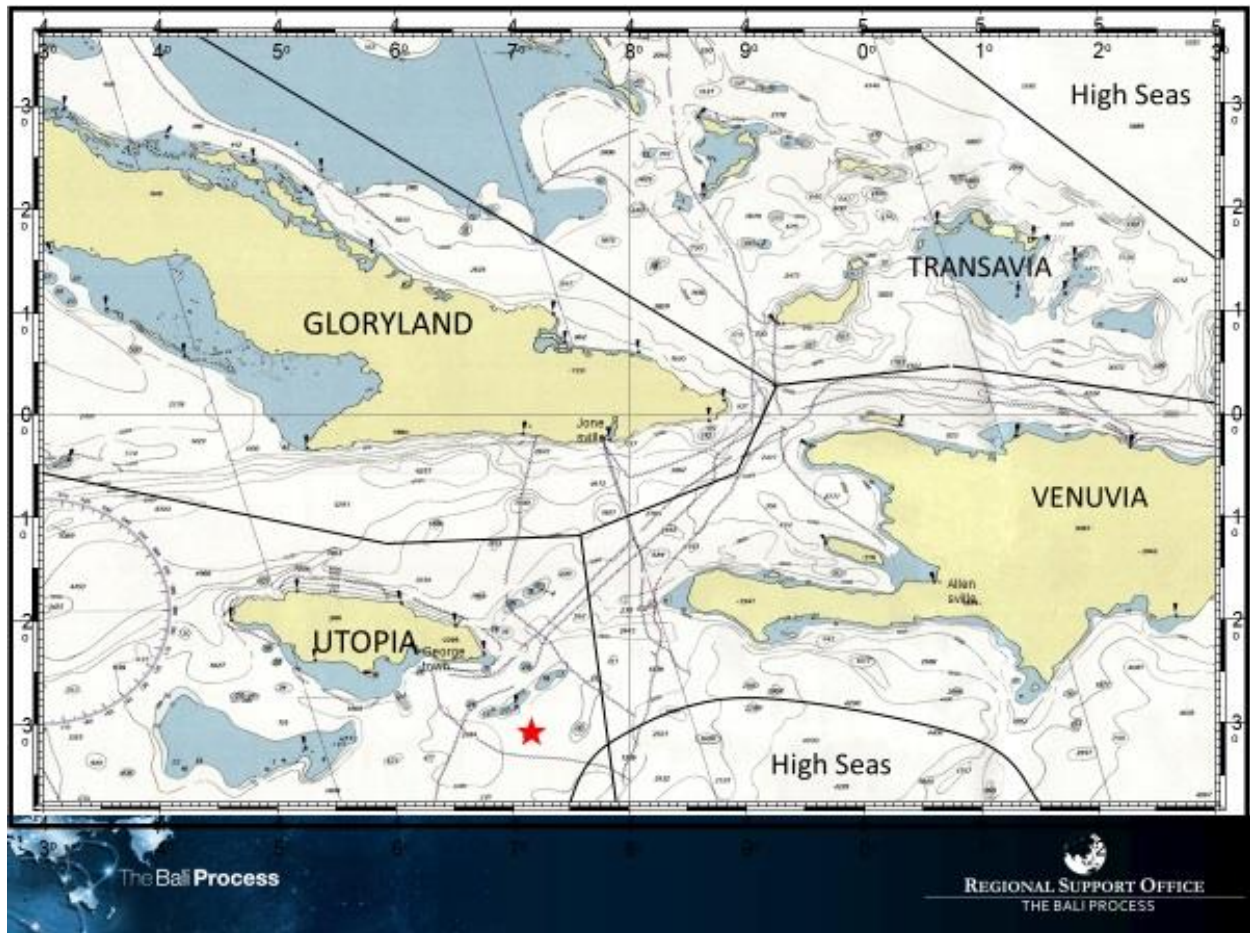
The master of a small foreign-flagged vessel rescues 50 Transavian migrants in Gloryland's SRR. [The vessel does is not sufficiently equipped to accommodate the additional passengers for long.] Gloryland is not party to the 1951 Refugee Convention or any of the main human rights treaties. It is known to apply a policy of mandatory detention for irregular migrants who must pay fines and transport costs to be released and return home.



- Can Gloryland be considered a 'place of safety'? By what process (criteria?) should a place of safety be determined?
- Assuming that some of the 50 migrants are under the age of 18 years, would the flag-state of the rescue vessel breach its 'best interest of the child' obligation if it were to disembark in Gloryland?
- Where disembarkation is not possible at the nearest port, which state assumes responsible for disembarkation?

Scenario 1c (20 minutes)

A private Utopian-flagged vessel rescues 100 migrants in the Utopian SRR. Georgetown RCC dispatches its RSD team to assess the status of those onboard.

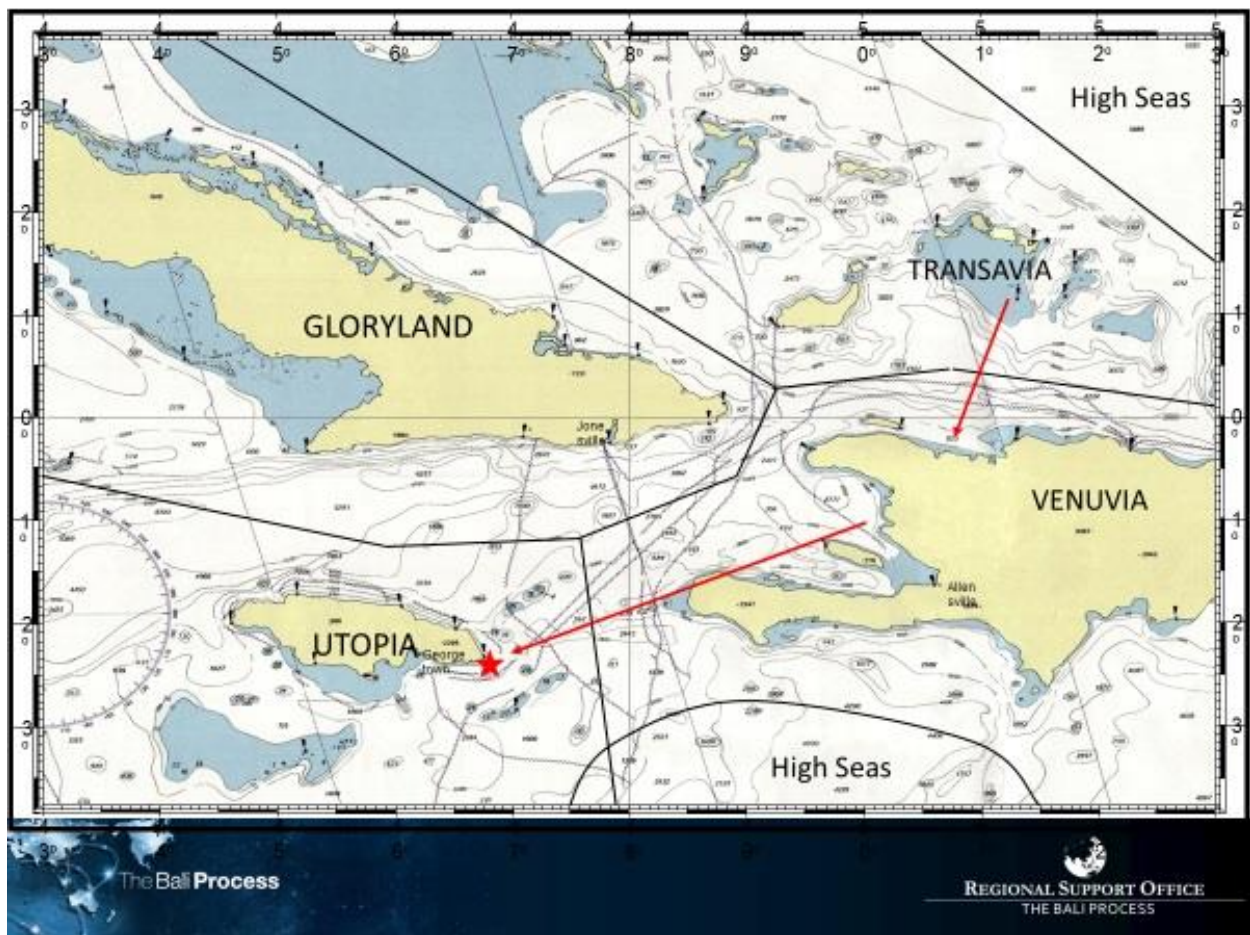


- Can a rescue vessel be a 'place of safety'? if no State allows for disembarkation, or would this amount to indefinite detention? Which state should be held responsible for such detention? By what institution?
- Can asylum procedures be carried out on board rescue ships? What conditions would be necessary for an RSD process to meet standards of fairness and efficiency?

Cooperation

Scenario 1 (20 mins)

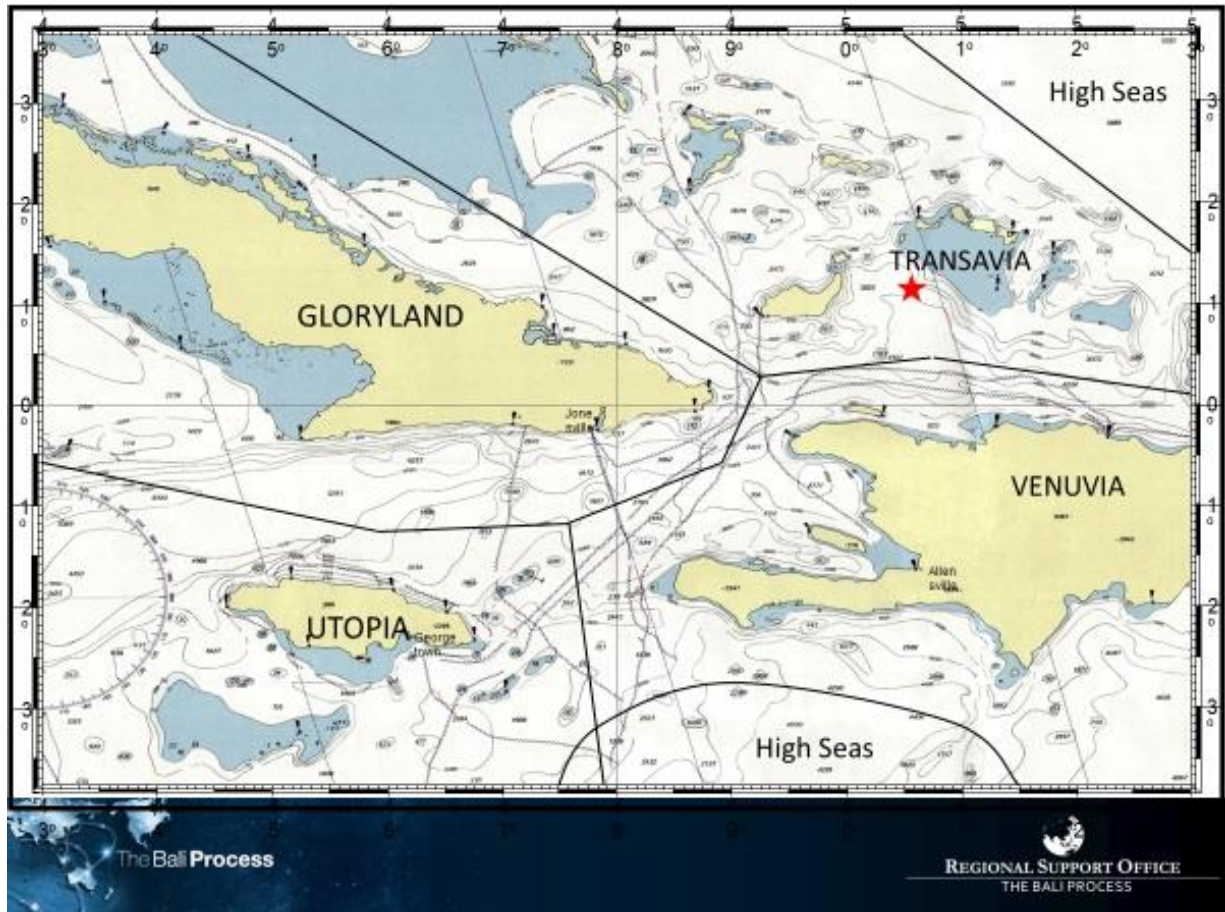
Utopia and Venuvia have a bilateral agreement stating that asylum seekers cannot claim asylum in Utopia if they have transited through Venuvia, as they could have claimed asylum in Venuvia.



- On what basis, if any, can informal agreements and arrangements between States on mixed maritime migration violate international law?

Scenario 2 (20 minutes)

Utopia takes an interest in building Transavia's capacity in combatting Trafficking in Persons and the Smuggling of Migrants by providing them with patrol boats, surveillance equipment and training.



- Does Utopia have any obligation to ensure that Transavia uses these resources in accordance with international law?
- Is Utopia responsible if Transavia uses this investment to violate international law (e.g. push-back activities in violation of the principle of *non-refoulement*?)

Section 2: Responses to questions surrounding practical challenges in fulfilling international obligations to protect migrants at sea

Interception / Interdiction

<i>Question</i>	<i>Response</i>
<i>Territorial seas</i>	
If a vessel overloaded with migrants and asylum seekers passes through territorial sea , is this innocent passage? Or is it prejudicial to peace, good order and security? (UNCLOS, Article 19)	This is a situation of innocent passage that is not prejudicial to peace, good order and security. Moreover, people have a right to seek asylum. Where the vessel is identified as being a smuggling vessel, meaning that a crime is taking place in the territorial seas, the Smuggling of Migrants Protocol may come into play, and bring Article 27 of UNCLOS into play, where a connection between the crime (smuggling) and the coastal State can be established.

Question	Response
Contiguous zone	
If a vessel overloaded with migrants and asylum seekers passes through the contiguous zone, what measures could be taken under UNCLOS? (UNCLOS, Article 33)	Measures can be taken under Article 33 to exercise the control necessary to prevent infringements of <i>inter alia</i>, immigration laws within its territorial sea, provided that there is a connection between what the vessel passing through is doing, and the coastal State. If the vessel is a smuggling vessel, the coastal State may interdict only after receiving authorization from the flag State. If the smuggling vessel is unflagged, the vessel could be boarded and investigated, but the coastal State has no obligation to do so.
Does a mixed migrant vessel entering the contiguous zone constitute an infringement of immigration law under Article 33 of UNCLOS?	Entry into the contiguous zone gives the State power to enforce its laws. However, in this context, article 31 of the Refugees Convention notes that illegal entry for the purpose of seeking asylum should not be criminalized.
What can and cannot be done to ‘exercise the control necessary’ to prevent infringements of immigration law?	Any action, including arrest, that results in ‘effective control’ would result in full obligations to protect, respect and fulfil the rights of persons who fall within that effective control. Further, the principle of <i>non-refoulement</i> would operate to prohibit push back into a territory where persons would be risk. This would preclude ‘push-backs’ in most cases.

Question	Response
High Seas	
On what basis, if any, can a State extend its maritime enforcement jurisdiction into the high seas?	A state cannot unilaterally extend its jurisdiction into the high seas. Article 27 of the Vienna Convention on the Law of Treaties prohibits States from evoking its domestic law to justify its failure to perform a treaty. States may extend their maritime enforcement jurisdiction by making a bilateral agreement with another State.
What international laws govern what States can and cannot do in exercising jurisdiction on the high seas?	On the high seas, flag state exercises exclusive jurisdiction over the ships flying its flag with some exception (e.g. piracy and unauthorized broadcasting). A State can exercise jurisdiction on its own vessels on the high seas. Authorization of flag States for other States in order to exercise enforcement jurisdiction over the vessels.
What relevance, if any do the principles of Use of Force and / or Rules of Engagement have in determining what actions can be taken?	Use of force does not come into play in relation to migration issues. Rules of engagement are highly internal, and any actions taken would be necessary and proportionate subject to international laws including human rights law.
Smuggling of migrants	
What constitute ' appropriate measures ' that can be taken against a flagless smuggling vessel according to article 8 of the Smuggling Protocol?	The Smuggling Protocol does not provide additional powers, but the right to take measures in accordance with domestic laws. Accordingly, appropriate measures would be determined in accordance with the relevant criminal law on smuggling of migrants, and may include boarding, investigation and prosecution.

Question	Response
Human trafficking	
What actions can / must be taken in relation to a smuggling vessel that has confirmed trafficked victims on board?	The Trafficking Protocol does not offer any jurisdiction to States, nor any grounds to take action. Therefore, in practice: • Interception may be on other grounds, and an investigation for trafficking could subsequently result. Article 99 of UNCLOS requires States to prevent transportation of slaves flagged to it, but it may be difficult to establish that the trafficking is occurring for the purpose of slavery; and 'slavery' itself is a high threshold to establish. • Another option could be to exercise the right to visit and board the vessel (on grounds specified under Article 110 of UNCLOS) and if persons on board are found to be in distress action can be taken to rescue them. Notably, when effective control is exercised over a ship, then human rights obligations are triggered to persons on board.
Slavery	
What action can / must be taken against a fishing vessel that is using enslaved labour?	Use of enslaved labour would constitute a violation of article 99 of UNCLOS, and would require a State to take action including exercising the right to visit and board under article 110(1)(b) of UNCLOS. This is not true for situations of forced labour or trafficking. Primarily however, the flag State is responsible for preventing slavery on vessels flagged to it, and should be held to account for failures to do so. In practice, there are no explicit legal obligations to take action for slavery, but there are diplomatic obligations. The role of international criminal jurisdiction to take action against slavery at sea has not yet been tested. States have so far proven disinterested in expanding their enforcement powers to protect people on the high seas.

Search and rescue

<i>Question</i>	<i>Response</i>
<i>Duty to coordinate and cooperate</i>	
If a rescue coordination centre (RCC) calls on the RCC of another State to assist, where does the obligation to assist lie?	All vessels have responsibilities under customary law to carry out rescues. They are individually responsible for doing so, and are responsible for cooperating in doing so.
Is a State that is aware of a situation of distress absolved of responsibility under international law if SAR is within the SRR of another state?	The SRR that first becomes aware of the vessel in distress maintains responsibility for coordinating the SAR until such time as another SRR has confirmed that it is taking over coordination.
Who should be responsible for coordinating rescue when the relevant SAR authority does not take responsibility?	The failure of one State to apply due diligence in exercising its responsibilities, does not absolve other States of their responsibility to address situations of distress.
How can accountability for failure to rescue be strengthened?	Diplomatic channels can be engaged to address failures to carry out rescue. Domestic criminal law could also come into play to hold actors responsible for failure to rescue.
<i>Duty to respond to situations of 'distress'</i>	
Who has authority to determine whether a situation is one of interception or rescue, and on what basis?	Distress does not only refer to distress of the vessel, but also to human beings on board. While international law is not wholly clear about who has authority to determine whether a situation is one of distress, the principle of flag State sovereignty would allocate this responsibility to the shipmaster of the distressed vessel.

Question	Response
<i>Duty to respond to situations of 'distress' (cont.)</i>	
On what basis if any can rescue be carried out where the master of a vessel refuses assistance though persons on board are clearly in distress?	There is disagreement here. In customary law, there are grounds for taking action if the vessel is transporting slaves there are grounds for action. Otherwise, there are no explicit grounds for taking action. Two approaches apply: • If the vessel in question is flagged, there is an argument that on the high seas the exclusive jurisdiction of the flag State applies, so that even if a vessel is known to be abusing the rights of the child (for instance), another vessel would have no jurisdiction for boarding in the absence of authority from the captain or the flag State. In this case, the exclusive jurisdiction of the flag State applies. • Alternatively, there is an argument to suggest that a State which has decided to intervene on such grounds, may defend itself for violating the principle of flag State sovereignty on the basis of the obligation to save lives at sea.
<i>Obligations of private vessels</i>	
What is the extent of obligations of a private vessel to migrants rescued at sea, and when do those obligations end?	The master of a private vessel has the same obligations as a State vessel to disembark rescued persons to a place of safety.
Can a country other than the flag State issue binding instructions to a private vessel in the context of a SAR operation?	Only the flag State can issue binding instructions.
On what basis can a private vessel refuse to comply with a request from an RCC in a search and rescue context?	Instructions can be issued to private vessels in the context of its duty to coordinate; these are not binding instructions; SAR is not a way of extending State jurisdiction.

Disembarkation

Question	Response
<i>Rights and obligations of States</i>	
Do coastal States, including those in whose SRR a rescue takes place have a legal obligation to allow disembarkation? On what grounds can disembarkation be refused?	There is no obligation in international law to allow disembarkation. Rescued persons must be disembarked at the nearest port that is a 'place of safety'. The State responsible for the SRR is responsible to find a place of safety. This may be the port that is geographically closest or it could be the next port of call requires the least diversion. In practice, where States have refused disembarkation they have asserted that they have discharged their duty by providing enough assistance (e.g. food and water) to reduce the situation of distress. States have argued that disembarkation may create instability and disorder, and refuse disembarkation as a deterrent. There is no legally binding default as to which State has responsibility when States refuse disembarkation. In practical terms, the solution is often found through political rather than legal means.
Do rescuing vessels have a right of access to ports to seek refuge on the basis of <i>force majeure</i>?	<i>Force majeure</i> is a state of necessity that is beyond human control and precludes wrongfulness.
Where disembarkation is not possible at the nearest port, how should the place of disembarkation be determined?	The RCC is responsible for finding a place of safety to allow disembarkation.

Question	Response
<i>'Place of safety'</i>	
Can a country that is not party to the 1951 Refugees Convention or any of the main human rights treaties be considered a 'place of safety'? By what process or criteria should a 'place of safety' be determined?	A country that does not have a functional asylum system in place and cannot fulfil basic human rights obligations, cannot be considered a 'place of safety' for an asylum-seeker.
Under what circumstances, if any can a vessel be a 'place of safety' if no State allows for disembarkation? If this is held to amount to 'indefinite detention' which State should be held responsible for such detention? By what institution?	A vessel is not considered a place of safety under international law. Where migrants are compelled to stay on board because disembarkation is refused, this would amount to indefinite detention although, given there is no obligation for a State to allow disembarkation, it is unclear which State is at fault.
<i>Refugee Status Determination procedures</i>	
Under what circumstances if any can asylum procedures be carried out on board a rescue vessel? What conditions would be necessary for a Refugee Status Determination (RSD) process to meet standards of fairness and efficiency?	In most cases, a vessel would not be considered an appropriate venue in which to carry out the refugee status determination process because it would not be consistent with due process obligations, including for instance, allowing a negative decision to be appealed.
<i>Human rights considerations</i>	
How can the best interests of the child be upheld if children are disembarked in a country that is not signatory to the 1951 Refugees Convention or any of the main human rights treaties, including the Convention on the Rights of the Child?	The determination that a country is safe has to be considered in context; what may be safe for an adult male, may not be safe for women and children. Decisions have to be made on an individual basis (<i>Hirsi</i>)

Cooperation

Question	Response
<i>Effect of bilateral and regional agreements on international law</i>	
On what basis, if any, can informal agreements between States on mixed maritime migration violate international law?	Nothing in bilateral or regional agreements can serve to make international law null and void. In practical terms in the context of mixed maritime movements, agreements cannot undermine the principle of non-refoulement (including where the person is at risk of being transferred onto a place in violation of the principle of non-refoulement), or result in collective expulsion. Agreements that serve to deny opportunities to seek asylum would likely be in violation of international law.
<i>Obligations of States providing technical and other assistance</i>	
Does a State have a responsibility to ensure that resources it contributes to another State are used in accordance with international law? Where does responsibility for any violation lie?	While there is no positive legal obligation on the State providing assistance, to ensure it is used in accordance with human rights. However, legal obligations could arise where the assisting State should have known the assistance would be used to violate international law; the obligation to reflect human rights consideration in training on counter-smuggling (article 16 of Smuggling of Migrants Protocol) removes plausible deniability. The reflection of human rights training and inclusion of humanitarian actors in its provision would not be sufficient to refute this claim.



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