BRILL
NIJHOFF

JOURNAL OF THE HISTORY OF
INTERNATIONAL LAW 24 (2022) 149–188

JHIL
brill.com/jhil

The Historical Origins of the Duty to Save Life at Sea in International Law

Irini Papanicolopulu
Associate Professor, Università degli Studi di Milano-Bicocca,
School of Law, Milan, Italy
irini.papanicolopulu@unimib.it

Received: 10 December 2020; Revised: 18 August 2021;
Accepted: 14 September 2021; Published Online: 09 June 2022

Abstract

The article looks into the historical development of the international law duty to save life at sea. It argues that this duty has its origins into legal sources that predated the genesis of international law in the sixteenth century. According to these sources, three separate sets of norms were developed to address the need to save life at sea: rules on the safety of navigation; rules concerning assistance to the shipwrecked and their protection; and rules on the duty of masters to provide assistance. Leaving aside the first category, the article illustrates how these sources where used by seventeenth and eighteenth century international lawyers to substantiate the existence of a duty to assist the shipwrecked and a right to seek refuge for vessels in distress. Nineteenth century scholars added the duty of the master to provide rescue. These scholarly codifications set the basis for a codification, first by learned societies and then by states, during the last decades of the nineteenth century. Codification was eventually achieved through two conventions adopted in 1910. The article argues that while the content of the duty changed to adapt to technological developments affecting navigation, as well as to changing perceptions of the sources and effects of international law, the common principle at its basis has always been part of international law.

Keywords

law of the sea – duty to rescue – distress – Vattel

 | DOI:10.1163/15718050-12340199

1 Introduction

The duty to save life at sea is a cornerstone of modern international law. It is consistently incorporated in widely ratified international treaties, such as the 1982 United Nations Convention on the Law of the Sea (UNCLOS),[1] so far ratified by 168 states, and the 1974 International Convention for the Safety of Life at Sea (SOLAS),[2] ratified by 164 states, representing 99,18% of the world gross tonnage. States, international bodies and leading scholars in the field proclaim that it is a rule of customary international law.[3]

Nonetheless, there is still uncertainty as to some of its elements. The above-mentioned treaties do not provide any clear rules concerning the place where the rescued persons should be disembarked,[4] or about the duties of coastal states when vessels in distress reach their shores.[5] Nor do they contain any cogent indication as to the State that has the duty to intervene when there

1 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397 (UNCLOS).

2 International Convention for the Safety of Life at Sea, 1 November 1974, 1184 UNTS 278, as amended (SOLAS).

3 Attard, Felicity G. *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (Leiden: Brill, 2020), 92–109; Papanicolopulu, Irini. 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview'. *International Review of the Red Cross* 98 (2016), 491–514, 494; Scovazzi, Tullio. 'Human Rights and Immigration at Sea', in *Human Rights and Immigration*, ed. Ruth Rubio-Marín (Oxford: Oxford University Press, 2014), 212–260, 225; Barnes, Richard. 'The International Law of the Sea and Migration Control', in *Extraterritorial Immigration Control: Legal Challenges*, eds. Bernard Ryan and Valsamis Mitsilegas (Leiden: Brill, 2010), 103–149, 134; Oxman, Bernard H. 'Human Rights and the United Nations Convention on the Law of the Sea'. *Columbia Journal of Transnational Law* 36 (1998), 399–429, 415; Nordquist, Myron, Satya N. Nandan and Shabtai Rosenne, eds. *The United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. 3 (Leiden: Martinus Nijhoff, 1985).

4 Thus leading to situations where people rescued have to spend long periods at sea, waiting for states to decide where they should be disembarked, from the *Tampa* case (Fife, Rolf Einar. 'The Duty to Render Assistance at Sea: Some Reflections after Tampa', in *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi*, eds. Jarna Petman and Jan Klabbers (Leiden: Martinus Nijhoff, 2003), 469–484) to recent cases in the Mediterranean (Papastavridis, Efthymios. 'We Saved Them. Now What?: The Unresolved Question of Disembarkation of Rescued Persons at Sea', in *La contribution de la Convention des Nations Unies sur le Droit de la Mer à la bonne gouvernance des mers et des océans*, ed. Jose Manuel Sobrino Heredia (Napoli: Editoriale Scientifica, 2014), 587–606).

5 As in the case concerning the vessel *Sea Watch 3*, which claimed a situation of distress and entered into the Italian port of Lampedusa on 29 June 2019, notwithstanding the prohibition by the Italian government. The case was eventually decided in favour of the master of *Sea Watch 3*, Carola Rackete, by the Italian Supreme Court of Cassation, Cass. pen., sez. III, 16 January 2020, n. 6626.

is a vessel at risk,[6] or any indication about whether search and rescue services may be provided by non-State actors.[7]

These gaps and ambiguities have assumed major relevance in recent years, when the duty to save life at sea has been put to test by the significant mixed fluxes of irregular migrants crossing seas in search of safety or a better future.[8] States have tried to exploit the shortcomings of the applicable legal regime in order to bypass their fundamental obligation to rescue.[9] Furthermore, and increasingly, the scope itself of the duty to rescue is questioned: it is hinted that the relevant provisions were not initially developed with big numbers of people in mind, that they should not concern people voluntarily putting themselves at risk, or that the duty does not apply to individuals, but only to States – or the opposite.

'Historical' arguments are thus employed in an effort to try and reduce the scope of the duty to save life at sea. These efforts make it useful to investigate the historical origins of this duty. The purpose of this article is to try and shed some light on when and how norms that aim at saving life at sea became part of international law. This aim, accordingly, delimits the scope of the article. First, this article is limited to inquiring when the duty to save life at sea became part

6 Lack of action by coastal states may lead to loss of life that generates the responsibility of the coastal state, as recently recalled by the Human Rights Committee in the cases A.S., D.I., O.I. and G.D. against Italy and Malta; United Nations, Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3042/2017, CCPR/C/130/D/3042/2017, 28 April 2021.

7 For a list of vessels, mainly funded by humanitarian NGOs, which are active in rescuing people at sea in the Mediterranean Sea, updated to June 2020, European Union Agency for Fundamental Rights. '2020 update – NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them', available at: https://fra.europa.eu/en/publication/2020/2020-update-ngos-sar-activities#TabPubTable1-NGOshipsinvolvedinSARoperations1 (last accessed on 3 August 2021). On the role of NGOs in providing search and rescue: Cuttitta, Paolo. 'Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean'. *Geopolitics* 23 (2018), 1–29; Bevilacqua, Giorgia. 'Italy Versus NGOs: The Controversial Interpretation and Implementation of Search and Rescue Obligations in the Context of Migration at Sea'. *Italian Yearbook of International Law* 28 (2018), 11–27.

8 In 2016, the deadliest year, at least 5143 persons lost their life at sea while trying to cross the Mediterranean Sea towards Europe. For updated information see the website maintained by the International Organization for Migration (IOM) https://missingmigrants.iom.int/ (last accessed on 7 September 2020).

9 Mallia, Patricia. *Migrant Smuggling by Sea. Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Leiden: Martinus Nijhoff, 2010); Moreno Lax, Violeta and Efthymios Papastavridis, eds. *Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Leiden: Martinus Nijhoff, 2017).

of international law, i.e. the law that regulates relationships between states and other international actors. The genesis of international law is set, according to the prevailing view, towards the end of the sixteenth and the beginning of the seventeenth century.[10] References to other sources of legal norms will therefore be limited to providing some context to the genesis of the rules of international law; any comprehensive historical enquiry concerning other sources of law, such as mediaeval laws and customs, falls beyond its scope. Second, this is an article about legal rules. Nonetheless, since factual circumstances and practical necessities are at the basis of any legal regulation, this article will briefly provide – again, without any claim to comprehensiveness – some key facts in the development of the art of navigation.

Furthermore, in setting out to discuss the duty to save life at sea, a preliminary point should be made. This duty is actually not unique, but consists of different elements.[11] Looking at the current legal framework, it is possible to identify three main groups of rules that address the need to save life at sea. First, rules relating to the duty of the master to provide assistance to people and other vessels in distress at sea.[12] Second, rules relating to the duties of coastal states vis-à-vis vessels in distress off their coasts or in their ports.[13] Third, duties relating to the safety of navigation, which include duties of flag states to control vessels flying their flag and duties (and powers) of masters in the conduct of navigation.[14] All these duties derive from a common concern: the humanitarian drive to save life at sea and prevent the death of those navigating therein. At the same time, they may be seen as separate legal duties, each having its own content and each binding different addressees. As will be seen in the following sections, these duties have indeed developed at different times and in different factual and legal contexts.

In addressing the historical origins of international law norms that purport to save life at sea, this article will focus on the first two categories of norms, adopting a division into periods that takes into account the different periods of

10 According to the conventional periodization. See, e.g., Neff, Stephen C. 'A Short History of International Law', in *International Law*, ed. Malcolm D. Evans (Oxford: Oxford University Press, 4th ed. 2010), 3–28, 8.

11 De Vittor, Francesca and Massimo Starita. 'Distributing Responsibilities between Shipmasters and the Different States Involved in SAR Disasters'. *Italian Yearbook of International Law* 28 (2018), 77–95, 77.

12 UNCLOS, 1982 (n. 1), art. 98, para 1; SOLAS, 1974 (n. 2), chapter V, reg. 33.1.

13 UNCLOS, 1982 (n. 1), art. 98, para. 2; International Convention on Maritime Search and Rescue, 27 April 1979, 1405 UNTS 97 (SAR Convention).

14 SOLAS, 1974 (n. 2); Convention on the International Regulations for Preventing Collisions at Sea, 20 October 1972, 1050 UNTS 16 (Colregs Convention); International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 7 July 1978, 1361 UNTS 2.

international law, but also the advances in shipping that have sparked normative developments.[15] It will first illustrate succinctly legal rules already existing before the genesis of international law (section 2) and will then consider the duty to save life at sea during the seventeenth and eighteenth centuries (section 3). Building on technological developments taking place in the first half of the nineteenth century, it will then turn to the duty to save life at sea in the course of the nineteenth century (section 4). Eventually, it will present the first codificatory efforts, which took place towards the end of the nineteenth century (section 5) and their outcome (section 6),[16] before offering some concluding remarks (section 7).

2 The Shipwrecked and Their Protection Prior to Modern International Law

Law rules are generally created when there is a need for them and the rules on the rescue of people in distress at sea seem to have emerged in the context of the ancient seafaring nations as a response to the dangers of navigation.[17] In fact, any rule about the safety of life at sea implies two factual premises. The first, quite obvious, is that there is a vessel in a situation of distress at sea. The second, less obvious but nonetheless necessary, is that there is someone who can actually provide assistance to those in danger. It would have been pointless to provide for a duty to rescue those in distress at sea if there was no one able to do so.

For a long time, the only persons that, as a rule, could render assistance to a vessel in distress were those on the coast. While navigation has been ongoing for millennia, until the beginning of the twentieth century the use of radio signals in navigation was totally unknown.[18] This often meant a complete

15 The discussion of rules concerning safety of navigation, as well as the duties and powers of the master to ensure the safety of his own vessel, such as the rules on jettison, will therefore not be specifically addressed, except for a brief mention in section 2 in order to provide context.

16 In order to keep the article within a manageable size, the analysis will stop at the year 1910, when international law rules concerning the duty to rescue were codified for the first time into a treaty. The author proposes to discuss historical developments during the twentieth and early twenty-first centuries in an article to follow.

17 Khalilieh, Hassan S. *Admiralty and Maritime Laws in the Mediterranean Sea (ca. 800–1050): The Kitāb Akriyat Al-Sufun Vis-a-vis the Nomos Rhodion Nautikos* (Leiden: Brill, 2006), 205.

18 'It is supposed that the first vessel to have a Ship Radio Station (SRS) was the American liner *St. Paul*, equipped in 1899. The next, early in the following year, was the German vessel SS *Kaiser Wilhelm der Große*.... The first distress signal CQD (Come Quick Distress) was used from 1904 on British ships equipped with Marconi radio devices', Ilcev, Stojce D.

impossibility of communicating danger, unless the vessel was close to shore so that it could send visual (flags, fire) or auditory (whistles, drums) signals. Assistance from one vessel to another was exceptional, both because masters of vessels often were unaware of others in peril and also because the construction of ships did not allow them to approach each other safely.[19] People in distress at sea had therefore either to depend on themselves or on the people on shore for their rescue.

This factual situation gave rise to two norms concerning safety of life at sea. On the one hand, the people on the vessel could try to save themselves by sacrificing part of the cargo, making the vessel lighter and easier to navigate. This practice gave birth to the famous rule on jettison, incorporated in the *Lex Rhodia*.[20] Rules on jettison were later taken up by the Romans[21] and would eventually find their way in mediaeval collections of sea customs, such as the Consolato del Mare,[22] up to present day rules on average.[23] With the development of technology, rules on the safety of vessels increased to the present detailed international regulation.[24]

'The Development of Maritime Radio Communications'. *International Journal of Maritime History* 30(3) (2018), 536–543, 541.

19 Le Clere, Julien. *L'assistance aux navires et le sauvetage des epaves* (Paris: Librairie Generale de Droit et de Jurisprudence, 1954), 9.

20 Purpura, Gianfranco. 'Ius naufragii, sylai e lex rhodia. Genesi delle consuetudini marittime mediterranee'. *Annali dell'Università di Palermo* 47 (2002), 273–292, 288–289. The Rhodian law of antiquity should not be confused with the compilation known as 'Rhodian sea law': Pardessus, Jean Marie. *Collection de Lois Maritimes Antérieures au XVIII^e Siécle* (Imprimerie Royale, 1828), 24–31; Ashburner, Walter. *The Rhodian Sea-Law* (Oxford: Clarendon Press, 1909).

21 Digest 14.2; Chevreau, Emmanuelle. 'La Lex Rhodia de Iactu: Un exemple de la reception d'une institution etrangere dans le droit romain'. *Tijdschrift voor Rechtsgeschiedenis* 73(1) (2005), 67–80.

22 The *Llibre del Consolat de Mar* was a collection of maritime customs published in many versions and different languages: Smith, Robert S. 'The Llibre Del Consolat De Mar: A Bibliography'. *Law Library Journal* 33(6) (1940), 387–395; Corrieri, Salvatore. 'Profili di storia del commercio maritime e del diritto della navigazione nel Mediterraneo: Dal period statutario all'era delle scoperte geografiche', in *La formazione del Diritto marittimo nella prospettiva storica*, eds. Guido Camarda, Salvatore Corrieri and Tullio Scovazzi (Milano: Giuffrè, 2010), 1–79, 36. The most well-known version is probably the Italian one with the commentary by Casaregi, Giuseppe Maria. *Il Consolato del Mare colla spiegazione di Giuseppe Maria Casaregi* (Venezia: Per Francesco Piacentini, 1737). On general average ibid. 86–97 (chapters 93–97).

23 Rose, Francis. *General Average. Law and Practice* (Abingdon-on-Thames: Routledge, 3rd ed. 2020) para 1.1.

24 See treaties referred to in n 14; Boisson, Philippe. *Safety at Sea: Policies, Regulations & International Law* (Paris: Bureau Veritas, 1999), 45–55. The historical developments of these rules falls beyond the scope of this article.

On the other hand, external assistance was generally provided from shore. If the vessel was navigating close enough to the coast, so that people could see it, they could try to help survivors once they had reached the coast – or they could loot the shipwreck and enslave the survivors, depending on whether humanitarian considerations would prevail or not.[25] It is to contain the latter 'barbarian' practice, which endangered trade and communications, that sea trading communities in the Mediterranean Sea seem to have developed the first rules for the safety of life at sea and the assistance of the shipwrecked. These rules, essentially, would prohibit local people from killing, robbing or otherwise harming people who had shipwrecked on the shores of a state and would impose sanctions on those who did not comply with these humanitarian rules. Furthermore, they would allow vessels in distress to enter into ports without having to pay taxes or running the risk of being confiscated.[26]

During the following two millennia, little changed in the rules, because little changed in the navigational practices. Ships would generally sail close to the coast, so that they could be seen from the shore. In situations of distress, ships would try to attract the attention of those on land, asking for assistance. The only ways of communication ships had were visual and acoustic methods, such as lights, drums or – later – cannon shots, which only allowed for communication over brief distances, in particular under bad weather conditions. In such circumstances, both assistance to a ship in distress and to those washed ashore depended on the good will of people on land. With the end of the Roman Empire, 'barbarian' practices became widespread again. Ships would be attracted by fraudulent means to the coast, pretending there was a port, and once there they would be plundered. Shipwrecked persons would be enslaved or killed and their belongings, together with anything found on the vessel, would be stolen.[27]

Rules where therefore again devised to contrast these practices, such as the punishment provided for in Article 38 of the Rolls of Oleron for those who would rob or kill the shipwrecked.[28] Other rules would reward virtuous conduct, such

25 Purpura, 'Ius naufragii' 2002 (n. 20), 277–278.

26 Ibid., 285–286.

27 This practice was later deplored as a 'barbarian' practice by Vattel, Emerich de. *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite & aux affaires des nations & des souverains*, vol. I (Neuchâtel: De Imprimerie de la Société Typographique, 1773), 236 (book I, chapter 293). A different issue that is not discussed in this article pertains to the so-called law of salvage, i.e., the rules regulating rights over goods saved from a shipwreck. On this matter, see Khalilieh, *Admiralty* 2006 (n. 17), 207–223.

28 Pardessus, *Collection* 1828 (n. 20), 347. See also the other acts mentioned by Perels, Ferdinand and Léon Arendt. *Manuel de droit maritime international* (Paris: Librairie Guillaumin, 1884), 152–154.

as those providing compensation for rescue, starting at least from the mediaeval times.[29] Rules generally did not address the issue of whether rescue was mandatory or not, but would rather focus on whether compensation should be paid for the rescue of people, as opposed to the salvage of goods.[30] It seems, however, that, in some instances at least, rescue of people in distress at sea was 'mandatory as long as the rescuers did not compromise their own safety'.[31]

With the establishment of the sovereign state and the ensuing craving for control over law, among other things, states started incorporating these rules into formal legislative acts. For example, the 1681 French *Ordonnance de la Marine* (Ordonnance Colbert) proclaims that ships, crews and cargo escaping from shipwreck are posed under the protection of the king,[32] orders all subjects to do everything in their power to assist shipwrecked persons, and condemns to death those who harm their persons or their goods – without the possibility of pardon.[33]

At the same time, there seems to have been little rules concerning assistance from one ship to another. For example, the Consolato del Mare refers to assistance from one ship to another solely in the context of vessels connected by a rope[34] and of vessels that had agreed to navigate together in a 'consort', in order to help each other in case of danger.[35] Later, the Hanseatic League adopted 'orders, which required that the captains and their crews assist imperilled or wrecked ships … not older than the fifteenth century'.[36] In 1604, King James adopted a proclamation requiring all officers and subjects, by sea and land, to rescue merchants and others that had reached the coasts of the kingdom, likely because of necessity.[37]

The reasons for this lack of a general duty on the masters of vessels to rescue other vessels in distress at sea seem to be two. On one hand, once on the

29 Khalilieh, *Admiralty* 2006 (n. 17), 205–207.

30 Ibid. 206. A special case was that of slaves, who, depending on the legal system under consideration, could be seen as 'persons' or 'things'; see Khalilieh, Hassan S. 'Human Jettison, Contribution for Lives, and Life Salvage in Byzantine and Early Islamic Maritime Laws in the Mediterranean'. *Byzantion* 75 (2005), 225–235.

31 Khalilieh, *Admiralty* 2006 (n. 17), 206–207.

32 Ordonnance Colbert, Book 4, Title IX, Art. 1.

33 Ordonnance Colbert, Book 4, Title IX, Art. 2.

34 Casaregi, *Consolato del Mare* 1737 (n. 22), 130–131 (Chapter 92).

35 Ibid., 130 (chapter 91), and 198–199 (chapter 283).

36 Daenell, Ernst. 'The Policy of the German Hanseatic League Respecting the Mercantile Marine'. *The American Historical Review* 15 (1909), 47–53, 51.

37 Mentioned in Wheaton, Henry. *Elements of International Law: With a Sketch of the History of the Science* (Philadelphia: Carey, Lea & Blanchard, 1836), 287. Reference to the masters of vessels would point to the fact that the duty applied also at sea.

open sea, it was very difficult to send distress signals that could be captured by anyone. When at sea, vessels very much depended, for their safety, on themselves.[38] Hence the detailed rules on jettison and other practices aimed at ensuring the safety of seagoing vessels and in particular the safety of the lives of those on board (as well as the cargo of the ship).[39] On the other hand, the case of collisions, where one vessel could render assistance to another, were very rare on the open seas. As Valin noted in 1766, '[l]es abordages en route sont fort rares; ceux en rade le sont un peu moins; mais au port ils sont assez communs'.[40] Assistance by other vessels could however be provided in some specific cases, in particular for vessels in port or near the shore, hence the few rules mentioned above.

3 The Emergence of International Law Rules

As discussed in the previous section, by the time international law came into existence, two main types of rules on the safety of life at sea already existed in other legal systems.[41] First, rules according protection to people who had shipwrecked on the shores of a state. Such rules would prohibit looting, enslavement and killing of the shipwrecked and would require the coastal community or ruler to assist them. Second, rules concerning rescue of vessels in distress at sea, in circumstances where this could be done, for example in harbours or when vessels where navigating in a 'consort'. Both categories of rules were generally to be found in two types of sources: they were either adopted within the domestic context – laws and regulations adopted by cities, states and other rulers – or they formed the object of maritime customs common to seafaring communities, such as those incorporated into the main compilations of maritime customs of the mediaeval period.

With the advent of international law in the seventeenth century these rules became part of international law. There seems to be no treatise on the duty to save life at sea as such, nor any extensive discussion of the ensuing duties in

38 Corrieri, Salvatore. *Il Consolato del Mare. La tradizione giuridico-marittima del Mediterraneo attraverso un'edizione italiana del 1584 del testo originale catalano del 1484* (Roma: Ass. Naz. del Consolato del Mare, 2005), 251–252.

39 Frankot, Edda. *'Of Laws of Ships and Shipmen'. Medieval Maritime Law and Its Practice in Urban Northern Europe* (Edinburgh: Edinburgh University Press, 2012), 32.

40 Valin, René-Josué. *Nouveau Commentaire sur l'Ordonnance de la Marine*, vol. 2 (La Rochelle: Jerome Legier, 1766), 178.

41 As already mentioned, the third type of rules, concerning the safety of vessels, will not be further addressed in this context.

international law books or books dealing with law of the sea issues. This lack of dedicated works would point at a lack of interest of scholars for the topic, rather than to an absence of actual instances of shipwreck. Nonetheless, international law scholars made occasional references to the duties stemming from the necessity to save life at sea.[42]

At the beginning of the seventeenth century, Welwod referred to rules that prohibited hindering the shipwrecked from help in danger, looting them or adopting practices that aim at causing shipwrecks; furthermore, he considered it a duty of the coastal people to attend to the shipwrecked.[43] Selden recalled treaties providing that vessels in distress could seek refuge in the coasts and ports of other states if 'driven thither by Tempest or som [sic] other necessity, to avoid a greater force, or the danger of shipwrack [sic]'.[44] Molloy, who also recalls the prohibition to rob the shipwrecked, provides that those who do not offer help to the shipwrecked shall be punished as if they were murderers.[45] Pufendorf also referred to the rules condemning those that try to make profit from the shipwrecked as rules deriving from the laws of nature.[46]

All these authors appear to assume that the duties of states and coastal communities towards the shipwreck are part of international law, either on the basis of Roman law precepts, as argued by Welwod and Molloy, or because such rules are provided into treaties entered into by states, as argued by Selden, or because they are mandated by natural law, according to Pufendorf. In any case, there does not seem to be any doubt as to their legally binding nature. Roman law, treaties and natural law were all well-accepted sources of international

42 One may only surmise why other scholars, including Grotius, who dealt extensively with issues relating to the sea and international law, have not addressed the safety of life at sea and the duty to provide assistance to vessels in distress and the shipwrecked. A reason is probably to be found in the fact that scholarly debate was monopolised by the tension between freedom and dominion of the seas; Bederman, David J. 'The Sea', in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 359–380.

43 Welwod, William. *An Abridgement of All Sea-Lawes* (London: Printed for Humfrey Lownes, Thomas Man, 1613), 50.

44 Selden, John. *Of the Dominion, or, Ownership of the Sea Two Books* (London: Printed by William Du-Gard, 1652), 125 (book 1, chapter 20).

45 Molloy, Charles. *De jure maritimo et navali, or, A Treatise of Affairs Maritime and of Commerce* (London: Printed for John Bellinger ... George Dawes ... and Robert Boulter ..., 1676), 238 (book II, chapter 5, para 2).

46 Pufendorf, Samuel. *De Jure Naturae et Gentium Libri Octo* (Oxford: Clarendon Press, 1934), 272 (chapter 4, para 494).

law at the time.[47] This is probably the reason why there is not much doctrinal discussion of these rules. At the same time, the fact that these rules did not form the object of any controversy, among scholars or among states, would seem to point to their general acceptance by both the scholarly community and the community of states.

It is only with Vattel that the rules on safety of life at sea will find a more extensive treatment. In his fundamental work, the Swiss jurist devotes attention to the rules governing both the right of entry into ports for vessels in distress and the prohibition of pillage of shipwrecked vessels, that is, the two rules which had already been recalled by the earlier scholars mentioned above.[48]

Vattel considered that there was a right of entry into port for a vessel in distress, and that this right existed notwithstanding the opposition of the coastal state. In light of present discussions concerning entry into port for vessels in distress,[49] and considering that not everyone may have Vattel's volume close at hand, it is interesting to reproduce his entire reasoning in this respect:

> Ces parties de la mer [which form the territorial sea], ainsi soumises à une nation, sont comprises dans son territoire; on ne peut y naviger [sic] malgré elle. Mais elle ne peut en refuser l'accès à des vaisseaux non suspects, pour des usages innocens [sic], sans pécher contre son devoir; tout propriétaire étant obligé d'accorder aux étrangers le passage, même sur

47 On the role of classical sources in seventeenth century international law scholarship Straumann, Benjamin. *Roman Law in the State of Nature. The Classical Foundations of Hugo Grotius' Natural Law* (Cambridge: Cambridge University Press, 2015).

48 Vattel's treatment of these rules deserves particular attention for several reasons. First, quite obviously, because Vattel was a prominent international law scholar, whose book soon became a classic in this discipline (Jouannet, Emmanuelle. 'Emer De Vattel (1714–1767)', in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 1118–1121). Second, Vattel's text was one of the most successful international law treatises of any time: it was reprinted several times and was translated in other languages; as such, it exercised a significant influence into the understanding of international law, that extended well beyond the life of its author (Haggenmacher, Peter. 'Le modèle de Vattel et la discipline du droit international', in *Vattel's International Law from a XXIst Century Perspective*, eds. Vincent Chetail and Peter Haggenmacher (Leiden: Martinus Nijhoff, 2011), 1–48, 5). Third, because he seems to have devoted more attention to the topic than other authors. Fourth, because of his conceptual background, which made him at the same time an eminent natural lawyer and one privileging states as the sole subjects of international law.

49 The events leading to the forcible entry into the Italian port of Lampedusa of the vessel *Sea Watch 3* in July 2019 clearly illustrate the issues raised by denial of entry into ports for vessels in distress that have rescued irregular migrants.

> terre, lorsqu'il est sans dommage et sans péril. Il est vrai que c'est à elle de juger de ce qu'elle peut faire, dans tout cas particulier qui se présente; & si elle juge mal, elle peche [sic], mais les autres doivent le souffrir. Il n'en est pas de même de cas de nécessité, comme, par exemple, quand un vaisseau est obligé d'entrer dans une rade qui vous appartient, pour se mettre à couvert de la tempête. En ce cas, le droit d'entrer par-tout, en n'y causant point de dommage, ou en le réparant, est, comme nous le ferons voir plus au long, un reste de la communauté primitive, dont aucun homme n'a pu se dépouiller; & le vaisseau entrera légitimement malgré vous, si vous le refusez injustement.[50]

Vattel therefore considers that vessels in distress have a sort of 'right' to enter into port, so as to save themselves and the people on board. It is worth noting the distinction made between cases in which the territorial sovereign should allow free passage through the territorial sea when the activity does not cause any damage – what we would today term the right of innocent passage in the territorial sea – and the right of a vessel in distress to enter into a bay to safeguard its integrity. In the first case, Vattel underlines that, in the end, it is up to the sovereign to determine whether a certain vessel can enter, and if the decision is wrong then the sovereign 'commits a sin, but others must suffer it'. On the opposite, in the case of a vessel in distress, the vessel has a sort of 'right' to enter, and the sovereign cannot do anything about it. This would lead to consider that while in the case of 'innocent passage' the last word is attributed to the sovereign, in the case of distress it is attributed to the vessel.

Furthermore, Vattel considers that in the case of a shipwreck, the old right to take possession of objects would not apply unless the owner of the objects cannot be identified. Vattel considers that the 'droit de naufrage', which allowed the lord of the coastal area where the vessels had shipwrecked to spoil the vessel, was a 'fruit malheureux de la barbarie, & qui a heureusement disparu presque par-tout avec elle' and adds that '[l]a justice & l'humanité ne peuvent lui donner lieu'.[51] Reference to 'justice and humanity' should not misled the reader as to the binding value of the rules enunciated by Vattel. He is one of the founding fathers of natural law and therefore reference to justice and humanity holds a normative value for him, since the two are considered foundations of binding legal norms.

---

50 Vattel, *Le droit des gens* 1773 (n. 27), 232–233. This passage was already included in the first edition of the book, published while its author was still alive: Vattel, Emer de. *Le droit des gens, ou principes de la loi naturelle* (London: 1758), tome I, 409–410 (book I, chapter 23).

51 Vattel, *Le droit des gens* 1773 (n. 27), 136.

4 The Nineteenth Century: Technological Developments and New Rules

4.1 *Steamers, Greyhounds and Collisions*

Until the beginning of the nineteenth century, as discussed in the previous section, international law had incorporated the old rules concerning assistance to vessels in distress or shipwrecked. Furthermore, states and scholars had referred to a further norm, on the right of vessels in distress to seek refuge in the coasts or ports of other states. Little was said concerning the duty of the master to rescue *other* vessels in distress. This was due to the fact that, apart from incidents of navigation while entering or exiting ports, there was little occasion for contact between two vessels and there was no possibility of communication, unless the vessels were very close to each other.[52]

The factual situation changed dramatically in the nineteenth century, with a technological development that caused new concerns for safety and prompted unprecedented normative developments: steam ships.[53] Vessels fitted with steam-powered engines soon became widely used for transatlantic routes, also because wooden hulls were substituted by iron and steel hulls. The increased number of vessels navigating the seas and oceans, and their greater size and speed, increased the risks of navigation. The dangers generated by steamships and the concerns raised are vividly described in a statement made during the 1889 Washington Congress:[54]

> The greatest danger of navigation I know of, is during a heavy fog to fall in with one of the ocean racers or greyhounds, as they are fitly called, who recklessly, with full speed, or even with what they call moderate speed (1 knot or 2 knots less per hour, or a few insignificant revolutions less per minute), traverse the ocean under the well-known system that has got its rather cutting characteristic in the following expression said to have come from the bridge of one of those crack steamers; 'Heaven, hell, or New York in seven days is my order.' They speed along like a thunderbolt,

52 Supra, section 2.

53 This development led, also for the purposes of assessing the rules applicable to maritime incidents, to a distinction between the age of sail and the age of steam. See, e.g., De Courcy, Alfred. *Questions de droit maritime* (Paris: Cotillon, 1877), 183–184. Obviously, developments in maritime safety had already started before the age of steam, in particular with the first industrial revolution: Kelly, Morgan, Cormac O. Grada and Peter M Solar. 'Safety at Sea during the Industrial Revolution'. *The Journal of Economic History* 81(1) (2021), 239–275.

54 On the Washington Congress see infra, section 4.2.

> and if they strike a lonely vessel in the fog, they are prevented by their own speed from rendering assistance or saving life. It is like the arrow's speed in its flight, and what an arrow![55]

Incidents due to overloaded vessels or collisions between vessels became much more frequent than before, causing thousands of shipwrecks and deaths.[56] Collisions at sea became such a relevant topic, that by the end of the nineteenth century there were two leading texts on the law of collisions, by Autran, in the French language,[57] and by Marsden, in the English language.[58] The former, writing in 1890, vividly elaborated upon the reasons for the increase of collisions since the beginning of the nineteenth century:

> Avant l'apparition de la marine à vapeur, les rencontres en mer étaient fort rares et donnaient lieu plus rarement encore à des catastrophes. Les abordages ne se produisaient guère qu'à l'entrée ou à la sortie des ports, dans des manœuvres de rade, et n'entrainent le plus souvent que des avaries de médiocre importance. Aujourd'hui les navires, ne demandant plus leur force motrice aux vents ou aux courants, se croisent à chaque instant.... La dimension des vapeurs augmente chaque année, ce qui en rend la manœuvre plus difficile; leur Vitesse commandée par l'intérêt, stipulée pour les services postaux, exagérée par la concurrence, augmente leur force d'impulsion.... La collision en pleine mer, ce danger inaperçu du législateur d'autrefois ... est à l'heure actuelle le plus redoutable péril de la navigation à vapeur. A chaque instant de nouveaux sinistres se produisent, des navires, des cargaisons ayant une valeur considérable sont engloutis, sans parler de ces catastrophes douloureuses où périssent des centaines de passagers et de matelots.[59]

The outrage raised by collisions and the ensuing human and economic losses prompted normative developments at both the national and international

55 Mr. Flood, Norway, in *Protocols of Proceedings of the International Marine Conference*, vol. I (Washington: Government Printing Office, 1890), 425.

56 In the winter of 1820, more than 2,000 vessels were wrecked in the North Sea, causing 20,000 deaths; Vassalos, Dracos and Donald Paterson. 'Reconfiguring Passenger Ship Internal Environment for Damage Stability Enhancement'. *Journal of Marine Science and Engineering* 8 (2020), 1–25, 2.

57 Autran, Frederic Charles *Code international de l'abordage maritime* (Paris: Chevalier-Marescq et Cle, 1890).

58 Marsden, Reginald G. *A Treatise on the Law of Collisions at Sea* (London: Stevens and Sons, 1880).

59 Autran, *Code international* 1890 (n. 57), 5–6.

level, which set the basis for the modern treaties on the duty to save life at sea. In fact, it is during this period that the actual duty of the master to provide assistance to vessels in distress and their crews and passengers was generally acknowledged and found its way into the writings of scholars and into legal instruments.

Before turning to international efforts, which will form the object of the next sections, it is useful to recall that in the course of the nineteenth century states enacted national legislation imposing upon the master of a vessel the duty to render assistance to those in distress at sea. These provisions preceded and indeed inspired international codificatory efforts.[60] The best-known provision is probably s. 33 of the British *Merchant Shipping Amendment Act*, 1862, according to which:

> In every case of collision between two ships it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew, to render to the other ship, her master, crew and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision: In case he fails to do so, and no reasonable excuse for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default.

In his classic work, Marsden notes that the provision introducing '"Standing by" was first made a statutory duty by 25 & 26 Vict. C. 63, s. 33 (c). Previous to this Act, however, the duty of one ship to render assistance to the other was distinctively recognized by the Admiralty Court.'[61] Similar provisions were included in the domestic legislations of other States that had an interest in shipping.[62] It is therefore possible to argue that by the second half of the nineteenth century, the duty to provide assistance, which had already been in use among the (international) maritime community, found its way into national

60 Infra, section 4.2.

61 Marsden, *The Law* 1880 (n. 58), 13. Twentieth century editions of the work refer to the fact that the rule was introduced 'by Lord Kingsdown in consequence of a case which came before him in the Privy Council', e.g. Marsden, Reginald G. and Kenneth McGuffie. *The Law of Collisions at Sea* (London: Stevens & Sons Limited, 1961), 430–431 (para. 614). According to Higgins, A. Pierce and C. John Colombos. *The International Law of the Sea* (London: Longmans, Green, 1945), 233 '[t]he duty imposed on the master or the person in charge of a vessel to render every possible assistance in saving life at sea was emphasized in English case law since very old times'.

62 Autran, *Code international* 1890 (n. 57), mentioning in particular the laws of Norway (ibid., 29), Germany (ibid., 109) and the Netherlands (ibid., 112).

legislation, where it was definitively worded. At the same time, however, the rule did not lose its international character, as will be seen in the next section.

4.2 *Legal Doctrine and the 'Common Law of the Sea' Rules on the Protection of Life at Sea*

Nineteenth century technological developments and their consequences were reflected in the writings of international law scholars. Texts dealing with international law in that period referred to two sets of interlinked rules. On one hand, following earlier scholars, they confirmed the existence of duties towards the shipwrecked and a right to seek refuge for vessels in distress. On the other hand, they introduced the duty of the master of a vessel to provide assistance to other vessels in distress.

In the first place, nineteenth century leading textbooks and scholarly codification oeuvres of international law, following Vattel, included rules on the right to entry into port for vessels in distress and the duty of coastal states to provide assistance to the shipwrecked. According to Bluntschli, a rule of international law provides that 'On doit accorder aux navires en détresse et à leurs équipages tous les secours nécessaires, et leurs laisser le libre usage des établissements de secours'[63] and another provides that '[l]es états situés au bord de la mer sont tenus d'employer tous les moyens dont ils disposent pour secourir les navires en détresse, sans distinction de nationalité ou de religion, d'accueillir les naufragés, et de leur accorder aide et protection'.[64] Similar rules are included by Fiore in his work on the codification of international law. According to Fiore, states must allow entrance in ports and bays to vessels in distress,[65] and must provide assistance to these vessels.[66] Furthermore, states must take all measures necessary to avoid shipwrecks and to rescue vessels in distress.[67] Notably, according both to Bluntschli and to Fiore, the duty of states to provide assistance to vessels in distress extends to the whole territorial sea and concerns both preventive measures and reactive measures.

63 Bluntschli, Johann Caspar. *Le droit international codifié* (Paris: Librairie de Guillaumin, 1870), 190 (rule 333). In this respect, Bluntschli notes that this is 'un devoir humanitaire que tous les états civilisés pratiquent aujourd'hui' and that civilised nations are authorised 'à contraindre les peuplades barbares à remplir ce devoir humanitaire', ibid.

64 Ibid., 191 (rule 337).

65 Fiore, Pasquale. *Il diritto internazionale codificato e la sua sanzione giuridica* (Torino: Unione Tipografico-Editrice, 1898), 160.

66 Ibid., 225.

67 Ibid., 226: '[è] doveroso per gli Stati di fare quanto possa occorrere onde ovviare al pericolo che si verifichi il naufragio, l'arenamento, o l'investimento delle navi nelle acque territoriali, e di provvedere a che quelle che si trovino in pericolo siano soccorse'.

In the second place, scholars started referring to the duty of the master of a vessel to provide assistance to other vessels in distress at sea. Writing in 1852, before the codification of this duty in the *Merchant Shipping Amendment Act*, Flanders notes with respect to the master that it is 'thrown on him by the first principles of natural law, the duty to succor the distressed'[68] and that 'humanity and morality unite in forbidding any such construction of the law as will prevent prompt attention and succor to ships in distress.'[69] Ortolan, in concluding his book on international rules and diplomacy of the sea, mentions the assistance that must be given to vessels in distress as a topic that could have been dealt with in the book – thus indirectly confirming its relevance for international law.[70] Perels considers that military vessels of all states are under a duty to render assistance to commercial vessels, which 'consiste à sauver la vie des hommes, à écarter un danger de mer qui menacerait un navire, à arracher un navire à un danger imminent, à fournir l'assistance nécessaire si les objets de première nécessité lui font défaut'.[71] The same author reports that there were long held usages concerning assistance between fishing vessels.[72]

The source of the duty of the master to render assistance is not clear. While Flanders refers to 'natural law', Perels seems to consider it a rule of positive law or at least a principle shared by all nations. In order to better understand their probable normative basis, statements concerning the duty to rescue have to be contextualised within the nineteenth century concept of the 'common law of the sea'. Writing in 1884, Twiss described it in the following words:

> [the open sea] is the public highway of Nations, upon which the vessels of all Nations meet in terms of equality, each vessel carrying with it the laws of its own Nation for the government of those on board of it in their mutual relations with one another, but all subject to a Common Law of Nations in matters of mutual relation between the vessels themselves and their crews. The origin of this *Common Law of the Sea* is lost in the darkness of a very remote antiquity, but it sprang into existence with the earliest necessities of maritime commerce. We find the rudiments of such a law amongst the Athenians; and the Rhodian Law of the Sea, of which a very few fragments have been preserved in the Digest,

68 Flanders, Henry. *A Treatise on Maritime Law* (Boston: Little, Brown and Company, 1852), 157.

69 Ibid., 158.

70 Ortolan, Théodore. *Règles internationales et diplomatie de la mer*, vol. 1 (Paris: Cosse et N. Delamotte - J. Dumaine, 1845), 398.

71 Perels, *Manuel de droit* 1884 (n. 28), 157 (para 24).

72 Ibid., 148 (para 21).

> are supposed to have been a collection of Maritime Customs observed amongst the Nations established on the shores of the Mediterranean, and which formed at such time their Common Law on maritime matters. Rules of Law which prevailed amongst those Nations are still recognized by the Maritime tribunals of existing European Nations, as rules for the decision of analogous questions.[73]

Putting aside the romantic tones characterising that era, the narrative of a 'common law of the sea' that derives from old customs applied by the maritime communities, and which partakes of acts by both public and private actors, is generally recognised throughout the nineteenth century.[74] The American Captain Colomb, writing to the ILA in 1883, notes that '[i]n days gone by, before the rules regulating sea traffic were authoritatively formulated, nations recognised a general 'custom of the sea', on the main points of which it was understood that all mariners worthy of authority were agreed, and owing to such understood agreement, National Courts were able to administer a law which was accepted as fairly international'.[75]

This 'common law of the sea' went beyond what came to be understood as the 'law of the sea' in the second half of the twentieth century, i.e. rules that were made by states and were addressed only at states.[76] It included rules originating from and binding also other actors, such as the master and the crew of a vessel, and the ship-owner. It contained a mixture of 'public' norms, 'private' norms, and norms that were located in between the public and the private. The rules of the 'common law of the sea' applied beyond the territory of states and to actors coming from different states. This way, the law applicable to maritime activities, whether termed common law of the sea or international maritime

73 Twiss, Travers. *The Law of Nations Considered as Independent Political Communities* (Oxford: Clarendon Press, 1884) 286 (emphasis added). Twiss, who had been Advocate-General to the Admiralty and Queen's Advocate-General, was one of the participants at the Brussels Conference of 1888 (infra, section 4.1.) and chaired one of its commissions.

74 The idea of a common core of principles applicable beyond state boundaries is common also to those who considered that national legislation had in fact taken over the common law, e.g. Reddie, James. *An Historical View of the Law of Maritime Commerce* (Edinburgh: William Blackwood and Sons, 1841), 24–27.

75 11 Ass'n Reform & Codification L. Nations Rep. Conf. 133 (1883), 134.

76 Churchill, Robin R and A. Vaughan Lowe. *The Law of the Sea* (Manchester: Manchester University Press, 3rd ed. 1999), 1. Nonetheless, the narrative of a 'common law of the sea' was resilient as a notional category and was still used well into the twentieth century, see Higgins/Colombos, *The International* (n. 61), 223.

law, was truly international.[77] It is irrelevant for the purpose of this article to discuss whether the 'common law of the sea' had actually existed before that time.[78] What is relevant is that, for those writing in the nineteenth century, the 'common law of the sea' was of ancient descent and was part of international law. Therefore, its rules were rules of international law.

The duty of the master to provide assistance to vessels in distress could therefore be seen as an extension of the, rather restricted, old duty of the 'common law of the sea' to assist vessels in distress in some specific circumstances, found in the Consolato del Mare and the rules of the Hanseatic League. The extension would be due to the new practical possibilities offered by technological changes in shipping. Otherwise, it could be conceived of as an abstraction from the different rules of the 'common law of the sea' aiming at the protection of life at sea. These rules included those arising out of conduct adopted by actors directly affected by a certain activity, as in the case of the Consolato del Mare and the Rolls of Oleron, rules developed by entities having an international standing, such as the Hanseatic League, rules codified by legal doctrine, such as those contained in Vattel, and rules adopted by States in the contemporary meaning of the word, such as the *Ordonnance Colbert* and the *Merchant Shipping Amendment Act*. Independently from their source, these rules shared some common features and could be seen as the expression of a common humanitarian principle, mandating the adoption of all possible measures to save life at sea. The specific duty obliging the master of a vessel to rescue people in distress at sea was probably considered as part of the broader duty, or principle, to save life at sea and assist the shipwrecked.

Whatever the conceptual thinking behind this conclusion, in the course of the nineteenth century, those writing on international rules applicable at sea considered the duty of the master to rescue vessels in distress at sea as a rule of the 'common law of the sea'. By consequence, it was incorporated into international law, of which the 'common law of the sea' formed a part. As a result, in the course of the nineteenth century, the international law duties to save life at sea saw the addition of a further component: the duty of the master of a vessel to render assistance to vessels in distress at sea and the people therein. This duty did not substitute the already existing duty to assist the shipwrecked and the right of vessels in distress to seek refuge but was added to those.

77 See for example Mancini, Pasquale Stanislao. *Diritto internazionale. Prelezioni* (Napoli: Giuseppe Marghieri, 1873), 99–100, who considers that '[d]a cinque sorgenti positive si raccolgono i materiali de' quali si compone la disciplina del Diritto Marittimo: gli Usi e le Costumanze della navigazione; gli Statuti e le Leggi maritime; I Trattati Internazionali; la Giurisprudenza delle Corti maritime; gli Scrittori speciali della materia' (ibid., 105).

78 One might indeed trace it at least to Welwod's 'Sea-Lawes'.

5 Towards Codification

The second half of the nineteenth century saw an unprecedented flourishing of efforts at international law-making, in the form of codification and the further development of international law rules. The 'common law of the sea' or 'international maritime law' was among the earliest matters considered by both States and non-State actors. In particular, great attention was put on two separate, yet interlinked, issues, both having a direct relevance for the duty to save life at sea. The first was safety of navigation and the second was uniformity of (maritime) commercial law.

Safety of navigation was mostly pursued at the State level, since States soon realised that such matter could not be left to the whim of private parties. The first meetings dealt with rather technical and quite narrow matters, such as 'a uniform system of meteorological observations at sea'.[79] They therefore do not contain express statements of the duty to save life at sea, although the general humanitarian aim of such efforts was clear. Nonetheless, they posed the basis for trust among states and they prompted further codificatory efforts in the form of intergovernmental conferences.

While States were developing rules on the safety of navigation, non-state actors were far from idle. The maritime and commercial world, on one hand, and the scholarly community, on the other, were active in thinking about an international regime that would uniformly apply to maritime commerce and all issues related to it – including safety of navigation and rescue of vessels in distress. Differently from States, which focused on technical and administrative issues related to safety of navigation, non-state actors were mostly considering conflict of laws and were in quest of a uniform regime, or at least common rules for the resolution of conflicts of national laws relating to cases of collision between vessels and assistance to vessels in distress.

All non-State entities that had been created in the second half of the nineteenth century with the objective of codifying and further developing

79 See *Maritime Conference Held at Brussels in 1853 for Devising an Uniform System Of Meteorological Observations at Sea*, 1853. While the object was indeed technical and rather narrow, the relevance of the conference as an international law-making exercise should not be underestimated; as noted already at that time by Matthew Fontaine Maury, promoter and participant to the meeting, 'we are taking part in a proceeding to which we would vainly seek for a parallel in history. Heretofore, when naval officers of different nations met in such numbers, it was to deliberate at the cannons' mouths and the most efficacious means of destroying the human species. To-day, on the contrary, we see assembled the delegates of almost every maritime nation, for the noble purpose of serving humanity by seeking to render navigation more and more secure.', ibid., 42.

international law and maritime law were devoted to this task: the *Institut de Droit International* (IDI), the *Association for the Reform and Codification of the Law of Nations* (whose name was later changed into *International Law Association* – ILA), and the *Comité Maritime International* (CMI).[80] Furthermore, a series of conferences on commercial and maritime law sponsored by the Belgian Government and involving non-State actors considered the same issues as the other bodies; they included the 1885 Antwerp Conference, the 1888 Brussels Conference and the 1910 Brussels Conference.

The link between uniform rules – or at least common rules on conflicts of law – on one hand, and the safety of life at sea, on the other, was obvious to jurists working in the 1880s, if not to us today. According to the 1883 ILA Resolution on Collisions at Sea 'it is in the simplification and consistency of regulations for preventing collisions at sea that the highest attainable degree of security for lives and property when on sea is to be sought'.[81] Similarly Jacobs, commenting on the work of the Antwerp Congress that will be discussed soon hereunder, notes that '[i]l faut encourager l'assistance, et on ne l'encouragera que pour autant que l'on donne au capitaine du navire, disposé à prêter assistance, la garantie qu'il ne la prêtera pas à un navire soumis à une législation défectueuse d'après laquelle il ne lui serait accordé qu'une indemnité dérisoire'.[82]

The didactive and somewhat patronising effect of a uniform law on salvage, which would 'teach' recalcitrant masters to obey the duty to save life at sea and become 'civilised',[83] was motivated by the actual situation that saw an impressive increase in incidents of navigation and by the humanitarian desire to ensure the safety of life at sea. The two characteristics of international efforts – legal certainty and humanitarian aim – are recalled by Lyon-Caen who considers '[m]ais en faveur de la loi de l'assistant qui a définitivement prévalu, on a surtout fait valoir qu'il importe dans un intérêt humanitaire d'encourager l'assistance, et que cette solution a l'avantage de conduire à ce précieux résultat:

80 It is not the object of this article to detail how each of these associations dealt with maritime law, safety of navigation and salvage, although that would have been a fascinating study.

81 11 Ass'n Reform & Codification L. Nations Rep. Conf. 133 (1883), 143.

82 'Congrès international de droit commercial de Bruxelles. Rapport de M. Jacobs, President de la section de droit maritime'. *Revue internationale du droit maritime* 4 (1888), 348–378, 352.

83 The 'civilising' mission taken upon themselves by international lawyers in the second half of the nineteenth century is aptly described in Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2002).

l'assistant sait par avance quels droits dériveront pour lui de l'assistance'.[84] Similarly, at the 1893 meeting of the ILA it as observed, when discussing fisheries, that 'Si on veut protéger ces pêcheries, le premier et le plus sûr moyen me parait être de sauvegarder avant tout la vie des pécheurs. N'est-ce pas le devoir du législateur international et celui des divers gouvernements?'[85]

The following sections will focus on the two major efforts to codify the duty to save life at sea in the late nineteenth century: the two congresses convened by the King of Belgium in 1885 and 1888, first, and the 1889 Washington intergovernmental conference, in the second place.

5.1 *The 1885 Antwerp and 1888 Brussels Congresses*

The first international meeting that set down to codify the rules on the duty to provide assistance was the 1885 Antwerp Congress on international commercial law.[86] This meeting brought together a vast number of individuals from different backgrounds – representatives of governments, members of commercial tribunals, lawyers, representatives of commercial and maritime associations, scholars and academics – and several states, including from the Americas and Asia. The Congress had 'un certain caractère officiel' being authorised by the King of Belgium and being organised by a commission nominated by him.[87]

The Congress adopted a resolution on uniformity of maritime laws, which includes the following provisions on the duty to rescue in the case of collision and generally:

> 42. – Dans chaque cas de collision entre deux navires, il est du devoir du capitaine ou de toute personne ayant charge du navire, et pour autant qu'il le peut sans danger pour son navire, son équipage et les passagers,

84 Lyon-Caen, Charles. 'Le congrès international de droit commercial d'Anvers'. *Journal du droit international privé* 12 (1885), 593–631, 607.

85 16 Ass'n Reform & Codification L. Nations Rep. Conf. 97 (1893), 98.

86 The 1885 Antwerp Congress on international commercial law was held from 27 September to 3 October 1885. Notwithstanding its name, the Congress mainly dealt with what we today identify as maritime law, rather than commercial law.

87 Lyon-Caen, 'Le congrès' 1885 (n. 84), 593. As described by Constant, Charles. *Le congrès international de droit commercial d'Anvers. compte rendu* (Paris: A Durant and Pedone Laurier, 1886), 3–4: '[c]e Congrès empruntait à son origine un caractère tout particulier: un arrêté du roi des Belges en avait déterminé le but, une commission royale en avait tracé le programme, la plupart des gouvernements avaient désigné des délégués officiels pour s'y faire représenter, et des invitations spéciales avaient été adressées, dans tous les pays, aux jurisconsultes, aux chambres et bourses de commerce, aux compagnies d'assurances et de navigation, aux représentants de la presse juridique'.

> de rester à proximité de l'autre navire jusqu'à ce qu'il se soit assuré qu'une plus longue assistance était inutile, et de donner à ce navire, à son capitaine, à son équipage at à ses passagers, tous les secours possibles et utiles pour les sauver de tout danger résultant de l'abordage.
>
> A défaut de se conformer à ces prescriptions, le capitaine ou toute autre personne avant charge du navire sera, sauf la preuve du contraire, présumée avoir provoqué l'abordage par fausse manœuvre, négligence ou défaut de soins. Il sera, en outre, passible des pénalités à comminer par la loi de son pays.
>
> 43. – Le capitaine qui rencontre un navire, même étranger ou ennemi, en détresse, doit venir à son aide et lui prêter toute l'assistance possible, sous des pénalités à comminer par la loi de son pays.[88]

These provisions constitute the first codification of an international law rule on the duty of the master to provide assistance to vessels in distress.[89] They already include all the elements of the future rule that will eventually find its place in the UNCLOS as art. 98: the general duty; the two hypotheses of vessels in distress due to a collision or for any other reason; the beneficiary which is any vessel in distress (even foreign or enemy) without any exception; the need not to jeopardise the safety of the rescuing vessel, its crew and its passengers.

As to the legal value of the instrument, we can consider it, by today's standards, as a soft law instrument. It is not a treaty, since it is not negotiated and adopted by states. Yet State representatives did participate in the conference and did vote in favour of the text, together with representatives from organisations which we might today define as 'civil society' or 'non-governmental organisations' (NGOs) that had an interest in the topic under discussion, such as domestic tribunals, and commercial and maritime associations. Its normative value therefore derives from the fact that it was adopted by the relevant stakeholders and embodies their views on the topic. Furthermore, it represented, according to those that participated to the conference and supported its final text, a statement of international law as it should be developed and it seems to include, using the categories developed by the International Law Commission some decades later, both the codification of international law rules and the further development of this law. It could therefore be considered

88 Autran, Frederic Charles 'Le congrès international d'Anvers – Ces résolutions en matière maritime'. *Revue internationale du droit maritime* 1 (1885), 425–435, 433–434.

89 While there may be earlier documents adopted at the international level that contain this statement of an international law rule, this is the first such document the author was able to locate during her research.

as a 'soft law' instrument, which, although not creating law by itself, may contribute to the crystallisation and development of rules of international law. This is also evident in the use that the Conference intended to be made of the final declaration: in its plenary session of 3 October 1885, the Congress unanimously prayed the royal Belgian commission to continue working on the text and, if necessary, to convene a new congress.[90]

Turning in particular to the duty of the master to provide assistance, this provision was adopted unanimously. It therefore represents the uniform view of all participants, including both State representatives and the industry and scholarly community. Furthermore, from the comments of those that attended the conference and reported on its works, it emerges quite clearly that the provisions on assistance to vessels in distress were motivated by 'superior reasons of humanity'.[91] This is the language, it may be recalled, already used to justify the existence of rules on assistance in both international and national law. From these elements, one may infer that there was a strong support for such a rule, which was both justified under what was at the time a cogent element and did not receive any opposition, from either State or non-State actors.

The suggestions of the Antwerp Congress plenary were enacted upon and the provisions formulated at Antwerp were reproduced in the resolution adopted at the following conference sponsored by Belgium, held in Brussels in 1888. The comments accompanying the text by Jacobs, President of the maritime section of the conference, are illuminating as to the nature of the provision and its relevance:

> Nous avons reproduit une disposition accessoire, admise au Congrès d'Anvers et que nous n'aurions pas voulu paraître abandonner: c'est celle qui oblige le capitaine du navire abordeur à rester à proximité du navire abordé, pour autant qu'il le peut sans danger pour son navire, son équipage et ses passagers, jusqu'à ce qu'il se soit assuré qu'une plus longue assistance est inutile.[92]

90 Lyon-Caen, 'Le congrès' 1885 (n. 84) 631.

91 According to Lyon-Caen, '[l]a section de droit maritime a adopté à l'unanimité une disposition empruntée à la loi anglaise … qui, en cas d'abordage, impose aux capitaines, une obligation d'assistance justifiée par des raisons supérieures d'humanité' (Lyon-Caen, 'Le congrès' 1885 (n. 84), 625). There is no comment specifically on paragraph 43 (the general duty to provide assistance); the reason is probably the fact that Lyon-Caen was much more interested in conflicts of laws rather that the duty to rescue *per se*.

92 'Congrès international' 1888 (n. 82), 360.

The reproduction *verbatim* of the provision shows its generalised acceptance and its non-contentious nature. Furthermore, the fact that the provision was repeated because the participants 'did not wish to seem to have abandoned it' suggests that the provision was strongly supported and was considered as an important and possibly essential part of international law.[93]

5.2 *The 1889 Washington Conference*

The biggest intergovernmental conference that considered safety of life at sea was probably the 1889 International Marine Conference, organised from 16 October to 31 December 1889 in Washington by the government of the United States. Contrary to the Antwerp and Bruxelles Congresses, which had a mixed composition, this was a truly intergovernmental meeting: the Conference saw the participation of delegates from twenty eight states that represented the major maritime powers of the day.[94] The objective of the Conference was to 'revise and amend the rules, regulations and practice concerning vessels at sea and navigation generally', including 'to compare and discuss the various systems employed for the saving of life and property from shipwreck'.[95]

The final act includes a provision on the duty of the master to provide assistance in the case of collision that is very similar to s. 33 of the *Merchant Shipping Amendment Act*, 1862. The reasons for inserting this provision are clearly given in the report by the committee that was examining the rule, among other provisions, to the plenary of the Conference. They are worth reporting in their original text, as they very likely constitute the first *travaux preparatoires* of the international law rule on the duty of the master to render assistance and as they provide food for further considerations.

> (a) Duties of vessels after collision.
> What these duties are is obvious enough. Common humanity requires that the colliding vessels should remain by each other and render all needed assistance so long as they can do so consistently with their own

93 Albeit considered, at the same time, as 'accessory' to the text that was being discussed and which mostly concerned private international law issues.

94 Representatives from the following States attended the Conference: Austria-Hungary, Belgium, Brazil, Chili, China, Costa Rica, Denmark, France, Germany, Great Britain, Guatemala, Hawaii, Honduras, Italy, Japan, Mexico, Netherlands, Nicaragua, Norway, Portugal, Russia, Siam, Spain, Sweden, Turkey, Uruguay, Venezuela and United States. They thus included, apart from American and European States, also three Asian states and one Pacific state.

95 *Protocols of Proceedings*, vol. I (n. 54), v. The Conference is best known for the adoption of the first *International Regulations for Preventing Collisions at Sea* ('Colregs' 1889) which are in their revised version to this very day the standard for navigation.

> safety. Experience shows, however, that masters of vessels frequently take advantage of the circumstances attending such disasters to escape from the scene without identification, in order to avoid responsibility. Several of the maritime nations have, therefore, imposed upon them the legal obligation of performing these natural duties.... It would seem, then, that any effective measure which might prevent such a practice, or make it less frequent, would not only be in the interest of humanity, but also aid in securing justice in regard to the rights of property. The committee, therefore, are of the opinion that in case of collision between two vessels, the master or person in charge of each vessel should be required, so far as he can without danger to his own vessel, crew, or passengers, to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers, such assistance as may be practicable and necessary in order to save them from any danger caused by the collision; and also to give to the master or person in charge of the other vessel, the name of his own vessel, and of her port of registry, or of the port or place to which she belongs, and the name of the ports and places from which and to which she is bound ... . In expressing the foregoing opinion the committee are unanimous, but a minority think the Conference should indicate what, in their opinion, the penalty of failure to comply with the duties prescribed should be. The majority, however, do not deem this necessary, believing that the consequences of disobedience to their laws can and will properly be taken care of by the several governments, without suggestions from the Conference.[96]

The text just reproduced is very informative concerning a number of issues related to the genesis of the duty to rescue at sea. First, by 1889, this is a well-established duty. The initial phrase, according to which the duty to assist a vessel in danger after a collision 'is obvious enough', is telling of the normative premises of those discussing the rule. This is neither a new rule that was unheard of before, nor a controversial rule that is strenuously debated and sees a number of states questioning its existence and content. This is an 'obvious' rule, that is approved unanimously by all state representatives taking part in the Conference. The only discussion raised with regard to it concerns the convenience of completing the provision with a uniform sanction for masters disregarding the rule.

96 *Protocols of Proceedings of the International Marine Conference*, vol. II (Washington: Government Printing Office, 1890), 1082–1083.

The unanimous and uncontroversial nature of the rule appears also from the fact that the text remained virtually unchanged throughout the negotiations. The only substantial modification of the rule, as put forward at the committee, was to add the word 'serious' before the word 'danger', when reference is made to the only exception to the duty to provide assistance. This modification was justified on the grounds that the absence of the word 'serious' would practically allow masters to escape their responsibilities at any time, given that the activity of sailing itself always presents some danger, however slight.[97] This addition, therefore, aimed at strengthening the obligation to provide assistance and was unanimously accepted, as was the entire provision.

Second, the origin of the rule appears to be rooted in natural law, as may be inferred from the characterisation of the duty in question as a 'natural duty' required by 'common humanity'. At the same time, the report underlines how this 'natural duty' has been transformed into a 'legal obligation' by maritime states. This process – we are at the close of the nineteenth century – is very much in line with the transition from natural law to positive law that characterised the nineteenth century. The need to transform the duty into a 'legal obligation' arises from the growing positivisation of legal thinking, whereby only rules written in legally binding instruments, such as state laws, have normative power. At the same time, the reference to a natural duty should not be underestimated, as it is very probably evidence of the pre-existence of the rule in natural law – a law that was recognised and applied internationally up until that moment. Combining these two remarks, one may surmise that the change suffered by the rule, from a natural (legal) rule to a (positive) legal one was due not so much to the fact that the rule did not exist before, but rather to the change in conceptual thinking, which required that anything having legally binding nature should find its way into national and international legislation.

Third, by 1889 at least if not before, it can be assumed that it constituted a general principle shared by the relevant states. While the nature of this rule as such was not discussed, the report remarks that the legislation of all states

97 In supporting his proposed amendment, the German delegate Sieveking thus observes: '[w]e have it provided for in the German law now, that a captain is not allowed to leave the other vessel in case of a collision unless there is *serious* danger to his own vessel; and if we alter that and say where there is danger to his own vessel, it would be quite clear that it is our intention to allow him to get away from the other vessel even if he should incur a slight danger only by standing by. He might always say that there was a slight danger, because every vessel which is on the seas, in a certain degree, exposed to danger, and he might always have an excuse for saying that there was danger, not a serious danger, but some danger. That is not the meaning of the law'. *Protocols of Proceedings*, vol. II (n. 96), 1308.

that addressed the duties of a master following a collision contained the same provision, with variances only as to the penalties imposed. Abstraction from national legislation of an international rule – what we qualify today as a general principle of international law according to Art. 38 Statute of the International Court of Justice – is a process that was operative at that time as well as today.[98]

The Washington Conference did not purport to adopt an international treaty, but rather a set of unanimously agreed rules that would be in the form of a 'model legislation', to be then implemented by each state separately.[99] In its final act, however, it also inserted a number of resolutions, including two on the duty of 'standing-by' and assisting the other vessel in case of collision. The text of the two resolutions is identical, apart from the verb used to describe the nature of the duty of the master. While one resolution uses the form 'should' the other uses the form 'shall'. The resolutions were adopted by the Conference unanimously and were called to the special attention of States. Therefore, and while one may muse on the reasons for two modalities of the verb 'shall', this divergence should not be overemphasised: first, because the final outcome was not a treaty, but rather a 'soft law' instrument and, second, because the unanimous approval of this rule underlines its generalised acceptance, as proven by the record of the Conference.

In conclusion, the proceedings of the Washington Conference confirm the existence of a rule of customary international law requiring masters of vessels to rescue persons in distress at sea. the official character of the Conference, and the fact that it was wholly composed of representatives of states, leaves no doubt as to the fact that its discussions may be considered states practice. If therefore the 1885 Antwerp resolution could be considered as the first codification of such customary rule in a soft law instrument, the resolutions of the 1889 Washington Conference are proof of the 'hard' nature of the customary rule.

98 See, e.g., Anzilotti, Dionisio. *Corso di diritto internazionale* (Roma: Athenaeum, 1923), 38, considers that 'anche una recezione di norme interne nel diritto internazionale può certamente aver luogo, nel senso già spiegato, se due o più Stati accolgono come contenuto di un loro accordo norme proprie di un ordinamento giuridico interno. La storia del diritto marittimo potrebbe forse dimostrare la recezione in consuetudini o trattati internazionali di principi propri del Consolato del Mare o dell'Ordinanza francese del 1681'.

99 The Colregs retained this form until well into the twentieth century, when they were eventually transformed into an international treaty, with the adoption in 1972 of the Colregs Convention (n. 14).

6 The 1910 Conference and Conventions

Compared with the 1889 Washington Conference, the Antwerp and Bruxelles Congresses do not appear to be truly intergovernmental conferences by the standards of today. Although they had been organised under the sponsorship of the King of Belgium, voting rights were given not only to States, but also to other non-state actors, as well as private individuals. They were nonetheless fundamental, together with the work performed by other non-State bodies, in triggering attention for the codification of international maritime law and providing the bases for State action.

From the point of view of their initiators, the texts produced at the two Belgian congresses were particularly relevant and deserved to be transformed into hard law. At the same time, it was not easy to pursue continuity of work in occasional events, such as the two congresses. More continuous work was being pursued at the two permanent international bodies existing at the time, the ILA and the IDI. Both were active, since their inception, on projects to codify and further develop international maritime law, including the law of collisions ('abordage') and assistance to distressed vessels ('assistance'), two branches that were of direct relevance for the duty to rescue.

After the adoption of its first projects on international maritime law,[100] the ILA was to abandon work in the field and a leading role was to be performed by the CMI. The latter was an organisation, which had been formally constituted in 1897 with 'distinctive policy-influencing objectives'.[101] A peculiar characteristic of the CMI was that it grouped not only maritime lawyers but also representatives of other economic activities related to maritime commerce, including ship-owners, underwriters and national judges active in maritime matters.[102] The capacity of the CMI to influence national and international law-making

100 *The York-Antwerp Rules of General Average* adopted at the 5th ILA Conference in 1877.

101 Khan, Daniel-Erasmus. 'The International Ice Patrol', in *Recht und Realität. Festschrift für Christoph Vedder*, eds. Stefan Lorenzmaier and Hans-Peter Folz (Baden-Baden: Nomos Verlagsgesellschaft, 2017), 477–510, 485. On the genesis and history of the CMI see Lilar, Albert and Carlo Van Den Bosch. 'Comité maritime international 1897–1972', available at https://comitemaritime.org/wp-content/uploads/2018/05/LILAR-VAN-DEN-BOSCH-Le-Comit%C3%A9-Maritime-International-1.pdf (last accessed on 25 November 2021).

102 In the words of one of the participants, '[T]hese Conferences … have, as it seems to me, another very valuable result: they bring together Merchants, Underwriters, Shipowners, and Lawyers of different countries. They bring together different men of different countries exercising different capacities and positions, and the result of bringing these men together is, I have no doubt whatever (for I have seen something of it myself) to teach them to appreciate, to respect, and to like one another.' Comité maritime international, *Conférence de Venise* (Anvers: Imprimerie J.-E. Buschmann, 1908), 467.

was in part due to the positions held by some of its members. Suffice it to mention that its first president, from 1896 to 1912, was August Beernaert, the leading Belgian politician that had just been Prime Minister and who eventually won the Nobel prize for his work at the 1899 and 1907 Hague peace conferences.[103] While Prime Minister, Beernaert had been one of the promoters of the 1885 Antwerp Congress and the 1888 Brussels Congress. When the CMI was constituted, he, together with the other members, devoted themselves to furthering the project for the codification of international maritime law, including the law related to collisions and rescue at sea.

In the works of the CMI, the provisions on the duty of the master to provide assistance to a vessel in distress, also in the case of collision, remain present and do not seem to constitute the object of discussion. While the duty to provide assistance did not feature prominently in the discussions, the different drafts that followed each other in the works of the CMI did contain a provision on the duty of the master to provide assistance to other vessels in distress. These provisions, which obliged the master both generally and with respect to situations of collision between two vessels, were to be found in the draft treaties concerning, respectively, salvage (*assistance*) and collisions (*abordage*)[104] and were reported as enjoying the unanimous support of those attending the CMI Conferences.[105]

Following the Antwerp and Brussels Congresses, with the new century the Belgian Government convened further conferences, in the effort to ensure the adoption of an international treaty that would codify (at least part of) international maritime law, including one hosted in Brussels on 16 October 1905. The texts discussed in these conferences were essentially those elaborated by the CMI, concerning salvage and collisions.

While the conferences did not generally change the text of the CMI, a relevant modification took place at the Brussels Conference. The modification concerned the duty of the master to provide assistance and was described in these terms by the Secretary of the CMI to the meeting following the conference:

> Et si dans le code relatif à l'Assistance en mer, une modification plus importante a été faite, c'est au moins une réforme à laquelle nous pouvons nous rallier sans difficulté. Lors de nos délibérations, la France et l'Italie avaient proposé que dans tout sinistre maritime, l'assistance fût

103 Beernaert, Auguste. 'Biographical', available at: https://www.nobelprize.org/prizes/peace/1909/beernaert/biographical (last accessed on 18 June 2020).

104 Comité maritime international, *Conférence de Liverpool* (Anvers: Imprimerie J.-E. Buschmann, 1905), 93.

105 Ibid., 221.

> une obligation; qu'elle dût être rendue même au navire coupable qui avait causé la collision, même aux navires étrangers, même – disait la formule – aux navires ennemis. Nous avions pensé que s'il fallait consacrer cette obligation c'était dans des limites prudentes, et non au delà, il convenait de ne demander que le strict nécessaire et de ne rendre l'assistance obligatoire que lorsqu'il s'agissait de l'abordage. La conférence diplomatique a été plus large et elle a rendu général ce devoir de se secourir et de s'entr'aider.
>
> Il me semble que c'est vraiment sous une belle étoile que naît un code qui inscrit dans le droit international un principe d'aussi noble humanité!'[106]

From this account we learn that it was the States themselves that decided to expand the scope of the duty of the master to provide assistance to any vessel in distress. Particularly significant is the reference to foreign and even enemy vessels, at a time when war was not yet prohibited.[107]

The efforts of Belgium to codify international law relating to collisions and salvage were eventually successful in 1910, when an intergovernmental Conference convened in Brussels adopted two international treaties, the *International Convention for the Unification of Certain Rules of Law Related to Collision between Vessels* (1910 Collisions Convention)[108] and the *International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea* (1910 Salvage Convention).[109]

The two treaties contain the following provisions on the duty of the master to provide assistance to ships in distress:

> Every master is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to everybody, even though and enemy, found at sea in danger of being lost.[110]
>
> After a collision, the master of each of the vessels in collision is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to the other vessel, her crew and her passengers.[111]

106 Comité maritime international, *Conférence de Venise* 1908 (n. 102), 477–478.

107 As it now is by art. 2 Charter of the United Nations.

108 International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, 23 September 1910 (Salvage Convention).

109 International Convention for the Unification of Certain Rules of Law Related to Collision between Vessels, 23 September 1910 (Collisions Convention).

110 Art. 11 Salvage Convention.

111 Art. 8 Collisions Convention.

As can be seen from the text of the two provisions, they repeat *verbatim* the content of the provisions already discussed earlier in this work. The first provision, in particular, incorporates the text as amended at the 1905 Brussels Conference by States, which aimed at enlarging the scope of the provision, so as to encompass any person in danger of being lost at sea.

In conclusion, the official and unofficial *travaux preparatoires* that led to the formulation of the two provisions eventually incorporated in the 1910 conventions clearly prove that the duty of the master to rescue people in distress at sea was a rule strongly desired by States and the maritime community. This duty was referred to as a necessary element of any future treaty since the beginning of negotiations in 1885. It was unanimously accepted in all the meetings that followed and there is no record of anyone having proposed to delete it or reduce its scope. Quite to the contrary, the only textual changes that took place with respect to its formulation went in the direction of broadening its scope and clarifying that it had a universal application, in time of peace as well as in time of war. All these elements, together with the fact that states had already introduced this duty into their national legislations, point to the fact that this duty was considered as applicable international law, arguably already as far back as 1885 and certainly by 1899.

7 Conclusions

The current formulation of the international law duty to save life at sea is the result of developments that spanned through centuries, if not millennia. When international law emerged in the sixteenth and seventeenth century, the common principle that mandated protection for those in peril at sea had already been declined into three separate, yet interrelated duties, to be found in other legal systems, which included Roman law, mediaeval maritime customs and domestic legislation. The first mandated assistance to the shipwreck and punished those who would not assist them, but would rather rob and kill them. The second consisted in the right to seek refuge for vessels in distress. The third imposed on the master of a vessel to provide assistance to other vessels in distress.

With the emergence of international law in the sixteenth and seventeenth centuries, international lawyers took stock of the general principle and the existing duties concerning protection of life at sea, which seem to have naturally been incorporated into the new discipline. Seventeenth- and eighteenth-century scholarship took it for granted, that rules concerning the rescue of the shipwrecked and the right of refuge for vessels in distress formed part of international law. In contrast, the duty of the master to rescue vessels in distress

at sea seems to have escaped the attention of international law scholars of that period. It apparently remained for some more time a custom of the 'common law of the sea' and was eventually fully integrated into international law 'only' in the nineteenth century.[112] At that point, however, its transformation acquired a speed not shown by the other rules, and it was indeed the first to be codified, first in soft law, in 1885, and finally in hard law, in the two 1910 Bruxelles Conventions. As a consequence, by 1910, the customary rule of the master to render assistance became the object of a treaty rule, without at the same time losing its customary nature. On the opposite, the rules concerning assistance to the shipwrecked, in particular by the coastal states, and the right to seek refuge, were still only customary rules, codified by scholars.[113]

These findings confirm the general belief of international lawyers that '[t]he duty to rescue persons in distress is one of the most ancient and fundamental features of the law of the sea'[114] and, one can add, of international law itself. There is a strong continuity in the enunciation of the duties relating to the protection of life at sea throughout the different epochs and legal sources in which they have been spelt out. In fact, the content of the duty has varied little, if at all, from one text to another. These findings cannot but reinforce the strength of the principle to save life at sea and its ensuing duties.

The main aim of this article and the underlying research has been to conduct a historical investigation; nonetheless, it is submitted, this research has produced some results that may be useful also to those who are called to apply the duty to save life at sea today. On one hand, information as to its origin is certainly useful in corroborating specific conclusion as to interpretation of current rules, in accordance with Art. 32 Vienna Convention on the Law of Treaties. On the other hand, a historical examination of the duty may shed light into little known aspects of the process that led to the emergence of this

112 This trajectory follows the generalised process witnessed by many norms of international law in the nineteenth century. First, due to the nationalisation of law-making that took place in the first half of the century, many international law rules commonly used throughout the world were incorporated into national legislation. Then, in the second half of the century, the internationalisation that followed led to a 're-internationalisation' of these rules first through a process of scholarly codification and then through incorporation into treaties ratified by states.

113 The rule on the duties of states towards vessels in distress off their coasts will be codified only later, while the right to seek refuge still lacks a codification into a binding treaty.

114 Barnes, Richard. 'Refugee Law at Sea'. *International & Comparative Law Quarterly* 53 (2004), 47–77, 49. For Oxman, 'Human Rights' 1998 (n. 3), 414, it is 'one of the traditional hallmarks of the law of the sea'. For a minority view, according to which this would be only 'an optimistic account', Guilfoyle, Douglas. 'Article 98. Duty to Render Assistance', in *United Nations Convention on the Law of the Sea. A Commentary*, ed. Alexander Proelß (Munich / Oxford / Baden-Baden: C.H. Beck / Hart / Nomos, 2017), 725–730, 726.

duty as a duty of international law and may therefore help better inform views about its nature, its content and the subjects that are bound by it.

Looking at the above analysis through the eyes of the modern reader, troubled by current issues in the interpretation and application of the duty to save life at sea, there are some points, which are worth highlighting. In the first place, the historical evolution of the duty to save life at sea confirms that the humanitarian principle to do everything possible to save life at sea has been a constant in the evolution of international law. One may therefore share the assumption that this duty 'can be considered as a manifestation of the principle of protection of human life which has a long-standing tradition in maritime custom'.[115] Historical analysis, therefore, confirms the assumption that, in addition and further to the specific duties contained in Article 98 UNCLOS and the other legal instruments mentioned in the introduction, there is an underlying general principle that mandates states and other actors to do everything possible to save life at sea. As has been authoritatively stated, treaty rules give 'expression to the general tradition and practice of all seafarers and of maritime law regarding the rendering of assistance to persons or ships in distress at sea, and elementary considerations of humanity'.[116]

Second, while the underlying principle has remained immutable, the actual content of the duties derived by it have developed depending upon the factual circumstances existing at different times. At a time when people in distress at sea depended, for help, from those on the coast, international lawyers privileged to codify rules on the duty to provide assistance to the shipwrecked by coastal communities and the coastal state, as well as the right of vessels in distress to enter into the ports and coasts of other states. Later, when steam ships rendered manoeuvring easier but also increased the number of collisions, international lawyers came to recognised as a rule of international law the duty of the master to render assistance when out at sea. The lesson seems clear: while the principle is undisputable, the specific duties deriving from it adapt to current circumstances, and in discussing today the content of this duty we should take into account existing circumstances.[117]

115 Scovazzi, 'Human Rights' 2014 (n. 3), 225.

116 Nordquist/Nandan/Rosenne, *The United Nations* 1985 (n. 3), 171. While this is not the place to further discuss this issue, suffice it to mention that the principle to save life at sea appears to be a due diligence duty, and the specific rules included in international treaties operationalise the general duty; on duties that operationalise due diligence duties Ollino, Alice. *Due Diligence Obligations in International Law: A Theoretical Study* (Cambridge: Cambridge University Press, 2021), chapter 3.

117 In fact, in the twentieth century, the use of radio communications has further added dutiers concerning search and rescue.

Third, it is worth noting that the different duties stemming from the general principle to save life at sea seem to have been conceived as norms binding not solely states, but other actors, as well. The duty to provide assistance to the shipwrecked was also couched in terms of a duty of individuals, or of coastal communities. The right to seek refuge in case of distress was attributed to vessels, rather than to their flag states. Finally, the duty to rescue persons in distress at sea was a duty pending on the master of the vessel, rather than on the flag state, as now in Article 98(1) UNCLOS. At a time when there is much discussion about the rights and duties of individuals and other non-state actors, stressing the fact that the duty to save life at sea has been addressed also to others than states for some centuries at least has a certain significance.

Turning to the specific duties identified above, it is worth highlighting the longstanding existence of the duty to seek refuge for vessels in distress at sea. This is the one duty that has so far not been fully codified into treaty law. Nonetheless, it is a well-established duty, that was considered part of international law since the latter's inception in the seventeenth century and has continued being part of international law during the nineteenth century. The long history of this duty and its continuing existence are certainly relevant also for today, in particular in cases where delay by national authorities in granting a port for the disembarkation of the persons rescued at sea may cause a situation of distress on board the rescuing vessel.

Finally, with respect to the duty of the master to rescue people in distress at sea, the 'delay' in the reception of the master's duty into the scholarly writings of international lawyers should not be overemphasised. Other sources of law, including domestic statutes and maritime usages, already prescribed such duties even before the genesis of international law. Furthermore, in the nineteenth century this duty was rapidly received in both international instruments and national legislation without much discussion. Lack of debate demonstrates the generalised acceptance of this duty. Eventually, the duty of the master was the first to be codified into a treaty. It seems reasonable to argue that there has always been a norm that obliged masters to act whenever the circumstances so required. It simply took different forms – a common custom between seafaring nations, a rule under the common law of the sea, a rule of national law applicable internationally, a rule of customary international law, a treaty rule – following the development of the conceptual understanding by the members of the international community, as to what constitutes a binding rule internationally. In each historical period, in fact, the rule is incorporated into the formal source that, at that period, was considered as the expression of an internationally legally binding rule.

Acknowledgments

Research for this article was conducted while I was a Visiting Scholar at the Max Planck Institute for Comparative Public Law and International Law in January-February 2019. I am particularly grateful to Professor Anne Peters and the Max Planck Society for funding my research, as well as to the library staff at the Institute for their precious help. This is the first of a series of two articles, the second of which should illustrate the development of the duty to save life at sea from 1910 until now.

Bibliography

'Congrès international de droit commercial de Bruxelles. Rapport de M. Jacobs, President de la section de droit maritime'. *Revue internationale du droit maritime* (1888) 348–378.

Anzilotti, Dionisio. *Corso di diritto internazionale* (Roma: Athenaeum, 1923).

Ashburner, Walter. *The Rhodian Sea-Law* (Oxford: Clarendon Press, 1909).

Attard, Felicity G. *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (Leiden: Brill, 2020).

Autran, Frederic Charles. 'Le congrès international d'Anvers – Ces résolutions en matière maritime'. *Revue internationale du droit maritime* (1885), 425–435.

Autran, Frederic Charles. *Code international de l'abordage maritime* (Paris: Chevalier-Marescq et Cle, 1890).

Beernaert, Auguste. 'Biographical', available at https://www.nobelprize.org/prizes/peace/1909/beernaert/biographical (last visited on 18 June 2020).

Barnes, Richard. 'The International Law of the Sea and Migration Control', in *Extra-territorial Immigration Control: Legal Challenges*, eds. Bernard Ryan and Valsamis Mitsilegas (Leiden: Brill, 2010), 103–149.

Barnes, Richard. 'Refugee Law at Sea'. *International & Comparative Law Quarterly* 53 (2004), 47–77.

Bederman, David J. 'The Sea', in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 359–380.

Bevilacqua, Giorgia 'Italy Versus NGOs: The Controversial Interpretation and Implementation of Search and Rescue Obligations in the Context of Migration at Sea'. *The Italian Yearbook of International Law* 28 (2018), 11–27.

Bluntschli, Johann Caspar. *Le droit international codifié* (Paris: Librairie de Guillaumin, 1870).

Boisson, Philippe. *Safety at Sea: Policies, Regulations & International Law* (Paris: Bureau Veritas 1999).

Casaregi, Giuseppe Maria. *Il Consolato del Mare colla spiegazione di Giuseppe Maria Casaregi* (Venezia: Per Francesco Piacentini, 1737).

Chevreau, Emmanuelle. 'La Lex Rhodia de Iactu: Un exemple de la reception d'une institution etrangere dans le droit romain'. *Tijdschrift voor Rechtsgeschiedenis* 73(1) (2005), 67–80.

Churchill, Robin R and A. Vaughan Lowe. *The Law of the Sea* (Manchester: Manchester University Press, 3rd ed. 1999).

Comité maritime international, *Conférence de Liverpool* (Anvers: Imprimerie J.-E. Buschmann, 1905).

Comité maritime international, *Conférence de Venise* (Anvers: Imprimerie J.-E. Buschmann, 1908).

Constant, Charles. *Le congrès international de droit commercial d'Anvers. Compte rendu* (Paris: A Durant and Pedone Laurier, 1886).

Corrieri, Salvatore. *Il Consolato del Mare. La tradizione giuridico-marittima del Mediterraneo attraverso un'edizione italiana del 1584 del testo originale catalano del 1484* (Roma: Ass. Naz. Del Consolato del Mare, 2005).

Corrieri, Salvatore. 'Profili di storia del commercio maritime e del diritto della navigazione nel Mediterraneo: Dal period statutario all'era delle scoperte geografiche', in *La formazione del Diritto marittimo nella prospettiva storica*, eds. Guido Camarda, Salvatore Corrieri and Tullio Scovazzi (Milano: Giuffrè, 2010), 1–79.

Cuttitta, Paolo. 'Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean'. *Geopolitics* 23 (2018), 1–29.

Daenell, Ernst. 'The Policy of the German Hanseatic League Respecting the Mercantile Marine'. *The American Historical Review* 15 (1909), 47–53.

De Courcy, Alfred. *Questions de droit maritime* (Paris: Cotillon, 1877).

De Vittor, Francesca and Massimo Starita. 'Distributing Responsibilities between Shipmasters and the Different States Involved in SAR Disasters'. *Italian Yearbook of International Law* 28 (2018), 77–95.

European Union Agency for Fundamental Rights. '2020 update – NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them'. 19 June 2020, available at: https://fra.europa.eu/en/publication/2020/2020-update-ngos-sar-activities#TabPubTable1-NGOshipsinvolvedinSAROperations1 (last accessed on 25 November 2021).

Fife, Rolf Einar. 'The Duty to Render Assistance at Sea: Some Reflections after Tampa', in *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi*, eds. Jarna Petman and Jan Klabbers (Leiden: Martinus Nijhoff, 2003), 469–484.

Fiore, Pasquale. *Il diritto internazionale codificato e la sua sanzione giuridica* (Torino: Unione Tipografico-Editrice, 1898).

Flanders, Henry. *A Treatise on Maritime Law* (Boston: Little, Brown and Company, 1852).

Frankot, Edda. *'Of Laws of Ships and Shipmen'. Medieval Maritime Law and Its Practice in Urban Northern Europe* (Edinburgh: Edinburgh University Press, 2012).

Guilfoyle, Douglas. 'Article 98. Duty to Render Assistance', in *United Nations Convention on the Law of the Sea. A Commentary*, ed. Alexander Proelß (Munich / Oxford / Baden-Baden: C.H. Beck / Hart / Nomos, 2017), 725–730.

Haggenmacher, Peter. 'Le modèle de Vattel et la discipline du droit international', in *Vattel's International Law from a XXIst Century Perspective*, eds. Vincent Chetail and Peter Haggenmacher (Leiden: Martinus Nijhoff, 2011), 1–48.

Higgins, A. Pierce and C. John Colombos. *The International Law of the Sea* (London: Longmans, Green, 1945).

Ilcev, Stojce D. 'The Development of Maritime Radio Communications'. *International Journal of Maritime History* 30(3) (2018), 536–543.

Jouannet, Emmanuelle. 'Emer De Vattel (1714–1767)', in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 1118–1121.

Kelly, Morgan, Cormac O. Grada and Peter M Solar. 'Safety at Sea during the Industrial Revolution'. *The Journal of Economic History* 81(1) (2021), 239–275.

Khalilieh, Hassan S. *Admiralty and Maritime Laws in the Mediterranean Sea (ca. 800–1050): The Kitāb Akriyat Al-Sufun Vis-a-vis the Nomos Rhodion Nautikos* (Leiden: Brill, 2006).

Khalilieh, Hassan S. 'Human Jettison, Contribution for Lives, and Life Salvage in Byzantine and Early Islamic Maritime Laws in the Mediterranean'. *Byzantion* 75 (2005), 225–235.

Khan, Daniel-Erasmus. 'The International Ice Patrol', in *Recht und Realität. Festschrift für Christoph Vedder*, eds. Stefan Lorenzmaier and Hans-Peter Folz (Baden-Baden: Nomos, 2017), 477–510.

Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2002).

Le Clere, Julien. *L'assistance aux navires et le sauvetage des epaves* (Paris: Librairie Generale de Droit et de Jurisprudence, 1954).

Lilar, Albert and Carlo Van Den Bosch. 'Comité maritime international 1897–1972', available at https://comitemaritime.org/wp-content/uploads/2018/05/LILAR-VAN-DEN-BOSCH-Le-Comit%C3%A9-Maritime-International-1.pdf (last accessed on 25 November 2021).

Lyon-Caen, Charles. 'Le congrès international de droit commercial d'Anvers'. *Journal du droit international privé* 12 (1885), 593–631.

Maritime Conference Held at Brussels in 1853 for Devising an Uniform System of Meteorological Observations at Sea, 1853.

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

Mancini, Pasquale Stanislao. *Diritto internazionale. Prelezioni* (Napoli: Giuseppe Marghieri, 1873).

Marsden, Reginald G. *A Treatise on the Law of Collisions at Sea* (London: Stevens and Sons, 1880).

Marsden, Reginald G. and Kenneth McGuffie. *The Law of Collisions at Sea* (London: Stevens & Sons Limited, 1961).

Mediterranean Sea, updated to June 2020, European Union Agency for Fundamental Rights. '2020 update – NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them', available at: https://fra.europa.eu/en/publication/2020/2020-update-ngos-sar-activities#TabPubTable1-NGOshipsinvolvedinSAROperations1 (last accessed on 03 August 2021).

Molloy, Charles. *De jure maritimo et navali, or, A Treatise of Affairs Maritime and of Commerce* (London: Printed for John Bellinger ... George Dawes ... and Robert Boulter ..., 1676).

Moreno Lax, Violeta and Efthymios Papastavridis, eds. *Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Leiden: Martinus Nijhoff, 2017).

Neff, Stephen C. 'A Short History of International Law', in *International Law*, ed. Malcolm D. Evans (Oxford: Oxford University Press, 4th ed. 2010), 3–28.

Nordquist, Myron, Satya N. Nandan and Shabtai Rosenne, eds. *The United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. 3 (Leiden: Martinus Nijhoff, 1985).

Ollino, Alice. *Due Diligence Obligations in International Law: A Theoretical Study* (Cambridge: Cambridge University Press, 2021).

Ortolan, Théodore. *Règles internationales et diplomatie de la mer*, vol. 1 (Paris: Cosse et N. Delamotte - J. Dumaine, 1845).

Oxman, Bernard H. 'Human Rights and the United Nations Convention on the Law of the Sea'. *Columbia Journal of Transnational Law* 36 (1998), 399–429.

Papanicolopulu, Irini 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview'. *International Review of the Red Cross* 98 (2016), 491–514.

Papastavridis, Efthymios. 'We Saved Them. Now What?: The Unresolved Question of Disembarkation of Rescued Persons at Sea', in *La contribution de la Convention des Nations Unies sur le Droit de la Mer à la bonne gouvernance des mers et des océans*, ed. Jose Manuel Sobrino Heredia (Napoli: Editoriale Scientifica, 2014), 587–606.

Pardessus, Jean Marie. *Collection de Lois Maritimes Antérieures au XVIII^e Siécle* (Imprimerie Royale, 1828).

Perels, Ferdinand and Léon Arendt. *Manuel de droit maritime international*, transl. by Léon Arendt (Paris: Librairie Guillaumin, 1884).

Protocols of Proceedings of the International Marine Conference, vol. I (Washington: Government Printing Office, 1890).

Protocols of Proceedings of the International Marine Conference, Vol. II (Washington: Government Printing Office, 1890).

Pufendorf, Samuel. *De Jure Naturae et Gentium Libri Octo* (Oxford: The Clarendon Press, 1934).

Purpura, Gianfranco. 'Ius naufragii, sylai e lex rhodia. Genesi delle consuetudini marittime mediterranee'. *Annali dell'Università di Palermo* 47 (2002), 273–292.

Reddie, James. *An Historical View of the Law of Maritime Commerce* (Edinburgh: William Blackwood and Sons, 1841).

Rose, Francis. *General Average. Law and Practice* (Abingdon-on-Thames: Routledge, 3rd ed. 2020).

Scovazzi, Tullio. 'Human Rights and Immigration at Sea', in *Human Rights and Immigration*, ed. Ruth Rubio-Marín (Oxford: Oxford University Press, 2014), 212–260.

Selden, John. *Of the Dominion, or, Ownership of the Sea Two Books* (London: Printed by William Du-Gard, 1652).

Smith, Robert S. 'The Llibre Del Consolat De Mar: A Bibliography'. *Law Library Journal* 33(6) (1940), 387–395.

Straumann, Benjamin. *Roman Law in the State of Nature. The Classical Foundations of Hugo Grotius' Natural Law* (Cambridge: Cambridge University Press, 2015).

Twiss, Travers. *The Law of Nations Considered as Independent Political Communities* (Oxford: Clarendon Press, 1884).

United Nations, Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3042/2017, CCPR/C/130/D/3042/2017, 28 April 2021.

Valin, René-Josué. *Nouveau Commentaire sur l'Ordonnance de la Marine*, vol. 2 (La Rochelle: Jerome Legier, 1766).

Vassalos, Dracos and Donald Paterson. 'Reconfiguring Passenger Ship Internal Environment for Damage Stability Enhancement'. Journal of Marine Science and Engineering 8 (2020), 1–25.

Vattel, Emer de. *Le droit des gens, ou principes de la loi naturelle* (London: 1758).

Vattel, Emerich de. *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite & aux affaires des nations & des souverains*, vol. 1 (Neuchâtel: De L'Imprimerie de la Société Typographique, 1773).

Wheaton, Henry. *Elements of International Law: With a Sketch of the History of the Science* (Philadelphia: Carey, Lea & Blanchard, 1836).

Welwod, William. *An Abridgement of All Sea-Lawes* (London: Printed for Humfrey Lownes, Thomas Man, 1613).