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Human Rights Obligations in Maritime Search and Rescue

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Abstract

The duty to render assistance to persons in distress is well established in the international law of the sea, but none of the instruments which codify the duty contains human rights obligations. However, serious human rights violations may occur during search and rescue (SAR) operations or because of the lack thereof. This article examines the duty of States to render assistance to persons in distress through the lens of international human rights law and advocates for a human rights-oriented approach to SAR. It discusses the due diligence nature of the duty, the scope of jurisdiction in maritime SAR and how States should act to adhere to their human rights obligations from the moment they receive a distress call through to the moment they disembark rescued persons on land.

Keywords: human rights; law of the sea; refugee law; maritime search and rescue; extraterritorial jurisdiction; migration

1. Introduction

Rendering assistance to ships in distress is a long-standing rule of custom, which was codified as early as 1910 and has since been incorporated into several law of the sea instruments.¹ The ‘universal duty to rescue at sea has existed since time immemorial’²

¹ Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea (adopted 23 September 1910, entered into force 1 March 1913) art 11; Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (adopted 23 September 1910, entered into force 1 March 1913) art 8; International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 1 (SOLAS) ch V; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC) art 98; International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR Convention); see also FG Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (Brill 2020) 18–28.

² BH Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (1997) 36 *Columbiana TransnatlL* 399, 414–15; see also R Barnes, ‘The International Law of the Sea and Migration Control’ in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Brill 2010) 103, 134–35.

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and is founded on the principle of solidarity.³ With the number of people at sea rising, the duty to render assistance has become more demanding and controversial for States and shipmasters alike.⁴ Complexities arise primarily from the increasing demand for search-and-rescue (SAR) operations for migrants and refugees in danger of being lost at sea.⁵ Throughout history, people fleeing war and persecution have used the sea as an escape route,⁶ but seaborne migration has dramatically increased over recent decades across many regions of the world.⁷ This humanitarian crisis has not been dealt with by more and better-planned SAR operations. On the contrary, States have implemented strict border control measures to keep migrants out of their territory at all costs.⁸ Interceptions, pushbacks and limited SAR services have been frequently reported.⁹

The extent to which these practices comply with international law has justifiably triggered heated discussion.¹⁰ This article contributes to this topical debate by advocating the need for a human rights-oriented approach to maritime SAR. This approach is justified on two grounds. First, it is well established that migrants may face severe human rights violations while crossing the sea, as a result of both the

³ F Munari, 'Search and Rescue at Sea: Do New Challenges Require New Rules?' in A Chircop et al (eds), *Governance of Arctic Shipping* (Springer 2020) 63, 64–65.

⁴ Haines estimates that at any given time approximately 30 million people are at sea: S Haines, 'Developing Human Rights at Sea' (2021) 35 *OceanYB* 18, 21.

⁵ According to the International Organization for Migration (IOM), 'migrant' is 'an umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons': IOM, *Fundamentals of Migration* <<https://www.iom.int/about-migration>>. The term 'refugee' is defined in the Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art I. For the purposes of the discussion in this article, the term 'migrant' is used to refer to all persons in an irregular situation, including migrants, refugees, asylum-seekers and persons in need of international protection.

⁶ See, e.g. R Gruber, *Exodus 1947: The Ship that Launched a Nation* (Union Square Press 2007); NM Vo, *The Vietnamese Boat People, 1954 and 1975–1992* (McFarland and Company 2005).

⁷ IOM, *Missing Migrants Project* <<https://missingmigrants.iom.int/>>.

⁸ S Fabio Nicolosi, 'Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law' (2024) 71 *NILR* 1.

⁹ UN Human Rights Council (HRC), 'Report of the Special Rapporteur on the Human Rights of Migrants: Human Rights Violations at International Borders: Trends, Prevention and Accountability' (26 April 2022) UN Doc A/HRC/50/31, para 24; examples of pushback practices can be found in paras 34–38 of the report. According to the Office of the UN High Commissioner for Refugees (UNHCR), 'interception' should be interpreted to encompass 'all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination': UNHCR, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach' (9 June 2000) UN Doc EC/50/SC/CRP.17, para 10 <www.unhcr.org/sites/default/files/legacy-pdf/3ae68d144.pdf>.

¹⁰ See, e.g. V Moreno-Lax and E Papastavridis (eds), *"Boat Refugees" and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill 2016); AT Gallagher and F David, *The International Law of Migrant Smuggling* (CUP 2014); I Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29 *EJIL* 347; V Moreno-Lax, D Ghezelsash and N Klein, 'Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia' (2019) 32 *IJIL* 715.

brutal acts of smugglers and the law enforcement operations of States.¹¹ During SAR operations, migrants may be ill-treated, drown, go missing or be forced to return to countries where they face torture or other human rights violations.¹² Second, despite the lack of human rights obligations for States in the law of the sea instruments containing the duty to render assistance, it is widely accepted that States are bound by their human rights obligations when they operate at sea, including in SAR operations.¹³

Accordingly, this article fleshes out and systematises the human rights obligations of States during maritime SAR operations. In doing so, Section 2 discusses the nature of the duty to render assistance and explains the obligations of States and shipmasters under international law. Section 3 addresses the issue of jurisdiction. Understanding the scope of States' human rights jurisdiction is an essential prerequisite for applying human rights law in SAR operations. The subsequent sections delve into the substantive aspects of the duty to render assistance in a human rights-compliant fashion, explaining when the duty to render assistance is triggered (Section 4), how it should be discharged (Section 5) and when it terminates (Section 6). Due to the growing attention paid to the SAR of migrants, the article predominantly draws on this type of State practice. However, the findings of the article are of relevance to all ships in distress and offer practical guidance to all those involved in maritime SAR.

2. The nature of the duty to render assistance

The duty to render assistance to persons in distress 'exists throughout the ocean, whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the exclusive economic zone or on the high seas'.¹⁴ It applies to all ships, including private ships and warships, and to all persons in distress regardless of their nationality or status.¹⁵ The fact that a person in distress is involved in an unlawful activity does not alter the obligation of States to render

¹¹ UNHCR (n 9); UN HRC, 'Report of the Special Rapporteur on the Human Rights of Migrants: Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea' (12 May 2001) UN Doc A/HRC/47/30.

¹² See, e.g. the human rights implications of the SAR operations conducted by Libyan agents in UN Security Council (UNSC), 'Letter dated 14 September 2023 from the Panel of Experts on Libya established pursuant to Resolution 1973 (2011) addressed to the President of the Security Council' (15 September 2023) UN Doc S/2023/673, paras 57–74; HRC, 'Report of the Independent Fact-Finding Mission on Libya' (3 March 2023) UN Doc A/HRC/52/83, paras 40–53; Office of the United Nations High Commissioner for Human Rights (OHCHR) in cooperation with the United Nations Support Mission in Libya, 'Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya' (April 2018) <www.ohchr.org/sites/default/files/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf>; OHCHR, "Lethal Disregard" Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea' (2021) 15–17 <www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf>.

¹³ D Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (2010) 59 ICLQ 140; A Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff 2014); S Galani, 'Somali Piracy and the Human Rights of Seafarers' (2017) 34 NQHR 71.

¹⁴ MH Nordquist (ed), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (Martinus Nijhoff 1985) vol 3, 177.

¹⁵ SAR Convention (n 1) ch 2.1.10; International Maritime Organization (IMO), 'Resolution MSC.167(78) on Guidelines on the Treatment of Persons Rescued at Sea' (20 May 2004) IMO Doc MSC 78/26/Add.2, 3 (IMO Guidelines); SOLAS (n 1) reg 33(a).

assistance.¹⁶ Thus, States are required to render assistance to smugglers and irregular migrants with no exception.

The duty to render assistance binds flag States and coastal States, but under Article 98(1) of the United Nations (UN) Convention on the Law of the Sea (LOSC), the responsibility to rescue persons in distress lies primarily with shipmasters.¹⁷ The provision states that:

Flag States shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.¹⁸

In light of this provision, flag States have to take necessary and appropriate measures to ensure that vessels that fly their flag render assistance to persons in distress, but they are not under an obligation to guarantee that all persons in distress are rescued.¹⁹ This means that the duty to render assistance is of a due diligence nature. A due diligence duty:

entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.²⁰

Accordingly, flag States are required to adopt relevant laws and monitor their implementation. Similarly, Article 98(2) LOSC requires coastal States to 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose'.²¹ The choice of the word 'promote' suggests a due diligence obligation that requires coastal States to establish cooperation and coordination mechanisms in SAR, but not a duty to rescue every person in distress.²² The same conclusion can be drawn from the International Convention

¹⁶ IMO, 'Resolution MSC.153(78): Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended' (20 May 2004) IMO Doc M/78/26/Add.2: '[t]he obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found' (emphasis added).

¹⁷ See also SOLAS (n 1) reg 33.

¹⁸ LOSC (n 1).

¹⁹ *Case No 21 (Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission)* (Advisory Opinion of 2 April 2015) ITLOS Reports 2015, para 148; see also E Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention under the Law of the Sea Paradigm' (2020) 21 GermanLJ 417, 430; Attard (n 1) 80.

²⁰ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 197.

²¹ LOSC (n 1).

²² D Guilfoyle, 'Article 98' in A Proells (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Bloomsbury Publishing 2017) 725–31; N Klein, 'Maritime Autonomous Vehicles and International Laws on Boat Migration: Lessons from the Use of Drones in the Mediterranean' (2021)

on Maritime Search and Rescue (SAR Convention) that establishes a comprehensive SAR system, requiring States to designate a search and rescue region (SRR), develop effective and well-organised SAR services and cooperate with neighbouring States whenever necessary, but without imposing on them an obligation of result.²³ A due diligence duty, however, 'may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough'.²⁴ Considering the sharp rise in ships in distress, the SAR services that certain coastal States have in place may have to be reconsidered to respond to contemporary needs.

While the duty to render assistance has been developed within the law of the sea framework, increasing attention has been paid to its relationship with the right to life.²⁵ Trevisanut has pointed out that 'the duty to render assistance [is] an operative tool for the implementation of the right to life at sea; it is the corollary obligation of the right to life at sea'.²⁶ The efforts to understand the duty to render assistance in human rights terms have found fertile ground not only in the ongoing debate on the applicability of human rights law at sea, but also in the views of the UN Human Rights Committee (HRC).²⁷ In General Comment No 36, the HRC explained that the duty of States to protect the right to life includes 'those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea'.²⁸ The HRC took its views further in a complaint brought against Malta and Italy concerning a shipwreck that occurred 113 kilometres south of Lampedusa, causing the deaths of more than 200 people. In its decision, the HRC reaffirmed that a failure to render assistance to persons in distress may amount to a violation of the right to life.²⁹ It is clear that the HRC considers that the obligation to protect the right to life at sea constitutes a due diligence obligation.³⁰ In human rights terms, this has been

127 MarPoly 104447, 4. For a stricter interpretation of LOSC art 98, see S Trevisanut, 'Search and Rescue Operations at Sea' in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 438.

²³ SAR Convention (n 1) chs 2–6.

²⁴ *Case No 17 (Responsibilities and Obligations of States with respect to Activities in the Area)* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, para 117.

²⁵ S Trevisanut, 'Is There a Right to Be Rescued at Sea? A Constructive View' (2014) 4 *QuestIntL* 3; A Papachristodoulou, 'The Recognition of a Right to be Rescued at Sea in International Law' (2022) 35 *LJIL* 337; S Dimitrova, 'Rethinking "Jurisdiction" in International Human Rights Law in Rescue Operations at Sea in the Light of *AS and Others v Italy* and *AS and Others v Malta*: A New Right to be Rescued at Sea?' (2023) 56 *IsraelLRev* 120, 137–38.

²⁶ Trevisanut (n 22) 439.

²⁷ Haines (n 4); I Papanicopolu, *International Law and the Protection of People at Sea* (OUP 2018); S Galani, 'Assessing Maritime Security and Human Rights: The Role of the EU and its Member States in the Protection of Human Rights in the Maritime Domain' (2020) 35 *IJMCL* 325; Human Rights at Sea, 'The Geneva Declaration on Human Rights at Sea' (January 2022) <www.humanrightsatsea.org/sites/default/files/media-files/2022-02/GDHRAS_Jan_2022_Final_online_version_sp%20%281%29.pdf>.

²⁸ UN HRC, 'General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36 (General Comment No 36) para 63.

²⁹ *A.S., D.I., O.I. and G.D. v Malta* Comm No 3043/2017 (27 January 2021) UN Doc CCPR/C/128/D/3043/2017; *A.S., D.I., O.I. and G.D. v Italy* Comm No 3042/2017 (27 January 2021) UN Doc CCPR/C/130/D/3042/2017.

³⁰ General Comment No 36 (n 28) paras 21, 63.

interpreted to impose an obligation on States to take reasonable, positive measures to protect the right to life at sea, without imposing a disproportionate burden on them.³¹ These measures include steps to prevent or put an end to ‘reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State’.³² Ergo, States have to render assistance to all persons in distress regardless of how they came to be in such a situation, including where people embarking on adventurous journeys have made an error of judgment, and situations involving unlawful acts, such as those of migrant smugglers.

The European Court of Human Rights (ECtHR) has also held that the duty to safeguard the right to life may include the provision of air-sea rescue facilities to assist those in distress depending on the circumstances.³³ It has further clarified that this obligation is one of means and not of result. Thus, States are required to ‘take preventive operational measures to avoid a real and immediate risk to life of which [they] had or ought to have had knowledge, while bearing in mind that State agents cannot be expected to succeed in rescuing every person in a situation of danger’.³⁴ In *Safi v Greece*, which concerned the sinking of a migrant boat that caused the deaths of 11 people near the Greek island of Farmakonisi in the Aegean Sea, the ECtHR held that the operational choices of the Greek authorities should be evaluated in light of the difficulties they face because of the high number of people who cross the Aegean Sea into Greece.³⁵

3. Human rights jurisdiction in maritime SAR

Having discussed the nature of the duty of States to render assistance to persons in distress, the question of when States have human rights jurisdiction over persons in distress should now be examined. The existence of jurisdiction is an essential prerequisite for applying human rights law in SAR operations. Nonetheless, the question of jurisdiction in SAR is not an easy one to answer. Legal complexities arise from the different applicable legal frameworks as well as the various actors involved in SAR. This section untangles the complex jurisdictional seascape and determines when States have human rights obligations in SAR.

Under the international law of the sea, the oceans are divided into maritime zones in which States are granted specific rights and powers and bear specific duties. Accordingly, the location of an incident is a key determinant of which State is responsible for enforcing human rights,³⁶ given that coastal States enjoy sovereignty over their internal waters and territorial sea.³⁷ Under international human rights law, States have to protect human rights within their territory.³⁸ As a result, States have a

³¹ *ibid.*

³² *ibid.*

³³ *Alhowais v Hungary* App No 59435/17 (ECtHR, 2 May 2023) para 118.

³⁴ *ibid* para 132; *Safi and Others v Greece* App No 5418/15 (ECtHR, 7 July 2022) para 157.

³⁵ *Safi v Greece* *ibid* para 164.

³⁶ N Klein, ‘Geneva Declaration on Human Rights at Sea: An Endeavor to Connect Law of the Sea and International Human Rights Law’ (2022) 53 *OceanDev&IntLL* 232.

³⁷ LOSC (n 1) art 2.

³⁸ See, e.g. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2; European Convention for the Protection of

duty to have SAR services readily available to render assistance to persons in distress within their internal waters and their territorial sea under both the international law of the sea and human rights law. This duty also applies in internal waters and the territorial sea of States bordering international straits.³⁹

Internal waters of a maritime character include navigable rivers;⁴⁰ thus, SAR services should be readily available there too. Navigable boundary rivers are used by migrants to cross from one country into another and, despite a lack of data, there is evidence that migrants often drown in rivers.⁴¹ However, little attention has been paid to the duty of States to render assistance to persons at risk of drowning in rivers. The delimitation of the outer limit of boundary rivers, the regulation of navigation and other safety-related matters are dealt with by bilateral agreements or river commissions,⁴² but it may not always be clear which of the riparian States is responsible for providing SAR services. An example is the River Evros, a natural border that separates Bulgaria, Greece and Türkiye. Smugglers have used it to transfer migrants from Türkiye into the European Union (EU). Migrants are sometimes left on river islets or in demilitarised zones, with none of the riparian States willing to undertake responsibility for rescuing them.⁴³ A further obstacle is that States often build fences along boundary rivers, refusing to rescue persons at risk of drowning.⁴⁴ In such cases, it is beyond doubt that persons in distress are within the jurisdiction of a riparian State who should render assistance in a human rights-compliant fashion.

While coastal States are clearly under an obligation to respect human rights in relation to their territorial seas and internal waters, their obligation in relation to their contiguous zone, exclusive economic zone (EEZ) and continental shelf is less clear. They may have human rights jurisdiction to a limited extent in accordance with the powers that they are granted by the LOSC within these maritime zones.⁴⁵ One example is the jurisdiction that coastal States exercise over artificial islands, installations and structures built in their EEZ or continental shelf, which includes a

Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 1.

³⁹ LOSC (n 1) arts 41, 42(1)(a). States bordering straits are responsible for the safety of navigation.

⁴⁰ R Churchill, V Lowe and A Sander, *The Law of the Sea* (4th edn, Manchester University Press 2022) 110.

⁴¹ R Flores, '2 Children and a Woman Drowned in the Rio Grande, Authorities Say, Days after Texas Blocked the Feds Amid Migrant Crisis' CNN (15 January 2024) <<https://edition.cnn.com/2024/01/13/us/us-mexico-border-drowned-migrants/index.html>>; B Bathke, 'Greece: 145 Migrants Saved from Evros River Islet' *InfoMigrants* (23 June 2023) <www.infomigrants.net/en/post/49884/greece-145-migrants-saved-from-evros-river-islet>; L Westendarp, 'Eighth Death at Polish Border as Body of 19-Year-Old Syrian Man Found in River' *Politico* (21 October 2021) <<https://www.politico.eu/article/death-poland-belarus-border-19-year-old-syrian/>>.

⁴² LOSC (n 1) art 9; see also Churchill, Lowe and Sander (n 40) 118.

⁴³ C Boitiaux, 'Evros Frontier: A Militarized No-Man's Land Where "No One Can Access Migrants"' *InfoMigrants* (12 October 2021) <<https://www.infomigrants.net/en/post/35657/evros-frontier-a-militarized-nomans-land-where-no-one-can-access-migrants>>.

⁴⁴ Flores (n 41); A Zimmermann, 'Greek Prime Minister Renews Call for EU Cash for Border Fence' *Politico* (1 April 2023) <www.politico.eu/article/kyriakos-mitsotakis-greek-prime-minister-border-fence-anti-migrant-turkey/>.

⁴⁵ Klein (n 36) 242–48; Papanicolopulu (n 27) 145–46.

surrounding 500-metre safety zone.⁴⁶ In these areas, coastal States exercise exclusive jurisdiction over various matters such as health, safety and immigration and should also be held responsible for enforcing human rights.⁴⁷ Accordingly, coastal States are primarily responsible for rendering assistance to persons in distress in safety zones and must do so while upholding their human rights.

Human rights jurisdiction is more complicated in relation to the high seas. Under the LOSC, the jurisdiction of coastal States does not extend to the high seas and, consequently, nor do their human rights obligations.⁴⁸ This is confirmed in the SAR Convention, which states that:

Nothing in the Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to resolution 2750 (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.⁴⁹

For that reason, SRRs are not zones of jurisdiction but rather ‘delimited areas of ocean space where State parties must ensure cooperation and coordination of SAR activities’.⁵⁰ Notably, the SRRs of coastal States extend well beyond their territorial sea and into the high seas. Under the international law of the sea, the duty to render assistance requires no nexus of jurisdiction between coastal States or shipmasters and the persons they are asked to rescue.⁵¹ However, human rights violations frequently occur during SAR operations. An additional layer of complexity is added by the fact that human rights violations may occur because of the failure of States to conduct a SAR operation. It is thus critical to understand which State has human rights jurisdiction over persons in distress in SRRs. While it is difficult to cover all possible actions or omissions of States in the context of maritime SAR, several typical scenarios are examined in the rest of Section 3 in order to determine where jurisdiction lies.⁵²

3.1. Jurisdiction of the rescuing State during the conduct of a SAR operation

The first scenario examined is where a State responds to a distress call and a State rescuing unit reaches a ship in distress to provide assistance. In this case, the

⁴⁶ LOSC (n 1) arts 60, 80.

⁴⁷ *ibid.* In Case C-347/10 *A Saleminck v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* ECLI:EU:C:2012:14, paras 35–36, the Court of Justice of the EU held that ‘work carried out on fixed or floating installations positioned on the continental shelf, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying EU law’, including EU social security law and EU laws designed to ensure the freedom of movement of persons.

⁴⁸ LOSC (n 1) art 86.

⁴⁹ SAR Convention (n 1) art II.

⁵⁰ P Vella De Fremeaux and FG Attard, ‘Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part I’ (*Opinio Juris*, 3 March 2021) <<http://opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-rights-committee-part-i/>>.

⁵¹ *ibid.*

⁵² See also the discussion in Trevisanut (n 25) 11–14.

effective control test applies.⁵³ According to this test, a State remains bound by its human rights obligations extraterritorially where it exercises de facto effective control over persons at sea.⁵⁴ The application of the test requires some form of physical contact between the State agents and the persons at sea, or at least some form of control exercised by the State agents over those in distress.⁵⁵ In the SAR context, the requirements of this test are met once a unit of the rescuing State reaches the ship in distress and takes control of the situation, whether by giving verbal orders, using force, rescuing people, treating the injured or towing the vessel.⁵⁶ Papastavridis has argued that human rights jurisdiction is triggered as soon as ‘the on scene [commander] has arrived at the area [of the vessel in distress]’.⁵⁷ In this scenario, the effective control test applies regardless of whether the rescuing State operates in its SRR, the SRR of another State or a part of the high seas not encompassed by a SRR.

3.2. Jurisdiction of the flag State over rescued persons on board the rescue ship

Once the persons in distress have been rescued and boarded on a rescue ship, they fall within the jurisdiction of the flag State. The HRC has underlined that ‘States parties are ... required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag’.⁵⁸ The ECtHR has also held that flag States have to enforce human rights standards on board ships that fly their flag.⁵⁹ In *Hirsi Jamaa v Italy*, the ECtHR ruled that ‘Italy cannot

⁵³ For an analysis of the spatial and personal effective control tests, see M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 127–209.

⁵⁴ UN Committee Against Torture (UNCAT), *JHA v Spain* Comm No 323/2007 (21 November 2008) UN Doc CAT/C/41/D/323/2007, para 8.2; UNCAT, *Fatou Sonko v Spain* Comm No 368/2008 (25 November 2011) UN Doc CAT/C/47/D/368/2008, para 10.3; *Rigopoulos v Spain* App No 37388/97 (ECtHR, 12 January 1999); *Xhavara and Others v Italy and Albania* App No 39473/98 (ECtHR, 11 January 2001); *Medvedev and Others v France* App No 3394/03 (ECtHR, 23 February 2010); *Women on Waves and Others v Portugal* App No 31276/05 (ECtHR, 3 May 2009); *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, 23 February 2012); *Sharifi and Others v Italy and Greece* App No 16643/09 (ECtHR, 14 October 2014) para 212; *The Haitian Centre for Human Rights et al v United States*, Case No 10.675 (Inter-American Commission on Human Rights, 13 March 1997) para 171.

⁵⁵ For example, in *Women on Waves v Portugal* *ibid*, Portugal was found to have violated the right to freedom of expression of NGO vessels by using a Portuguese warship to block their entry to the port despite the lack of physical contact between the law enforcement agents and the persons on board the NGO vessels.

⁵⁶ See the discussion on the use of force in Section 5.

⁵⁷ Papastavridis (n 19) 434. According to SAR Convention (n 1) ch 1.1.6, the ‘on-scene commander’ is ‘[t]he commander of a rescue unit designated to coordinate search and rescue operations within a specified search area’.

⁵⁸ General Comment No 36 (n 28) para 63; see also A.S., D.I., O.I. and G.D. v Malta (n 29) para 6.7; see also the discussion in U Khaliq, ‘Jurisdiction, Ships and Human Rights Treaties’ in H Ringbom (ed), *Jurisdiction over Ships* (Martinus Nijhoff 2007) 324.

⁵⁹ *Bankovic and Others v Belgium and 16 Other Contracting Parties* App No 52207/99 (ECtHR, 12 December 2001) para 73; *Medvedev v France* (n 54) para 65; *Hirsi Jamaa v Italy* (n 54) para 75; *Bakanova v Lithuania* App No 11167/12 (ECtHR, 31 August 2018) para 63. For a discussion of other regional systems, see U Fleth-Barten, ‘Flag States and Human Rights Protection: Obligations and Justiciability under International Human Rights Law’ in K Siig, B Feldtmann and FMW Billing (eds), *The United Nations Convention on the Law of the Sea – A System of Regulation* (Routledge 2024) 115, 118–20.

circumvent its “jurisdiction” under the Convention by describing the events in issue as rescue operations on the high seas’ and found Italy to have jurisdiction over the migrants who had been intercepted and returned to Libya.⁶⁰ These findings are in line with the duty of flag States under the LOSC. Pursuant to Article 92 LOSC, ships sailing on the high seas are under the exclusive jurisdiction of the flag State, save for in exceptional circumstances.⁶¹ Article 94 adds that ‘[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag’.⁶² Social matters include human rights.⁶³

3.3. Jurisdiction of the coastal State within its SRR

As previously noted, SRRs are not zones of jurisdiction under the international law of the sea and the application of the human rights laws of coastal States extends within their SRRs only when they conduct SAR operations. In a surprising decision in *A.S., D.I., O.I. and G.D. v Malta*, the HRC concluded that a coastal State exercises effective control over persons within its SRR, departing from previous rules of jurisdiction. It noted that:

in the present case it is undisputed that the vessel in distress was located in the search and rescue area for which the State party authorities undertook responsibility to provide for overall coordination of search and rescue operations, in accordance with section 2.1.9 of the International Convention on Maritime Search and Rescue, 1979, and chapter V, regulation 33, of the International Convention for the Safety of Life at Sea, 1974. It further notes that it is undisputed that the State party authorities formally accepted to assume the coordination of the rescue efforts at 2.35 p.m. on the day of the shipwreck. The Committee therefore considers that the State party exercised effective control over the rescue operation, potentially resulting in a direct and reasonably foreseeable causal relationship between the States parties’ acts and omissions and the outcome of the operation.⁶⁴

The HRC seems to argue that Malta exercised de jure control over persons in distress on the basis of the legal obligations it carries under the international law of the sea to assume responsibility for the coordination of SAR operations.⁶⁵ In the case at hand, the coastal State, Malta, requested assistance from Italy who conducted the SAR operation.⁶⁶ The findings of the HRC suggest that a coastal State may be found to have human rights jurisdiction over persons in distress within its SRR even if another State conducts the SAR operation, without excluding the possibility of concurrent jurisdiction between the two States.⁶⁷

⁶⁰ *Hirsi Jamaa v Italy* ibid para 79.

⁶¹ LOSC (n 1).

⁶² ibid.

⁶³ Klein (n 36) 254; FMW Billing, ‘Human Rights from within the UNCLOS System: An Overview’ in Sig, Feldtmann and Billing (n 59) 110.

⁶⁴ *A.S., D.I., O.I. and G.D. v Malta* (n 29) para 6.7. The complaint was found inadmissible because of a failure to exhaust domestic remedies: para 6.9.

⁶⁵ For a similar rationale, see the decision adopted by the UN Committee on the Rights of the Child, *LH v France*; *FB v France* Comm Nos 79/2019 and 109/2019 (2 November 2020) UN Docs CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019, para 9.7.

⁶⁶ See the discussion in Section 3.4.

⁶⁷ *A.S., D.I., O.I. and G.D. v Italy* (n 29) para 7.8.

In practice, the broad interpretation of effective control by the HRC may force States to take a more responsible stance in their SRRs, for example, by relinquishing parts of their SRRs that they cannot manage or by better equipping themselves to meet their SAR obligations.⁶⁸ It may also encourage States to resolve disputes concerning overlapping SRRs where delays are often caused by the confusion as to which State is responsible to respond to a distress call.⁶⁹ Such a broad interpretation may also have far-reaching effects in practice as it suggests that any person found within the SRR of a coastal State falls within its jurisdiction for the purposes of human rights. It also ignores the fact that coastal States may be required to coordinate rescue efforts, but they cannot compel third States or private vessels to respond to their requests for assistance.

It is the view of the author that the HRC did not intend to extend human rights jurisdiction extraterritorially, but by equating the duty of a State to coordinate rescue efforts within its SRR with the duty to protect the right to life, it did just that. Although it was a remarkable attempt to interpret human rights obligations in light of the law of the sea—an approach that reflects an emerging trend in the debate on the protection of human rights at sea—the HRC's conclusion does not facilitate the harmonious application of the law of the sea and human rights law.⁷⁰ On the contrary, it risks being counterproductive as it conflates the notions of jurisdiction under the law of the sea and human rights law.⁷¹ Zimmermann, one of the dissenting members of the HRC, underlined that 'the notion of jurisdiction in human rights treaties is not tantamount to the concept of jurisdiction to prescribe provided for [under the international law of the sea]',⁷² and by turning a violation of the law of the sea into a human rights violation, there is a risk that States might become more reluctant to render assistance to ships in distress.⁷³

3.4. Jurisdiction of a State when failing to respond to a distress call in the SRR of another State or on the high seas

The HRC took its findings further by finding Italy in breach of Article 6 of the International Covenant on Civil and Political Rights (ICCPR) because of its failure to render assistance to persons in distress in the Maltese SRR. In *A.S., D.I., O.I. and G.D. v Italy*, the applicants complained that they alerted the Maritime Rescue Coordination Centre (MRCC) in Rome that the vessel was going to sink and forwarded the coordinates to the Italian operator. Italy took no action other than informing Malta, who was responsible for the SRR in which the incident took place, and even ordered one of its navy ships, the *ITS Libra*, to move away from

⁶⁸ Dimitrova (n 25) 135.

⁶⁹ S Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict' (2010) 25 IJMCL 523, 532–42.

⁷⁰ Oxman (n 2); T Treves, 'Human Rights and Law of the Sea' (2010) 28 BerkeleyJIntL 1; S Cacciaguidi-Fahy, 'The Law of the Sea and Human Rights' (2007) 19 SriLankaJIntL 85; I Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons' (2012) 27 IJMCL 867; Papanicolopulu (n 27) 209–45; Klein (n 36) 236–51; Galani (n 27) 333.

⁷¹ Vella De Fremeaux and Attard (n 50); Dimitrova (n 25) 135–36.

⁷² *A.S., D.I., O.I. and G.D. v Malta* (n 29) Dissenting Opinion of Andreas Zimmermann, paras 6–7.

⁷³ *ibid* para 9.

the ship in distress. By the time Italy agreed to order the *ITS Libra* to provide assistance and the latter reached the site, the ship in distress had already capsized. In finding a violation of Article 6 ICCPR, the HRC argued that:

a special relationship of dependency had been established between the individuals on the vessel in distress and Italy. This relationship comprised of factual elements – in particular, the initial contact made by the vessel in distress with the MRCC, the close proximity of *ITS Libra* to the vessel in distress and the ongoing involvement of the MRCC in the rescue operation and – as well as relevant legal obligations incurred by Italy under the international law of the sea, including a duty to respond in a reasonable manner to calls of distress pursuant to SOLAS [International Convention for the Safety of Life at Sea] Regulations and a duty to appropriately cooperate with other states undertaking rescue operations pursuant to the International Convention on Maritime Search and Rescue. As a result, the Committee considers that the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and that they were thus subject to Italy's jurisdiction for the purposes of the Covenant, notwithstanding the fact that they were within the Maltese search and rescue region and thus also subject concurrently to the jurisdiction of Malta.⁷⁴

The HRC's interpretation of the rules of jurisdiction reflects a progressive approach that aims to consider the contemporary realities of SAR. It primarily seeks to address the practice where States avoid coming into contact with ships in distress carrying migrants to avoid being considered to have human rights jurisdiction over them.⁷⁵ An overly expansive interpretation of extraterritorial jurisdiction, however, warrants caution. Dissenting members of the HRC stated that:

the majority Views fails to distinguish between situations in which states have the *potential* to place under their effective control individuals who are found outside their territory or areas already subject to their effective control, and situations involving the *actual* placement of individuals under effective state control.⁷⁶

Indeed, one could validly question how realistic it is to find that a State acquires jurisdiction over persons in distress merely by answering a distress call, or not answering it on time, or by ignoring it altogether, especially where a distress call concerns an incident in the SRR of another coastal State.⁷⁷

Nonetheless, there seem to be two key factors that influenced the decision of the HRC and the way it justified the 'special relationship of dependency' between Italy and those in distress. These factors should be carefully considered in order to

⁷⁴ A.S., D.I., O.I. and G.D. v Italy (n 29) para 7.8.

⁷⁵ In her Individual Opinion, Hélène Tigroudja claimed that the views of the HRC may contribute to addressing the 'maritime legal black holes' in the protection of migrants at sea: *ibid* annex 7, 22–23 (Individual Opinion of Hélène Tigroudja); see also examples of States exercising 'contactless control' in V Moreno-Lax, 'Meta-Borders and the Rule of Law: From Externalisation to "Responsibilisation" in Systems of Contactless Control' (2024) 71 NILR 21, 29–34.

⁷⁶ A.S., D.I., O.I. and G.D. v Italy (n 29) para 2 (Dissenting Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis).

⁷⁷ See, e.g. the discussion in M Milanovic, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations' (*EJIL:Talk!*, 16 March 2021) <www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/>.

inform future SAR operations. The first concerns the fact that loss of life was reasonably foreseeable given Italy's acts and omissions. This finding aligns with the HRC's interpretation of Article 6 ICCPR that 'the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life'.⁷⁸ The ECtHR has also held that a violation of the right to life can be found if it is established that:

the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁷⁹

States are obliged to take reasonable measures to protect the right to life even if these measures cannot guarantee a change in the course of events.⁸⁰ In the context of maritime SAR, it should be reasonably foreseeable that failing to render assistance to persons in distress seriously threatens their right to life. States are therefore bound to take positive steps to rescue those in distress regardless of whether their efforts are likely to be successful or not.

The second factor emphasised by the HRC was the 'close proximity' of the *ITS Libra* to the ship in distress. 'Proximity' lacks sufficient clarity to be considered as a standalone criterion in future cases, given questions such as how close a rescue unit should be, and how distance at sea is measured. Nonetheless, the Italian warship's proximity to the distress site was a sufficient indicator of Italy's capability to take reasonable measures to protect the right to life of the persons in distress.⁸¹ Put simply, where States have the capacity to render assistance to persons in distress, they should do so or otherwise risk being in breach of their duty to protect the right to life. The combination of these two criteria—knowledge of the distress situation and capacity to render assistance—may prove helpful in addressing similar jurisdictional questions in the context of SAR.

One such scenario may arise where States use aerial maritime autonomous vehicles for detecting boats carrying migrants and monitoring their routes and condition.⁸² The use of drones meets the 'knowledge requirement' as it enables States to know whether migrants are at risk of drowning as well as their exact location. This on its own is not enough to trigger jurisdiction as States also need to be capable of rendering assistance to ships in distress. Drones may be used to drop lifesaving equipment, medicine or other supplies but, in most cases, they are not able to rescue a large number of persons in distress.⁸³ In such cases, States are required to

⁷⁸ ICCPR (n 38).

⁷⁹ *Osman v United Kingdom* App No 23452/94 (ECtHR, 28 October 1998) para 116.

⁸⁰ *Opuz v Turkey* App No 33401/02 (ECtHR, 9 June 2009) para 136.

⁸¹ M Giuffrè, 'A Functional-Impact Model of Jurisdiction: Extraterritoriality before the European Court of Human Rights' (2021) 82 *QuestIntlL* 53; A Ollino, 'The "Capacity-Impact" Model of Jurisdiction and its Implications for States' Positive Human Rights Obligations' (2021) 82 *QuestIntlL* 81.

⁸² Frontex, 'Eyes in the Sky: Monitoring the Mediterranean' (Press Release, 20 October 2023) <www.frontex.europa.eu/media-centre/news/news-release/eyes-in-the-sky-monitoring-the-mediterranean-17Gg1W>.

⁸³ J Coito, 'Maritime Autonomous Surface Ships: New Possibilities—and Challenges—in Ocean Law and Policy' (2021) 97 *IntlLStud* 259, 264–74.

mobilise appropriate rescue units.⁸⁴ Where this is not possible, States are still expected to take other reasonable measures to rescue persons in distress, such as by requesting the help of private ships or neighbouring States.

3.5. *Jurisdiction where States cooperate with other States or private actors*

Cooperation to provide effective SAR services is a key requirement under the SAR Convention, but in practice it may further complicate jurisdiction.⁸⁵ One possible scenario is where a State becomes aware of a ship in distress in the SRR of another State or in a part of the high seas not encompassed by a SRR, and transmits the coordinates of the ship in distress to the coastal State in charge of the SRR or nearby ships. Does the State that shares the relevant information have jurisdiction over those in distress who may be subjected to human rights violations by the rescuing State? Based on the existing rules of jurisdiction, this question should be answered in the negative. The application of the existing rules points to the human rights jurisdiction of the State conducting the operation or at least assuming the coordination of the rescue efforts within its SRR.⁸⁶

The unique situation in the Mediterranean, however, shows that these rules may not be sufficient to uphold human rights in SAR operations. More specifically, challenges arise from cooperation between Italy, Malta and Libya.⁸⁷ Since 2017, when Libya notified the International Maritime Organization (IMO) of the extension of its SRR to 94 nautical miles off its coasts, many distress calls to the Maltese or Italian MRCCs have been diverted to the Libyan Coast Guard (LCG).⁸⁸ Their cooperation efforts appear to be aligned with the obligations that States have under the SAR Convention. However, the return of migrants to Libya raises serious human rights concerns as violence by LCG agents during SAR operations has been widely reported and migrants are subjected to severe human rights violations, including torture, once returned to Libya.⁸⁹ This raises the question of whether Italy or Malta should be considered to have jurisdiction over persons in distress rescued by the LCG and, as a result, be required to uphold their human rights. The existing rules of jurisdiction cannot capture the nuance of such a scenario. As previously noted, a phone call or the use of drones should not be considered sufficient to trigger extraterritorial jurisdiction, especially in the SRR of

⁸⁴ Klein (n 22) 4.

⁸⁵ SAR Convention (n 1) ch 3.

⁸⁶ See the discussion in Sections 3.1–3.3.

⁸⁷ 'Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic' (2 February 2017) <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>; 'Memorandum of Understanding between the Government of National Accord of the State of Libya and The Government of the Republic of Malta in the Field of Combatting Illegal Immigration' (28 May 2020) <<https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf>>.

⁸⁸ OHCHR, 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' (18 December 2018) 34 <www.ohchr.org/sites/default/files/Documents/Countries/LY/LibyaMigrationReport.pdf>.

⁸⁹ See sources cited in n 12.

another State. In addition, Italy and Malta generally seem to take reasonable steps to render assistance by notifying other vessels in the vicinity of the ship in distress. Migrants may admittedly have a good chance of being rescued, but it is also highly likely that they will be subjected to other human rights violations once disembarked in Libya.

In response to these challenges, there have been efforts to reframe the rules of extraterritorial jurisdiction with regards to migration control at sea.⁹⁰ One of the proposed tests is based on remote or contactless control ‘exercised through remote management techniques and/or *in cooperation with* a local administration acting as a proxy’.⁹¹ Moreno-Lax, one of the key proponents of this new jurisdictional approach, has argued that ‘[c]ontrol over (general) policy areas or (individual) tactical operations, performed or producing effects abroad ... are the vehicles of the exercise of “public powers” that amounts to jurisdiction’.⁹² In the present case, public powers refer to the provision of SAR services. This approach has been developed to support the case of *S.S. v Italy*, currently pending before the ECtHR.⁹³ The complaint concerns the rescue of migrants on the high seas by the LCG and the treatment of survivors thereafter. According to the applicants, when their boat started capsizing, they contacted the MRCC in Rome, which requested the help of ships transiting the area. A non-governmental organisation (NGO) vessel, the *Sea Watch 3*, and an LCG vessel, the *Ras Al Jadar*, responded to the request and reached the ship in distress. The applicants allege that the LCG did not help them and obstructed the NGO’s rescue efforts. When the LCG finally rescued some of the persons in distress, it returned them to Libya where they were abused for over a month, following which they agreed to be repatriated to Nigeria to escape indefinite detention.

It is the view of the author that despite the justifiable efforts of the advocates of the ‘contactless control’ test to tackle injustice at sea, the test suffers certain limitations. First, it fails to distinguish between instances where States exercise remote control over SAR operations and instances in which they merely cooperate with other States as required by the international law of the sea. In the first instance, where the coastal State retains the overall control of an operation remotely, it would be reasonable to argue that it exercises effective control over a SAR operation.⁹⁴ This

⁹⁰ T Gammeltoft-Hansen, ‘Extraterritorial Human Rights Obligations in regard to Refugees and Migrants’ in M Gibney et al (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022) 153, 158–60.

⁹¹ V Moreno-Lax, ‘The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *S.S. and Others v Italy*, and the “Operational Model”’ (2020) 21 *GermanLJ* 385, 387 (emphasis added); see also M Giuffrè and V Moreno-Lax, ‘The Rise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migratory Flows’ in S Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 82.

⁹² Moreno-Lax *ibid* 403.

⁹³ *S.S. and Others v Italy* App No 21660/18 (ECtHR, communicated on 26 June 2019).

⁹⁴ The same applies where a flag State orders a ship that flies its flag to proceed with a SAR operation or disembarkation in a specific manner that may violate the human rights of those rescued: see Papastavridis (n 19) 432; P Busco and A Pizzuti, ‘Flag State Responsibility in International Human Rights Law for Individuals on Board Private Vessels’ (*EJIL:Talk!*, 1 May 2024) <<https://www.ejiltalk.org/flag-state-responsibility-in-international-human-rights-law-for-individuals-on-board-private-vessels/>>.

could be the case for every SAR operation in which a coastal State orders a private ship or a ship in public service to conduct a SAR operation under its own instructions or orders the disembarkation of those rescued in a specific place.⁹⁵ For example, coastal States should be considered to have jurisdiction over survivors who are taken back to Libya under their instructions and be held responsible for any associated human rights violations. Flag States could be found to have concurrent jurisdiction in such instances.⁹⁶ Arguably, coastal States also exercise remote control when utilising drones to locate persons in distress and ordering other ships to return them to a location where their human rights are violated.⁹⁷ It is hard, however, to argue that a coastal State has jurisdiction over persons in distress in a part of the high seas that does not form part of its SRR, or the SRR of another State, merely by cooperating with or notifying a foreign flagged vessel or a neighbouring State of a distress call. The ECtHR may reach a different conclusion but, at the time of writing, the Court does not seem willing to establish new tests for jurisdiction.⁹⁸

The ‘contactless control’ test has been designed to respond to migration control in general and to migrants returned to Libya, in particular, bearing in mind the support that Italy and Malta (with EU funds) have been providing to Libya.⁹⁹ However, the solution is not to come up with expansive rules of jurisdiction, rules tailored to apply to migration control or rules with geographic limitations, all of which risk complicating the jurisdiction seascape and may be hard for international courts or other States outside of the Council of Europe to accept.¹⁰⁰ A more viable alternative would be to require all States to improve their compliance with human rights obligations in SAR from the time a ship is in distress through to disembarkation, as shown in the following sections.

4. When is the duty to render assistance triggered?

Having addressed the question of when a State has jurisdiction for human rights purposes in the SAR context, an examination of how the duty to render assistance should be discharged in line with international law is necessary. The first query is when the duty to render assistance arises. None of the instruments codifying the duty to render assistance specifies when this duty is triggered. The SAR Convention defines the ‘distress phase’ as ‘[a] situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance’.¹⁰¹ It further notes that the distress phase starts:

⁹⁵ On disembarkation and human rights, see Section 6.

⁹⁶ Billing (n 63) 110–11; Trevisanut (n 22) 440–41.

⁹⁷ Klein (n 22) 4; J Sunderland and L Pezzani, ‘Airborne Complicity: Frontex Aerial Surveillance Enables Abuse’ (*Human Rights Watch*, 8 December 2022) <www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse>; Moreno-Lax (n 75) 32–33.

⁹⁸ *Duarte Agostinho and Others v Portugal and 32 Others* App No 39371/20 (ECtHR, 9 April 2024) para 188.

⁹⁹ J Lindholm, ‘Remote Migration Control at Sea: Jurisdiction Relating to Joint or Proxy Interception in Foreign Waters or Foreign Search and Rescue Regions’ in Siig, Feldtmann and Billing (n 59).

¹⁰⁰ For a different view, see Moreno-Lax (n 75) 22.

¹⁰¹ SAR Convention (n 1) ch 1.1.3.

[w]hen positive information is received that a vessel or a person is in grave and imminent danger and in need of immediate assistance; or [w]hen, following the alert phase, further unsuccessful attempts to establish contact with the vessel and more widespread unsuccessful inquiries point to the probability that the vessel is in distress; or [w]hen information is received which indicates that the operating efficiency of a vessel has been impaired to the extent that a distress situation is likely.¹⁰²

The International Law Commission has stated that ‘a situation of distress, ... may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the persons concerned’.¹⁰³ This reflects an earlier interpretation of distress, according to which:

a ship floundering in distress, resulting either from the weather or from other causes affecting the management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked on its behalf.¹⁰⁴

Essentially, the definition of distress consists of two criteria, namely, the gravity and imminence of danger. States and shipmasters evaluate these criteria on the basis of the relevant factual circumstances and determine whether or not it is reasonable to intervene.

However, certain States take a strict interpretative approach to the meaning of distress when it comes to ships carrying migrants, claiming that if a ship is not sinking, she is not in distress.¹⁰⁵ In the *Tampa* incident, for example, in which a Norwegian ship rescued migrants in distress in international waters and sought to disembark them in Australia, the captain argued that the ship was in distress because it carried critically ill people and, with the rescued migrants on board, the vessel was no longer compliant with the International Convention for the Safety of Life at Sea (SOLAS).¹⁰⁶ Australia, on the other hand, considered that the rescue had been completed once the migrants boarded the *Tampa* and that ‘[t]he urgent circumstances which give rise to the rescue no longer exist[ed]’.¹⁰⁷ Such a strict interpretation of ‘distress’ ignores the overall condition of a ship, such as its seaworthiness, the number of persons on board, their medical needs, a potential lack of trained crew or safety equipment and the sanitary conditions, factors which may cumulatively lead to the conclusion that a ship is in distress.

¹⁰² *ibid* ch 5.2.3.

¹⁰³ International Law Commission, ‘Report of the Commission to the General Assembly on the Work of its Thirty-First Session’, UNYBILC, vol II (part II) (1979) UN Doc A/CN.4/SER.A/1979/Add.1, 135.

¹⁰⁴ *Kate A Hoff v United Mexican States* (1929) VI RIAA 444, 447.

¹⁰⁵ See, e.g. the case of Malta and Greece in Attard (n 1) 65; see also S Galani, ‘Port Closures and Persons at Sea in International Law’ (2021) 70 ICLQ 605, 615–16.

¹⁰⁶ SOLAS (n 1) art IV(b) underlines that a vessel may be rendered unseaworthy as a result of a rescue operation; see also IMO, ‘The *MV Tampa* Incident: Communication by the Government of Australia’ (Circular Letter No 2345, 15 October 2001); R Barnes, ‘Refugee Law at Sea’ (2004) 53 ICLQ 47, 59; M Pallis, ‘Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes’ (2002) 14 IJRL 329, 338–39.

¹⁰⁷ IMO *ibid*; E Willheim, ‘*MV Tampa*: The Australian Response’ (2003) 15 IJRL 159, 169.

To avoid discrepancies in the practice of Member States, the EU has listed several criteria that should be considered when determining whether a vessel is in distress, such as:

- (1) the existence of a request for assistance, although such a request shall not be the sole factor for determining the existence of a distress situation;
- (2) the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination;
- (3) the number of persons on board in relation to the type and condition of the vessel;
- (4) the availability of necessary supplies such as fuel, water and food to reach a shore;
- (5) the presence of qualified crew and command of the vessel;
- (6) the availability and capability of safety, navigation and communication equipment;
- (7) the presence of persons on board in urgent need of medical assistance;
- (8) the presence of deceased persons on board;
- (9) the presence of pregnant women or of children on board;
- (10) the weather and sea conditions, including weather and marine forecasts.¹⁰⁸

However, State practice within the EU continues to vary as most of these criteria remain subject to the interpretation of State authorities. For example, the likelihood of a vessel reaching its destination is speculative unless combined with other criteria, such as the seaworthiness of the ship, the weather conditions or the number of persons on board. Other criteria, such as the presence of pregnant women and children on board, leave no room for interpretation. In practice, however, the mere presence of pregnant women and children is usually not enough for a ship to be treated as being in distress. The EU Border and Coast Guard Agency, Frontex, has also taken a strict approach when evaluating whether a ship is in distress. Whereas Frontex is not mandated to decide when a SAR operation should begin, it may issue a Mayday alert when a ship is in distress.¹⁰⁹ This happens in:

situations of impending death on board (e.g. people are seen in water, ship is sinking, there's a fire on board), but also situations of significant uncertainty and high likelihood that people may die in the context of hours (e.g. boats found adrift, when

¹⁰⁸ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L189/93, art 9. In addition, the EU has established a SAR Contact Group that aims, inter alia, to develop a better understanding of distress situations: European Commission, 'European Contact Group on Search and Rescue' <<https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupId=3752&fromMeetings=true&meetingId=27635>>.

¹⁰⁹ Frontex, 'Final Serious Incident Report on the Pylos Shipwreck' (1 December 2023) 12 <www.statewatch.org/media/4179/eu-frontex-pylos-sir-report.pdf>; European Ombudsman, 'Conclusions of the European Ombudsman on EU Search and Rescue following Her Inquiry into How the European Border and Coast Guard Agency (Frontex) Complies with its Fundamental Rights Obligations in the Context of its Maritime Surveillance Activities, in particular the Adriana Shipwreck', Case No OI/3/2023/MHZ (26 February 2024) <www.ombudsman.europa.eu/en/doc/correspondence/en/182671>.

night is falling, [the Frontex Surveillance Aircraft] has to leave the scene and there is no certainty that [the vessel in distress] will be found again later).¹¹⁰

Understanding when a ship is in distress is absolutely essential at an operational level. The 2004 IMO Guidelines on the Treatment of Persons at Sea (IMO Guidelines) point out that ‘shipmasters should understand and heed obligations under international law to assist persons in distress at sea’.¹¹¹ Having a common understanding of distress is important to enable shipmasters to understand not only when they should conduct a SAR operation, but also when they should refrain from intervening. The latter point is relevant as it may prevent States from using SAR as a pretext for intercepting vessels. There have been instances of Libyan agents intercepting overcrowded vessels not for the purpose of rescuing those in distress but for the purpose of extorting release fees from them.¹¹²

A final but equally problematic scenario may arise when a ship is clearly in distress but the persons on board the ship do not accept assistance. What are States expected to do in such a scenario? Is the offer of food and water enough? Does the rescue unit have to stay in the vicinity of the ship in distress, and escort it until it enters another SRR or reaches its destination? Should the rescuing State intercept the ship to rescue those on board? The lack of a clear answer to such questions has allowed States to refrain from rendering assistance to ships in distress.¹¹³ This is allegedly what happened in June 2023 when a ship sank off the coast of Pylos in the Peloponnese region of Greece. The *Adriana* was a fishing trawler that had started its journey from Libya to Italy with more than 700 migrants on board. It sank in international waters within the Greek SRR, causing the deaths of more than 600 people.¹¹⁴ At the time of writing, the factual circumstances of the event are still under investigation but, according to the reports of the Hellenic Coast Guard (HCG), the captain of the *Adriana* refused assistance and informed the HCG that they wished to proceed to Italy.¹¹⁵ Reportedly, the captain requested only food and water which was provided to them by a Maltese-flagged vessel in the vicinity because he refused

¹¹⁰ Frontex *ibid* 12.

¹¹¹ IMO Guidelines (n 15) annex 34, para 5.1.1.

¹¹² UNSC (n 12) 97.

¹¹³ Regulation (EU) No 656/2014 (n 108) art 9(h) provides that: ‘[w]here a vessel is considered to be in a situation of uncertainty, alert or distress but the persons on board refuse to accept assistance, the participating unit shall inform the responsible Rescue Coordination Centre and follow its instructions. The participating unit shall continue to fulfil a duty of care by surveying the vessel and by taking any measure necessary for the safety of the persons concerned, while avoiding to take any action that might aggravate the situation or increase the chances of injury or loss of life’, but this is rarely complied with in practice.

¹¹⁴ ‘Greece: 6 Months On, No Justice for Pylos Shipwreck’ (*Human Rights Watch*, 13 December 2023) <www.hrw.org/news/2023/12/14/greece-6-months-no-justice-pylos-shipwreck>.

¹¹⁵ HCG, ‘Continuation of Information regarding a Large-Scale Search and Rescue Operation of Foreigners in International Waters in the Sea Area 47 nm Southwest of Pylos’ (14 June 2023) <www.hcg.gr/el/drastriothtes/synxeia-enhmerwshs-anaforika-me-eyreia-epixeirhsh-ereynas-kai-diaswshs-allodapwn-se-die8nh-ydata-sth-8alassia-perioxh-47-nm-notiodytika-pyloy_>; G Wright and L Gozzi, ‘Greece Boat Disaster Leaves at Least 78 Dead and Hundreds Missing’ *BBC News* (15 June 2023) <www.bbc.com/news/world-europe-65901005>.

any aid from the HCG.¹¹⁶ The *Adriana* had clearly been in distress. The large number of people, including women and children, on board a fishing trawler that lacked safety equipment and was travelling in the deepest area of the Mediterranean in adverse weather conditions should have been more than enough to convince the HCG that a rescue operation was needed. Evidence has emerged that the Greek authorities mishandled the case, even if there was a refusal of assistance from the migrants.¹¹⁷ The incident illustrates how States may absolve themselves from the responsibility of rescuing migrants because of a lack of common understanding as to when a ship is in distress.¹¹⁸ Malta has also taken advantage of this legal gap. It has been reported that when Maltese authorities have encountered boats carrying migrants within the Maltese SRR, they have not rescued them, even in situations where the boat has been in distress. Instead, they have provided food, water and fuel and allowed or encouraged them to continue their voyage to Italy.¹¹⁹

In light of this discussion, it is clear that the lack of a common understanding of what constitutes distress permits inconsistent responses by States. However, strictly defining distress may not provide a desirable solution either.¹²⁰ There is a need for captains and rescue commanders to retain some operational flexibility as they are best placed to decide when a rescue operation is needed and what risks such an operation entails for the safety of their own ship as well as the ship in distress. It is therefore argued that a human rights-oriented approach to SAR should meet two requirements. The first is that a distress call should be responded to as soon as possible because this allows States and shipmasters to evaluate better whether a ship is in distress and what further rescue steps should be taken. Second, determining whether a ship is in distress should not be based merely on technical considerations such as the weather or the characteristics of a ship, but should primarily be focused on the needs of those on board, such as the presence of

¹¹⁶ *ibid.*

¹¹⁷ European Ombudsman (n 109); N Stamouli, 'Charge Greek Coastguard Officers over Deadly Shipwreck, Says Ombudsman' *Politico* (3 February 2025) <www.politico.eu/article/greek-ombudsman-suggests-charges-against-coastguard-for-the-pylos-shipwreck/>; N Beake and K Kallergis, 'Greece Boat Disaster: BBC Investigation Casts Doubt on Coastguard's Claims' *BBC News* (18 June 2023) <www.bbc.com/news/world-europe-65942426>.

¹¹⁸ Attard (n 1) 48–49.

¹¹⁹ S Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea' (2011) 23 *IJRL* 538, 552–53; M Vella, 'AFM Denies Italian Media Report Claiming it Pushed Migrants Away' *maltatoday* (19 August 2014) <www.maltatoday.com.mt/news/national/42414/afm_denies_italian_media_report_claiming_it_pushed_migrants_away>; L Tondo, '“We Give You 30 Minutes”: Malta Turns Migrant Boat Away with Directions to Italy' *The Guardian* (20 May 2020) <www.theguardian.com/global-development/2020/may/20/we-give-you-30-minutes-malta-turns-migrant-boat-away-with-directions-to-italy>.

¹²⁰ See also 'Distress at Sea: A Call for a Humanitarian and Precautionary Approach – A Joint Statement by the United Nations High Commissioner for Refugees, the International Organization for Migration, the United Nations Office of the High Commissioner for Human Rights, the United Nations Special Rapporteur on Trafficking in Persons, especially Women and Children, the United Nations Special Rapporteur on the Human Rights of Migrants and the Centre for Humanitarian Action at Sea' (18 December 2024) <www.unhcr.org/sites/default/files/2024-12/joint-statement-on-distress-at-sea.pdf>.

critically ill persons or pregnant women and children, who typically have little chance of surviving the sinking of a boat.¹²¹

5. How should a human rights-compliant SAR operation be planned and conducted?

As noted above, the duty to render assistance is a due diligence obligation.¹²² The extent to which a rescue operation complies with international human rights law is assessed on the basis of the means that a State employs to rescue persons in distress. The jurisprudence of the ECtHR provides helpful guidance on what States ought to bear in mind when conducting a rescue operation. Specifically, it has held that where a State conducts a rescue operation that may result in the death of one or more individuals, the authorities have to plan and control the operation with a view to ensuring that any risk to life is minimised and that they are not negligent in their choice of action.¹²³ The planning and conduct of a rescue operation are subject to high scrutiny and the ECtHR may evaluate the measures that a State takes to prevent loss of life, rescue persons in danger, evacuate them safely and provide them with medical aid wherever necessary.¹²⁴ In *Alhowais v Hungary*, which concerned, inter alia, the death of a migrant who tried to cross the River Tisza at the border between Serbia and Hungary on a boat, the ECtHR placed emphasis on the fact that the Hungarian authorities were aware that the river had become a dangerous crossing point for migrants and were therefore expected to take positive measures to rescue those in danger.¹²⁵ In *Safi v Greece*, the ECtHR noted that while Greece was aware of the condition of the ship in distress, the adverse weather conditions and the fact that there were women and children on board, it failed to plan and conduct an appropriate SAR operation, in violation of the right to life.¹²⁶ The violation was attributed to a series of failings on behalf of Greece, including the fact that Greece did not use an appropriate rescue unit but instead opted for a speedboat that had neither space for the safe transfer of migrants nor safety equipment.¹²⁷ The ECtHR also found that Greece had not considered requesting additional assistance or sending a more suitable vessel to the

¹²¹ Women and children are usually kept below deck and have weaker or no swimming skills, which minimises their chances of survival: see, e.g. H Smith, 'Greece Shipwreck: Up to 100 Children Were Below Deck, Survivors Say' *The Guardian* (15 June 2023) <www.theguardian.com/world/2023/jun/15/greece-refugee-shipwreck-rescuers-scur-sea-for-survivors>; UN Office on Drugs and Crime, 'Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response' (Human Trafficking and Migrant Smuggling Section, 2021) <www.unodc.org/documents/human-trafficking/2021/Aggravated_SOM_and_Gender.pdf>.

¹²² See Section 2.

¹²³ *McCann and Others v United Kingdom* App No 18984/91 (ECtHR, 27 September 1995) para 194; *Giuliani and Gaggio v Italy* App No 23458/02 (ECtHR, 24 March 2011) para 248.

¹²⁴ *Finogenov and Others v Russia* App Nos 18299/03 and 27311/030 (ECtHR, 4 June 2012) para 216; *Tagayeva and Others v Russia* App Nos 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 and 37096/11 (ECtHR, 13 April 2017); *Alhowais v Hungary* (n 33) para 116; see also S Galani, *Hostages and Human Rights: Towards a Victim-Centred Approach* (CUP 2021) 132–38.

¹²⁵ *Alhowais v Hungary* *ibid* para 127.

¹²⁶ *Safi v Greece* (n 34) para 159.

¹²⁷ *ibid* para 160.

scene, had not provided the persons in distress with lifesaving equipment, such as lifejackets, and had failed to consider the reaction of the migrants who started panicking, risking the sinking of the boat.¹²⁸ The case demonstrates that States must carefully plan a SAR operation bearing in mind several crucial factors, such as the weather and the number of persons in distress, and have in place appropriate rescue units and equipment to conduct the operation. In addition, States are required to have appropriate evacuation plans in place and readily available medical aid.¹²⁹ Designated SAR units should be equipped with medical supplies and first aid, and those in need of urgent medical assistance should be airlifted wherever possible.¹³⁰

The use of force is not envisaged during a SAR operation. States, however, may encounter resistance from smugglers or migrants who refuse aid, and force might be employed to protect the safety of the rescuers or others from the risk of drowning. The International Tribunal for the Law of the Sea (ITLOS) has examined the legality of the use of force under the law of the sea in relation to maritime law enforcement operations. A SAR operation is not a law enforcement operation, but it is worth noting that ITLOS has taken a strict approach in respect of the use of force at sea. It has held that:

the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.¹³¹

The reference to considerations of humanity leaves no doubt that human rights safeguards apply when force is deployed at sea.¹³² Under international human rights law, when an operation involves the use of force, State agents must accurately plan it in advance, including having medical aid in place, so as to minimise, to the greatest extent possible, recourse to lethal force and incidental loss of life.¹³³ Lethal force may be used only as a last resort and must be absolutely necessary in defence of persons from unlawful violence.¹³⁴ Although these criteria were developed in relation to operations on land, they should also apply at sea.¹³⁵

¹²⁸ *ibid* paras 161–167.

¹²⁹ *Finogenov v Russia* (n 124) para 237; *Tagayeva v Russia* (n 124) para 571.

¹³⁰ SAR Convention (n 1) ch 2.5.4; see also S Galani, ‘The Right to Health’ in I Papanicolopulu and A Petrig (eds), *Oxford Handbook on Human Rights at Sea* (OUP forthcoming).

¹³¹ *M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999, para 155; see also *I’m Alone* (1935) 3 RIAA 1609; *Red Crusader* (1962) 35 ILR 485, 499; *M/V ‘Virginia G’ (Panama/Guinea-Bissau)* (Judgment of 14 April 2014) ITLOS Reports 2014, 4; *Guyana v Suriname*, PCA Case No 2004-04, Award (17 September 2007) para 445.

¹³² Galani (n 105) 618–19; F Delfino, ‘“Considerations of Humanity” in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals’ in A Del Vecchio and R Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer 2019) 407.

¹³³ General Comment No 36 (n 28) para 12; *Suarez de Guerrero v Colombia* Comm No 45/1979 (31 March 1982) UN Doc CCPR/C/15/D/45/1979, para 13.1; *McCann v United Kingdom* (n 123) paras 150, 200; *Finogenov v Russia* (n 124) paras 232–236; *Tagayeva v Russia* (n 124) para 601.

¹³⁴ *McCann v United Kingdom* *ibid* para 190; *Isayeva, Yusupova and Basayeva v Russia* App Nos 57947/00, 57948/00 and 57949/00 (ECtHR, 24 February 2005) para 179.

¹³⁵ Galani (n 13) 89; E Papastavridis, ‘The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)’ (2015) 2 *JTerrit&MaritStud* 119, 133–36.

In the case of smugglers or migrants who refuse assistance, it has been argued that 'the interception cannot fall within the SAR legal regime'.¹³⁶ Such a proposition entails the risk that States use resistance as a pretext for transforming SAR operations into law enforcement. States often use disproportionate force to intercept or push back migrant boats. An illustrative example is the deployment of Italian warships to prevent Albanian boats carrying migrants from entering Italy in the late 1990s. In 1997, the Italian ship *Sibilla* collided with the *Kater I Rades* that was carrying Albanian migrants.¹³⁷ It was later disclosed that initially *Sibilla* attempted to block *Kater*'s propeller by throwing a cable in the water.¹³⁸ In a second attempt to divert her from her route, *Sibilla* engaged in 'kinematics and interposition manoeuvres based on the harassment modalities used within the [North Atlantic Treaty Organization] framework'.¹³⁹ As Scovazzi has pointed out, the incident is 'an egregious instance of how the stronger (a ship of the navy) can disregard the most fundamental rights of the weaker (a ship overcrowded with poor people hoping for a decent future)'.¹⁴⁰ This is certainly not an isolated example of State vessels abusing their powers to intercept boats carrying migrants, and thus SAR operations should not be allowed to turn into law enforcement operations, even when smugglers or migrants resist assistance. Only minimal force may be deployed, subject to the international law of the sea and human rights safeguards.

Finally, where life is lost during a rescue operation, States must investigate and establish the circumstances in which a person was killed or went missing and punish those responsible wherever appropriate.¹⁴¹ The duty to investigate is one of means not of result.¹⁴² This is an important qualification considering the challenges that States might encounter when they operate extraterritorially and in adverse sea conditions. Despite this, a human rights-compliant investigation must meet certain requirements, including being prompt, effective, thorough, independent, impartial and transparent through openness to the scrutiny of the general public, the victims and their families.¹⁴³ In *Safi v Greece*, the ECtHR noted that Greece had instituted criminal proceedings against the coastguards involved in

¹³⁶ M Tondini, 'The Legality of Intercepting Boat People under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the *Hirsi Case*' (2012) 18 JIML 59, 62.

¹³⁷ See the facts of *Xhavara v Italy* (n 54).

¹³⁸ T Scovazzi, 'Human Rights and Immigration at Sea' in R Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 212, 236.

¹³⁹ *ibid* 237.

¹⁴⁰ *ibid* 238.

¹⁴¹ General Comment No 36 (n 28) para 27; *Velásquez-Rodríguez v Honduras*, Preliminary Objections, Inter-American Court of Human Rights Series C No 1 (26 June 1989) paras 174–176; *Zimbabwe NGO Human Rights Forum v Zimbabwe* Comm No 245/02 (African Commission on Human and Peoples' Rights, 15 May 2006) para 153.

¹⁴² *Pueblo Bello Massacre v Colombia*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 140 (31 January 2006) para 143; *Jaloud v Netherlands* App No 47708/08 (ECtHR, 20 November 2014).

¹⁴³ General Comment No 36 (n 28) para 28; *Armani Da Silva v United Kingdom* App No 5878/08 (ECtHR, 30 March 2016) para 245; *Comité Loosli Bachelard and Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* Comm Nos 48/90, 50/91, 52/

the SAR operation. These proceedings could establish an accurate account of the facts that caused the deaths of migrants and could result in the prosecution of those responsible.¹⁴⁴ However, it went on to highlight a series of inadequacies, including problems of interpretation when victim statements were taken, limited collection of evidence, exclusion of the victims from the investigation and the lack of an adequate investigation into the victims' allegations of pushbacks.¹⁴⁵

6. When does the duty to render assistance terminate?

A final limitation of the SAR legal regime that requires consideration is the lack of a clear indication as to where rescued migrants should be disembarked. Notably, it has been pointed out that there cannot exist a duty to rescue persons in distress without disembarking them on land.¹⁴⁶ Although there are multiple disembarkation options—including the next port of call, the closest port to where the SAR operation took place, the nearest port of the coastal State that is responsible for coordinating the SAR operation and a port of the rescuing vessel's flag State—no particular option has emerged as a customary obligation.¹⁴⁷

Following the *Tampa* incident, the IMO tried to alleviate the burden on shipmasters of keeping rescued migrants on board because of the refusal of coastal States to allow disembarkation. The relevant amendments to SOLAS urged States to coordinate and cooperate 'to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage'.¹⁴⁸ In addition, SOLAS provides that States responsible for coordinating SAR have to ensure that survivors 'are disembarked from the assisting ship and delivered to a place of safety'.¹⁴⁹ Furthermore, according to amendments to the SAR Convention:

[t]he Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the [IMO].¹⁵⁰

Although the amendments reinforce the point that there cannot be rescue without disembarkation, they have not brought about the desired result. During the negotiations for the drafting of the amendments, it was evident that

91 and 89/93 (African Commission on Human and Peoples' Rights, 15 November 1999) para 51; Galani (n 124) 143–48.

¹⁴⁴ *Safi v Greece* (n 34) paras 115–118.

¹⁴⁵ *ibid.*

¹⁴⁶ Attard (n 1) 66; P Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Brill 2009) 97.

¹⁴⁷ Barnes (n 106) 63; Pallis (n 106) 360; P Turrini, 'Between a "Go Back!" and a Hard (to Find) Place (of Safety): On the Rules and Standards of Disembarkation of People Rescued at Sea' (2019) 28 *ItalYrbkIntL* 29, 33–44.

¹⁴⁸ SOLAS (n 1) ch V, reg 33.

¹⁴⁹ *ibid.*

¹⁵⁰ IMO, 'Resolution MSC.155(78) on Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended' (20 May 2004) IMO Doc MSC 78/26/Add.1, 3.

disembarkation remained a sensitive issue for States.¹⁵¹ Malta, for example, opposed proposals that sought to determine the ports of the State responsible for coordinating SAR as the appropriate place for disembarkation and has not adopted the amendments.¹⁵² It has argued that, to determine the right place for disembarkation, the geographical realities have to be considered.¹⁵³ Given that Malta has a vast SRR, on many occasions an Italian port is the closest option for disembarkation and, thus, Malta argues that timely disembarkation may justify it being in a coastal State other than the one coordinating the SAR. Italy, on the other hand, adopted the amendments, and the disparity in the legal regime between the two neighbouring States has resulted in many standoffs where migrants are left stranded at sea for days.¹⁵⁴ The Italian courts have also reinforced that rescue generates a right to be disembarked,¹⁵⁵ but this is not always upheld in practice or is complied with in a superficial way that gives rise to further human rights concerns.¹⁵⁶ For the EU, the preferred place for disembarkation is ‘the third country from which the vessel is assumed to have departed’.¹⁵⁷ Australia’s practice also shows that it prevents rescued migrants from ever reaching an Australian port, disembarking them at Christmas Island (an Australian external territory) or in third States such as Indonesia that are willing to receive them.¹⁵⁸

The implementation of the amendments remains problematic for another reason—they do not define what constitutes a ‘place of safety’. The IMO Guidelines do elaborate on the meaning of a ‘place of safety’, stating that it is ‘a location where rescue operations are considered to terminate. It is also a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met’.¹⁵⁹ The Guidelines further state that ‘[a]n assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship’.¹⁶⁰ However, the IMO Guidelines are not legally binding and the meaning of ‘place of safety’ remains open for discussion.

The definition of a ‘place of safety’ should not be discerned solely on the basis of the law of the sea. International refugee law and human rights law have well-established safeguards regarding the return of persons to third countries and

¹⁵¹ Attard (n 1) 73–77.

¹⁵² J Coppens and E Somers, ‘Towards New Rules on Disembarkation of Persons Rescued at Sea?’ (2009) 25 *IJMCL* 377, 392–93.

¹⁵³ *ibid* 397; Turrini (n 147) 36; Trevisanut (n 69) 531–32.

¹⁵⁴ S Galani, ‘Tensions and Cooperation in Realizing Maritime Security in the Mediterranean Sea: The Examples of Maritime Terrorism and Irregular Migration’ (2021) 31 *ItalYrbkIntL* 91, 111.

¹⁵⁵ See *Case of Carola Rackete*, Case No 6626 (Tribunal of Agrigento, 16 January 2020) 11–12 <<https://www.giurisprudenzapenale.com/wp-content/uploads/2020/02/Cass-6626-2020.pdf>>.

¹⁵⁶ See, e.g. Decree-Law No 1/2023, under which Italy designated ports for disembarkation in Northern Italy far from where SAR operations take place.

¹⁵⁷ Regulation 656/2014 (n 108) art 10(1)(b).

¹⁵⁸ M Ratcovich, ‘The Concept of Place of Safety: Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?’ (2015) 33 *AustYBIL* 81, 124.

¹⁵⁹ IMO Guidelines (n 15) 8.

¹⁶⁰ *ibid*.

these must be considered when States decide where to disembark those rescued at sea.¹⁶¹ More specifically, the non-refoulement obligation entails that States cannot expel or return a refugee to a State where they face persecution.¹⁶² Under human rights law, the principle of non-refoulement is protected through the prohibition of torture and inhuman or degrading treatment or punishment.¹⁶³ The ECtHR, for example, has firmly expressed that States cannot send a person to a country where they face a real risk of being subjected to treatment contrary to Article 3 of the European Convention on Human Rights.¹⁶⁴ This means that States are prohibited from disembarking rescued persons in countries where they face persecution or torture, or ordering private vessels to disembark them in such a country.¹⁶⁵ Along the same lines, the Italian courts have held that the actor who conducts a rescue operation is responsible for finding a safe place for disembarkation and that such a place cannot be where the principle of non-refoulement is violated or where those rescued may be subjected to human rights violations.¹⁶⁶ The IMO has also underlined 'the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened'.¹⁶⁷

In addition, it should be noted that the principle of non-refoulement and the prohibition of torture apply regardless of whether a State rescues persons within their territorial waters, at its borders or beyond.¹⁶⁸ In *Hirsi Jamaa v Italy*, where the Italian authorities intercepted boats carrying migrants on the high seas and returned them to Libya, the ECtHR held that:

indirect refoulement of an alien leaves the responsibility of the Contracting State intact, and that State is required, in accordance with the well-established case-law, to ensure

¹⁶¹ See also the discussion in GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (4th edn, OUP 2021) 343; Billing (n 63).

¹⁶² Refugee Convention (n 5) art 33.

¹⁶³ ICCPR (n 38) art 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3; ECHR (n 38) art 3.

¹⁶⁴ *Soering v United Kingdom* App No 14038/88 (ECtHR, 7 July 1989); *Chahal v United Kingdom* App No 22414/93 (ECtHR, 15 November 1996); *Hirsi Jamaa v Italy* (n 54).

¹⁶⁵ See also Parliamentary Assembly of the Council of Europe, 'Resolution 1821 (2011) on the Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants' (21 June 2011) <<https://pace.coe.int/en/files/18006>>.

¹⁶⁶ See, e.g. Tribunal of Agrigento (n 155); *Case of Tijani Ibrahim Mirghani Bichara and Amid Ibrahim*, Case No 15869 (Tribunal of Trapani, 16 December 2021) 16–23 <https://www.studiogamberiniassociati.it/upload/sentenza-cassazione-non-ufficiale_627b82cea8676.pdf>; Case Nos 1216-1282/18 RGNR and 1182/18 RG GIP (Tribunal of Ragusa, 16 April 2018) <https://www.asylumlawdatabase.eu/sites/default/files/alddfiles/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_gip.pdf>.

¹⁶⁷ IMO Guidelines (n 15) para 6.17; see also UNHCR, 'Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea (September 2020) para 33 <www.refworld.org/policy/countrypos/unhcr/2020/en/123326>.

¹⁶⁸ Mallia (n 146) 86; D McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (OUP 2007) 440; T Gammeltoft-Hansen and N Feith Tan, 'Extraterritorial Migration Control and Deterrence' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 502, 506–07. See the different view of the US Supreme Court in *Sale v Haitian Centers Council, Inc* 509 US 155 (1993).

that the person in question would not face a real risk of being subjected to treatment contrary to Article 3 in the event of repatriation.¹⁶⁹

Refraining from violating the principle of non-refoulement is not enough. The principle further entails a requirement to provide asylum seekers with access to fair and effective procedures to assess their protection claims on an individual basis.¹⁷⁰ This is nearly impossible to facilitate at sea. The Office of the UN High Commissioner for Refugees has stated that:

the identification and subsequent processing of asylum-seekers is an activity most appropriately carried out on dry land. Onboard processing, both in the form of initial screening and more comprehensive determination, has been attempted in past refugee crises. It proved problematic in various respects, including inter alia, ensuring adequate access to translators, safeguarding the privacy of the interviews carried out under difficult conditions on board ship, ensuring access to appropriate counsel and providing appropriate appeal mechanisms.¹⁷¹

The ECtHR has also underlined that the individual circumstances of every person rescued must be the subject of a detailed examination and has noted the difficulty of doing so on board a ship mainly because of the lack of trained personnel, legal advisers and interpreters.¹⁷² It is therefore essential that refugees and asylum-seekers are disembarked or taken to a safe third country where they can receive temporary protection until their claims are fully processed.¹⁷³ Human rights standards apply in temporary reception centres, including rescue units or ships used for that purpose.¹⁷⁴

7. Conclusion

This article has examined the duty to render assistance through the lens of international human rights law. It demonstrated that while this duty is well established in the international law of the sea, significant human rights issues arise during maritime SAR that need to be studied and addressed from a human rights perspective. Most human rights challenges concern SAR operations, or the lack thereof, involving boats carrying migrants. This article discussed these challenges and suggested how they could be overcome by adopting a human rights-oriented approach to maritime SAR.

¹⁶⁹ *Hirsi Jamaa v Italy* (n 54) para 146.

¹⁷⁰ Goodwin-Gill and McAdam (n 161) 317.

¹⁷¹ UNHCR, 'Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea' (18 March 2002) para 23 <www.unhcr.org/au/media/background-note-protection-asylum-seekers-and-refugees-rescued-sea>; see also S Trevisanut, 'The Future of the Oceans: The Role of Human Rights Law and International Environmental Law in Shaping the Law of the Sea' in N Krisch and E Yildiz (eds), *The Many Paths of Change in International Law* (OUP 2023) 201, 205–11.

¹⁷² *Hirsi Jamaa v Italy* (n 54) para 185.

¹⁷³ E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 87, 113.

¹⁷⁴ *JHA v Spain* (n 54); *Khlaifia and Others v Italy* App No 16483/12 (ECtHR, 15 December 2016); *J.A. and Others v Italy* App No 21329/18 (ECtHR, 30 March 2023); see also Galani (n 105) 622–26.

The starting point was to underline that the duty to render assistance is a due diligence obligation. States are required to take reasonable steps to rescue persons in distress but are not expected to rescue every person at risk of drowning. Subsequently, the complex jurisdictional issues were addressed. It was explained that the existing rules of jurisdiction may be read and applied to various scenarios of maritime SAR to hold coastal States, flag States and rescuing States responsible for upholding the human rights of persons in distress. Admittedly, these rules do not capture all possible scenarios, but caution was urged with regard to efforts to come up with new rules of jurisdiction that risk distorting the existing jurisdiction seascape. Instead, it was argued that human rights law should be used to guide the responses of States to maritime SAR from the moment they receive a distress call through to the moment they disembark rescued persons on land. While the concurrent application of the law of the sea and human rights law might not always be straightforward, human rights law can provide a compass to States in rescuing those who have lost theirs.

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