DON'T ASK ME WHO I AM: THE DEAF EAR AND THE BLIND EYE OF MARITIME LAW ON DISEMBARKATION OF REFUGEES AND ASYLUM-SEEKERS RESCUED AT SEA

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You have to understand,
No one puts their children in a boat
Unless the water is safer than the land
Warsan Shire

Abstract

This paper seeks to identify and unpack the international law on disembarkation as part of Search and Rescue (SAR) of persons in distress at sea, with a specific focus on refugees and asylum-seekers. It seeks to understand the continued failure of this international legal framework and suggests a normative solution as a starting point. It does this by exposing a fundamental contradiction in current maritime law which makes its reconciliation with refugee protection challenging in the context of disembarkation during SAR operations. This contradiction arises from the fact that disembarkation as part of SAR under maritime law is, by design, restricted to only rescue from drowning at sea, whereas disembarkation for rescued refugees or asylum-seekers is additionally related to the principle of non-refoulement and 'temporary admission'. Maritime law consciously delinks survivor status from all stages of the SAR process, including disembarkation, whereas refugee law is founded on linking international protection with status as an asylum-seeker or refugee. This paper identifies the several de jure and de facto constraints introduced in protection of refugees and asylum-seekers rescued at sea due to maritime law turning a deaf ear and a blind eye to survivor status at the stage of disembarkation. It suggests that instead of

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institutionalizing survivor status as a 'non-SAR matter', maritime law needs to be modified to explicitly link survivor status with disembarkation, while continuing to delink it with search, assistance, and embarkation.

I. INTRODUCTION

These heart-wrenching lines by Somali-British poet, Warsan Shire, epitomize the dramatic plea often made by the umpteen number of refugees rescued from drowning at sea and then facing the dreadful ignominy of being denied disembarkation by a coastal State because they might claim asylum. Examples are aplenty of refugees who have managed to escape from persecution and the near-death traumatic experience of drowning at sea, often facing a blind eye and a deaf ear from coastal States quarrelling with each other on who should let them in. 2 Rescuing vessels, often commercial ships, and increasingly NGO ships, have been stuck on the high seas for days together until some coastal State relents and permits disembarkation. 3 The last five years alone have witnessed some of the worst manifestations of the plight faced by such refugees, many of whom have been swallowed by the seas. 4 Recent conflicts in Libya, Syria, Iraq, Somalia and Yemen, and persecution of the Rohingyas in Myanmar have led to an exodus of refugees by sea in unseaworthy and overcrowded ships, mostly without a professional crew, looking for safe havens for themselves and their families. These refugees, although much higher in number, often have to share migration means and routes with others who are being trafficked or are escaping punishment for crimes committed or are simply looking


4 For up to date data, see: <https://missingmigrants.iom.int/>.
for better economic opportunities elsewhere.\textsuperscript{5} Increasingly, these mixed migratory flows are facilitated by smugglers, many of whom are organized transnationally, and who thrive monetarily by leeching on the desperation of such migrants to reach across the shores.\textsuperscript{6}

The Mediterranean, of course, has been a dominant theatre for drownings in the past five years. 2016 was the worst year for recorded deaths at sea in the Mediterranean with 5,143 deaths against 355,395 people who arrived via the sea route, that is, 1 death for every 69 people who completed the journey.\textsuperscript{7} In 2018, for 116,674 people that reached Europe via the Mediterranean, 2,297 drowned at sea.\textsuperscript{8} This means that although fewer number of people made the journey and, therefore, fewer died, the journey in fact became more dangerous with one life lost for every 50 people who successfully crossed.\textsuperscript{9}

While these numbers starkly highlight the humanitarian need for search and rescue (SAR) of persons in distress at sea, they have not been matched by the willingness of coastal States to permit disembarkation after migrants have been saved from drowning by rescuing vessels. This reluctance has only grown over time as incessant migratory influxes continue. Refugees are in the worst situation possible because disembarkation for them, is not only related to finding dry land after almost drowning, it is also associated with admission, even if temporary, for enjoying international protection which international law guarantees to them even before such disembarkation. Indeed, to qualify as a refugee under international law, disembarkation on another country’s territory is


\textsuperscript{6} \textit{Ibid.}

\textsuperscript{7} See data at: <https://missingmigrants.iom.int/region/mediterranean>.

\textsuperscript{8} \textit{Ibid.}

\textsuperscript{9} These recorded numbers are only indicative, since a large number of drownings do not even making it to datasets, especially from Asia, Africa, and Oceania.
not a requisite.\textsuperscript{10} As soon as the person fleeing persecution for any reason mentioned in Article 1 of the 1951 Convention is \textit{outside the country of nationality} (or habitual residence, in case of stateless refugee), that is, alienage is established, the person is already a refugee.\textsuperscript{11} As such, the moment a person fulfilling all other qualifications of the refugee definition is outside the territorial waters of her/his country, the person has submitted to international protection. For the refugee rescued from distress, disembarkation, therefore, also doubles up as the place where the first claim for refugee status determination will likely be made and international protection sought.\textsuperscript{12}

The international law on disembarkation as part of maritime SAR of the distressed falls within the interface between international refugee law (and human rights law) on the one hand, and international maritime law on the other, making its identification quite complex. Continuing refusals by coastal States to permit disembarkations indicate that this interface is perhaps fragmented and not quite effective. This paper, therefore, seeks to identify and unpack the international law on disembarkation as part of SAR operations, with a specific focus on refugees and asylum-seekers rescued at sea. It seeks to understand its continued failure and suggests a normative solution as a starting point. It does this by exposing a fundamental contradiction in current maritime law which makes its reconciliation with refugee protection challenging in the context of disembarkation during SAR operations.

\textsuperscript{10} Article 1(2) of the 1951 Convention Relating to the Status of Refugees defines a refugee as someone who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, \textit{is outside the country of his nationality} and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being \textit{outside the country of his former habitual residence} as a result of such events, is unable or, owing to such fear, is unwilling to return to it".


Refugee status determination is purely declaratory in nature. A person does not become a refugee because of recognition, but is recognized because he or she is a refugee.

II. INTERNATIONAL LAW ON SEARCH, RESCUE AND EMBARKATION

The International law on SAR related to refugees and asylum-seekers in distress at sea has, unsurprisingly, largely developed within the overarching framework of international maritime treaty and customary law. The first instance of concrete engagement between refugee law and maritime law can be traced back to mid-1975, when the unprecedented Indo-Chinese refugee crisis erupted following the establishment of communist governments in the former French colonies of Vietnam, Cambodia and Laos, leading to an enormous exodus of refugees using maritime routes to reach such places as Hong Kong, Malaysia, Thailand, and Indonesia. These ‘Boat People’, as they came to be known, were left with no choice but to overcrowd themselves in unseaworthy vessels resulting in shipwrecks and deaths, a situation further worsened by persistent looting by pirates and deadly attacks by criminal gangs.

These unfortunate events coincided with the emergence of a new practice by the Executive Committee of the UNHCR (ExCom) of issuing ‘conclusions’ on matters directly impacting protection of persons of concern to UNHCR. In its second meeting, the ExCom expressed its deep concern “at the fate of asylum-seekers who had left their country in small boats and were in need of rescue or admission to a country of first asylum”, and, “appealed to States scrupulously to observe the legal provisions relating to the rescue of persons at sea, as contained in the Brussels Convention of 1910 and the United Nations Convention on the High Seas of 1958”.  

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14 Ibid.
15 The ExCom currently comprises 102 States. These conclusions, although not formally binding, constitute highly persuasive expressions of opinion broadly representative of the views of the international community, especially since they are adopted by consensus. The first ExCom Conclusions were adopted in 1975. For more information on mandate and functions, see: <https://www.unhcr.org/executive-committee.html>.
16 UNHCR, ExCom Conclusion No. 2 (XXVII), Functioning of the Sub-Committee and General, 1976, para. f.
17 Ibid., para. g.
The aforementioned Conventions, alongwith the 1960 Convention on the Safety of Life at Sea, collectively comprised the applicable law on SAR at the time. They codified what had been a longstanding basic set of rules under customary international law on SAR, predominantly relying on an obligation of shipmasters to render assistance to those in danger of being lost at sea and to proceed with all possible speed to rescue those in distress, coupled with obligations on flag States to require shipmasters to do so, and on coastal States to promote the establishment and maintenance of an adequate and effective SAR service. These three Conventions have since been replaced by a new set of treaties viz. the 1989 International Convention on Salvage (hereinafter, Salvage Convention), the 1982 UN Convention on the Law of the Sea (hereinafter, UNCLOS), and the 1974 Convention on the Safety of Life at Sea (hereinafter, SOLAS), reinforcing the same basic rules.

The Indo-Chinese refugee crisis bared open two major problems. Firstly, although the basic obligations on SAR were already enshrined in international law, there was no concrete international system covering SAR operations, with each State being left to its own design. Secondly, as the flow of refugees grew over time, countries became increasingly reluctant to allow rescuing vessels to land at their ports until resettlement guarantees were provided by other States. This, in turn, led to a growing reluctance on behalf of shipmasters of commercial and passenger vessels worried about economic losses to shipping companies due to delays and divergences, to rescue refugees in distress. To address this, the International Maritime Organization (IMO) adopted the 1979 Convention on Maritime Search and Rescue (hereinafter, CMSAR),

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19 1958 United Nations Convention on the High Seas, Article 12 (1)(a) and (b).
20 Ibid., Article 12(2).
aimed at developing an international SAR plan, so that, "no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a SAR organization and, when necessary, by co-operation between neighbouring SAR organizations".

This section elaborates on the rules of international law as enshrined in the aforesaid treaties with respect to SAR until the stage where the distressed are embarked on rescuing vessels. This analysis will provide us with the necessary pedestal to delve deeper in the next section, into the much more complex rules of international law pertaining to disembarkation of the rescued, with a specific focus on refugees and asylum-seekers.

**Duty of the Shipmaster:**

1. Under SOLAS, "the master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so". Similarly, the Salvage Convention obliges every Master to "render assistance to any person in danger of being lost at sea".

2. SOLAS stipulates that "this obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found". In other words, the asylum-seeker or refugee status of a person in distress is inconsequential to this obligation of the shipmaster.

3. The Salvage Convention provides an exception that the aforesaid must be done by the master "so far as he can do so without serious danger to his vessel or persons thereon".

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23 Ibid. Also see, CMSAR, Preamble, para. 3.
25 Salvage Convention, Article 10(1).
26 SOLAS, note 24.
27 Salvage Convention, note 25.
SOLAS stipulates that in order to inform the appropriate SAR service accordingly, “if the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress [...].”

Duty of the Flag State:

1. Every ship can sail under the flag of one State only and, save in exceptional cases expressly provided for in applicable international treaties, are subject to the exclusive jurisdiction of the flag State on the high seas.

2. Under Article 98(1) of UNCLOS, every State must require the master of a ship flying its flag, as long as can be done without serious danger to the ship, the crew or the passengers, to render assistance to any person found at sea in danger of being lost. Similarly, flag States are obliged to require such masters “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”.

3. Article 98 (1) is non-self-executing and requires implementing legislation in the flag State. The aforesaid has been described as the ‘duty of due diligence’ on the flag State, meaning, that it must take all measures, including legislative and administrative, and where necessary, even enforcement, to require shipmasters to carry out their obligations. In case of

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28 SOLAS, note 24.
29 UNCLOS, Article 92.
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non-State vessels, the flag State is not directly responsible for violations of these obligations by shipmasters, if it has otherwise through its conduct exercised due diligence. However, in case of State vessels or warships or ships controlled or directed by the State, the flag State is directly responsible for the internationally wrongful act of the shipmaster.  

Duty of Coastal States in General

1. Article 98(2) of UNCLOS stipulates that “every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose”.

2. Although UNCLOS does not define ‘search and rescue service’, Regulation 2.5 of SOLAS and Regulation 1.3.3 of CMSAR do so in identical language:

“Search and rescue service: The performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircraft, ships, vessels and other craft and installations”.

3. Regulation 7 of SOLAS entitled “Search and Rescue Services” elaborates further by stipulating that “Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and operations involving refugees and migrants at sea, November 2017, FN 36, available at <https://www.refworld.org/docid/5a2e9efd4.html>. For a further elaboration of the obligation of “due diligence” on flag States under UNCLOS, see ITLOS, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (Request for Advisory Opinion Submitted to the Tribunal), para. 127-129. Also see, ICJ, Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, para. 197.

coordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers, and shall, so far as possible, provide adequate means of locating and rescuing such persons.”

4. CMSAR is more detailed since it is specifically aimed at operationalizing SAR activities. It defines ‘search’ as “an operation, normally co-ordinated by a rescue co-ordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress”.33 ‘Rescue’ is defined as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”.34

5. CMSAR requires that States, individually and in cooperation with each other and the IMO, shall participate in the development of SAR services “to ensure that assistance is rendered to any person in distress at sea”35, and therefore, “on receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided”.36

6. The basic structure of CMSAR requires the establishment of SAR Regions all around the world, with a State (or more than one State jointly, if so agreed by the States concerned) accepting responsibility to develop37 and provide38 SAR services, through the establishment of Rescue Coordination Centres (RCCs) and Rescue Sub-Centres (RSCs), for the

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33 CMSAR, Regulation 1.3.1.
34 CMSAR, Regulation 1.3.2.
35 CMSAR, Regulation 2.1.1.
36 Ibid.
37 CMSAR, Regulation 2.2.
38 CMSAR, Regulation 2.1.9.
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corresponding SAR region. The ‘Rescue Co-ordination Centre’ (RCC) is the unit responsible for promoting efficient organization of SAR services and for co-ordinating the conduct of SAR operations within a SAR region and is envisaged to work in conjunction with the RSC.\(^3^9\) ‘SAR region’ is “an area of defined dimensions associated with a RCC within which SAR services are provided”\(^4^0\). Each SAR region is required to be established by agreement among Parties concerned,\(^4^1\) and, should be contiguous and, as far as practicable, not overlap.\(^4^2\) The delimitation of SAR regions is neither related to nor prejudices the delimitation of any boundary between States, and as such, there is no requirement that a country’s SAR region agreed upon with neighbouring States be coterminous with either the territorial sea, contiguous zone, or Exclusive Economic Zone of the State concerned. It may be larger or smaller, depending on the agreement between parties.\(^4^3\)

7. The ‘basic elements of a SAR service’ which parties are required to establish include a legal framework, assignment of a responsible authority, organisation of available resources, communication facilities, co-ordination and operational functions, and processes to improve the service including planning, domestic and international co-operative relationships and training.\(^4^4\)

8. Parties are required “to ensure that assistance be provided to any person in distress at sea” and must do so “regardless of

\(^{39}\) Rescue Sub-centre is defined as “A unit subordinate to a rescue co-ordination centre established to complement the latter according to particular provisions of the responsible authorities”, CMSAR, Regulation 1.3.6.

\(^{40}\) CMSAR, Regulation 1.3.4.

\(^{41}\) CMSAR, Regulation 2.1.4.

\(^{42}\) CMSAR, Regulation 2.1.3. For a global map of current SAR regions, see: <https://www.dco.uscg.mil/Portals/9/CG-5R/nsarc/IMO%20Maritime%20SAR%20Regions.pdf>.

\(^{43}\) Unilateral declarations of SAR regions are provisional, and are final once agreements with neighbours is reached. See CMSAR, Regulations 2.1.4 to 2.1.8. For an explanation, see: Rick Button, “International Law and Search and Rescue”, Naval War College Review, vol. 70, no. 1 (2017), pp. 25-40 at p. 30.

\(^{44}\) CMSAR, Regulation 2.1.2.
the nationality or status of such a person or the circumstances in which that person is found". Therefore, similar to the non-discrimination obligations of shipmasters, in case of countries responsible for a SAR region, the status of a person in distress as an asylum-seeker or refugee is inconsequential when it comes to providing assistance.

9. In terms of mandatory operational procedures, Chapter 4 of the Annex to the CMSAR stipulates detailed obligations on State/s responsible for the corresponding SAR region with respect to conducting SAR services. Although the Convention obliges the responsible States to use their own established SAR units and other available facilities for a SAR operation, a conjoined reading of all aforementioned Conventions, other provisions in CMSAR, and practicality make it clear that on most occasions, the role and obligations of shipmasters in the vicinity of those in distress will need to be invoked.

10. Finally, CMSAR highlights the importance of cooperation between States and stipulates that "Parties shall co-ordinate their SAR organizations and should, whenever necessary, co-ordinate SAR operations with those of neighbouring States".

One particular question that has come up, especially at the behest of Malta in the context of refugees and asylum-seekers rescued in its vast SAR region in the Central Mediterranean, is what constitutes distress. The view taken by Malta is that for distress to occasion, there needs to be a request of assistance and an immediate danger of loss of life. According to this perspective, if there is unsolicited but credible information that a boat is unseaworthy, overcrowded, and lacks a professional crew on board, and loss of life is likely, a situation of distress would still not arise as long as the boat can float. This view, however, is contrary to the clear language and

45 CMSAR, Regulation 2.1.10.
46 CMSAR, Regulation 2.1.9.
47 CMSAR, Regulation 3.1.1.
48 Amnesty, note 2, p. 12.
49 Ibid.
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objective of CMSAR. Regulation 1.13 defines ‘Distress phase’ as "a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance". Imminence refers to the likelihood of something happening very soon,\(^{50}\) something impending, that may be separated by space or time, rather than the very next in order, at least in the context of distress at sea.\(^{51}\) In the *Kate Hoff* case, the General Claims Commission of the US and Mexico held that there was no requirement for the vessel to be “dashed against the rocks” before a claim of distress can be invoked.\(^{52}\) This is also borne out in widespread practice of States and mariners considering vessels that are apparently unseaworthy, overcrowded, or lacking a professional crew on board, to be in ‘distress’ from the moment they depart the coast. This ‘precautionary’ approach reflects “the common sense of experienced and competent seafarers, and to increase the chances of survival of those on board by allowing timely SAR responses without waiting for an evident and often inevitable risk of loss of the vessel to materialise”.\(^{53}\) UNHCR rightly points out that this humanitarian and precautionary approach is consistent with a good-faith interpretation of the Conventions.\(^{54}\) Insofar as the claim that a request for assistance ought to be made, CMSAR requires RCCs to take necessary action upon ‘information’ being received.\(^{55}\) This could obviously be from any source.\(^{56}\)

\(^{50}\) See: <https://dictionary.cambridge.org/dictionary/english/imminent>.


\(^{52}\) *Kate A. Hoff v. The United Mexican States*, *The American Journal of International Law*, vol. 23, no. 4 (1929), pp. 860-865; See also Guilfoyle et.al., *note 31*, at p. 15.


\(^{54}\) UNHCR, *note 31*, at para. 10.

\(^{55}\) See CMSAR, Regulations 2.1.1 and 4.4.

\(^{56}\) This would be consistent with the obligation under SOLAS on shipmasters to render assistance “on receiving information from any source”. See *note 24*. 
III. INTERNATIONAL LAW ON DISEMBARKATION

‘Rescue’, as per the definition of CMSAR, does not stop at embarkation on a rescuing vessel, but requires delivery of the rescued “to a place of safety”. However, CMSAR had not entered force until 1985 and was inapplicable during most of the Indo-Chinese refugee crisis. The growing reluctance of South East Asian countries to permit disembarkation on their shores until resettlement guarantees were provided by other countries meant that by 1981, the Indo-Chinese refugee crisis of shipwrecks had peaked and the ExCom had to begin debating the content and scope of obligations of receiving States in case of large-scale influx of asylum-seekers and refugees rescued at sea. In this backdrop, in 1981, the ExCom introduced the concept of ‘next port of call’ and concluded that:

in accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum-seekers rescued at sea. In cases of large-scale influx, asylum-seekers rescued at sea should always be admitted, at least on a temporary basis.

At the same time, the ExCom also concluded that “States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities”. Indeed, rescue of asylum-seekers during the crisis had largely been facilitated by the willingness of flag States of rescuing ships to provide guarantees of resettlement as required by the coastal States as a condition for disembarkation. In addition, in 1979, the UNHCR had also introduced a scheme known as the Disembarkation Resettlement Offers (DISERO), whereby several developed countries agreed to offer themselves as resettlement destinations as part of a pool that

57 Note 34.
58 UNHCR, ExCom Concluion No. 23 (XXXII), Problems Related to the Rescue of Asylum Seekers in Distress at Sea, 1981, para. 3.
59 Ibid.
60 Ibid., para. 2.
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could be drawn on when required to facilitate the immediate disembarkation of rescued refugees in coastal States.\textsuperscript{61} Coupled with the subsequent Rescue at Sea Resettlement Offers (RASRO) scheme launched in 1985, and finally, the Comprehensive Plan of Action of 1989, guarantees of disembarkation were operationalized during the crisis response through international cooperation.\textsuperscript{62}

The law on disembarkation, however, remained embryonic and this was reflected in the early 1990s, when large-scale arrivals of refugees and asylum-seekers from Haiti and Cuba, rescued at sea in distress, were refused disembarkation by the US. It was not until the \textit{Tampa} incident of August 2001, when the Australian government refused permission for the Norwegian freighter \textit{MV Tampa} carrying 433 rescued refugees mostly from Afghanistan to enter Australian waters, that the law on disembarkation started taking some concrete shape.\textsuperscript{63} The outcry against this incident helped focus international attention on the question of disembarkation and subsequent responsibility for accepting asylum seekers rescued at sea and adjudicating their claims.\textsuperscript{64} Both the UNHCR and the IMO began considering these questions in parallel. Thus, in January 2002, the General Assembly of the IMO adopted Resolution A.920(22) seeking to identify any gaps, inconsistencies and inadequacies associated with the treatment of persons rescued at sea.\textsuperscript{65} Simultaneously, the UNHCR in March 2002, produced a 'Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea' in


\textsuperscript{62} Ibid.


\textsuperscript{64} Ibid.

preparation of a series of workshops with experts. As will be discussed below, this background note proposed an explanation of the concept of disembarkation at the 'next port of call' introduced by the ExCom in 1981 and reiterated thereafter, and sought to interpret 'place of safety' employed by CMSAR for the purpose of disembarkation through the lens of refugee law.

The IMO's Maritime Safety Committee (MSC), on the other hand, sought to address the issue through adoption of certain amendments to SOLAS and CMSAR. The following identical provision was introduced through Paragraph 1.1 of Regulation 33, Chapter V in SOLAS and through Regulation 3.1.9 in CMSAR:

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


67 See UNHCR, ExCom Conclusion No. 53 (XXXIV), Stowaway Asylum-Seekers, 1988, para. 2.


the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.

A new Regulation 4.8.5 was also introduced in CMSAR stipulating that the RCC or the RSC concerned “shall initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea. It shall inform the ship or ships and other relevant parties concerned thereof.” 70

Simultaneously, the MSC adopted extensive Guidelines on the Treatment of Persons Rescued at Sea (hereinafter MSC Guidelines), “to help Governments and masters better understand their obligations under international law and provide helpful guidance with regard to carrying out these obligations.” 71 The MSC Guidelines thus served two purposes: they provided, in some parts, an interpretation by IMO member States of their obligations under international law related to SAR, and in other parts, a non-binding guidance to help Governments and masters carry out these obligations in practice. Importantly, these Guidelines were endorsed in 2007 by the UNGA which urged States to cooperate and to take all necessary measures to ensure their effective implementation. 72

The 2004 amendments coupled with the MSC Guidelines were thus seen as having caused the rules of maritime and refugee law to tightly interlock, 73 and fill in the normative gaps in the law on disembarkation encountered during the Tampa incident. As will be discussed below, however, they also introduced a fundamental contradiction in the interface between maritime law on SAR and refugee law, thereby creating a fragmented structure and an enabling environment for distortions by States of their fundamental

70 Ibid.
obligations of providing international protection to refugees and asylum-seekers.

A. The Delinking of Survivor Status with Disembarkation under Maritime Law on SAR

The responsibility for finding solutions to enable timely disembarkation in a humane manner rightly rests exclusively with States and not with private actors such as shipmasters or shipping companies. While the purpose of the 2004 amendments to SOLAS and CMSAR, as outlined in the Preamble of the Resolutions adopting the amendments, was to establish a State-led structure to ensure that "in every case a place of safety is provided within a reasonable time" to those rescued at sea, their stated objective was also to guarantee that this shall be done "regardless of their nationality, status or the circumstances in which they are found". This neutrality pertaining to the stage of disembarkation echoes the neutrality required by shipmasters and RCCs at the stage of embarkation, and is incorporated, perhaps, under an assumption that the former would be a logical extension of the latter. Therefore, this neutrality at the stage of disembarkation was also deemed essential to ensure that States do not discriminate against disembarkation of refugees and asylum-seekers, fearing that their return to the country of origin or resettlement might prove difficult. As will be pointed out presently, the MSC Guidelines identify survivor status as a non-SAR matter, and further reinforce and firmly embed the delinking of survivor status with SAR at all stages – search, embarkation or disembarkation – such that this principle becomes the dominant pillar on which legal obligations pertaining to even disembarkation have been understood and developed post-2014. Therein lies the fundamental contradiction. What constitutes a place of safety for the purpose of refugees and asylum-seekers can never be determined regardless of their status because doing so may violate the non-derogable principle of non-refoulement. In other words, the benevolent approach of status-neutrality under maritime law translates into an approach of status-blindness abhorred under

74 UNHCR, note 12, para. 32.
75 IMO, note 68.
refugee law when it comes to disembarkation. This paper contends that it is this fundamental contradiction that creates fertile ground for dehumanizing asylum-seekers and refugees rescued at sea and blatant violations of State obligations related to international protection. It posits that while survivor status neutrality is essential at the stage of embarkation during SAR operations, it is deeply problematic at the stage of disembarkation since it militates against the principle of non-refoulement and thus strikes at the very roots of refugee law.

Non-Refoulement

The principle of non-refoulement constitutes the fundamental bedrock of the international law on refugee protection. Article 33 of the 1951 Refugee Convention stipulates that:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”

The formulation ‘in any matter whatsoever’ covers any imaginable action exposing the person concerned to the risk of persecution. This principle also constitutes a rule of Customary International Law and is, therefore, binding on all States irrespective of their status as parties to the 1951 Convention or the 1967 Protocol. It is considered to be non-derogable and has been described as such on several occasions by the ExCom and the UNGA. Because of its universal applicability and non-derogability, it is also considered by many as a jus cogens norm. This principle applies to all asylum-

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76 UNHCR, note 31, para. B.1; Fischer-Lescano, note 73, at p.268.
78 Ibid., para. 12.
seekers pending the conclusive determination of their status as a refugee through appropriate and effective legal procedures. It applies even to those who may not have yet had the opportunity to present a claim for refugee status determination. It applies wherever the State in question exercises jurisdiction, whether on its territory or territorial waters, or outside these, including in the context of maritime SAR operations or interception at sea.

Apart from refugee law, international human rights law also incorporates this principle explicitly in Article 3 of the Convention against Torture and has been recognized as an inherent component of the right to life and the right to be free from torture or other cruel, inhumane or degrading treatment or punishment under the International Covenant on Civil and Political Rights (ICCPR). All regional human rights systems reinforce the centrality of the principle of non-refoulement.

It is, therefore, evident that in the case of refugees and asylum-seekers rescued at sea, disembarkation decisions must necessarily take into account their status lest they be disembarked at a place where the cardinal principle of non-refoulement might be directly or indirectly threatened. Such decisions simply cannot be made 'regardless of their status', as the structure of the 2004 amendments to SOLAS and CMSAR dictate.

In the face of this inherent contradiction, IMO Member States attempted to strike a compromised balance through the MSC Guidelines. At this juncture, a note on the lead up to those guidelines

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80 UNHCR, note 77, para.6.
81 Ibid. See also, UNHCR, Excom Conclusion No. 6 (XXVIII) – Non-Refoulement, 1977, para.c.
82 UNHCR, note 31, para. B.1
83 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 10 December 1984, entered into force 26 June 1987. Article 3(1) states that "1. No State Party shall expel, return ("refoul") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".
84 ICCPR, Article 6.
85 ICCPR Article 7.
86 For a list, see: UNHCR, note 77, Para 13.
might be in order. Although the CMSAR, even prior to the 2004 amendments, defined ‘rescue’ as including delivery of the rescued to ‘a place of safety’, it did not explicitly define this phrase. Post the Tampa incident, in its Background Note of 2002, the UNHCR recalled Conclusion 23 of 1981 whereby the ExCom had contended that maritime law should be understood as requiring prompt disembarkation of the survivors at the ‘next port of call’ and that, this principle must be applied to the rescued refugees and asylum-seekers as well.\textsuperscript{87} It is noteworthy that in 1981, CMSAR and the obligations on States responsible for SAR regions had not yet come into force, and as such, the phrase ‘place of safety’ employed therein was not discussed by the ExCom. But, the ExCom also did not elaborate on the meaning to be assigned to its phrase ‘next port of call’. Thus, in the 2002 Background Note, the UNHCR noted that “since the ‘next port of call’ with reference to the disembarkation of rescued persons is nowhere clearly defined, there are a number of possibilities, which would need to be further explored to clarify this concept”\textsuperscript{88} It then suggested that depending on the circumstances, it could be the ‘nearest port in terms of geographical proximity’, ‘the port of embarkation’, ‘the next scheduled port of call’, the port ‘best equipped for the purposes of receiving traumatised and injured victims and subsequently processing any asylum applications’, or in case of State vessels intercepting illegal migrants, perhaps the nearest port of that State.\textsuperscript{89} It also listed a number of factors that “the development of criteria that help to define the most appropriate port for disembarkation purposes will be informed by”.\textsuperscript{90}

Post the 2004 amendments to SOLAS and CMSAR, the UNHCR has, however, appeared reluctant to revert back to the ‘next port of call’ concept, perhaps based on an assumption that if the SAR regime as envisaged under CMSAR fructifies in letter and spirit, there would be certainty of legal obligations and no legal gaps left to fill. Yet,

\textsuperscript{87} Note 58.
\textsuperscript{88} UNHCR, note 66, para. 30.
\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid., para. 31.
although the amendments again employed the phrase ‘place of safety’ following the definition of ‘rescue’, they did not elaborate on what it meant. Instead, meaning was assigned in the simultaneously adopted MSC Guidelines which stipulated that “a place of safety is a place: where the survivors’ safety of life is no longer threatened; where their basic human needs (such as food, shelter and medical needs) can be met; and from which transportation arrangements can be made for the survivors’ next or final destination”.  

It is this definition, instead of the ‘next port of call’ concept, that the UNHCR has sought to utilize since 2004 in determining what would be a place of safety vis-à-vis refugees and asylum seekers. The assumption is that in the specific context of refugees and asylum-seekers, the aforesaid MSC Guidelines’ definition would mean, at the very least, a place where the non-derogable principle of non-refoulement would be guaranteed and further, where their asylum claims might be effectively addressed and basic needs met in the meanwhile. This is reflected further in the MSC Guidelines which stipulate that “the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea”.  

This tenuous clarification does not, however, sit well with the fact that under the very same MSC Guidelines, survivor status has been identified as a ‘non-SAR matter’. They further prescribe that such ‘non-SAR considerations’ must typically be dealt with by national authorities other than RCCs. The problem here is that on

91 IMO, note 71, para 6.1.2  
92 UNHCR, note 5, para 17; UNHCR, note 31, para. 16.  
94 Ibid., paras. 6.19-6.22.  
95 Ibid., para. 6.19.
the one hand, RCCs are responsible for disembarkation of survivors regardless of their status because such status is presumed to be a non-SAR matter, and on the other hand, disembarkation of refugees and asylum-seekers necessitates considerations of non-refoulement and hence their status in fact is a SAR matter. As pointed out earlier, ‘rescue’ is not over until the survivor, in this case the asylum-seeker or refugee, is delivered to a place of safety.

This delinking of asylum-seeker or refugee status with SAR in general leads to further complications in practice. If the place of safety for all survivors is to be determined prior to their disembarkation, there will need to be at least an initial profiling or pre-screening of who is an asylum-seeker or a refugee prior to disembarkation as well. Indeed, the UNHCR itself acknowledges that while this process onboard maritime vessels is generally not appropriate, “in exceptional circumstances, that would need to be defined further, initial profiling or prescreening onboard the maritime vessel by the intercepting State may be one solution to ensure that persons with international protection needs are identified and protected against refoulement”. But the delinking under maritime law referred to above raises the question – who is to conduct this initial profiling or pre-screening? As per the MSC Guidelines, the body competent to coordinate disembarkation - the RCC or the RSC – should not be the one doing this. At the same time, the UNHCR acknowledges that “the master will not be aware of the nationality or status of the persons in distress and cannot reasonably be expected to assume any responsibilities beyond rescue” and that “the identification of asylum-seekers [...] is the

96 The UNHCR explains that profiling or pre-screening is a process that precedes formal RSD and aims to identify and differentiate between categories of arrivals. It must not be equated with a formal RSD which must almost always be done on land after disembarkation. See: UNHCR, “Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing”, November 2010, available at: <https://www.refworld.org/docid/4cd12d3a2.html>, at para.15.

97 Ibid., at para.55.
responsibility of State officials adequately trained for that task. Attempting to address the problem of international protection of refugees through specific structures established under maritime law which do not permit refugee or asylum-seeker status to be a consideration is a self-defeating exercise.

B. When the State Responsible for the SAR Region itself Poses Threats of Non-refoulement

The aforesaid unpacks a yet bigger problem. How is a situation to be resolved where either the embarked survivor who is a refugee or an asylum-seeker, or the shipmaster, are of the opinion that the place of safety proposed by the RCC concerned poses threats of direct or indirect refoulement or of persecution in such a place itself? In other words, what happens when there is a difference of opinion among the RCC concerned and those on board? Worse, what if the country responsible for the SAR region, and therefore, disembarkation, itself poses threats of refoulement or of persecution? The current structure of maritime law on SAR provides no answers to these because it is based on a flawed assumption that the country responsible for coordinating SAR will always have the right intentions in protecting rescued refugees and asylum-seekers as it goes about performing its maritime law obligations of disembarkation. By conferring the dominant, and perhaps, final authority to determine the place of safety upon the RCC or RSC concerned, the maritime SAR structure under these conventions entirely ignores the fact that the saviour (the state responsible for the SAR region) may turn out to be an unsafe place insofar as refugees and asylum-seekers are concerned. Maritime law confers authority on the State feared as a persecutor by the asylum-seeker or refugee, to legally determine itself as a place of safety. The SAR structure under SOLAS and CMSAR is erected on this foundation.

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98 UNHCR, note 66, para. 22; Also see: IMO, UNHCR, and the International Chamber of Shipping, “Rescue at Sea: A Guide to Principles and Practice as Applied to Refugees and Migrants”, 2015, available at <https://www.refworld.org/docid/54b365554.html>, p. 10, stating inter alia, “if rescued persons appear to indicate that they are asylum-seekers or refugees or that they fear persecution or ill-treatment if disembarked at a particular place, the Master should inform the rescued persons concerned that the Master has no authority to hear, consider or determine an asylum request”.
and thus creates a legal framework under maritime law that facilitates violations of refugee law. Again, this flawed assumption is facilitated, nurtured, and operationalized by delinking survivor status with SAR. It is this delinking that permits CMSAR to ignore refugee status and safely assume that the country responsible for a SAR region will have the right intentions in determining the place of safety in case of all survivors, including refugees and asylum-seekers.

The aforesaid is amply demonstrated by the recent situation emerging from Libya. Libya is today considered one of the most unsafe places for refugees and migrants, who rampanty face exploitation, abduction, forced and bonded labour, extortion, torture, sexual violence, rape, other violence or death while in Libya. Refuges are routinely detained in substandard conditions, many of them automatically, upon being found in Libya without documents.

On 14 December 2017, Libya declared the establishment of a maritime SAR region in compliance with CMSAR. This massive Libyan SAR region was made effective by the IMO in June 2018. The Italian coastguard is leading an EU project to assist the Libyan authorities in establishing a Maritime RCC, to achieve full operational capacity by 2020, in order to coordinate and carry out SAR operations within this Libyan SAR Region. Support by EU is not only fully compatible but is also encouraged under CMSAR. This compliance by Libya and EU of their CMSAR obligations, however, provides a fig leaf that obscures their collective intention of preventing refugees and asylum-seekers from entering high seas in the Central Mediterranean, where SAR and disembarkation

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100 Ibid.
101 Ibid., para.12.
103 Ibid.
obligations of EU countries might become applicable. The EU’s intention is well documented as can be seen from the parallelly launched new proposal made by the EU Council to establish EU’s Regional Disembarkation Platforms (in third safe countries) and Controlled Centres (on EU soil). More visibly, the EU Commission’s follow-up report evaluating this new proposal opines that “Disembarkation in a third country is possible if the search and rescue is carried out in the territorial sea of that country by its coast guard or by other third country vessels.” The SAR structure under CMSAR – establishment by Libya of SAR region and support by EU to Libya’s RCC – is thus, utilized to ensure that those leaving Libya on unseaworthy ships towards EU through the Central Mediterranean, are intercepted within Libya’s SAR region by Libyan Coast Guard in the name of SAR, and returned back to Libya. In case the refugees are Libyans (as was the case during the Libyan armed conflict), this mechanism may allow the bypassing of the prohibition of non-refoulement since its infringement can only occur if the person concerned is outside her or his state of origin. In case the refugees launching themselves from Libya comprise non-Libyans (as is the case currently), an arguably customary maritime law obligation of every coastal State to prevent unseaworthy ships from setting sail from its ports is invoked. In practice, this has also been fortified by invoking obligations of States under criminal law, flowing from the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime (hereinafter, Migrant Smuggling Protocol). Among other things, this treaty seeks to punish smugglers engaged in “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party.” Under the Migrant

107 Amnesty, note 2.
108 Fischer-Lescano, note 73, p.278.
109 UNHCR, note 12, para.8.
Smuggling Protocol, there are almost no restrictions on Libyan Coast Guards for intercepting and boarding on migrant vessels carrying their national flag or on vessels without a flag (which is the case many times with refugee boats), especially within the SAR region. All of the aforesaid then sets into place a framework where Libya has the permissive and enabling environment to search, save, embark refugees and asylum-seekers on rescuing vessels and then disembark them in their own ports self-determined as a ‘place of safety’. This is despite the fact that UN bodies have documented the use of firearms, physical violence and threatening language by the Libyan coastguard during SAR operations in Libyan and international waters. The SG’s recent report to the Security Council also notes that reception conditions are inhumane and survivors disembarked in Libya are automatically detained without due process facing serious human rights violations. Infact, while this report urges EU and other countries to refrain from returning any asylum-seeker or refugee to Libya, CMSAR establishes the framework for Libya to do exactly the opposite itself. As noted earlier, this situation is the result of the delinking of survivor status with disembarkation in SAR under maritime law. This delinking essentially permits CMSAR to entirely remain oblivious to the fact that Libya might, as the country responsible for the SAR region, have motivations to coordinate and conduct SAR with the objective of frustrating the rights of asylum-seekers and refugees to seek international protection.

C. When the State Responsible for the SAR Region is a Place of Safety

The other side of this equation relates to circumstances when the State responsible for the SAR region is agreeably a place of safety,

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110 See Article 3(a), Migrant Smuggling Protocol.
111 A Saving Clause, Article 19(1), however stipulates that “Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein”.
112 UN, note 99, para. 6.
113 Ibid.
114 Ibid., para. 50.
but refuses to disembark survivors, including refugees and asylum-seekers on its ports when no other coastal State is willing to accept disembarkation. This necessitates an inquiry into the structure under maritime law and refugee law on the obligations of coastal States with respect to disembarkation, however, it is important to again situate this debate in the context of the contradiction posed by delinking of survivor status from disembarkation in SAR. Under maritime law, disembarkation as part of SAR is related to rescue from drowning at sea. That is its sole objective and hence the delinking with status. Under refugee law, however, disembarkation is linked not only to rescue from drowning at sea but also to further temporary admission and protection, leading to asylum and then search for an appropriate durable solution. Maritime law, post the 2004 amendments, only requires the need to consider avoiding disembarkation of refugees and asylum-seekers at an unsafe place. This negative framing means that maritime law does not explicitly require disembarkation of refugees and asylum-seekers at a place of safety for the purpose of processing asylum claims or at least for temporary admission. Per contra, under refugee law, asylum claims are required to be first processed by the State providing for disembarkation. In this backdrop, let us now evaluate the law on which State is responsible for disembarkation, focusing specifically on the context of refugees and asylum-seekers.

a. Maritime Law

As per the 2004 amendments to SOLAS and CMSAR, while the States relevant to a particular SAR operation collectively must “co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking onboard persons in distress at sea are released from their obligations with minimum further deviation from the ships’ intended voyage”, the State primarily responsible

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"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", rests on the State responsible for the SAR region in which assistance is rendered. Some scholars have lamented that this obligation on the State responsible for the SAR Region is only one of ensuring coordination and cooperation with other relevant States in good-faith, and in case the same is not possible, there is no residual obligation on such a State to itself allow disembarkation on its land. This interpretation, however, does not appear to be accurate. The Preambles of the MSC Resolutions adopting the 2004 amendments explicitly state that by introducing the amendments, it is “intended that the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Party responsible for the SAR region in which the survivors were recovered”. This exact statement is reiterated in the MSC Guidelines, which although non-binding as an instrument, ought not to be dismissed as merely recommendatory. As mentioned previously, the MSC Guidelines do provide operational guidance to States in some parts, but in others such as the one being discussed, they may be seen as reflecting an authoritative interpretation by IMO Members of their own legal obligations under the amended SAR structure. Unfortunately, following the delinking of survivor status from disembarkation, nothing in CMSAR or the MSC Guidelines specifically relates this duty of the State responsible for the SAR Region to a duty of processing asylum claims.

b. Refugee Law

Under refugee law, there are two fundamental questions that must be answered to identify the legal obligations related to
processing of asylum claims of refugees and asylum-seekers rescued at sea. Firstly, does the obligation on States to prevent non-refoulement also entail a positive obligation to grant at least temporary admission on their territory, and if yes, what does this further entail? Secondly, which State has this obligation and is there a territorial limitation on its exercise, including at sea?

Insofar as the first question is concerned, the following principles have become firmly embedded in refugee law, as demonstrated by consistent State practice, ExCom Conclusions, scholarly opinions as well as regional and national jurisprudence.

a. As a general rule, the obligation of non-refoulement entails also a positive obligation on States to allow at least temporary admission to refugees and asylum-seekers till their claims are processed determinatively.120

b. Although under human rights and refugee law, asylum-seekers do not have an absolute right to be granted asylum, they do have the unqualified right to seek asylum. Without temporary admission, the right of refugees to seek asylum is violated.121

c. Additionally, to give full effect to and comply with the principle of non-refoulement, States are required to provide


access to fair and effective refugee status determination procedures.\textsuperscript{122}

d. For the same reason, they are further required to provide access to effective remedies against status determination decisions, whether through legal appeals or administrative reviews or other appropriate means.\textsuperscript{123}

e. Because the aforesaid cannot be guaranteed onboard rescued vessels, States are generally required to process asylum claims on their territories post-disembarkation, beginning with temporary admission.\textsuperscript{124}

f. The aforesaid State responsibilities are activated once it becomes clear that there are asylum-seekers among those rescued. There is no need for a specific claim to be made by asylum-seekers, if it is otherwise obvious that some of them are fleeing persecution. States parties are required to make independent inquiries as to the need for international protection of persons seeking asylum.\textsuperscript{125}

g. In case of mass influx of migrants (irrespective of their specific status), which many times may be the case in SARs at sea, States are also required to ensure ‘temporary protection’. Temporary protection has been defined as “a means, in situations of large-scale influx and in view of the impracticality of conducting individual refugee status determination procedures, for providing protection to groups or categories of persons who are in need of international protection”. It entails “an emergency protection measure of short duration in response to large-scale influxes, guaranteeing admission to safety, protection from non-refoulement and respect for an appropriate standard of

\textsuperscript{122} UNHCR, 1997, note 121; UNHCR, note 66, para.20; UNHCR, note 31, para. 4; Fischer-Lescano, note 73, pp. 284-285.

\textsuperscript{123} UNHCR, 1997, note 121; Fischer-Lescano, note 73, pp. 285-286.

\textsuperscript{124} UNHCR, note 66, paras. 22-24; UNHCR, note 96, paras. 55-59; UNHCR, note 31, para. 7.

\textsuperscript{125} UNHCR, note 66, para.18; UNHCR, note 31, para. 4. See also: Hirsi Jamaa and Others v. Italy, Application No. 27765/09, European Court of Human Rights, 23 February 2012, paras 146-148.
treatment". The UNHCR has explained the applicability of the non-refoulement principle to beneficiaries of temporary protection by the fact that, among its beneficiaries, there might be refugees and also asylum-seekers may not have had their claims determined.\textsuperscript{126}

In its applicability to asylum-seekers and refugees rescued at sea, the aforesaid principles mean that the State whose non-refoulement obligations are invoked, must ensure, at the very least, temporary admission and then full access to fair and effective determination procedures and further remedies.

In so far as the second question on which State has the aforesaid responsibility is concerned, international law is clear that in case refugees and asylum-seekers have disembarked at a place of safety, then that country has the obligation to process asylum-claims.\textsuperscript{127} Territoriality undisputedly attaches jurisdiction to the State of disembarkation with respect to temporary admission and processing of asylum claims.\textsuperscript{128} For the same reason, even if the rescued are not disembarked but are within the territorial waters of the State, the State concerned still has territorial jurisdiction and is bound by the aforesaid obligations.\textsuperscript{129}

Questions have been raised in the past whether the principle of non-refoulement applies extra-territorially.\textsuperscript{130} This has principally been

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\bibitem{126}UNHCR, 1997, \textit{note 121}; UNHCR, "Guidelines on Temporary Protection or Stay Arrangements", February 2014, available at: <https://www.refworld.org/docid/52fba2404.html>. See also: UNHCR, 1981, \textit{note 120}, at para.II.A.1; UNHCR, ExCom Conclusion 74(XLV) – General, 1994, paras. 7-20; UNHCR, ExCom Conclusion 103 (LVI) - Provision of International Protection Including through Complementary Forms of Protection, 2005, para.10.\\[1ex]\bibitem{127}See \textit{note 115}. Also See: UNHCR, \textit{note 31}, para. 7. The obligation to process asylum claims and grant temporary admission/protection does not necessarily mean that the country of disembarkation should also be responsible for durable solution.\\[1ex]\bibitem{128}UNHCR, \textit{note 96}, para. 10; UNHCR, \textit{note 31}, para.7.\\[1ex]\bibitem{129}UNHCR, \textit{note 96}, para. 10; Fischer-Lescano, \textit{note 73}, at p. 263.\\[1ex]\bibitem{130}For instance, see the judgement of the US Supreme Court in Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et. al., 509 U.S. 155 (1993), holding that Article 33(1) of the 1951 Convention applied only to persons within US territory. There is overwhelming scholarly opinion, however, that this judgement laid down erroneous legal principles, and that Article 33(1) definitely
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raised in the context of whether a State can return a person intercepted or rescued on the high seas back to a place where well-founded fear of persecution exists either directly or indirectly. Under international law, a State has jurisdiction, and consequently is bound by international human rights and refugee law, if it has effective \textit{de jure} and/or \textit{de facto} control over a territory or over persons.\textsuperscript{131} Therefore, if a State is in a position to return, transfer, or disembark a person at a place where life is threatened, the State clearly has \textit{de facto} control over the person.\textsuperscript{132} This applies to interception as well as rescue operations carried out by the State, whether through State vessels, warships, or other vessels under its control or direction. In such instances, the territory where it does so is inconsequential.\textsuperscript{133}

The obligation not to return the person back to a place where life is threatened applies even outside its territorial waters, such as in the contiguous zone, exclusive economic zone, or on the high seas.\textsuperscript{134} All countries, including the State responsible for the SAR region, or the State whose SAR services have conducted SAR operations outside their SAR regions, or the flag State of the rescuing vessel, are bound by the prohibition of \textit{refoulement}.\textsuperscript{135} \textsuperscript{33}

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\textsuperscript{134} UNHCR, note 77, para.21.
Does any State, however, have the obligation to provide temporary admission to asylum-seekers and refugees through disembarkation when a rescuing vessel is on the high seas with such survivors onboard? The same principles regarding jurisdiction apply. If the intercepting or rescuing vessel is a State vessel or warship or is controlled or directed by the State, then that State has already invoked its jurisdiction over the rescued persons, and will have the obligation to grant temporary admission on its territory. This applies even when a State has conducted SAR operations on the high seas but in a SAR region of another country. In other words, whichever State exercises control attracts jurisdiction.

The question is not as straightforward, however, when it comes to determining which country has an obligation to permit disembarkation for the purpose of temporary admission when the rescuing vessel or unit is a private commercial or passenger ship on the high seas. The answer to this question depends on identification of the country which has *de jure and/or de facto* control over the rescued persons on the high sea.

This paper contends that maritime law establishes a SAR structure whereby the country responsible for the SAR region is the one which should be seen as exercising *de jure* control over asylum-seekers and refugees in distress rescued by private vessels at high sea but within its SAR region. It does so even when such State has failed or refused to coordinate SAR operations and the survivors have been rescued by private vessels without any coordination from the corresponding RCC. It exercises both *de jure* and *de facto* control over persons in distress rescued at high sea within its SAR region, when it does in fact coordinate such SAR operations. The justification for this argument is that under CMSAR, the legal obligation “to use SAR units and other available facilities for providing assistance to a person who is, or appears to be, in distress at sea”, vests with the State which has “accepted responsibility to provide SAR services for a specified area”. CMSAR obliges States to establish RCCs and

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137 For an argument on the similar lines, see: Trevisanut, *note 132.*
138 CMSAR, Regulation 2.1.9.
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RSCs and operationalize them to provide SAR services during distress situations. Several provisions of the Convention related to operational procedures during actual distress situations make it clear that lives of those in distress, including decisions affecting their search and rescue, are dependent entirely on actions taken or not taken by the responsible RCCs or RSCs. For instance, Regulation 4.2.4 prescribes that "RCCs and RSCs shall, immediately upon receipt of information concerning a person, a vessel, or other craft in a state of emergency, evaluate such information and determine the phase of emergency [...], and the extent of operations required". Regulation 4.5 then stipulates in mandatory terms the procedures to be followed by RCCs and RSCs during emergency phases. It is obvious that failure by the country responsible for the SAR region to perform any of these obligations will directly impact the lives of those in distress. The fact that their very survival is dependent entirely on decisions and actions by such States is further made obvious by Regulation 4.8 which empowers the RCCs or the RSCs to make determinative decisions regarding termination and suspension of SAR operations.

The extra-territorial obligations of States with respect to the right to life also support this conclusion. In its most recent General Comment No. 36 (2018), the Human Rights Committee has observed that:

In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.

139 CMSAR, Regulation 2.3.
The aforesaid also provides strong reasons to contend that these obligations apply equally to those States which have established SAR regions and have voluntarily undertaken SAR obligations without ratifying CMSAR. The direct and foreseeable impact they have on the right to life of those in distress in their SAR region is similar, having voluntarily declared a SAR region and undertaken to provide SAR services. This jurisdiction is more strongly attracted where a non-CMSAR State party has rejected proposals to give up control over part of their SAR region to CMSAR State parties.

From any perspective, therefore, the analysis above amply demonstrates that States responsible for a SAR region have *de jure* and/or *de facto* control over asylum-seekers and refugees rescued within such region, and consequently, have the primary jurisdiction over them. Clearly, they therefore also have the primary obligation to permit temporary admission through disembarkation on their territories. The only circumstance when this primary jurisdiction is transferrable onto another State/s is by agreement. For instance, the coordination and cooperation among coastal States related to disembarkation envisaged under the 2004 amendments might result in an agreement whereby a State other than the one responsible for the SAR region might agree to permit disembarkation. From a refugee law perspective, it would be this other State that would then be responsible for providing temporary admission and then processing asylum claims. This sort of international cooperation for burden or responsibility sharing is entirely compatible, and indeed encouraged, under refugee law.

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141 For instance, also Malta is not a State party to CMSAR, see concluding observations by Human Rights Committee holding Malta responsible for the same obligations. See: UN Human Rights Committee, "Concluding Observations on the Second Periodic Report of Malta", CCPR/C/MLT/CO/2, 21 November 2014, Para 17.

142 Ibid.

Our common conclusion under both maritime and refugee law that in absence of an agreement between coastal States, the State responsible for the SAR region has the obligation to permit disembarkation might blind us to important contradictions resulting from the delinking of status with SAR. As discussed previously, the 2004 amendments require coastal states to coordinate and cooperate disembarkation, but in the absence of an agreement, there is a residual obligation upon the country responsible for the SAR region. This order of obligations, while leaving fewer legal gaps as such, recognizes obligation on the State responsible for the SAR region only as one of last resort after coordination and cooperation attempts with other States have failed. It is a direct result of the delinking of survivor status from disembarkation under SAR because disembarkation is then only related to rescue from drowning at sea and not temporary admission. *Per contra*, under refugee law as discussed above, the obligation on the country responsible for the SAR region is not a residual obligation, but should be seen as the primary obligation which can be transferred to other States only by agreement. This reverse order of obligations follows from firmly linking survivor status as refugee or asylum-seeker with disembarkation, because disembarkation here serves as not only a dry place, but also as temporary admission in compliance with the principle of *non-refoulement*. In other words, when survivor status is delinked from disembarkation in SAR, the latter is also delinked from the obligation of temporary admission under refugee law, and hence the principle of *non-refoulement*.

A recent example from the Mediterranean starkly brings out the difference this makes. As is the case with numerous incidents post the Syria crisis, several ‘refugee boats’ rescued at sea have been denied disembarkation by Malta when SAR operations have been conducted by private commercial vessels or NGO vessels, even if they were so done within its SAR region.¹⁴⁴ Let’s take the most recent example. The Sea-Watch 3 incident which unfolded on 22 December...

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2018 and ended only on 9 January 2019 is a case at hand. On 22 December 2018, a German NGO vessel named Sea-Watch 3 rescued 32 refugees, including three children, three unaccompanied adolescents and four women from Nigeria, Libya and Ivory Coast, from a makeshift boat in the Mediterranean within Maltese SAR region. Under maritime law as it stands, Malta would have to coordinate with Italy, Spain, Greece or others in the vicinity, and all of them would be required to cooperate with each other to find a place of safety for the survivors. Under the conservative interpretation of maritime law, if a place of safety was not provided by any State, Malta would still be compliant with its primary obligation of coordination if it had done so in good faith. Under the more liberal interpretation preferred in this article, Malta would have a residual obligation to permit disembarkation on its ports. But, even here, this order of obligations means that a several days would need to be spent by the survivors onboard the rescuing vessel till Malta concludes that it is time for its residual obligation to step in. The current maritime law provides no indication on what would be a reasonable time, if it were ever possible, even though it stipulates that “the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable”. Needless to mention, this eventuality is extremely dangerous for the survivors, many of whom may be suffering from physical and mental trauma, and further victimizes them in a way that itself may border on persecution. In case of Sea-Watch 3, the boat was allowed to disembark by Malta (on humanitarian grounds, without accepting its legal obligation) only after negotiations had been attempted

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145 Aditus Foundation, *note 3.*


147 See *notes 68 and 69.*

with other EU countries for 18 days and failed. The High Commissioner expressed concern at this inordinate delay and termed it as unacceptable. The reason is in fact quite apparent. This was the case first and foremost because survivor status is delinked from disembarkation. If it were not so delinked, Malta would have to be recognized as the State with the primary obligation for permitting temporary admission and therefore, disembarkation, and not just the State with residual obligation for disembarkation de hors of temporary admission. This primary obligation was transferable to other countries only if Malta had either reached a general stand-by agreement prior to the incident, or an agreement specific to the incident almost immediately after it had happened. In its absence, it would have to permit disembarkation of the refugees and grant them temporary admission promptly, without waiting for the possibility of an agreement with other coastal States first.

IV. CONCLUSION

This paper has contended that the fundamental contradiction in the legal regime for disembarkation of refugees and asylum-seekers at sea is that maritime law adopts an approach which delinks survivor status from all stages of the SAR process, whereas refugee law is founded on linking international protection with status as an asylum-seeker or refugee. The delinking of survivor status under maritime law is at all stages of the SAR process, be it search, embarkation, or disembarkation. This is the result of the fact that disembarkation under maritime law is restricted to only rescue from drowning at sea. However, this way of delinking survivor status from disembarkation in the context of survivors who are refugees and asylum-seekers also means that disembarkation is delinked from the principle of non-refoulement as well as temporary

150 Ibid.
151 UNHCR, note 66, para.20 and 24; UNHCR, December 2014, note 143, para.1.
admission/protection under refugee law. Disembarkation for asylum-seekers and refugees is not an isolated act of rescue from drowning; it is part of a continuum—a cycle of displacement that begins with fleeing persecution, traveling through life-threatening routes, almost losing their lives in the escape, and seeking at least temporary refuge somewhere safe.

Tenuous attempts in the MSC Guidelines to somehow resolve this inherent contradiction are self-defeating. Specifically, the recommendation that in determining the place of safety, “the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea”,15 provides little help when immediately thereafter survivor status is declared a non-SAR matter and a non-SAR consideration. Structures established under CMSAR require RCCs to turn a blind eye to survivor status when deciding on disembarkation. If the eyeglass lens is designed to block light (delinking of survivor status with disembarkation), it is impossible for the person in front (State responsible) to see your eyes (status of the survivor), even if that person has all the intentions to (as recommended in the MSC Guidelines).

Refugee law depends entirely on maritime laws’ structures for rescuing refugees and asylum-seekers and ensuring disembarkation and temporary admission to them. This inevitable dependence, however, can also further victimize asylum-seekers and refugees if maritime law on disembarkation is flawed. The delinking of survivor status from disembarkation under maritime law, as demonstrated in the Libyan case above, establishes a SAR structure that permits and facilitates disembarkation of refugees and asylum-seekers in the State responsible for the SAR region, even when it might not be a place of safety.

Since it is impossible to find solutions for refugees rescued at sea outside of maritime law, it is important that maritime law adapts itself to ensuring compliance with the principles of non-refoulement. This means eliminating the delinking of survivor status from

152 IMO, note 93.
DISEMBARKATION OF REFUGEES

Dismarkation, while retaining it at the stage of search, the actual rescue, and embarkation. Instead, survivor status as refugees and asylum-seekers should be explicitly linked to disembarkation. This would not only allow it to be recognized as a determinative factor in identifying place of safety, but also specifically link disembarkation with temporary admission/protection in compliance with the non-derogable and universally applicable principle of non-refoulement. Linking survivor status with disembarkation will also necessitate revisiting the structures of CMSAR and reconciling the authority vested in States responsible for SAR regions with obligations under refugee law and human rights law.

Such explicit linking may also result in better and more effective frameworks for international cooperation required under CMSAR and SOLAS. It has been evident since the Indo-Chinese refugee crisis that receiving States are reluctant to permit disembarkation pursuant to SAR operations because there might be survivors who are refugees and might need to be provided asylum. The Libyan, Syrian and Rohingya crises have cemented this attitude. This reluctance is many times borne from real economic, logistical, and other pressures that receiving States face. As the global response to the Indo-Chinese refugee crisis demonstrated, the only real practical solution to ensuring willingness by States to permit disembarkation is through agreements of burden and responsibility sharing, including guarantees of resettlement.\textsuperscript{153} International law must reflect global realities. There is no merit in maritime law pretending that disembarkation can be blind to survivor status, when the actual decisions by States to disembarkation situations are based on survivor status. Instead, such explicit linking will allow the obligations of non-refoulement and temporary admission to be brought into the equation and will provide the much-needed basis for linking international cooperation under maritime law with burden and responsibility sharing under refugee law. Indeed, the

UNHCR has been exhorting coastal States to enter into regional agreements for ensuring disembarkation pursuant to SAR operations. This international cooperation under maritime law and for burden/responsibility sharing under refugee law can only come under one umbrella with explicit linking.

The UNSG recently noted that the “IMO maintains that the international legal framework for the rescue of persons at sea is sound, but it did not envisage, nor was it designed for, large movements of refugees and migrants by sea”, and that “IMO member States maintain that it is critical to manage the situation ashore before migrants are subjected to danger at sea, and to address the root causes of unsafe mixed migration by focusing on creating conditions for increased employment, prosperity and stability by enhancing the maritime sector and sustainable blue economy in developing countries”. While the latter is undeniably true, the fact is that until persecutions stop and conflicts end, refugees will try to reach safer places in unseaworthy ships subjecting themselves and their families to drowning at sea. All IMO members are bound by refugee and human rights law as well. They cannot forever turn a deaf ear and a blind eye to the distressed refugee pleading - Please don’t ask me who I am before you save me from drowning. But, please do, before you land me, lest I be led to drown again!


155 UN, note 99, para. 36.