



Maritime Safety and Security Law Journal

2019-20

Issue 6

Delivering Refugees and Migrants to a ‘Place of Safety’ Following Rescue by States at Sea

*Fenella M.W. BILLING**

Abstract

Irregular migration by sea leads states such as Italy and Australia to conduct maritime rescue operations involving refugees and other migrants. During these operations, states must deal with the question of where to disembark survivors. The law of the sea regime obliges states to ensure survivors are delivered to a ‘place of safety’, arguably requiring maritime officers to merely consider the physical safety of survivors immediately on disembarkation. Non-binding International Maritime Organization guidelines state that the need to avoid disembarking refugees and asylum-seekers in the states of departure or origin is also a consideration. The guidelines refer to other ‘relevant’ international law, including treaties dealing with ‘refugee refoulement’ or refoulement in connection with a risk of torture. Under the international human rights law regime, including international refugee law, states’ obligations in relation to non-refoulement are broader and prohibit the return of refugees and migrants to states where they directly or indirectly face persecution, torture or other serious harm. In interpreting ‘place of safety’, this work argues that there is insufficient consensus to integrate the two legal regimes. Nevertheless, states can be under co-existing human rights obligations that place limits on disembarkation of rescued refugees and migrants.

Keywords: Maritime Rescue, Refugees, Migrants, Disembarkation, ‘Place of Safety’, Non-Refoulement

First published online: 7 October 2019

1. Introduction

The law of the sea notion of ‘rescue’ involves retrieving persons in distress, providing for their medical or other basic needs and delivering them to a ‘place of safety’.¹ However, states have returned ref-

*Postdoctoral Research Fellow, Aalborg University, Denmark. This article was written as part of the PolSEA project. The author would like to thank Douglas Guilfoyle and Nikolas Feith Tan, as well as the peer reviewers and editors of the journal, for their valuable comments on previous drafts.

¹ International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR Convention), Annex para 1.3.2 and para 1.3.13 as amended by IMO Resolution MSC 70(69) (adopted 18 May 1998); see further 2.1.2 below.



ugees and irregular migrants to countries of origin or transit.² Refugee and migrant returns may be contrary to international obligations protecting human rights such as the right to leave any country and the prohibition on collective expulsion.³ While refugee and migrant returns may be consistent with a narrow definition of 'safety' in treaties creating international obligations for ocean governance, such returns may be contrary to the principle of *non-refoulement* under human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR)⁴ and more specifically under the 1951 Convention Relating to the Status of Refugees (Refugee Convention).⁵ The *non-refoulement* principle encompasses important absolute obligations of protecting human life and personal security. The interpretive debate is about the extent of integration of two international law regimes – the law of the sea and international human rights law. These regimes deal with state and community interests on the one hand and individual interests on the other. Of particular concern is the extent to which maritime officers and their advisers carrying out the duty to assist under the 1982 United Nations Convention on the Law of the Sea (LOSC)⁶ must consider *non-refoulement* in designating a 'place of safety' and disembarking survivors under the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention)⁷ and the 1979 International Convention on Maritime Search and Rescue (SAR Convention).⁸

States' international obligations under law of the sea and international human rights law regimes can be envisaged as either integrated or co-existing. A wide definition of the term 'place of safety' leads to considerations about disembarkation that integrate the principle of *non-refoulement*, protecting refugees from being returned to a country where they have a well-founded fear of persecution and all survivors from return to serious harm. The content of the term 'safety' may thus require maritime officers and their advisers to individually identify whether any survivors may be refugees and to assess any specific risk of harm.⁹ Based on law of the sea, a narrow definition of 'place of safety' involves providing for immediate and basic requirements such as removal from danger to a place of physical safety, as well as the provision of food, shelter and medical assistance. The term can be so

2 The declaratory 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 1A(2) and refers to a person who, owing to a well-founded fear of persecution, is outside their country of nationality (or residence, in the case of stateless persons) and is therefore unable or unwilling to avail themselves of the protection of that state. 'Irregular migrant' refers to a person seeking entry into a foreign state without documentation.

3 See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 12(2) and Protocol No. 4 arts 2(2) and 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 21 September 1970) as amended by Protocol No. 14 (entered into force 1 June 2010) CETS no. 194 (ECHR).

4 ICCPR art 6 and 7.

5 Refugee Convention (n 2).

6 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC).

7 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention).

8 SAR Convention (n 1).

9 See Violeta Moreno-Lax, *Policy Brief 4: The Interdiction Of Asylum Seekers At Sea: Law and (mal)practice in Europe and Australia* (Kaldor Centre for International Refugee Law, May 2017) 11.



narrowly defined that the rescue operation may be regarded as terminated once the survivors are 'safely' on board an assisting ship that has sufficient facilities to shelter survivors until a more permanent destination is found. In such a situation, disembarkation of refugees and irregular migrants may no longer be an issue in relation to the duty to assist, but the result of an administrative decision on asylum that is nevertheless governed by international obligations concerning asylum procedure and *non-refoulement*, under international refugee law and more broadly under international human rights law (IHRL). In either case it may be relevant that a potential country of disembarkation is known to detain migrants in conditions involving serious human rights abuse; or, like Libya and Sri Lanka which are discussed below, is not a signatory to the Refugee Convention, has no asylum procedure and criminalises irregular migrants. This work determines the extent to which the duty to deliver rescued refugees and irregular migrants to a 'place of safety' is defined by the principle of *non-refoulement*. Section 2 examines the rules about the duty to render assistance, disembarkation and delivery to a 'place of safety' under the LOSC, SOLAS and SAR conventions and guidelines of the International Maritime Organization (IMO). Section 3 investigates the principle of *non-refoulement* and its extraterritorial application under international refugee law and IHRL. Section 4 deals with state practice concerning refugee and migrant disembarkation and the principle of *non-refoulement* in relation to the European Union (EU), including Italy, and Libya along the Central Mediterranean route and in Section 5 in relation to Australia and Sri Lanka. Section 6 analyses the meaning of a 'place of safety' and the relevance of the principle of *non-refoulement* in the context of the nature of the LOSC.

2. Disembarkation to a 'Place of Safety' Under the Law of the Sea

2.1 Treaty Obligations - Disembarkation and Delivery to a 'Place of Safety'

2.1.1 Duties to Assist and to Provide Search and Rescue Services

The maritime duty to render assistance to persons in distress at sea is codified in Article 98(1) LOSC. Flag-states are obliged to create a general duty in domestic law requiring the shipmaster to render assistance to persons in danger of being lost at sea, regardless of nationality, status or circumstances.¹⁰ Under the SOLAS convention, rescued persons are to be treated with humanity, in accordance with 'the capabilities and limitations of the ship.'¹¹

Article 98(2) LOSC places states parties under a general duty to cooperate in operating adequate and effective search and rescue services. Initially established in the first UN Convention on the Law of the Sea 1958, this provision has been filled out by the SOLAS and SAR Conventions.¹² The duty

¹⁰ See SOLAS ch V, reg 33.1; SAR Annex 2.1.10.

¹¹ SOLAS ch V, reg 33.6.

¹² SOLAS ch V, regs 7 and 15 as amended and the preamble; SAR Annex as amended and the preamble; Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 447; Kristina Siig and Birgit Feldtmann, 'UNCLOS as a system of regulation and connected methodology – some reflections' (2018) *MarLus* 502 SIMPLY 2017 64-65.



may be broken down into two types of obligations. Firstly, states agree on SAR 'regions', each of which comes under the responsibility of the coastal state with a proactive duty to operate adequate and effective SAR services, including operating a 'rescue co-ordination centre' (RCC).¹³ Secondly, states parties have a shared obligation to co-ordinate services with neighbouring states as necessary.¹⁴ The primary RCC shall initiate the process of identifying the "...most appropriate place(s) for disembarking persons found in distress at sea..." and relevant RCCs should be authorised to cooperate.¹⁵

2.1.2 Disembarkation and Delivery to a 'Place of Safety'

Amendments to the SAR and SOLAS Conventions in 2004 brought the concept of a 'place of safety' to the fore.¹⁶ The amendments came as a result of the Tampa incident, in which a Norwegian merchant vessel was refused permission by Australia to disembark migrants rescued on the high seas.¹⁷ The Conventions require states parties to cooperate to ensure that shipmasters '... providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage...'¹⁸ Thus, to complement the shipmaster's duty to render assistance, the coastal state responsible for the SAR region in which survivors are recovered must:

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 ... as soon as reasonably practicable*.¹⁹

It is noteworthy that the relevant conventions clearly connect the duty to assist, including through embarkation, with efficiently terminating the assisting ship's role in the rescue operation through disembarkation. An additional connection is made between disembarkation from the assisting ship and delivery to a 'place of safety', although these may be read as two separate limbs of the duty borne by the coastal state and thus its RCC.²⁰ The provisions do not involve clear duties to disembark or

¹³ SAR Annex paras 1.3.1, 1.3.2, 2.1.4 and 2.3; SOLAS ch V, reg 7.

¹⁴ SAR Annex ch 3, 3.1.1.

¹⁵ See e.g. SAR Annex ch 3, 4.8.5, as amended by IMO Resolution MSC 155(78) (adopted 20 May 2004).

¹⁶ SAR Annex ch 1, 1.3.2 as amended by IMO Resolution MSC 70(69) (adopted 18 May 1998) and 3.1.9, as amended by IMO Resolution MSC 155(78) (adopted 20 May 2004); and see SOLAS ch V reg 33, 1.1 as amended by IMO Resolution MSC 153(78) (adopted 20 May 2004); but see definition of 'search and rescue service' in SAR Annex ch 1, 1.3.3 and SOLAS ch V reg 2.5.

¹⁷ See e.g. Donald R. Rothwell, 'The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty' (2002) 13 PLR 118.

¹⁸ SAR Annex ch 3, 3.1.9; see also SOLAS ch V, reg 33, as amended.

¹⁹ SAR Annex ch 3, 3.1.9 (emphasis added); see also SOLAS Preamble and ch V, reg 33, 1.1.

²⁰ See Martin 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) AYBIL Vol 33, 93-94, referring to A Proelss, 'Rescue at Sea Revisited: What Obligations Exist Towards Refugees?' (2008) SIMPLY 1, 14-21, arguing against a duty to deliver to a place of safety.



accept disembarkation.²¹ Moreover, while the SAR and SOLAS conventions use the term 'place of safety', neither define it. However, the provisions oblige states to take into account the particular circumstances of the case and guidelines developed by the International Maritime Organization.

2.2 The Notion of 'Safety' Under IMO Guidelines

2.2.1 Guidelines About Delivery to a 'Place of Safety'

The IMO's *Guidelines on the Treatment of Persons Rescued at Sea*²² were published at the same time the SOLAS and SAR Conventions were amended and the 'place of safety' concept became central.²³ Although non-binding, authorities are nevertheless *bound to consider* them.²⁴ The Guidelines thus indicate subsequent state practice relevant to treaty interpretation.²⁵

Under paragraph 2.5, the state responsible for the SAR region where survivors are recovered is obliged to provide or ensure the provision of a place of safety as soon as reasonably possible. Paragraph 6.12 provides that arrival at a place of safety will terminate the rescue operation, thus relieving the 'assisting' ship's master and flag-state of further legal obligations in connection with the survivors.

According to the Guidelines, a *place of safety* is one where the safety of life is no longer threatened and basic human needs can be met, while transportation arrangements for '...the survivors' next or final destination' are determined (6.12). A place of safety provides survivors with more than merely being out of immediate danger (6.13). In addition to necessities such as food, shelter and medical assistance (6.12), there should be adequate facilities and equipment to sustain additional persons without jeopardising the safety of others (6.13). Beyond providing for emergency care, the Guidelines state that the identification of a place of safety depends on the circumstances of each case, including a consideration of the factors and risks relevant to survivor's safety (6.15 and 6.16). This may include assessing the situation on board, as well as '... on scene conditions, medical needs, and availability of transport or other rescue units' (6.15). IMO's non-binding *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* (IMO Principles) suggest that all relevant parties should cooperate to ensure disembarkation takes place swiftly, taking into account the shipmaster's preferences and '...the immediate basic needs of rescued persons.'²⁶

21 Rothwell (n 17) 120; Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff 2010) 96-97; Gallagher and David (n 12) 456.

22 International Maritime Organization (IMO), *Guidelines on the Treatment of Persons Rescued at Sea* Resolution MSC 167(78) (adopted 20 May 2004); see further the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR) 9th ed. (IMO Publishing, 2013) referred to in Ratcovich (n 20) 88.

23 See 2.1.2 above.

24 SOLAS ch V, reg 33, 1.1.

25 Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(3)(a); Efthymios Papastavridis, 'Rescuing Migrants at Sea and The Law of International Responsibility' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control* (Routledge 2017) 166.

26 International Maritime Organization (IMO), *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* (2009) FAL.3/Circ.194, principle 3.



Despite the SAR and SOLAS conventions creating a duty to cooperate to ensure timely disembarkation and delivery to a place of safety, the IMO Guidelines do not suggest that this must be the nearest port.²⁷ The Guidelines state that a place of safety may be on land or may even be a rescue ship or another ship participating in the rescue operation (6.14 and 6.18). However, even a rescue vessel at sea that is sufficiently equipped and manned to be a temporary place of safety, '... should be relieved of this responsibility as soon as alternative arrangements can be made' (6.13).

While non-binding, this guidance is relevant to determining the scope of flag-state obligations. In particular, the combination of paragraphs 6.12, 6.13, 6.14, 6.16 and 6.18 is significant. Collectively, these guidelines separate assessment of a place of safety from the question of disembarkation and leave open that if a well-equipped assisting vessel is regarded as the place of safety, then the rescue operation may terminate prior to a further 'administrative' disembarkation. At the international level, this would leave the question of asylum procedure to be resolved under IHRL and more specifically international refugee law. However, such an interpretation is nevertheless subject to disembarkation '...as soon as reasonably practicable'.²⁸

The IMO Guidelines specify that if asylum seekers and refugees alleging a 'well-founded fear of persecution' are rescued at sea then the '... need to avoid disembarkation in territories where [their] ... lives and freedoms ... would be threatened *is a consideration* ...' (6.17).²⁹ Other guidelines for shipmasters suggest that if rescued people claim asylum at sea then, having alerted the closest RCC and the UNHCR, the shipmaster should '... not ask for disembarkation in the country of origin or from which the individual has fled'.³⁰ While not strictly prohibitive, paragraph 6.17 can thus be read as a guideline not for maritime officers but for the RCC or other state authorities making the decision about where to disembark. However, the guidelines do not identify whether such a consideration is triggered by self-identification, identification by an organization or whether there is an obligation on maritime officers to enquire of each irregular migrant whether he or she has an international protection claim.

Taken together with the SOLAS and SAR conventions, the Guidelines cast doubt on whether the duty of coastal states to cooperate in a rescue operation involves a duty to disembark survivors. In an attempt to clarify the issue in 2009, the IMO Principles state that if '...disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued...'³¹ However, the international law on a state's right to refuse disembarkation and state practice remain unsettled.³²

27 Mallia (n 21), 102-103 and 106-108, arguing that delivery to a place of safety necessitates disembarkation; Moreno-Lax (n 9) 8.

28 SAR Annex ch 3, new 3.1.9; SOLAS Preamble and ch V, reg 33, new 1.1.

29 IMO (n 22) (emphasis added).

30 See UNHCR, *Rescue at Sea: A guide to principles and practice as applied to refugees and migrants* (September 2006) 10.

31 IMO (n 29) principle 3.

32 Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 146-148; Gallagher and David (n 12) 460; Douglas Guilfoyle and Efthymios Papastavridis, 'Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea', Background Paper, UNHCR Regional meeting, Bangkok, 3-4 March 2014.



2.2.2 'Non-SAR Considerations': Status and Needs of Refugees and Migrants

Under the heading 'Non-SAR considerations', the IMO Guidelines state that matters dealing generally with survivors' status, including migrants, asylum seekers or refugees, or their needs after disembarkation are beyond the scope of the SOLAS and SAR Conventions and are most often handled by the appropriate authority at the place of disembarkation (6.19 and 6.21).³³ The IMO Principles also suggest that the question of return or repatriation follows disembarkation.³⁴ Nevertheless, RCCs may be requested by their national authorities to begin coordination in relation to non-SAR considerations before disembarkation, including informing, involving and obtaining the assistance of relevant international organisations or national authorities of other countries (6.19 and 6.21). Shipmasters may be requested by an RCC to gather and impart relevant information about a ship in distress or the survivors (6.22). Thus, carrying out the request under 6.22 is not expressed as an obligation on shipmasters under the guidelines, but as an action assisting the instructing state.

2.2.3 Relevant International Law

Paragraphs 7 and 8 of the Appendix to the Guidelines, on 'relevant international law', refer to: expulsion and *refoulement* of refugees under the 1951 Refugee Convention; *refoulement* in connection with torture under other international law; and the general relevance of the 2000 UN Convention on Transnational Organized Crime and its Migrant Smuggling Protocol and Protocol on Trafficking in Persons.³⁵ Of particular note, the Migrant Smuggling Protocol's Article 19 is a 'saving clause' that reiterates the relevance *inter alia* of international human rights law and the principle of *non-refoulement* in relation to refugees. Moreover, Article 5 contains a prohibition on criminal prosecution of migrants who are the object of smuggling, arguably making a domestic policy of criminalisation of irregular migration in countries such as Libya and Sri Lanka a relevant consideration for state party authorities in disembarkation.

3. Disembarkation of Refugees and Migrants and the Principle of *Non-Refoulement*

3.1 The Principle of *Non-Refoulement* in International Refugee Law

Article 33(1) of the Refugee Convention prohibits refugees from being returned:

in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.³⁶

³³ IMO (n 26) principle 2.

³⁴ *ibid*, principle 4.

³⁵ IMO (n 22) Annex 34, Appendix: 'Some Comments on Relevant International Law', referring to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (Migrant Smuggling Protocol).

³⁶ Refugee status under the Refugee Convention is declaratory and thus art 33(1) applies to persons recognized as refugees and to asylum seekers: Alice Edwards, 'International Refugee Law' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law*, 3rd ed. (OUP 2018) 547.



The notions of persecution and threats to life and freedom in both Articles 1A(2) and 33(1) include 'serious human rights violations and other forms of serious harm'.³⁷ Thus, not every human rights violation will be relevant to *non-refoulement* under the Refugee Convention. International protection is only intended to provide sanctuary from serious violations that demonstrate 'fracturing' of state protection.³⁸ In addition, the principle of *non-refoulement* prohibits return to the country from which a person has originally fled as well as any transit country along a migratory route where the person would face a reasonably foreseeable risk of *refoulement* to the state of origin ('chain *refoulement*').³⁹ The prohibition is subject to exception on the grounds of national security or serious criminal convictions.⁴⁰

Customary law rules about *non-refoulement* supplement treaty and domestic law, arguably protecting treaty obligations against future denunciation. In relation to refugees, customary norms have the potential to create obligations to be followed by states not party to the 1951 Convention or its 1967 Protocol. In 2003, Lauterpacht and Bethlehem argued that the principle of *non-refoulement* may be a cardinal norm of customary international law, subject to exceptions based on national security or public safety not involving non-derogable rights.⁴¹ Conversely, in 2010 Hathaway pointed in particular to a 'pervasive', if not 'dominant', state practice against the principle in relation to all individuals facing serious harm in departure or origin states, including refugees, belying the principle as a customary norm.⁴² More recently, Costello and Foster have argued that the principle of *non-refoulement* in relation to refugees is not only binding on all states as part of customary international law but is even approaching *jus cogens* status.⁴³

3.2 The Principle of *Non-Refoulement* Under IHRL

The protection of life and person under general international and regional human rights treaties is broader than under international refugee law because it applies to *all* people. Articles 6, 7 and 10 of

37 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (HCR/1P/4/ENG/REV.3, Geneva, 2011) 1ff.

38 Edwards (n 36) 545.

39 *ibid* 547.

40 Refugee Convention art 33(2).

41 Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in Erika Feller, Volker Türk and Francis Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), 140-150, 154-155 and 159-160; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (OUP 2007), 345ff; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007) 15ff; *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECHR, 23 February 2012 paras 23 and 134, referring to the UNHCR, *Note on International Protection* (A/AC.96/951, 13 September 2001) para 16; Edwards (n 36) 547, referring to the Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees (HCR/MMSP/2001/09, 16 January 2002) para 4.

42 James C. Hathaway, 'Leveraging Asylum' (2010) 45 *Texas International Law Journal*, 503-536, 506 and 515-516ff.

43 Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' (2015) 46 *NYIL* 273; and Moreno-Lax (n 9) 9.



the ICCPR and 2, 3 and 5 of the ECHR protect life and freedom and prohibit torture, cruel, inhuman and degrading treatment. Thus, under IHRL, migrants may be protected against crowded or poor conditions of detention, or a life of poverty in absence of state welfare, which may not amount to 'serious harm' under the Refugee Convention.⁴⁴ Under IHRL, the right to life and the prohibition on torture and other ill-treatment are 'non-derogable' and guarantee 'absolute' protection.⁴⁵ The IHRL provisions include an obligation on states to refrain from transferring a person to another state where there are substantial grounds for believing that the person will face a real risk of violation.⁴⁶ The UN Convention against Torture and other human rights treaties also protect the principle of *non-refoulement*.⁴⁷

Not only is the prohibition on torture said to be a fundamental norm under customary international law but it is also accepted as a *jus cogens* norm.⁴⁸ However, the definition and status under customary international law of inhuman and degrading forms of ill-treatment is uncertain and state practice is inconsistent. Arguably *non-refoulement* in relation to a risk of cruel treatment falling outside the definition of torture should also be protected under customary international law.⁴⁹ However, there is little evidence that states accept this position. The argument that *non-refoulement* is a principle of customary international law is strongest in relation to a risk of torture.

3.3 Extraterritorial Application of *Non-Refoulement*

A number of international and regional bodies including the Human Rights Committee, the Committee Against Torture and the International Court of Justice have confirmed extraterritorial jurisdiction of human rights obligations.⁵⁰ The Parliamentary Assembly of the Council of Europe referred to the relevance of the Refugee Convention to maritime operations and supported the UNHCR's opinion about the extraterritorial application of the principle of *non-refoulement* in maritime operations.⁵¹ The Assembly called upon member states to guarantee systematic protection of human rights, including the principle of *non-refoulement* '... regardless of whether interception measures are implemented within their own territorial waters, those of another state on the basis of an ad hoc agreement, or on the high seas.'⁵²

44 See e.g. *MSS v Belgium and Greece* 53 EHRR 28; *Warda Osman Jasin et al v Denmark* Communication No 2360/2014 (Human Rights Committee, 4 September 2015).

45 See ICCPR art 4(2); ECHR art 15.

46 Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law*, 3rd ed. (OUP 2018), 174; *Soering v the United Kingdom* (1989) 11 EHRR 439; *Hirsi Jamaa* (n 41) para 114.

47 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1486 UNTS 85 (CAT) art 3; see also the Committee on the Rights of the Child, General Comment 6 (2005). See also Charter of Fundamental Rights of the European Union, OJ 2012/C 326/02 (CFR), including art 19(2).

48 Lauterpacht and Bethlehem (n 41) 152; Rodley (n 46) 167-168; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, 422 para 99.

49 Lauterpacht and Bethlehem (n 41), 155-158, arguing that a customary norm of *non-refoulement* exists in relation to all non-derogable proscribed ill-treatment.

50 UNHCR 2007 (n 41) paras 33-39.

51 Council of Europe, Parliamentary Assembly Resolution 1821 (2011), paras 7-8; and *ibid* paras 12-19.

52 Council of Europe *ibid* para 9.3.



State practice on the question of extraterritorial application of *non-refoulement* to migrant returns from the high seas remains unsettled.⁵³ For example, the US Supreme Court found that *non-refoulement* under Article 33 Refugee Convention only applies to refugees who have reached foreign state territory.⁵⁴ However, the act of *refoulement* does not necessarily require prior entry to a foreign state's territory.⁵⁵ The Inter-American Commission on Human Rights found that US returns of Haitian asylum seekers to their country of origin interfered with the right to seek asylum in other countries.⁵⁶

3.3.1 The Position Under the ECHR

Under the ECHR, states may lawfully deport individuals.⁵⁷ Nevertheless, an individual's right to protection from being removed to another state where they face a real risk of violation of convention rights such as the prohibition on torture and ill-treatment is well-accepted in ECtHR case law.⁵⁸ This applies even if the individual entered the state irregularly.⁵⁹ Likewise, a state may not transfer an individual to another state where there is a real risk of 'chain *refoulement*'.⁶⁰ Moreover, although a state's jurisdictional competence under Article 1 ECHR is mainly territorial, in exceptional circumstances a Convention state will be regarded as having extraterritorial jurisdiction, where the state exercises 'authority and control' over an individual or 'effective control' over an area.⁶¹

3.3.2 *Hirsi Jamaa* and a Prohibition on Migrant Returns to Libya

In the 2012 ECtHR decision, *Hirsi Jamaa and Others v Italy*, about two hundred migrants were intercepted by Italian authorities on 6 May 2009, approximately 35 nautical miles south of Lampedusa, within the Maltese SAR Region. They were transferred onto Italian military ships and returned to Libyan authorities in Tripoli. Some migrants were subsequently granted refugee status by the UNHCR office in Tripoli.

Italy claimed that freedom of navigation on the high seas meant that the identity of the parties concerned in the rescue was irrelevant.⁶² Italy argued that the maritime operation had not been voluntary or coercive and therefore did not trigger human rights jurisdiction.⁶³ Thus, it was argued that the

53 See *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, para 42; Edwards (n 36) 548.

54 *Chris Sale, Acting Commissioner, Immigration and Neutralization Service, et al v Haitian Centers Council Inc., et al* (1993) 509 US 155, paras 183-187; the UK House of Lords indicated its support of the US Supreme Court position in *Sale in R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1, paras 29-31.

55 Selini Trevisanut 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection' (2008) Max Planck UNYB 12, 205, 243.

56 *The Haitian Centre for Human Rights et al v United States*, Case 10.675 IACommHR Report No 51/96 (13 March 1997).

57 *Chahal v UK* 23 EHRR 413; *Hirsi Jamaa* (n 41) para 113.

58 See e.g. *Soering* (n 46); *SF and others v Sweden*, App no 52077/10 (ECHR, 15 August 2012).

59 *Mubilanzila Mayeka and Kanika Mitunga v Belgium* 46 EHRR 449.

60 *MSS* (n 44).

61 *Al Skeini and others v The United Kingdom*, App no 55721/07 (ECHR, 7 July 2011); *Chagos Islanders* 35622/04 Admissibility Decision (ECHR, 11 December 2012).

62 *Hirsi Jamaa* (n 41) para 65; see Douglas Guilfoyle, 'Jurisdiction at sea: migrant interdiction and the transnational security state' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control* (Routledge 2017), 120.

63 *Hirsi Jamaa* *ibid* para 95; Guilfoyle *ibid* 120.



intercepted migrants were accompanied to Libya in accordance with bilateral agreements to combat illegal immigration.⁶⁴ However, the ECtHR found that Italy exercised both *de jure* (due to exclusive flag-state jurisdiction) and *de facto* authority and control over the survivors and had extraterritorial jurisdiction.⁶⁵ Italy had been bound to identify any potential claims for asylum in accordance with the prohibition on collective expulsion under Article 4 of Protocol No. 4 ECHR.⁶⁶ In addition, Italy was obliged to avoid transferring the irregular migrants to Libya, having regard to the conditions they would be facing, of which Italy knew or should have known.⁶⁷ Relevant conditions included: inhuman and degrading treatment and the lack of a proper asylum procedure in Libya; and the real risk of *refoulement* to the states of origin, and being subjected there to torture or other serious harm as returned migrants and refugees.⁶⁸ The Court concluded that the general impossibility of making the Libyan authorities recognise refugee status granted by UNHCR officers was relevant, apparently treating protection of refugees from serious harm as a subset of the protection of all individuals offered by Article 3 ECHR.⁶⁹

4. EU Approaches to Delivering Rescued Migrants to Safety in the Central Mediterranean

4.1 EU Operations in the Central Mediterranean

Since the entry into force of the Lisbon Treaty in 2009, the EU and member state authorities applying EU law must comply with the Charter of Fundamental Rights (CFR),⁷⁰ including Article 19(2) that specifically prohibits removal to states where there is a 'serious risk' that the individual will be subject to the death penalty or to '... torture or other inhuman or degrading treatment or punishment.'

From 2014 the focus of Operation Triton coordinated by 'Frontex' - renamed the European Border and Coast Guard Agency in 2016 - has been border security and migration control.⁷¹ Nevertheless, in line with *Hirsi Jamaa*, the Frontex maritime border surveillance Regulation 656/2014 is consistent with the CFR Article 19(2) and subjects operations to a broad understanding of the *non-refoulement*

64 *ibid* paras 65-66, 93.

65 *ibid* paras 70, 74, 80-81.

66 *ibid* paras 185-186.

67 *ibid* paras 131, 156-157.

68 *ibid* paras 88-89, 123-126, 156-157, 202-203.

69 *ibid* paras 134 and 156. See also *MSS* (n 44).

70 CFR (n 47).

71 Moreno-Lax (n 9) 3-4; Giorgia Bevilacqua, 'Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities' in Gemma Andreone (ed.) *The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests* (Springer Open 2017) 168-169.



principle and respect for fundamental rights.⁷² Article 4 of the Regulation prohibits disembarkation where the participating Member States are aware or ought to be aware that disembarked persons will be at risk contrary to the *non-refoulement* principle. According to Article 4(3), prior to disembarkation, rescued persons should be given the opportunity to express reasons for believing that disembarkation would violate the principle.

Under Article 10, interception in the territorial sea should result in disembarkation in the coastal Member State. Where possible, following interception on the high seas, disembarkation takes place in the country of departure in cooperation with the relevant RCC; otherwise, the vessel should be disembarked in the Member State hosting the operation. Disembarkation at a place of safety following search and rescue is carried out in cooperation with the relevant RCC. Guilfoyle notes the difficulty in finding cases where the Regulation and the disembarkation obligations have been applied.⁷³ One potential oversight of the Regulation is that it does not expressly provide for procedural safeguards, remedies or judicial oversight.⁷⁴

From 2015, the EUNAVFOR Med Operation Sophia crime control mission has operated on the Central Mediterranean high seas under UN Security Council Resolution 2240. The EU as an international organisation is committed to acting in accordance with international law.⁷⁵ Although the goal of the mission is to break the business model of migrant smugglers, the mission is subject to the LOSC duty to render assistance, which can arise as irregular migrants attempt the crossing. The Resolution allows interception and seizure of migrant smuggling vessels, with flag-state consent or following *bona fide* attempts to obtain flag-state consent. The Resolution generally requires states to act in compliance with human rights,⁷⁶ but does not provide detailed rules in relation to the principle of *non-refoulement*.⁷⁷

4.2 EU and Italian Cooperation with Libya Following the *Hirsi Jamaa* Case

Since the *Hirsi Jamaa* ruling prevented returns to Libya, the EU and Italy have supported Libyan coastguard operations to pull back migrant smuggling vessels through provision of funding,

72 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 OJEU L 189/93, recitals 8-13 and art 9(1); Steve Peers, *EU Justice and Home Affairs: vol. I EU Immigration and Asylum Law* 4th ed. (OUP 2016), 154-155.

73 Guilfoyle (n 62) 125. See also Annelise Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 248-251; Peers *ibid* 159-160.

74 Daniel Ghezbash, Violeta Moreno-Lax, Natalie Klein and Brian Opeskin, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) *ICLQ* 67, 315-351.

75 Treaty on European Union (Consolidated) OJ 2012/C326/01 (TEU) art 3 and 21. See also Charter of the United Nations, 24 October 1945, 1 UNTS XVI art 1.

76 United Nations Security Council Resolution 2240, para 13; see Bevilacqua (n 71) 182.

77 See Efthymios Papastravridis, 'EUNAVFOR Operation Sophia and the International Law of the Sea' *MarSafeLaw Journal* 2/2016, 57-72; Bevilacqua (n 71) 178-179.



vessels, training and assistance.⁷⁸ Given international reports documenting serious human rights violations,⁷⁹ the partnership's focus raises questions about the EU and Italy indirectly circumventing *non-refoulement*.⁸⁰ In addition, Italian vessels in Libyan waters arguably present as a 'maritime blockade', a measure that is incompatible with the prohibition on *refoulement*.⁸¹ Another aspect of the cooperation preventing departures from Libya and thus avoiding issues relating to *non-refoulement* is the approach by Italy and Libya seeking to curb the humanitarian response of non-governmental organisations in maritime search and rescue.⁸² However, EU funding is also channelled into UN-HCR and IOM efforts that arguably improve migrant safety in Libya, including resettlement and evacuation, improved conditions of detention and human rights education for detention and border authorities.

5. Disembarkation of Migrants in Australia's Cooperation with Sri Lanka

5.1 Operation Sovereign Borders and the Maritime Powers Act 2013 (MPA)

In addition to 'turnbacks' or 'towbacks' of migrants,⁸³ successive Australian governments have returned migrants in cooperation with countries of departure, including Sri Lanka ('takebacks'). Controversies have arisen about minimum incorporation and implementation of Australia's international obligations, in the application of Australian domestic law, such as the *Maritime Powers Act* 2013 (Cth), the *Navigation Act* 2012 (Cth) and Australian constitutional and administrative laws.⁸⁴

78 See European Council and Council of the EU, *Press Releases and Statements, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route* (3 February 2017); and *Memorandum of Understanding (Libya-Italy, Feb 2017)* <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 12 October 2017; Francesca Mussi and Nikolas Feith Tan, 'Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia' in Fiona De Londras and Siobhan Mullally (eds) 10, 2015 *Irish Yearbook of International Law* (Harts 2017) 87, 92-100.

79 See UN Security Council, *Report of the Secretary-General on the United Nations Support Mission in Libya S/2017/283* (4 April 2017); UN Security Council, *Letter dated 1 June 2017 from the Panel of Experts on Libya, S/2017/466*.

80 See Fenella M W Billing and Nikolas Feith Tan, 'Balancing legal obligations in Europe's cooperation with Libya in the fight against migrant smuggling' in Bettina Lemann Kristiansen, Katerina Mitkidis, Louise Munkholm, Lauren Nuemann and Cécile Pelaudeix (eds.) *Transnationalisation and Legal Actors: Legitimacy in Question* (Routledge, 2019); Violeta Moreno-Lax and Mariagiulia Giuffrè, 'The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows' in S. Judd (ed) *Research Handbook on International Refugee Law* (Edward Elgar, Forthcoming); Alessia de Pascale, 'Migration Control at Sea: The Italian Case' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 281ff.

81 Moreno-Lax (n 9) 9-10.

82 See Kristof Gombeer and Melanie Fink, 'Non-Governmental Organisations and Search and Rescue at Sea' *MarSafeLaw Journal* 4/2018, 1-25.

83 Official Committee Hansard, *Senate Legal and Constitutional Affairs Legislation Committee Estimates* (20 October 2014) 137-160.

84 See Nicholas Gaskell, 'Australian Merchant Shipping and Maritime Powers Laws' (2014) *Il diritto marittimo* 116/2-4 310, 328-330. See also Susan Kneebone, 'Controlling Migration by Sea: The Australian Case' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 362-366.



Part 3 MPA 2013 gives broad enforcement powers to 'maritime officers' including the s.69 power to detain or require a person to remain on the vessel at sea; and power under s.72 to take a person to a place in the Australian migration zone or outside Australia. Safeguard provisions include s.74, requiring an assessment on reasonable grounds that a person is 'safe' in the place to which he or she is transferred; and s.95 providing that any person being held must be treated with '... humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.'

In 2011, in *Plaintiff M70/2011 v Minister for Immigration, Citizenship and Another*, the Australian High Court found that Australia's international obligations prevented the government from making a declaration for the transfer of irregular migrants to Malaysia, as Malaysian legal obligations did not require protection of asylum seekers or provision of proper asylum procedure.⁸⁵ However, with the introduction of the MPA and fierce adherence to dualist policy and executive power, a new s.75A MPA states that any failure to comply with international obligations does not invalidate an action taken as a matter of national law.⁸⁶ Further, MPA powers will not be limited by the provisions of the *Migration Act 1958* (Cth), including provisions incorporating the principle of *non-refoulement*. Section 75B provides that the rules of natural justice do not apply to the exercise of maritime powers.⁸⁷ Under s.75C, restrictions on exercising powers in relation to a foreign vessel may be subject to an executive direction based on national interest.

5.2 Current Cooperation with Sri Lanka

According to official statements, persons coming from Sri Lanka who are individually assessed at sea under an 'enhanced screening process' and not found to have a *prima facie* protection case are returned to Sri Lankan authorities.⁸⁸ The process allows no opportunity for the decision to be reviewed and leaves open the possibility that returned migrants include refugees.⁸⁹ Reports suggest that on at least one occasion an asylum seeker eligible to be transferred for a full refugee determination voluntarily returned to Sri Lanka with the other migrants.⁹⁰ In addition, Australian authorities have returned people into Sri Lankan criminal investigators' custody amid reports of a culture of torture.⁹¹

85 *Plaintiff M70/2011 v Minister for Immigration, Citizenship and Another* [2011] HCA 31.

86 But see VCLT art 27, providing that national law may not be invoked to justify failure to perform international treaty obligations.

87 Sections 75A-C were inserted by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth).

88 See Peter Dutton, Minister For Home Affairs, 'People smuggling boat returned to Sri Lanka' (Media release, 17 August 2016, update 27 August 2018); Australian High Commission Colombo, 'Three illegal people smuggling vessels disrupted in recent months' (Media release, 24 January 2018); and UNHCR, 'Returns to Sri Lanka of individuals intercepted at sea' (7 July 2014) <<http://www.unhcr.org/afr/news/press/2014/7/53baa6ff6/returns-sri-lanka-individuals-intercepted-sea.html>> accessed 22 April 2018.

89 See Kaldor Centre for International Refugee Law (Kaldor Centre), 'Turning back boats' (Factsheet, 26 February 2015) 3.

90 See Scott Morrison, 'Australian Government returns Sri Lankan people smuggling venture' (Media Release, 7 July 2014). See also Kaldor Centre *ibid*.

91 See Kaldor Centre, *ibid* 4; Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka' (A/HRC/34/54/Add.2, 22 December 2016); OHCHR, 'Sri Lanka routinely tortures security suspects amid stalled reform process, UN expert finds' (news release, 18 July 2017), reporting that Tamils are disproportionately torture victims; Niro Kandasamy, 'Not 'all is forgiven' for asylum seekers returned to Sri Lanka' (The Conversation, 9 March 2017) <<http://theconversation.com/not-all-is-forgiven-for-asylum-seekers-returned-to-sri-lanka-73361>> accessed 23 April 2018.



Questions arise about extrajudicial criminal justice surrender, as well as arbitrary detention, torture and conditions of detention in Sri Lanka contrary to IHRL, and also about criminal prosecution of migrants contrary to Article 5, Migrant Smuggling Protocol. Such returns may be contrary to the principle of *non-refoulement* and the LOSC duty to deliver to a 'place of safety'.⁹²

As a migrant destination, Australia's coastline differs from the Mediterranean and the migrant flow is comparatively very small.⁹³ In addition, the high-level instability and high risks for migrants generally in Libya distinguish it from Sri Lanka as a location for migrant returns. A significant factor explaining different regional approaches is that extraterritorial *non-refoulement* obligations under the ECHR have been well defined and carry greater weight of legal enforceability, with similar obligations found in the CFR and woven into EU law.⁹⁴

6. A Broad or Narrow Notion of Survivors' 'Safety' Under the Law of the Sea?

The lack of express provisions protecting human rights during disembarkation raises questions concerning the integration of the law of the sea with human rights norms, returning to the question of a wide or narrow interpretation of 'safety'. Concerning state policies rejecting extraterritorial application of IHRL jurisdiction for breaches of *non-refoulement*, the question is important because a narrow interpretation of safety may provide destination states with the justification under the law of the sea for intercepting unflagged vessels and returning people to foreign states.⁹⁵ Such an interpretation may thus encourage states to circumvent rather than respect fundamental rights and the principle of *non-refoulement* as bases for cooperation.

6.1 Interpreting the Term 'Place of Safety' in the Context of the Law of the Sea

6.1.1 Ordinary Meaning of 'Safety' in Light of the Context, Object and Purpose

In application of Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), the starting point to interpret the meaning of the 'place of safety' under the SOLAS and SAR conventions is the complementary obligations in Article 98 LOSC with the purpose of protecting '*safety on and over the sea*': the duty of the shipmaster to render assistance to those in distress; and the obligation of the coastal states to cooperate in setting up and coordinating effective search and rescue services. The duty of the shipmaster may be seen as an extension of the *duty of the flag state* under the LOSC Article 94 to establish measures ensuring '*safety*' and '*safety of life*' at sea. The coastal states' duty to cooperate is elaborated on in the SOLAS and SAR conventions, with the coastal state in the relevant SAR region bearing primary responsibility to ensure disembarkation of survivors from the assisting

92 See IMO (n 22) Appendix, para 7.

93 Gaskell (n 84) 335-336.

94 See *Hirsi Jamaa* (n 41); CFR art 19(2); TEU art 3. See also 4.1 above.

95 Guilfoyle (n 62) 119-120; Moreno-Lax (n 9) 5-6.



ship and delivery as soon as possible at a place of safety. Coastal states also have other safety-related responsibilities under the LOSC, for example, in relation to prescriptive and enforcement jurisdiction regarding 'safety of navigation' in connection with innocent passage and the territorial sea.⁹⁶ Various provisions of the LOSC refer *inter alia* to 'safety of navigation',⁹⁷ 'safety aids',⁹⁸ 'safety zones',⁹⁹ 'safety of operations'¹⁰⁰ and preventing 'damage to the health and safety of persons'.¹⁰¹ In the context of pollution of the marine environment, Article 225 refers to avoiding adverse consequences in enforcement measures against foreign vessels, including avoiding bringing a vessel to an 'unsafe port'. An unsafe port or 'place' is arguably one where there is an immediate risk of physical damage, injury or harm to the objects of a maritime operation, such as vessels, crew or passengers.¹⁰² Therefore, the conventions may be interpreted as providing a general rule precluding delivery to a place where it is known or ought to be known that survivors' immediate, physical safety will be put at risk. According to IMO Guidelines, this will depend on various *factors and risks*, including on-scene conditions, the situation on board the assisting ship and the medical needs of survivors.

The IMO Guidelines provide that states must additionally consider refugee *refoulement* in designating a place to deliver survivors, whenever those claiming to be refugees are present. Bearing in mind that the Guidelines are non-binding, as a minimum under the law of the sea, states must demonstrate that the legal effect of the principle of *non-refoulement* was taken into consideration in the decision. This may preclude delivery to places where there is a real risk to asylum seekers or refugees of arbitrary detention, torture or serious abuse in immigration detention, a lack of asylum procedure in the country of disembarkation or chain *refoulement*. This guideline is consistent with the position that the principle of *non-refoulement* under the Refugee Convention is an exception to state sovereignty. However, neither the LOSC, SOLAS or SAR conventions, nor the IMO Guidelines, absolutely prohibit states from disembarking asylum seekers or refugees in countries such as Libya or Sri Lanka. The final resolution of the application of the principle of *non-refoulement* in specific situations is left to states. Protection of rescued refugees against *refoulement* is merely one of a number of considerations under the law of the sea, leaving refugees poorly protected. In fact, the IMO Guidelines make it clear that finding broader solutions for refugees are 'non-SAR considerations' that usually apply after the point of the first disembarkation.

The IMO Guidelines make no mention of considering *non-refoulement* in connection with the return of 'irregular migrants'. Furthermore, in 'Comments on Relevant International Law' the Guidelines refer only to the prohibition on return to a place where a survivor may be at risk of torture; and make no mention of the relevance of other risks not amounting to torture. Inconsistent state practice, as outlined in sections 4 and 5, does not help to fill in the gaps.¹⁰³

96 LOSC arts 21-22.

97 LOSC arts 42, 225 and 262.

98 LOSC art 43.

99 LOSC art 60 and 111.

100 LOSC art 194 and Annex 3, art 17(1)(b)(xii).

101 LOSC art 225.

102 See the definition of 'safety', Oxford English Dictionary.

103 VCLT art 31(3)(b).



6.1.2 The Meaning of 'Safety' in the Normative Context of the LOSC

One method to interpret the meaning of delivery to a 'place of safety' under the SOLAS and SAR conventions, as an application of the LOSC, may be to consider whether relevant general principles of law assist.¹⁰⁴ The principle of flag-state jurisdiction is one such principle. The duty to assist may be seen as an extension of the duty of the assisting ship's flag-state to ensure 'safety of life at sea'. However, this is insufficient to determine the extent to which *non-refoulement* is relevant to disembarkation;¹⁰⁵ and does not overcome the lack of a binding provision in relation to disembarkation.¹⁰⁶

The norms of the LOSC centre on balancing 'contrasting state-focused interests', including the sovereignty of coastal states and the flag-state's claim to freedom of the seas, with the community interest in the oceans as 'common heritage of mankind'.¹⁰⁷ Thus, core principles underlying the LOSC are concerned with issues in relation to the rights and responsibilities of states over the sea, as well as peaceful use, utilisation and protection of the oceans and marine resources.¹⁰⁸ This supports a conclusion that the LOSC was not intended to be a rights-creating treaty for the protection of individual interests.¹⁰⁹

Rules about enforcement jurisdiction emphasise that maritime enforcement measures against infringements of immigration law are permissible exercises of sovereignty. Article 19(2)(g) LOSC lists the 'unloading' of any persons in the territorial sea in contravention of the immigration laws of the coastal state as contrary to peace, good order and security. Therefore, in order to prevent non-innocent passage, the LOSC would appear to allow states to refuse entry to port and turn back foreign boats carrying irregular migrants detected in territorial waters or in a relevant contiguous zone.¹¹⁰ The LOSC provision applies without an express safety clause related to the protection of individuals claiming to be refugees or individuals generally. Alternatively, customary international law provides for an accepted right of entry to port for ships in distress to protect the safety of those on board – though not necessarily to disembark anyone there – that must be weighed against the risk of harm to the port state and local population.¹¹¹

104 See Siig and Feldtmann (n 12); Case C-15/17 *Bosphorus Queen Shipping Ltd. Corp. v Rajavartiolaivos* (CJEU, 28 February 2018) (Opinion of Advocate General Wahl).

105 Siig and Feldtmann *ibid* 71-79.

106 Bevilacqua (n 71) 179-180; Trevisanut (n 55) 235.

107 Siig and Feldtmann (n 12) 69-70, with reference to Grotius and the arguments of *mare liberum* and *mare clausum*.

108 *ibid* 71-79.

109 See also Case C-308/06 *The Queen, on the application of Intertanko and others v Secretary of State for Transport* ECLI:EU:C:2008:312 para 64, concluding in relation to marine pollution enforcement that the LOSC does not confer rights on individuals capable of being relied on against the state; Efthymios Papastavridis, 'Is there a right to be rescued at sea? A skeptical view' (2014) QIL, Zoom-in 4, 17, 20-24, arguing against interpreting the right to be rescued into the LOSC; but see Seline Trevisanut, 'Is there a right to be rescued at sea? A Constructive view' (2014) QIL, Zoom-in 4, 3, 7-8, arguing that a right to be rescued under the LOSC is the corollary of the duty to assist and part of 'community interests'.

110 LOSC arts 25 and 33; Gaskell (n 85) 330 and 335.

111 See Myres S. McDougal and William T. Burke, *The Public Order of the Oceans* (Yale University Press, 1962, reprint New Haven Press, 1987) 110; R.R. Churchill and A.V. Lowe, *The Law of the Sea* 3rd ed. (Manchester University Press, 1999) 63; and IMO Guidelines on Places of Refuge for Ships in Need of Assistance Resolution A.949(23), Adopted 5 December 2003, when safety of life is not involved.



6.2 Interpreting 'Safety' Differently in Light of the *Non-Refoulement* Principle?

6.2.1 A Case of Systematic Integration?

A final interpretative step is to consider whether there is a broad international consensus that co-ordination and designation of a 'place of safety' by coastal states involves an absolute duty to protect rescued refugees and irregular migrants, from *refoulement*.¹¹² Proponents of this approach find support in Article 31(1)(c) VCLT, inviting interpretation that is consistent with relevant rules of international law.¹¹³ Thus, the principle of 'systematic integration', involves the interpretation of international obligations by reference to their wider normative environment going beyond the treaty in question.¹¹⁴

As an example of support for systematic integration, paragraph 9.5 of Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe suggests that states should interpret a place of safety as one which not only provides for the immediate needs of those disembarked, but as a place that:

...in no way jeopardises their fundamental rights, since the notion of 'safety' extends beyond mere protection from physical danger and must take into account the fundamental rights dimension of the proposed place of disembarkation...¹¹⁵

The Parliamentary Assembly went on to consider that such a broad notion of safety would include ensuring protection of particularly vulnerable groups in maritime operations and access to fair and effective asylum procedures.¹¹⁶

No treaty has been made specifically connecting obligations relating to the protection of refugees and other individuals with the LOSC, SOLAS or SAR conventions. This creates a significant gap in the consensus of integration between the law of the sea and international human rights law regimes.¹¹⁷

6.2.2 Limiting Excess of Power Under the LOSC

Treves argues human rights principles and *considerations of humanity* may be relevant in the assessment of LOSC cases, giving examples of cases examining excessive use of power and limitation of

112 See *Bosphorus* (n 104) paras 56 to 57, speaking of a 'broad international consensus' of the need to protect the marine environment from ship-source pollution.

113 VCLT art 31(3)(c).

114 Ratcovich (n 20) 95ff, referring to Marti Koskeniemi, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (UN Doc A/58/10, 5-9 May 2003); Natalie Klein, 'A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants' (2014) ICLQ 63, 807-808.

115 Council of Europe (n 51) para 9.5.

116 *ibid* paras 9.6, 9.11-9.12 and 9.19; see further Jens Vedsted-Hansen, 'The asylum procedures and the assessment of asylum requests' in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar, 2014) Edward Elgar Publishing, Incorporated 2014.

117 But see Ratcovich (n 20) 105ff and 120.



power.¹¹⁸ This approach finds support in Article 31(1)(c) VCLT, although it may be contrasted with system-based integration of human rights principles to create additional duties that go beyond the LOSC provisions. The distinction to be made is between addressing *excess of power* compared with interpreting additional rights-bearing duties into the LOSC, SOLAS and SAR conventions.

Limiting excess of power may include preventing national authorities from handing over rescued migrants directly to another state, where it is known that they will be at an immediate risk of torture or other serious harm. This is to be contrasted, for example, with a decision to remove migrants from a crowded vessel and disembark them at a temporary location, even though the living standards are below what would be appropriate for medium or long-term care. In the second scenario, without reliable assurances, the disembarking state may need to maintain a level of control over the situation after disembarkation to avoid future breaches of fundamental human rights or refugee law obligations. Disembarking states may also be able to engage the active cooperation of international organisations such as the UNHCR at the 'place of safety' to assist in making specific arrangements for asylum seekers.¹¹⁹

This approach is consistent with the decision in *Khlaifia and Others v. Italy*,¹²⁰ where the ECtHR examined the circumstances of the disembarkation in September 2011 of three migrants at facilities on Lampedusa. The conditions were basic and overcrowded, though the migrants enjoyed a degree of free movement and their stay lasted only 3-4 days.¹²¹ In these circumstances, the court found:

[it] could not criticise, in itself, the decision to concentrate the initial reception of the migrants on Lampedusa. As a result of its geographical situation, that was where most rudimentary vessels would arrive and it was often necessary to carry out rescues at sea around the island in order to protect the life and health of the migrants. It was therefore not unreasonable, at the initial stage, to transfer the survivors from the Mediterranean to the closest reception facility...¹²²

While the case was not a *refoulement* situation and Italy remained in control at all relevant times, it demonstrates that *even under the ECHR* the standard for 'safety' may be relaxed in the extreme context of rescue of large numbers of migrants and delivery to a temporary place of safety.

6.2.3 *Non-Refoulement* as a Co-Existing Obligation

There is some international support for the relevance of human rights obligations to disembarkation of survivors. For example, the Australian High Court decision of *CPCF v Minister for Immigration and Border Protection* demonstrates how the concept of a safe place for disembarkation under the Australian *Maritime Powers Act 2013* (Cth) can be interpreted consistently with Australia's interna-

118 Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley J. Int'l Law 1, 3-6; see further Klein (n 113), 809; *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea)*, 1 July 1999, ITLOS Reports 1999 155.

119 UNHCR, *Guidelines on Temporary Protection or Stay Arrangements* (February 2014); UNHCR, "A Model Framework for Cooperation following Rescue at Sea Operations involving Refugees and Asylum-Seekers", Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea - how best to respond? Summary Conclusions, Djibouti, 8-10 November 2011.

120 *Khlaifia and Others v Italy* App. no. 16483/12 (ECHR 15 December 2016).

121 *ibid* para 190-193.

122 *ibid* para 181.



tional obligations.¹²³ In the context of the rescue, on board detention and transfer of 157 Sri Lankan asylum seekers, who had fled a refugee camp in India, French CJ of the Australian High Court stated that the content of the phrase 'safe for the person to be in that place' may involve a risk assessment on the part of those directing and advising maritime officers. In obiter, French CJ found that:

A place which presents a substantial risk that the person, if taken there, will be exposed to persecution or torture would be unlikely to meet the criterion "that it is safe for the person to be in that place". The constraint imposed by s 74 embraces risks of the kind to which the non-refoulement obligations under the Refugees Convention and the Convention against Torture are directed.¹²⁴

If such risks exist, French CJ found they may amount to a 'mandatory consideration' in the exercise of maritime power.¹²⁵ Gageler J also stated:

A person is not safe in a place if the person is exposed there to a real risk of harm for any reason, including but not limited to a reason which would give that harm the character of persecution within the meaning of the Refugees Convention.¹²⁶

The majority approach of the Australian High Court appears to be that maritime officers need to *consider* the risks to physical safety of survivors in the place of disembarkation. They may otherwise need to rely on the knowledge of executive and other authorities in consideration of the broader or procedural aspects of safety that are encompassed in the principle of *non-refoulement* under international refugee and human rights laws.¹²⁷ A number of the judgments referred to the principle of statutory interpretation in dualist systems that, unless otherwise stated, the general words of a statute should be interpreted in conformity with international obligations. However, it was stated that this principle is not one of legislative constraint; nor constraint of the executive in the exigencies of a situation.¹²⁸

The Australian case demonstrates that even without systematic integration of *non-refoulement* obligations into the meaning of the 'place of safety' under the LOSC, SOLAS and SAR conventions, disembarking states conducting refugee and irregular migrant returns may be liable for violations of coexisting international obligations. The LOSC recognizes the application of co-existing, non-conflicting rules.¹²⁹ The *non-refoulement* obligations creating legal rights are relevant under overlapping frameworks such as the 1951 Refugee Convention, the ICCPR and the CAT and are confirmed by

123 *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1.

124 *ibid* para 12 (French CJ).

125 *ibid* para 12 (French CJ).

126 *ibid* para 370 (Gageler J).

127 *ibid* paras 107, 109-110 and 113 (Hayne and Bell JJ); 294, 296-298 (Keifel J); 370-372 and 383-391 (Gageler J); 426-427 (Keane J).

128 *ibid* paras 383-391 (Gageler J); 219 (Crennan J). See also Peter Billings, 'Operation Sovereign Borders and interdiction at sea: *CPCF v Minister for Immigration and Border Protection*' (2016) 23 *AJ Admin L* 76.

129 LOSC art 293.



customary international law, at least insofar as they relate to torture and refugee *refoulement*.¹³⁰ These obligations are presumed to apply, subject to the question of jurisdiction under the specific treaty. Therefore, in addition to implementing the duties involved in rescue and disembarkation under the SOLAS and SAR provisions and the accompanying guidelines, refugee and irregular migrant returns by the state may trigger jurisdiction under IHRL and refugee law treaties, prohibiting disembarkation in departure or origin states.¹³¹ Refugees and irregular migrants are distinguishable from other survivors by the vulnerability that results from lack of state protection. This includes a lack of protection in and by the country of nationality, including diplomatic assistance abroad, as well as the lack of proper asylum procedures and protective systems in the transit states. This is particularly grave in the case of refugees, where the lack of state protection amounts to persecution.

7. Conclusion

A normative approach to interpreting the relevant LOSC, SOLAS and SAR provisions about disembarkation and delivery to a 'place of safety', leads to a conclusion that ensuring survivors' safety involves more than just removal from danger and the provision of emergency care. Under the SOLAS and SAR conventions, a place of safety has been conceived as one where survivors will be provided with temporary care, including provision of necessities, such as water, food, shelter, sanitation, medical, psychological, special needs and family tracing assistance that goes beyond the crowded deck. At this place, transport may be arranged to transfer survivors to the next or final destinations, where they can receive medium or longer term levels of care. Although not currently reflected as a mandatory consideration in the IMO guidelines, as a necessary minimum safeguard, maritime officers, state rescue authorities and their advisers need to consider whether there will be any real risk of serious harm to the survivors immediately on disembarkation at a place of safety, based on reasonably available information. This may include a risk of torture or physical or sexual abuse at the hands of the authorities.

According to SOLAS and SAR conventions and IMO guidelines, maritime officers involved in rescue are not obliged to consider broader aspects of the principle of *non-refoulement*. Moreover, SAR region states coordinating rescue are urged to disembark survivors on home territory if no other timely solution is available. However, when exercising a duty to cooperate and weighing up the various 'safety' considerations, state RCCs and other national authorities must consider the need to avoid disembarking asylum seekers or refugees claiming a well-founded fear of persecution at places of origin or departure, contrary to the principle of *non-refoulement* under the 1951 Refugee Convention and customary international law. In the context of rescue in hostile maritime environments, this does not equate to a prohibition on disembarking rescued refugees and irregular migrants at origin or departure ports. Instead, under the law of the sea, assessing the conditions at a proposed place of

¹³⁰ See section 3 above.

¹³¹ Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm' (2018) *JCMS* 56/1 119, 121-122, 126.



safety is one of a number of factors to be taken into account, in particular by the coastal state in the SAR region where survivors are assisted. As appears from the law of the sea treaty provisions and guidelines, the final decision about safe disembarkation is for states to determine, in accordance with international obligations. This conclusion reflects the intended outer-limits of the LOSC; and, in the sphere of maritime rescue, acknowledges the LOSC as a framework convention, complemented by other relevant international agreements.

Respect for *non-refoulement* in operations on the high seas relies on states' acceptance of the extra-territorial application of the principle under co-existing international human rights law obligations. A consideration of EU-Libya and Australia-Sri Lanka cooperation demonstrates the significant influence of the particular human rights framework on state practice in rescue operations; and the need for greater legal certainty. At present, closer harmonisation between the international regimes of the law of the sea and human rights law is unrealistic.¹³² Therefore, to avoid fragmentation of international obligations, the perspectives presented here highlight the need for *bona fides* implementation of the duty to render assistance, by planning and carrying out maritime operations in a manner that is consistent with other international obligations.¹³³ Upholding international obligations at sea is the logical and consistent extension of upholding the same obligations on home territory.¹³⁴

132 Guilfoyle (n 62) 124-125; and Klein (n 115), 811-813.

133 VCLT arts 26-27; Guilfoyle 124; Moreno-Lax (n 9) 9; *Bosphorus Queen Shipping Ltd Corp. v Rajavartiolaitos* ECLI:EU:C:2018:557, paras 45 and 67.

134 See TEU art 21.