

STATE OBLIGATIONS RELATING TO RESCUE AT SEA

BOOKLET AIMED AT THE CIVIL SOCIETY
2020



*Rescue and assistance
to persons in distress at sea*

*Shipwrecked persons /
refugees / migrants*

*Coordination of rescue
operations at sea ;
cooperation of States*

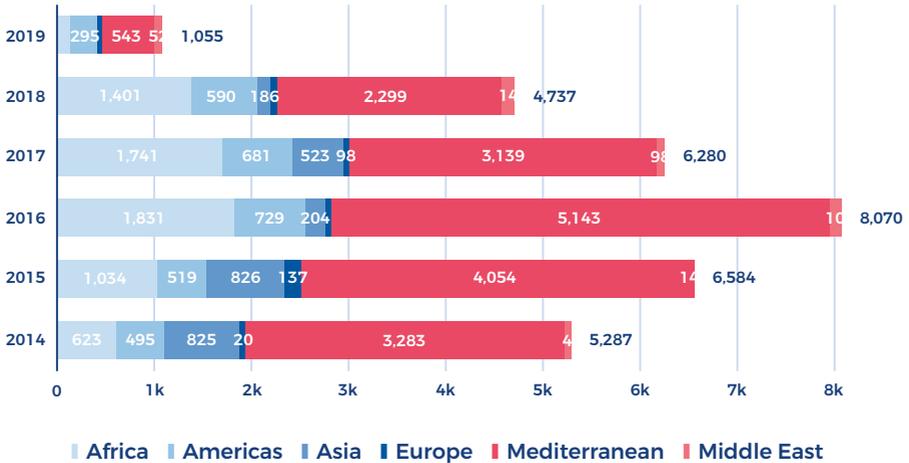
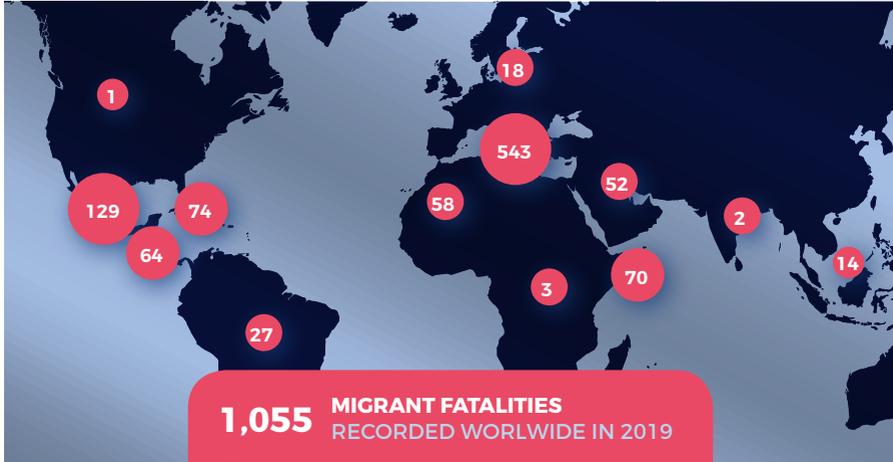
*Prompt disembarkation
in a place of safety*

*Mass rescue operations:
essential kit*



DEATH RATE AT SEA – THE MEDITERRANEAN: THE DEADLIEST ROUTE IN THE WORLD

RECORDED MIGRANT DEATHS BY REGION



Figures from the Missing Migrants Project of the International Organization for Migration (IOM): <https://missingmigrants.iom.int/>

RESCUE AT SEA – KEY DATES

1939 – *The unfortunate story of the St. Louis ocean liner*

The 973 passengers on board, most of them Jewish were fleeing Nazi Germany. They were denied entry to Cuba and the United States. They sailed back to Europe where most of them would suffer atrocities in the countries under German occupation.

1979 – *“Boat people” tragedy,*

Vietnamese refugees fleeing persecution by the Communists were denied permission to land in the ports of Malaysia, Singapore and Thailand

2004 – *Wandering of the Cap Anamur,*

between Italy and Malta for 3 weeks with 37 migrants on board. Captain was put on trial for smuggling. He was declared innocent 5 years later.

2013 – *Shipwreck off Lampedusa island*

366 die before the Italian navy and fishermen are able to rescue them. Italy organizes operation Mare Nostrum to avoid similar tragedies in the future.

2015 – *Shipwreck at 85 miles off the Libyan coast.*

More than 800 people die

2019 – *Repeated obstructions against vessels of sea-rescue NGOs.*

Almost none at sea. Increased sea-rescue by merchant ships and navy. Increase of interceptions.

1942 – *Struma disaster*

Bulgarian ship carrying 767 Jewish refugees, detained at the entrance of the Bosphorus during Winter 1941 and sunk by mistake by a Soviet torpedo.

2001 – *Tampa case*

Norwegian cargo ship which had taken on board 438 Afghan people and to which Australian authorities had closed its ports.

2009 – *Wandering of the Turk cargo Pinar,*

between Malta and Italy for 4 days with 140 migrants on board. Captain was prosecuted and then released.

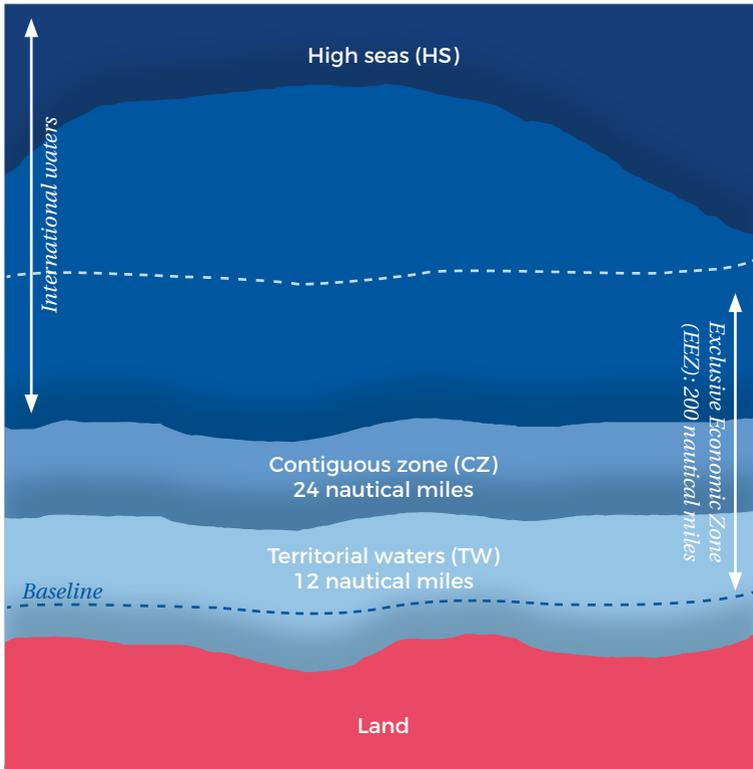
2014 – *Under European pressure, Italy ends Mare Nostrum.*

2018 – *Repeated wanderings of the Aquarius, in June and September*

The ship is successively de-flagged by Gibraltar and Panama. Part of the crew has been under investigation.

August 2019: SOS Méditerranée resumes operations with the Ocean Viking under Norwegian flag

AREAS AT SEA



High seas: Areas which are not subject to the sovereignty of any State.

EEZ: Area where the coastal State has exclusive rights over the natural resources. However the State must respect the high seas freedom of navigation.

CZ: Area in which a coastal state may prevent and punish infringements of its laws and regulations with regards to customs, taxation, immigration and health within its territory or territorial waters. The coastal State must declare and notify to the United Nations the existence of a CZ, in order to enjoy these powers.

TW: Area over which the coastal state applies its full sovereignty.

Baseline: Line from which is measured the extent of States' maritime entitlements.

KEY INTERNATIONAL INSTRUMENTS RELATED TO RESCUE AT SEA

United Nations Convention on the Law of the Sea (UNCLOS)

The UNCLOS was adopted on **10th December 1982** and came into force on **16th November 1994**. It **defines and delimits maritime spaces**, rights and obligations of the States over these areas, specifically those relating to navigation, use of natural resources and protection and preservation of the marine environment. It also created the **International Tribunal for the Law of the Sea (ITLOS)**, a tribunal which is competent to hear any dispute regarding the interpretation and application of the UNCLOS.

International Convention on Maritime Search and Rescue (SAR or Hamburg Convention)

It was adopted under IMO auspices on **27th April 1979** and entered into force on **22nd June 1985**. It has 111 State Parties and its purpose is not only to enable **cooperation and coordination of State actions in terms of rescue at sea** but also to *“encourage cooperation between search and rescue organizations worldwide and between all those who take part in search and rescue operations at sea”*.

International Convention for the Safety of Life at Sea (SOLAS or London Convention)

This text was adopted under IMO auspices on **1st November 1974** and came into force on **25th May 1980**. It includes 121 State Parties. It imposes **important obligations to States in terms of search and rescue**. In particular they are committed to monitoring coasts and supplying any information regarding their own rescue means.

Complementary IMO instruments

The IMO adopts amendments to SAR and SOLAS, which are binding upon member States. It also adopts various resolutions and circulars which contain recommended practices addressed to States and/or shipmaster. Even if these soft law instruments are not binding as such, States must take them into account in good faith.

NB : all the relevant IMO conventions can be amended through the procedure of tacit acceptance (or opt-out). This means that, if a competent IMO committee adopts an amendment, this is mandatory for all State parties. If a State wishes not to be bound, it must notify to the IMO their decision not to be bound by the amendment, within no later than 1 year after the adoption of the amendment. In relation to SAR obligations, only Malta made such a notification.

Protocol against the Smuggling of Migrants by Land, Sea and Air (Protocol of Palermo)

This text adopted under the auspices of the United Nations on **15th November 2000** and entered into force on **28 January 2004** is supplementing the United Nations Convention against Transnational Organized Crime. The Protocol aims at preventing and **combating the smuggling of migrants**, as well as promoting cooperation among States parties, while **protecting the rights of victims of smuggling** and preventing the worst forms of their exploitation.

EU regulation no 656/2014 of 15th May 2014

It applies to all **European Union member States**. It establishes rules for the **surveillance of the external sea borders** of the member States and for **assisting and rescuing persons in distress independently of their status or their nationality**, in accordance with international law.



Obligations relating to rescue at sea fall on ship masters but also and mainly on the three types of States involved, whether they are coastal States, States responsible for a SAR area or flag States

OBLIGATION TO PLAN SEARCH AND RESCUE CENTRES AT SEA



OBLIGATION TO RESCUE PERSONS IN DISTRESS



OBLIGATION TO PROCEED TO THEIR DISEMBARKATION IN A PLACE OF SAFETY



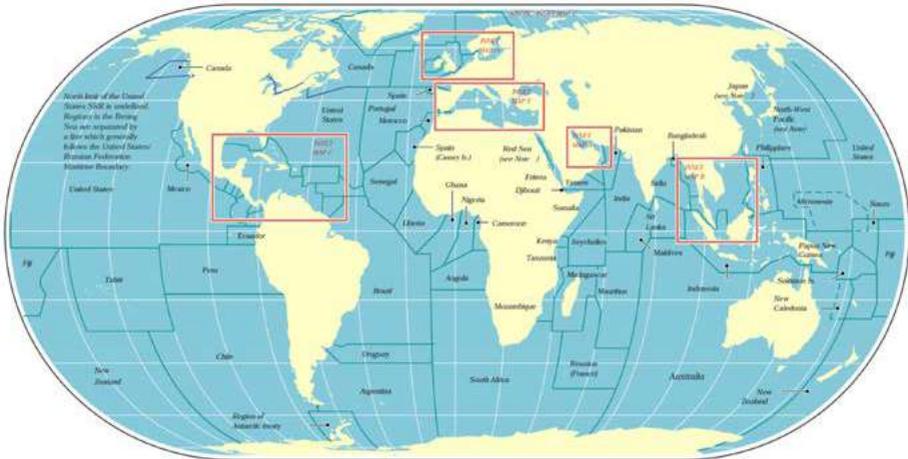
SAR : CONCEPT ET ZONES

I Obligation for coastal States: article 98 UNCLOS requires that *“Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service”*.

By joining the SAR-Hamburg Convention, States accept to define a search and rescue geographical area called **SAR region (SRR)** and to create one or more Rescue Coordination Centres (**RCCs**).

IMO's Maritime Safety Committee divided the world's oceans into 13 search and rescue areas. Therein States delimit, either by agreement or unilaterally, SRRs for which they are responsible.

GLOBAL MARITIME SEARCH AND RESCUE AREAS



— Agreed Maritime SSR boundary

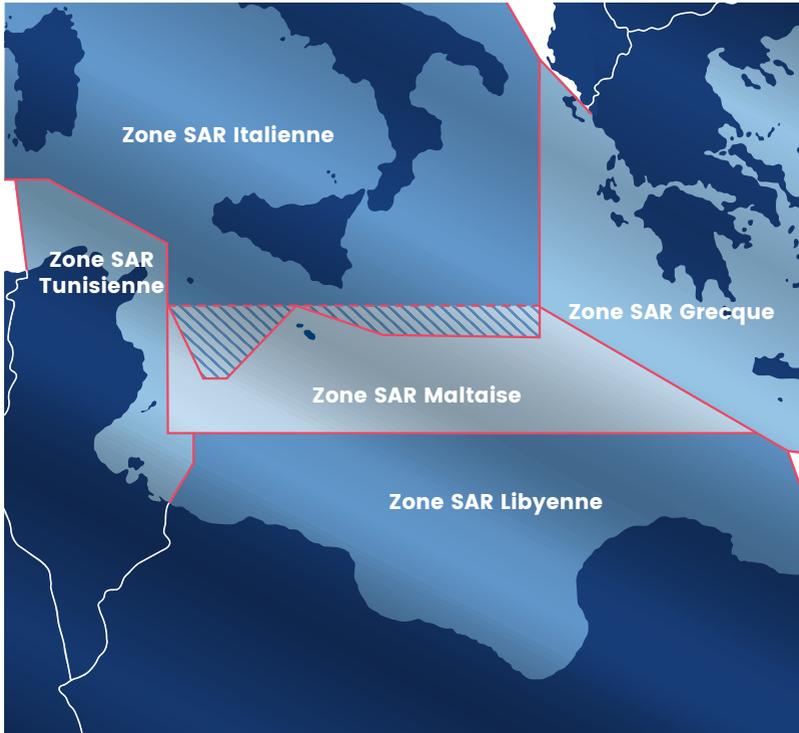
- - Provisional unilaterally declared SRR boundary

- - Areas of overlapping responsibility

The delimitation of a SRR is not related to and shall not prejudice the delimitation of any boundary between states. These areas are established to ensure that primary responsibility for co-ordinating Search and Rescue services for the geographical areas is assumed by some State. In practice, SAR services may not necessarily be provided by the designated State. In such cases, SAR facilities are likely to be provided by the nearest country having the most appropriate SAR

An RCC should meet technical and humanitarian requirements in order to be recognized internationally. According to the IMO, **the RCC must have certain basic capabilities** before it is recognized as having responsibility for an SRR by listing in the IMO Global SAR Plan.

Among these required capabilities: 24-hour availability, trained persons, persons with knowledge of the English language; charts which apply to the SRR, ability to receive distress alerts, ability to communicate provision of medical advice or assistance and evacuation. (IAMSAR Manual, vol. I, point 2.3.7)



SRR: area of enhanced obligations, not extended rights, for States.

The purpose of having an SRR is to clearly define who has primary responsibility for coordinating responses to distress situations in every area of the world and to enable rapid distribution of distress alerts to the proper RCC.

A search and rescue region of a coastal State is not to be mistaken with its territorial waters and is not an area where the said State has sovereign authority. It is an area where a SAR State has primary responsibility to coordinate rescue for the best possible outcome for people. In particular, the **SRR does not extend the police rights** of a State beyond the territorial sea and possibly the contiguous zone.

WHAT AND WHOSE OBLIGATIONS RELATING TO SEA-RESCUE AND DISEMBARKATION?

In May 2004, in the wake of the Tampa incident, the SAR and SOLAS Conventions were amended to impose, for the first time, an **obligation on States to 'cooperate and coordinate' to ensure that ships' masters are allowed to disembark rescued persons to a place of safety**. In order to fulfill this objective, both conventions impose inter-related obligations on 3 categories of States: coastal State, SAR State and all States concerned. The SAR State where a rescue occurred takes the lead in ensuring coordination and cooperation among Contracting Parties, so that mariners who had provided assistance are promptly relieved. The Conventions consequently placed an obligation on all Contracting Parties to coordinate and cooperate to ensure that masters of ships providing assistance were released from their obligations with a minimum of deviation from the ship's intended voyage.

■ Provide assistance and carry rescue operations

- **Flag State:** according to article 98 of the UNCLOS, it is the duty of the master of a ship to render assistance to *"any person found at sea in danger of being lost"* except where this leads to serious danger to the crew, the passengers or the ship. The flag State must ensure that this duty is complied with.
- **Coastal States: ensure that assistance be provided to people in distress at sea:** *"Parties shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts"*. (Regulation 2.1.1 SAR Convention)
- **SAR State: provide urgent assistance to individuals in distress at sea:** *"On receiving information that a person is in distress at sea in an area within which a Party provides for the overall co-ordination of search and rescue operations, the responsible authorities of that Party shall take urgent steps to provide the most appropriate assistance available"*. (Regulation § 2.1.9 SAR Convention)
- **All States: carry out non-discriminatory rescue operations regardless of the nationality or status of the rescued persons:** *"Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found"*. (Regulation § 2.1.10 SAR Convention).

■ Coordinate rescue operations, including disembarkation:

- **All States: coordinate search and rescue operations with neighboring States:** *"Parties shall co-ordinate their search and rescue organizations and should, whenever necessary, co-ordinate search and rescue operations with those of neighboring States"*. (Regulation § 3.1.1 SAR Convention).
- **All States: cooperate in order to identify a place of safety for disembarkation:** *"Each Party should authorize its rescue co-ordination centres [...] to make the necessary arrangements in co-operation with other RCCs to identify the most appropriate*

place(s) for disembarking persons found in distress at sea” ;“the rescue co-ordination centre or rescue sub-centre concerned shall initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea [...]”. (Regulations § 3.1.6 and § 4.8.5 SAR Convention).

– **SAR State: promptly find a place of safety for disembarkation:** “The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety.” (Regulation § 3.1.9 SAR Convention)

OBLIGATION TO PROVIDE ASSISTANCE

Under international and domestic laws, ship masters have an obligation to proceed with all speed to the assistance of persons in distress at sea. Lack of compliance with this obligation is a crime in most legal systems.

I An obligation of means

The said operation must only be carried out by the master of the ship “in so far as he can do so” (Art 98 UNCLOS). As such, the obligation to render assistance may be defined as an “**obligation of means**”. The obligation to provide assistance to persons in distress is only displaced if there is a risk for the ship, the crew or the passengers during the rescue operation.

I Assistance without delay

UNCLOS Art. 98: “Every State shall require the master of a ship flying its flag (...) b. to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.”

SOLAS Regulation 33(1): “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 [...]”.

I Obligation ends with disembarkation

The obligation to provide assistance ends when the rescued people are disembarked in a place of safety.

“The [SAR State] shall exercise primary responsibility for ensuring such co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety”. (SAR Convention, Chap. 3.1.9)

“The duty of rescue ends when passengers have been disembarked at a place of safety”. (UN Refugee Agency (UNHCR), doc. A/AC.259/17, para 21 (2008))

“At this point, it must be underlined that the duty to rescue cannot be considered to have ended with the transshipment on the rescuing boat, but it is characterized also by the disembarkation of the rescued persons in a ‘place of safety’”

(Tribunal of Agrigente (decision of 7.10.2009 re: case of Captain Schimdt of Cap Anamur)



WHAT IS DISTRESS?

General definition

A situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by **grave and imminent danger** and **requires immediate assistance**.

(SAR Convention Annex)

“The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature”

(International arbitration, *Rainbow Warrior* (1990))

“[the facts would] produce, in the mind of a skillful mariner, a well-grounded apprehension of the loss of the vessel and cargo, or of the lives of the crew”

(US Supreme Court, *The New Yorker case* (1818))

Distress at sea: some indicia

- Humanitarian considerations

(i) the existence of a **request for assistance**, although such a request shall not be the sole factor for determining the existence of a distress situation;

(iv) the availability of **necessary supplies** such as fuel, water and food to reach a shore;

(vii) the presence of persons on board in urgent **need of medical assistance**;

(viii) the presence of **deceased persons** on board;

(ix) the presence of **pregnant women** or of **children** on board.

- Navigational consideration

(ii) the **seaworthiness** of the vessel and the likelihood that the vessel will not reach its final destination;

(iii) the **number of persons on board** in relation to the type and condition of the vessel;

(v) the presence of **qualified crew** and command of the vessel;

(vi) the availability and capability of safety, navigation and communication equipment;

(x) the **weather and sea conditions**, including weather and marine forecasts.”

(EU Regulation 12 656/2014, Art 9)

PROMPT DISEMBARKATION IN A PLACE OF SAFETY

“**CONTRAR TO POPULAR
BELIEF AND SOME
POLITICAL STATEMENTS,
INTERNATIONAL LAW
DOES NOT IMPOSE
AN OBLIGATION
TO DISEMBARK IN
THE CLOSEST PORT BUT
IN A “PLACE OF SAFETY”**”

PROMPT

I Minimum deviation: *“Parties shall co-ordinate and co-operate to ensure that masters of ships [...] with minimum further deviation from the ships’ intended voyage. (Regulation § 3.1.9 SAR Convention)*

I As soon as reasonably practicable: *“the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.” (Regulation § 3.1.9 SAR Convention)*

I The captain has a say: *“All parties involved should cooperate in order to ensure that disembarkation of the persons rescued is carried out swiftly, **taking into account the master’s preferred arrangements for disembarkation and the immediate basic needs of the rescued persons.**” (FAL.3/Circ.194 - 2009)*

WHAT IS A PLACE OF SAFETY?



According to resolution MSC.167 (78) adopted by the Maritime Safety Committee (MSC) in 2004, **a place of safety [...] is a location where rescue operations are considered to terminate” and it 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”
- “from which transportation arrangements can be made for the survivors’ next or final destination” (MSC.167 (78))

In the same way: “the need to avoid disembarkation in territories where the lives and freedoms of those alleging a wellfounded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea”.

(Resolution MSC.167).

Sea rescue ≠ refugee status determination : “Any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation of survivors from the assisting ship(s)”.

(Resolution MSC.167).

SEA-RESCUE AND REFUGEE LAW

In principle, these are distinct areas of law: one applies at sea, the other on land. However, in case of mass-rescue of migrants they interact to a certain extent, since fundamental human rights and refugee law principles must also be respected at sea. The ocean is not outlaw. This being said, the fundamental law of rescue at sea must be respected irrespective of arrangements between States concerning asylum.

NON-DISCRIMINATION: THE CAPTAIN MUST NOT BE ASKED TO ASSESS THE NATIONALITY OR STATUS OF PERSONS RESCUED

It should also be ensured that any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress are to be carried out after disembarkation to a place of safety. The master should normally only be asked to aid such processes by obtaining information about the name, age, gender, apparent health and medical condition and any special medical needs of any person rescued.

(FAL.3/Circ.194 – 2009)

PROTECTION DES DEMANDEURS D'ASILE

If a person rescued expresses a wish to apply for asylum, great consideration must be given to the security of the asylum seeker. When communicating this information, it should therefore not be shared with his or her country of origin or any other country in which he or she may face threat. (FAL.3/Circ.194 – 2009)

The refugees law applies in principle from the moment when people looking for asylum entered the territory of the State. Migrant rescue operations generally take place in international waters. However, the European Court of Human Rights held that the principle of non refoulement could be opposed to a State party to the Convention when rescue operations were undertaken under its control in international waters. (Hirsi Jamaa v Italy, 2012).

NON-REFOULEMENT

This principle includes obligations not to return persons, where there are substantial grounds for believing that there is a real risk of irreparable harm. Article 33(1) of the 1951 Convention relating to the Status of refugees provides: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Article 3(1) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment provides: “No State Party shall expel, return (‘refouler’) 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.”



ABUSIVE CRIMINALIZATION OF RESCUERS

Within Eu States there is a trend of criminalising search and rescue (SAR) operations in the Mediterranean Sea carried out by non-governmental organisations (NGOs) or other private entities. This includes seizing rescue vessels, as well as arresting crew members. However, acts done for purely humanitarian purposes are protected under international law. EU law and State practice of criminalization are not consistent with international standards.

CRIMINALISATION: WHAT RISKS FOR SHIPMASTERS, CREW AND SHIP?

I Types of accusations:

- Smuggling of migrants
 - *Cap Anamur case (2005-2009)*: acquitted
 - *Morthada and Mohamed el-Hedi case (2007-2011)*: first instance condemned at 2.5 years and a penalty of €440000 each; acquitted on appeal
 - *Save the Children (2017)*; *Iuventa (2017)*; *Open Arms (2018)*: ongoing in Italy
 - *Lifeline (2018)*: ongoing in Malta
- False invocation of distress
 - *Cap Anamur*
- Illegal entry on the territory (immigration)
 - *Cap Anamur, Lifeline*
- Disobedience to the orders of the coastal authorities or the RCC
 - *Cap Anamur, Morthada, Open Arms*
- Irregular registration of ship
 - *Sea Watch (2018)*; *Lifeline (2018)*

I Ships blocked at port or confiscated:

- *Cap Anamur* > arrested, confiscated and sold to pieces
- *Morthada and Mohamed el-Hedi* > case the fishing vessel was confiscated
- *Open Arms preventive* > arrest, then released by order of the Tribunal
- *Iuventa* > under conservatory arrest since 2017
- *Sea Watch and Lifeline* > prevented to leave port by Malta for several months, despite repeated interventions by the flag State

IN EUROPE, CRIMINALIZATION OF SOLIDARITY DUE TO BAD IMPLEMENTATION OF INTERNATIONAL OBLIGATIONS

I International law: criminalization of smuggling

*“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and **in order to obtain, directly or indirectly, a financial or other material benefit:** (a) The smuggling of migrants.”*
(Palermo Protocol on smuggling of migrants (2000), Art. 6)

I EU: Criminalization of assistance to irregular immigration

“1. Each Member State shall adopt appropriate sanctions on: (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens.”
(Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence (2002) (Art. 1-1))

I International law: clear humanitarian exception

*“Another concern that may influence the decision of private parties to rescue smuggled migrants at sea consists in fearing potential investigative action and prosecution by States whose legislation does not clearly exclude criminal charges for facilitating irregular migration against private actors involved in rescue operations. Against this background, it is clear that the Smuggling of Migrants Protocol does not target persons who rescue smuggled migrants in distress at sea. Accordingly, **States should ensure that the legislative frameworks in place provide sufficient clarity to avoid that charges may not be pressed against those who fulfil their obligation of rescue and preservation of life.**”*
(Conference of State Parties to the Palermo Protocol, 2015).

I EU: Facultative exemption for acts of solidarity and assistance

*“2. Any Member State **may decide** not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.”*
(Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence (2002) (Art. 1-2))

GLOSSAIRE



Coastal State: State that has sovereignty over specific territorial waters as well as sovereign rights in the contiguous zone and in the exclusive economic zone.

Distress phase: Situation wherein there is reasonable certainty that a ship or a person is threatened by grave and imminent danger and requires immediate assistance. (SAR Convention).

Flag State: State in which the ship is registered. The State in question therefore has the authority and responsibility over the ship.

Innocent passage: As indicated under article 19 of the Montego Bay Convention, a “passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State”.

Non-discrimination: Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

Rescue: Operation which aims at recovering persons in distress, administering first aid or anything they might need and delivering them to a place of safety.

Rescue Coordination Centre (RCC): centre that is responsible for the efficient organization of the search and rescue services and coordination of search and rescue operations within a search and rescue area.

SAR State: State which is responsible for the search and rescue of persons using its services and equipment within the SAR area.

SAR area/region: Search and rescue area. Region of defined dimensions within which search and rescue services are provided.

Safe country: State where there is no serious danger or persecution for the individual based on its status or personal situation, in which the “non-refoulement” principle is being observed, which does not accept removal orders that go against the prohibition of torture and inhumane and degrading treatments, and where it is possible to request recognition of refugee status and thus benefit from protection under the Geneva Convention.



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PRÉSENTATION GÉNÉRALE

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