

# Towards New Rules on Disembarkation of Persons Rescued at Sea?

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## Abstract

It is an international legal obligation for States to render assistance to persons in distress at sea. However, a comparable legally binding duty to disembark these rescued persons does not exist in the law of the sea. As a result, these persons—often migrants—can spend weeks on a ship at sea before a State allows them to go ashore. This article analyses the existing legal framework concerning disembarkation and evaluates the recent initiatives taken within the International Maritime Organization. Suggestions for future improvements are made.

## Keywords

law of the sea; search and rescue; disembarkation; seaborne migrants; access to ports

## Introduction

It is a legal obligation for States under customary international law,<sup>1</sup> as well as under Articles 58(2) and 98(1) of the 1982 Law of the Sea Convention (LOSC), to render assistance to persons in distress in the exclusive economic

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<sup>1</sup> UN Commission on International Law, 'Commentary on Draft Article 12 of the United Nations Convention on the High Seas' (1956) UN Doc. A/3179.

zone (EEZ) and on the high seas.<sup>2</sup> A State cannot rely on its sovereign powers to disregard this obligation in its territorial sea.<sup>3</sup>

On the one hand, every flag State must require the master of a ship flying its flag to proceed with all possible speed to the rescue of persons in distress when informed of their need of assistance. On the other hand, coastal States must promote the establishment, operation and maintenance of an adequate and effective search-and-rescue (SAR) service, for example, through the creation of a Rescue Co-ordination Centre (RCC). For this purpose they will cooperate with neighbouring States, when appropriate. However, neither treaty law nor customary international law requires States to let these rescued persons disembark onto their territory.

Both the International Convention on Safety of Life at Sea (SOLAS Convention)<sup>4</sup> and the International Convention on Maritime Search and Rescue (SAR Convention)<sup>5</sup> state that States must arrange for the disembarkation of persons rescued at sea as soon as reasonably practicable.<sup>6</sup> The government in charge of the Search-and-Rescue Region (SRR) in which the survivors were recovered is held responsible for providing a place of safety on its own territory or ensuring that such a place of safety is granted in another country.<sup>7</sup> A place of safety can be defined as a location where rescue operations are considered to terminate, where the survivors' safety or life is no longer threatened,

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<sup>2</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 *UNTS* 3. Article 98(1) LOSC states:

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

<sup>3</sup> MSC 76/22/8, 'Any other business. Review of safety measures and procedures for the treatment of persons rescued at sea' (31 July 2002), Annex: 'Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea', para. 6, available at: <http://docs.imo.org/>; R. Barnes, 'Refugee Law at Sea' (2004) *ICLQ* 53 (1): 47–77, at 50–52.

<sup>4</sup> International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 *UNTS* 278 (SOLAS Convention).

<sup>5</sup> International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 405 *UNTS* 97 (SAR Convention).

<sup>6</sup> SOLAS Convention, *op. cit.*, *supra* note 4, Chapter V Regulation 33; SAR Convention, *ibid.*, Chapter 3 para. 3.1.9.

<sup>7</sup> MSC Res. 167(78) Annex 34: 'Guidelines on the Treatment of Persons Rescued at Sea' (20 May 2004), at para. 2.5, available at: <http://docs.imo.org/>.

basic human needs (such as food, shelter and medical needs) can be met and transportation arrangements can be made for the survivors' next or final destination.<sup>8</sup> Although an assisting ship may only serve as a temporary place of safety,<sup>9</sup> there is no actual duty for States to disembark the persons rescued. In other words, a State can refuse disembarkation onto its own territory or make this dependent on certain conditions.<sup>10</sup>

As a result, persons rescued at sea can spend weeks on a ship at sea before a State allows them to go ashore. The case of the *Marine I* provides an example. On 30 January 2007, the Spanish Coast Guard received a distress call from the vessel *Marine I*. It was alleged that over 300 migrants from Guinea were on board. Although the *Marine I* was within the Senegalese SRR, Senegal requested Spain to proceed with a rescue operation, claiming that Senegal did not have the proper means to assist. Because the Mauritanian port of Nouadhibou was closest to the emergency, Senegal also informed Mauritania of the situation. On 4 February, a Spanish maritime rescue tug reached the *Marine I* and provided immediate relief by handing out supplies of water and food. The Spanish government also commenced negotiations with Senegal and Mauritania on the fate of the migrants. On 12 February (two weeks after the distress call), Spain, Senegal and Mauritania finally reached an agreement regarding the passengers. It was reportedly agreed that Spain would pay €650,000, in return for Mauritania allowing the passengers to disembark. Repatriation commenced the day after the migrants had disembarked. Guinea agreed to readmit thirty-five passengers, all of African origin.<sup>11</sup> In total, Spain reported 18,000 irregular arrivals by sea from West Africa that year.<sup>12</sup> The fact that Spain was prepared to pay as much as €650,000 to prevent the disembarkation of 300 migrants shows that some States are reluctant to allow disembarkation of rescued persons onto their territory.

The main reason for this reluctance is that almost all of these persons are migrants requesting asylum. According to the UN High Commission for Refugees (UNHCR), it is very difficult to know the exact percentage of asylum-seekers that arrive by sea, because official statistics in most countries do not state how an asylum-seeker arrived, i.e., by sea, land or air. On average, roughly 70 % of those arriving by sea in Malta are asylum-seekers. In the case

<sup>8</sup> *Ibid.*, at para. 6.12.

<sup>9</sup> *Ibid.*, at para. 6.13.

<sup>10</sup> G.S. Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, Oxford, 1996) at 157.

<sup>11</sup> K. Wouters & M. Den Heijer, 'The *Marine I* Case: A Comment' (2010) *Int'l J. Refugee L.* 22(1):1–19, at 2–3.

<sup>12</sup> UNHCR, 'All in the Same Boat: The Challenges of Mixed Migration' (2010); available at: <http://www.unhcr.org/pages/4a1d406060.html>.

of Italy, one-third of those arriving on Lampedusa Island apply for asylum. This amounts to roughly 60 % of all applications for asylum in Italy.<sup>13</sup>

Moreover, this migration is often mixed. Not only political migrants or refugees try to reach a safe shore. Most of these people are economic migrants looking for a better life in a developed country. States are therefore reluctant to permit disembarkation unless they receive financial or readmission guarantees. Negotiations on these conditions can last for days, or even weeks. Unfortunately this means that the migrants—often requiring medical care—do not receive this aid immediately. The shipmaster and his crew are not trained to assist these migrants in their special needs. Furthermore, the financial pressure on the master and owner of the ship, due to the delay of the ship, can be enormous. In some cases, compensation for expenses, delay, and diversion—together with consequential losses—can be provided through Protection and Indemnity Clubs (P & I Clubs). However, with today's ever-increasing emphasis on swift deliveries and fast turn-arounds, the economic pressures on seafarers sometimes override humanitarian principles.<sup>14</sup> In May 2007, a group of 27 boat people were rescued by the Italian Navy after they had spent three days and nights clinging to tuna pens being towed by a Maltese fishing vessel, the *Budafel*. The captain of this vessel told the media that he refused to divert his ship to disembark the men because he was afraid of losing his valuable catch of tuna.<sup>15</sup> By failing to institute co-ordinated, well-organized systems for receiving and processing asylum-seekers and migrants, States are putting seafarers in an intolerable position: damned if they do, and damned if they don't.<sup>16</sup>

Consequently, in practice some shipmasters will ignore migrants at sea—thus violating international law—because they know that their entrance into ports will be refused. Human Rights Watch, one of the world's leading independent organizations dedicated to defending and protecting human rights, recorded several testimonies of migrants at sea. In August 2008, Abassi—a 21-year-old Nigerian—drifted on an inflatable boat in international waters for five days:

“One side of the boat had sunk and the other was still floating. There were 85 of us clinging to it. There was nothing to eat and by the second day we had

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<sup>13</sup> UNHCR, 'Irregular Migration by Sea' (28 May 2009); available at: <http://www.unhcr.org/4a1e48f66.html>.

<sup>14</sup> International Transport Workers' Federation (ITF), 'Damned If They Do...' (2006); available at: <http://www.itfseafarers.org/damned.cfm>.

<sup>15</sup> UNHCR, 'Between the Devil and the Deep Blue Sea' (2007) 148 *Refugees Magazine* 4; available at: <http://www.unhcr.org/refmag/148/index.html>.

<sup>16</sup> ITF, 'Damned if they do...' (2006) *op. cit.*, *supra* note 14.

no water. People were drinking sea water and got sick. Three people died. On the fourth day we saw a helicopter. The helicopter saw us and waved. The helicopter did not drop food or water, and no boat came to rescue us. Five hours later we saw a ship. It did not come to help. It stopped and spent a few hours standing there. The boat just watched.”<sup>17</sup>

In the beginning of 2009 the Facilitation (FAL) Committee of the International Maritime Organization (IMO) approved a circular on “Principles relating to administrative procedures for disembarking persons rescued at sea.”<sup>18</sup> This circular could lead to more harmonised, efficient and predictable procedures. Initially, the ultimate objective was to amend the SOLAS and SAR Conventions, taking into account these principles, as appropriate. Spain, Italy and Malta submitted proposals for amendment, which were rejected in 2010. In this article we first look at the background and the content of the existing legal framework, as well as its shortcomings. Second, the FAL principles and the amendment proposals will be discussed and evaluated. We conclude with a few suggestions for future improvements.

## **Background and Content of the Existing Legal Framework**

### *The Vietnamese Boat People*

In the mid-1970s many boat people fled from the communist regime in Vietnam. On the initiative of UNHCR and in cooperation with many States, the Disembarkation Resettlement Offers Scheme (DISERO) was completed in 1979,<sup>19</sup> followed by the Rescue-at-Sea Resettlement Offers Scheme (RASRO) in 1985.<sup>20</sup> The coastal States of Indochina were prepared to allow disembarkation and to grant temporary protection in exchange for guarantees that

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<sup>17</sup> Human Rights Watch, ‘Pushed Back, Pushed Around’ (21 September 2009); available at: [http://www.hrw.org/en/node/85582/section/11#\\_ftn104](http://www.hrw.org/en/node/85582/section/11#_ftn104).

<sup>18</sup> FAL 3/Circ.194 ‘Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea’ (22 January 2009), available at: [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D24818/194.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D24818/194.pdf).

<sup>19</sup> United Nations, International Conference on Indo-Chinese Refugees, 20–21 July 1979, Geneva; UNGA, ‘Report of the Secretary-General on the Meeting on Refugees and Displaced Persons in South East Asia and Subsequent Developments’ UN Doc. A/34/627 and Corr. 1, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae68f420&skip=0&query=A/34/627#hit1>.

<sup>20</sup> As described in: UNHCR EXCOM, Sub-Committee on International Protection, ‘Problems Related to the Rescue of Asylum-Seekers in Distress at Sea’ (1 September 1983) UN Doc. EC/SCP/30, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae68ccf8&query=EC/SCP/30>.

other—often developed—States would grant permanent protection to the refugees.<sup>21</sup>

By the end of the 1980s the number of people fleeing Vietnam was increasing, and the willingness of host States in the region to offer protection and of third countries outside the region to offer resettlement was declining. As a result the pool of ‘long-stayers’ in the first asylum camps grew and the countries in the region began to identify resettlement as a ‘pull factor’ attracting increasing numbers of economic migrants instead of political refugees.<sup>22</sup> In 1989 the Steering Committee of the International Conference on Indo-Chinese Refugees therefore drafted the Comprehensive Plan of Action 1989–1997 (CPA).<sup>23</sup> One of the goals of this CPA was to identify the status of the migrants and to resettle only persons who were granted the status of refugee according to the Convention relating to the Status of Refugees of 1951.<sup>24</sup> Those found not to be refugees were repatriated and reintegrated in their home countries. The big difference with the DISERO programme was that the countries of origin were also involved. The CPA ended in 1996, because it was considered to have met its objectives.<sup>25</sup>

### **The *Tampa* Incident**

In August 2001 the *Tampa* incident highlighted the problem of migrants at sea again. The captain of the Norwegian container ship *MV Tampa* rescued some 438 asylum-seekers from drowning in international waters between Christmas Island (Australia) and Indonesia. The captain first headed towards Indonesia, as he was technically in the Indonesian SRR. This reportedly elicited threats from some of the migrants, who insisted on being taken to Christ-

<sup>21</sup> UNHCR EXCOM Conclusion No. 23 (XXII) ‘Problems Related to the Rescue of Asylum-Seekers in Distress at Sea’ (1981), available at: <http://www.unhcr.org/3ae68c4344.html>.

<sup>22</sup> A. Betts, ‘Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA’ (January 2006) UNHCR Working Paper No. 120, at 32, available at: <http://www.unhcr.org/43eb6a152.html>. See also W.C. Robinson, ‘The Comprehensive Plan of Action for Indo-Chinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck’ (2004) *Journal of Refugee Studies* 17 (3):319–333, at 319–333.

<sup>23</sup> United Nations, International Conference on Indo-Chinese Refugees, 13–14 June 1989, Geneva; UNGA, ‘Report of the Secretary-General on the International Conference on Indo-Chinese Refugees [Annex: Declaration and Comprehensive Plan of Action (CPA)]’ UN Doc. A/44/523, available at: <http://www.unhcr.org/refworld/docid/3dda17d84.html>.

<sup>24</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>25</sup> UNHCR, ‘Report of the United Nations High Commissioner for Refugees, 1996’, UN Doc. A/51/12, available at: <http://www.unhcr.org/refworld/docid/3b00f4940.html>.

mas Island. As the captain prepared to enter Australian territorial waters, the Australian Special Air Services intercepted and boarded the ship.

The incident gave rise to a very complex international political situation. The Australian government claimed that the port facilities on Christmas Island could not accommodate a vessel of the *Tampa's* size. The UNHCR called upon the States to share the burden. Although the Norwegian government's reaction was positive, the Australian government rejected this arrangement and contacted New Zealand, Nauru, and later Papua New Guinea, all of which agreed to receive a number of migrants.<sup>26</sup>

It took weeks for all the countries involved to solve the disembarkation problem, thereby painfully demonstrating the insufficiency of the international legal framework.<sup>27</sup> In Resolution A.920(22) of November 2001, the IMO General Assembly asked the Maritime Safety Committee (MSC), the Legal Committee (LEG) and the FAL Committee to review the existing legal instruments to identify and eventually eliminate all legal inconsistencies, ambiguities and gaps concerning persons rescued at sea.<sup>28</sup> Mr. William O'Neil—the IMO Secretary-General in 2001—stated that the implementation of new measures for safety at sea would not suffice, because the problem of migrants at sea is not only a maritime issue. In a situation involving asylum-seekers instead of “ordinary” persons in need at sea (an example of the latter is, e.g., the passengers of a cruise ship that is sinking), certain principles of refugee law and human rights must be respected.<sup>29</sup>

Therefore an Interagency Group was set up in July 2002 to deal with the problem of migrants at sea.<sup>30</sup> The IMO, the UNHCR, the United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS), the United Nations Office on Drugs and Crime (UNODC), the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the International Organization for Migration (IOM) are all participating in this Interagency Group. The competences of the IMO and of UNDOALOS

<sup>26</sup> See S. Derrington & M. White, 'Australian Maritime Law Update 2001' (2002) *Journal of Maritime Law and Commerce* 33:275–291; C. Bailliet, 'The *Tampa* Case and its Impact on Burden Sharing at Sea' (2003) *Human Rights Quarterly* 3:741–774; Migration Policy Institute (MPI) 'Report on The New "Boat People". Ensuring Safety and Determining Status' (January 2006); available at: [http://www.migrationpolicy.org/pubs/Boat\\_People\\_Report.pdf](http://www.migrationpolicy.org/pubs/Boat_People_Report.pdf), at 21–23.

<sup>27</sup> P. Mathew, 'Australian Refugee Protection in the Wake of *Tampa*' (2002) *AJIL* 96:661–676.

<sup>28</sup> Under the authority of the IMO Secretary-General.

<sup>29</sup> Speech by Mr. William O'Neil, IMO Secretary-General, IMO Headquarters Londen (19 November 2001); available at: [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=82&doc\\_id=1703](http://www.imo.org/Newsroom/mainframe.asp?topic_id=82&doc_id=1703).

<sup>30</sup> First Interagency Group Meeting 'The Treatment of Persons Rescued at Sea', Geneva (2–3 July 2002); MSC 76/22/8. *op. cit.*, *supra* note 3.

extend to the search-and-rescue part at sea, as well as to the provision of a place of safety afterwards.<sup>31</sup> In addition, UNDOALOS deals with the coordination and cooperation in the field of the law of the sea within the framework of the UN General Assembly.<sup>32</sup> The competences of the UNHCR,<sup>33</sup> UNODC,<sup>34</sup> OHCHR,<sup>35</sup> en IOM<sup>36</sup> with respect to migrants at sea are considered to be multi-disciplinary and worldwide, as these relate to asylum, transnationally organized crime such as human trafficking, human rights and migrants.<sup>37</sup> The UN General Assembly highly welcomed this initiative to cooperate<sup>38</sup> and in 2004,<sup>39</sup> 2007<sup>40</sup> and 2008<sup>41</sup> three other interagency meetings were organized.

<sup>31</sup> Convention on the International Maritime Organization (adopted 6 March 1948, entered into force 17 March 1958) 289 *UNTS* 48 (IMO Convention) Arts. 1 and 15(j); Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967) 591 *UNTS* 265 (Facilitation Convention); SOLAS Convention, *op. cit.*, *supra* note 4; SAR Convention, *op. cit.*, *supra* note 5.

<sup>32</sup> UNGA Res. 49/28 (6 December 1994) UN Doc. A/RES/49/28, available at: <http://www.un.org/documents/resga.htm>; MSC 76/22/8, *op. cit.*, *supra* note 3 at Annex para. 26.

<sup>33</sup> UNHCR 'Background Note Concerning the Competence of the United Nations High Commissioner for Refugees in Relation to Rescue at Sea Matters' (18 February 2002) available at: <http://www.unhcr.org/home/RSDLEGAL/3cd14e3b4.pdf>, Annex 14; UNGA Res. 319 (IV) (3 December 1949) UN Doc. A/RES/319, available at: <http://www.un.org/documents/resga.htm>; UNGA Res. 428 (V) (14 December 1950) UN Doc. A/RES/428, available at: <http://www.un.org/documents/resga.htm>.

<sup>34</sup> MSC 76/22/8, *op. cit.*, *supra* note 3 at Annex para 27; UNGA Res. 55/25 (15 November 2000) UN Doc. A/RES/55/25, available at: <http://www.un.org/documents/resga.htm>.

<sup>35</sup> UNGA Res. 48/141 (20 December 1993) UN Doc. A/RES/48/141 (1993), available at: <http://www.un.org/documents/resga.htm>; MSC 76/22/8, *op. cit.*, *supra* note 3 at Annex paras. 19–21.

<sup>36</sup> Constitution of the International Organization for Migration (adopted 19 October 1953, entered into force 30 November 1954); available at: <http://www.iom.int>; IOM, 'Persons Falling Under the Mandate of the International Organization of Migration (IOM) and To Whom the Organization May Provide Migration Services' (January 1992); available at: <http://www.iom.int>; IOM, 'Strategic Objectives'; available at: <http://www.iom.int>; MSC 76/22/8, *op. cit.*, *supra* note 3 at Annex para. 18; IOM, 'Contribution of the International Organization for Migration to the Report of the Secretary General on Oceans and the Law of the Sea' (30 January 2003); available at: [http://www.un.org/depts/los/general\\_assembly/contributions58.htm](http://www.un.org/depts/los/general_assembly/contributions58.htm).

<sup>37</sup> MSC 79/22/6 'Report-Record of Decisions on the Second United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea' (15 September 2004), at para. 22, available at: <http://docs.imo.org/>.

<sup>38</sup> UNGA Res. 57/141 (12 December 2002) UN Doc. A/RES/57/141, para. 34, available at: <http://www.un.org/documents/resga.htm>.

<sup>39</sup> Second Interagency Group Meeting 'The Treatment of Persons Rescued at Sea', London (12 July 2004).

<sup>40</sup> Third Interagency Group Meeting 'The Treatment of Persons Rescued at Sea', Geneva (11 December 2007).

<sup>41</sup> Fourth Interagency Group Meeting 'The Treatment of Persons Rescued at Sea', New York (23–27 June 2008).

## The Current Legal Framework

The conclusions of the Interagency Group meetings were the basis for the 2004 SOLAS and SAR Amendments,<sup>42</sup> the IMO Guidelines on the Treatment of Persons Rescued at Sea<sup>43</sup> and the IMO/UNHCR practical guide on rescue at sea.<sup>44</sup> These instruments try to safeguard the rights and interests of all the parties involved, e.g., the persons rescued, the flag States, the coastal States, the ship master, etc. Although the amendments—when ratified—are binding, the guidelines aim to help States and ship masters in the execution of their duties. The objective of the practical guide is to form a kind of useful manual for ship masters, insurance companies, ship owners, government authorities, etc., during the post-rescue phase. It contains the procedures that must be followed, the applicable international law principles (not only rules under the law of the sea, but also principles of refugee law), contact information and other relevant advice.<sup>45</sup>

With regard to rescued persons, the 2004 SOLAS Amendments stipulate that the obligation of assistance applies, regardless of the rescued persons' nationality or status or the circumstances in which they are found.<sup>46</sup> Furthermore, within the capabilities and limitations of the ship, all embarked persons must be treated with humanity.<sup>47</sup> The owner, the charterer, the company operating the ship or any other person may not influence (for example, because of financial motives) the ship master's decision, which—in his professional judgement—is necessary for the safety of life at sea.<sup>48</sup> The inconvenience of and the financial burden for the assisting ship will be reduced due to the obligation on the Contracting Parties to cooperate in a way that minimizes further deviation from the ship's intended voyage. In addition, disembarkation will be arranged as soon as reasonably practicable.<sup>49</sup> The IMO Guidelines on the Treatment of Persons Rescued at Sea state that the Government responsible

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<sup>42</sup> The 2004 Amendments to the SOLAS (MSC Res. 153(78): 'Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended' (20 May 2004), available at: <http://docs.imo.org/>) and SAR Conventions (MSC Res. 155(78): 'Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as Amended' (20 May 2004), available at: <http://docs.imo.org/>), entered into force on 1 January 2006.

<sup>43</sup> MSC Res. 167(78) Annex 34, *op. cit.*, *supra* note 7.

<sup>44</sup> IMO/UNHCR, 'Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees' (2006); available at: [http://www.imo.org/includes/blastDataOnly.asp/data\\_id=15282/UNHCRIMOLEafletpersonsrescuedatsea.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id=15282/UNHCRIMOLEafletpersonsrescuedatsea.pdf).

<sup>45</sup> MSC 79/22/6, *op. cit.*, *supra* note 37 at paras. 23–27.

<sup>46</sup> SOLAS Convention, *op. cit.*, *supra* note 4, Chapter V Regulation 33 para. 1.

<sup>47</sup> *Ibid.*, para. 6.

<sup>48</sup> *Ibid.*, para. 34-1.

<sup>49</sup> *Ibid.*, para. 1–1; SAR Convention, *op. cit.*, *supra* note 5, Chapter 3 para. 3.1.9.

for the SRR in which survivors were recovered is responsible for providing a place of safety or ensuring that such a place of safety is provided.<sup>50</sup> Disembarkation of asylum-seekers recovered at sea, in territories where their lives and freedom would be threatened, must be avoided<sup>51</sup> in order to prevent the violation of the *non-refoulement* principle.<sup>52</sup>

## Remaining Problems

Although the previously mentioned legal instruments are an improvement, some issues still remain problematic. Implementing the 2004 SOLAS and SAR Amendments proved to be more difficult than expected. Developed countries like Finland and Malta have not even signed the amendments yet. Even for countries that did implement the amendments, together with the other legal obligations, it is in practice not always easy to enforce them. Several reports by non-governmental organizations (NGOs) indicate that some ship masters and even State authorities ignore people in need of assistance at sea or simply tow their boats into the SRR of another country.<sup>53</sup> The European Council on Refugees and Exiles (ECRE) is a pan-European network of NGOs concerned with the needs of all individuals seeking refuge and protection within Europe. It has collected migrant stories through its member agencies across Europe. For example, Mitra, an asylum-seeker from Afghanistan, was 16 years old when he tried to reach Greece with other people in a small inflatable dinghy. The Greek coast guard discovered them when they were 300 meters away from the Island of Lesbos. The coast guard threw them a rope

<sup>50</sup> MSC Res. 167(78) Annex 34, *op. cit.*, *supra* note 7 at para. 2.5.

<sup>51</sup> *Ibid.*, at para. 6.17.

<sup>52</sup> Article 33 of the Refugee Convention states that: “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.” This principle is not only applicable to refugees but also to all asylum-seekers. See, for example, D. Bethlehem and E. Lauterpacht, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in: E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, Cambridge 2003) 87–177, at 116–118; UNHCR, ‘The Protection of Asylum-Seekers and Refugees Rescued at Sea’, in: T.A. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms* (Asser Press, The Hague, 2003) 137–150.

<sup>53</sup> MSC 84/20/1 ‘Report-Record of Decisions on the Third United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea’ (1 February 2008), Annex, para. 12, available at: <http://docs.imo.org/>; see also European Council on Refugees and Exiles (ECRE) ‘What Price Does a Refugee Pay to Reach Europe?’ (10 February 2009); available at: [http://www.ecre.org/resources/ECRE\\_actions/1313](http://www.ecre.org/resources/ECRE_actions/1313).

and Mitra and the others were taken on board the coast guard's vessel. The coast guard threw the bread, water, and everything else that was left in the dinghy into the water. A few kilometres from the Turkish coast they threw the dinghy back out and Mitra and the others were violently forced back into it. The coast guard had made a small hole in the rubber dinghy and only gave them one oar.<sup>54</sup> Because of the isolated nature of the problem, chances are small that these kinds of practices will be revealed. Finally, many of the rules are soft law, such as the IMO Guidelines on the Treatment of Persons Rescued at Sea.

Disembarkation must be arranged as soon as reasonably practicable.<sup>55</sup> The government responsible for the SRR has the primary responsibility for providing a place of safety or ensuring that such a place of safety is provided.<sup>56</sup> Nevertheless, these provisions do not imply an obligation for States to disembark rescued persons on their territory. They can refuse disembarkation or make it dependent on certain conditions, such as the division of the financial burden (for example, for medical care), resettlement, readmission or immediate return to a safe third country.<sup>57</sup> The positive side of these agreements is that they share the burden between several States and that disembarkation will be advanced. Except for the immediate return to safe third countries—because this could violate the *non-refoulement* principle<sup>58</sup>—the UNHCR supports this burden-sharing approach.<sup>59</sup> Unfortunately not all countries have concluded such agreements. Most of the time burden-sharing decisions must be made *ad hoc*. Therefore in some cases it can still take weeks before arrangements for disembarkation have been made.<sup>60</sup>

<sup>54</sup> ECRE, *ibid.*, at 6–7.

<sup>55</sup> SOLAS Convention, *op. cit.*, *supra* note 4, Chapter V Regulation 33; SAR Convention, *op. cit.*, *supra* note 5, Chapter 3, para. 3.1.9.

<sup>56</sup> MSC Res. 167(78) Annex 34, *op. cit.*, *supra* note 7 at para. 2.5.

<sup>57</sup> Goodwin-Gill, *op. cit.*, *supra* note 10 at 157.

<sup>58</sup> See, for example, S. Lavenex, 'Transgressing Borders: The Emergent European Refugee Regime and "Safe Third Countries"', in: A. Cafruny and P. Peters (eds.), *The Union and the World. The Political Economy of a Common European Foreign Policy* (Kluwer Law International, The Hague 1998) 113–132; M.-T. Gil-Bazo, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited' (2006) *IJRL* 18:571–600; Amnesty International 'Amnesty International's Concerns Regarding an EU List of Safe Countries of Origin' (10 February 2006), available at: [http://www.amnesty-eu.org/static/documents/2006/b525-aide\\_memoire\\_safe\\_countries\\_of\\_origin-Feb\\_06.pdf](http://www.amnesty-eu.org/static/documents/2006/b525-aide_memoire_safe_countries_of_origin-Feb_06.pdf).

<sup>59</sup> UNHCR Expert Roundtable 'Rescue-at-Sea. Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees. Summary of Discussions', Lisbon (25–26 March 2002), available at: <http://www.unhcr.org/home/RSDLEGAL/3cd14e3b4.pdf>, at para. 15.

<sup>60</sup> See, for example, the cases involving the ships *Cap Anamur II* in 2004 (See: UNHCR, 'Italy boat: UNHCR urges disembarkation on humanitarian grounds' (9 July 2004), available at:

In addition to the fact that the period between rescue and disembarkation can be extended up to several weeks, some issues still remain ambiguous. First of all, no clear guidance is given as to the extent of the responsibility of Contracting Parties who are not responsible for the SRR in which the rescue occurs, even when these SRR are geographically located very close to where a vessel has rescued persons in distress. It is, for example, possible that SRRs stretch to areas near the coasts of other Contracting States. Second, in areas with overlapping SRRs, it is unclear which State is the Contracting Party that is primarily responsible for finding a suitable place of safety.<sup>61</sup>

At its third meeting in 2007, the Interagency Group discussed the issue of disembarkation of migrants rescued at sea and the IMO announced that its FAL Committee was preparing guidelines to harmonize the procedures on disembarkation and make them efficient and predictable. In the next part of this article these guidelines and the amendment proposals based on them are discussed.

## **Towards New SOLAS and SAR Amendments on Disembarkation? FAL Principles**

### *Content*

In January 2009 the FAL Committee identified five essential—but only recommendatory—principles that governments should incorporate into their administrative procedures for disembarking persons rescued at sea:

1. The coastal States should ensure that the search and rescue (SAR) service or other competent national authority coordinates its efforts with all other entities responsible for matters relating to the disembarkation of persons rescued at sea;
2. 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

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<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=40ee70780&query=cap%20anamur>), *Marine I* in 2007 (See: K. Wouters & M. Den Heijer, ‘The *Marine I* Case: A Comment’ (2010) *Int’l J. Refugee L.* 22:1–19) and *Le Diamant* in 2008 (See FSI 17/15/1 ‘Measures to protect the safety of Persons Rescued at Sea. Compulsory guidelines for the treatment of persons rescued at sea.’ Submitted by Spain and Italy. (13 February 2009), § 5, available at: <http://docs.imo.org/>).

<sup>61</sup> FSI 17/15/2 ‘Measures to Protect the Safety of Persons Rescued at Sea. Comments on Document FSI 17/15/1. Submitted by Malta’ (27 February 2009), paras. 9–12, available at: <http://docs.imo.org/>.

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. 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;

3. All parties involved (for example, the Government responsible for the SAR area where the persons are rescued, other coastal States in the planned route of the rescuing ship, the flag State, the ship-owners and their representatives, States of nationality or residence of the persons rescued, the State from which the persons rescued departed, if known, and the United Nations High Commissioner for Refugees (UNHCR)) 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. The Government responsible for the SAR area where the persons were rescued should exercise primary responsibility for ensuring such cooperation occurs. 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 in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support;
4. All parties involved should cooperate with the Government of the area where the persons rescued have been disembarked to facilitate the return or repatriation of the persons rescued. Rescued asylum seekers should be referred to the responsible asylum authority for an examination of their asylum request; and
5. International protection principles as set out in international instruments should be followed.<sup>62</sup>

The United States stated that, although it supports the aims and objectives of the circular, it disagreed with certain aspects, because some of the provisions are inconsistent with its domestic law.<sup>63</sup> The third Principle especially is quite far-reaching. When disembarkation cannot be arranged swiftly elsewhere, the Government of the SRR should accept—in accordance with national immigration laws and regulations—to disembark the persons rescued. This means that coastal States have the ultimate responsibility. Malta and Japan reserved their position with respect to this sentence.<sup>64</sup> The other FAL Principles were

<sup>62</sup> FAL 35/Circ.194 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea' (22 January 2009), para. 2, available at: <http://docs.imo.org/>.

<sup>63</sup> FAL 35/WP.6 'Draft Report of the Facilitation Committee on its Thirty-Fifth Session' (16 January 2009), para. 6.39, available at: <http://docs.imo.org/>.

<sup>64</sup> FAL 35/WP.5 'Formalities connected with the Arrival, Stay and Departure of Persons' (14 January 2009), para 6, available at: <http://docs.imo.org/>.

already incorporated in non-binding instruments—in particular the IMO Guidelines on The Treatment of Persons Rescued at Sea<sup>65</sup> and the IMO/UNHCR Practical Guide on Rescue at Sea<sup>66</sup>—but they can become binding when they are used as a basis for amendments to the SOLAS and SAR Conventions.

The FAL Circular was forwarded to the UNHCR for its information. The Working Group that drafted these Principles stated that if the MSC decides to amend the provisions of the SOLAS and SAR Conventions on persons rescued at sea, the FAL Principles could serve as interim guidelines to Member Governments until the revised provisions of the two Conventions enter into force.<sup>67</sup> Indeed, the MSC—at its eighty-fourth session in May 2008 (MSC 84)—already agreed to include a high-priority item on “Measures to protect the safety of persons rescued at sea” in the work programme of its Sub-Committee on Radiocommunications and Search and Rescue (COMSAR) and of its Sub-Committee on Flag State Implementation (FSI). On practical grounds, the MSC decided that the COMSAR should consider the matter first and then—at a later date—to progress it in cooperation with the FSI. The target completion date is 2010. The MSC further instructed the two Sub-Committees to take into consideration the work being carried out by FAL, as appropriate.<sup>68</sup>

### *Appraisal*

The FAL is responsible for IMO’s activities and functions relating to the facilitation of international maritime traffic.<sup>69</sup> These are aimed at reducing the formalities and simplifying the documentation required of ships when entering or leaving ports or other terminals. Its involvement on issues concerning persons rescued at sea should be limited to those matters which fall either within the areas of its competence already mentioned or within the scope of the FAL Convention. These can be broadly summarized as issues relating to the arrival and disembarkation of persons rescued.<sup>70</sup>

For example, in 2005 the 1965 FAL Convention was amended to include under Section 2, ‘Arrival, stay and departure of the ship’, special measures of

<sup>65</sup> MSC Res. 167(78) Annex 34, *op. cit., supra* note 7.

<sup>66</sup> IMO/UNHCR ‘Rescue at Sea. A guide...’, *op. cit., supra* note 44.

<sup>67</sup> FAL 35/WP.5 ‘Formalities...’, *op. cit., supra* note 64, at para. 4.

<sup>68</sup> MSC/84/24 ‘Report of the Maritime Safety Committee on its 84th Session’ (16 May 2008), at paras. 22.25 and 22.36, available at: <http://docs.imo.org/>.

<sup>69</sup> IMO Convention, *op. cit., supra* note 31, at Art. 1.

<sup>70</sup> COMSAR 13/WP.5 ‘Draft Report to the Maritime Safety Committee’ (22 January 2009), para 10.7, available at: <http://docs.imo.org/>.

facilitation for ships calling at ports in order to put ashore sick or injured persons rescued at sea.<sup>71</sup> The purpose of these measures is purely facilitative. Their application implies that the State already permitted disembarkation.

The 2009 FAL Circular on Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea actually go further than the 2005 FAL Amendments because they deal with the problem of disembarkation itself, which is regarded as falling within the FAL's competence. The FAL is clear: the purpose of the Principles set out in the Circular is to harmonize the administrative procedures and make them both efficient and predictable.<sup>72</sup> The hoped-for result is rapid disembarkation and legal certainty, which will lead to facilitated maritime traffic.

As mentioned before, four out of the five 2009 FAL Principles are not new. They were already included in non-binding instruments. The FAL Circular containing the Principles is not a binding instrument but can only be regarded as soft law. Nevertheless, because the MSC instructed the COMSAR and the FSI to take these principles into consideration—as appropriate—when drafting the SOLAS and SAR amendments, these could become binding law.<sup>73</sup>

The most controversial Principle is the one containing a new far-reaching duty for the Government of the SRR where the persons are rescued:

“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 in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support”.<sup>74</sup>

A number of observations can be made with regard to this text. First of all, this paragraph uses some vague terms. The word ‘swiftly’ can mean hours, days or even weeks, so that it is not very clear what is exactly meant. On the other hand, when disembarkation can be defined as being swift is dependent on the specific circumstances. For example, when the public order on the ship is totally disrupted, when the great number of rescued people endangers the seaworthiness of the ship, or when people are dangerously ill, even one day can be too long. An identical problem arises with regard to the word ‘timely’ in relation to access to post-rescue support.

Another ambiguous expression is that the Government should accept disembarkation at a place of safety ‘under its control’. It is not clear what is meant by this. For example, such a place could well be an isolated island. After

<sup>71</sup> Facilitation Convention 1965, *op. cit.*, *supra* note 31, at Section 2H.

<sup>72</sup> FAL 35/Circ.194, *op. cit.*, *supra* note 62, at para. 2.

<sup>73</sup> MSC/84/24, *op. cit.*, *supra* note 68, at paras. 22.25 and 22.36.

<sup>74</sup> FAL 35/Circ.194, *op. cit.*, *supra* note 62, at para 2.3.

all, the conditions for a place of safety incorporated in the IMO Guidelines are not mentioned in the FAL Principles. The last issue is that overlapping of SRR sometimes makes it difficult to determine the ‘Government responsible for the SAR area’.

Second, the SAR Government has a clear duty to permit disembarking, even when this cannot be arranged swiftly. The biggest advantage is the legal certainty for the ship and the rescued people. Moreover, as the SAR Government has the ultimate responsibility to permit disembarking, it will be stimulated to find a swift solution. In most cases, the State that takes care of the SAR operation will also have the closest port, which is positive from a humanitarian and seafarers’ perspective.

The counterpoint is that if this duty to disembark were laid down in binding amendments, it would never be accepted. Malta and Japan entered reservations concerning this paragraph of the Circular. During the MSC’s drafting of the 2004 SOLAS and SAR Amendments, most States had already indicated that they would not agree to such an obligation. As a matter of fact, this is the reason why the International Convention relating to Stowaways of 1957<sup>75</sup> remains unable to obtain the required number of ratifications. Its Article 2(1) stipulates:

“If on any voyage of a ship registered in or bearing the flag of a Contracting State a stowaway is found in a port or at sea, the Master of the ship may, subject to the provisions of paragraph (3), deliver the stowaway to the appropriate authority at the first port in a Contracting State at which the ship calls after the stowaway is found, and at which he considers that the stowaway will be dealt with in accordance with the provisions of this Convention.”

It is clear that imposing such a duty on States will be difficult to realize,<sup>76</sup> even more so because the 2004 SOLAS and SAR amendments cope with implementation problems. Furthermore, if the SAR Government bears the ultimate responsibility, it could be inclined to deny demands for assistance or to tow the migrant boats into the SRR of a neighbouring country. On the other hand, the willingness of other countries involved—such as the flag State—to make arrangements for disembarkation can diminish because they know that the SAR Government will eventually bear the responsibility.

As a last point, the disembarkation is related to the immigration laws and regulations of each Member State. In practice this often leads to the refusal of the sea-borne migrants. Only persons rescued at sea who are not asylum-

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<sup>75</sup> International Convention relating to Stowaways (adopted 10 October 1957, not yet entered into force) reprinted in Comité Maritime International, *Handbook of Maritime Conventions* (2001) as Doc. 14–1.

<sup>76</sup> Barnes, *op. cit.*, *supra* note 3, at 71–72.

seekers will be disembarked rapidly, but this has never posed a problem. However, when migrants are involved, States can use this provision to refuse disembarkation onto their territory.

## **Amendment Proposals**

### *Content*

Only one week after the completion of the January 2009 FAL meeting, the thirteenth session of COMSAR (COMSAR 13) started and the FAL Principles were formulated. Spain and Italy stated that they had intended to submit an information document, but that the period between the conclusion of MSC 84 and the date for submission of documents to COMSAR 13 had not left them enough time to do so. Instead they both intended to submit the documents to the seventeenth session of FSI (FSI 17) in April 2009. As a result COMSAR agreed that it was premature to refer the issue to the SAR Working Group due to the lack of substantive submissions and invited interested parties to submit proposals for consideration by FSI 17 and COMSAR 14 (March 2010).<sup>77</sup>

At FSI 17, Spain and Italy indeed submitted a proposal to amend the SOLAS and SAR Conventions. The existing paragraph 3.1.9 of Chapter 3 “Co-operation between States” in the SAR Convention and paragraph 1–1 of Regulation 33 “Distress situations: obligations and procedure” in Chapter V of the SOLAS Convention would be replaced by the following:<sup>78</sup>

“All parties involved (for instance, the Contracting Government responsible for the search and rescue area where persons are rescued, other States along the route of the vessels rescuing persons at sea, the flag State, the ship owners and their representatives, the States of nationality or residence of the persons rescued, the State where the persons rescued at sea are coming, if it is known) shall co-operate and collaborate to guarantee the rapid disembarkation of persons rescued at sea and to ensure that masters of ships, when involved in search and rescue operations by embarking persons in distress at sea, are released from their obligations with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from

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<sup>77</sup> COMSAR 13/14 ‘Report to the Maritime Safety Committee’ (6 February 2009), para. 10, available at: <http://docs.imo.org/>.

<sup>78</sup> FSI 17/15/1 ‘Measures to protect the safety of Persons Rescued at Sea. Compulsory guidelines for the treatment of persons rescued at sea.’ Submitted by Spain and Italy (13 February 2009), annexes 1 and 2, available at: <http://docs.imo.org/>.

their obligations under the current regulation does not further endanger the safety of life at sea.

The Contracting Government responsible for the search and rescue region, where the rescue operation takes place, shall exercise primary responsibility for ensuring that such coordination and co-operation occurs, so that the persons rescued at sea are disembarked from the vessel involved in the rescued operation and delivered to a place of safety under its control, where persons rescued at sea can have timely access to post rescue support.”

Both proposals go beyond the 2004 amendments of SOLAS and SAR Conventions. Four major changes can be identified:

- In the first paragraph the words ‘Parties’ (used in the 2004 SAR Amendments) and ‘Contracting Governments’ (used in the 2004 SOLAS Amendments) are replaced by ‘all parties involved’. These parties are specified between brackets, but because they are just given as an example, this list is not limited. Not only States are included; ship owners and their representatives are also mentioned. We must however keep in mind that the ship owner, according to Regulation 34–1 of the SOLAS Convention, must not prevent or restrict the master of the ship from taking or executing any decision which, in the master’s professional judgement, is necessary for the safety of life at sea.
- Disembarkation must be executed rapidly instead of ‘as soon as reasonably practicable’. These are both quite vague formulations, so that in practice there will probably be hardly any difference between the two. However, there is a slight difference in connotation for the parties involved. From a flag State point of view, it is deemed of critical interest that its merchant ships are relieved rapidly, as commercial vessels are not suited to host rescued persons for extended periods. Moreover, the financial impact for the ship due to delay can become enormous after a few weeks. The well-being of the rescued persons and of the crew of the rescuing vessel itself is also taken into account. As a result, when disembarkation is not rapidly achieved, ship masters could be dissuaded from fulfilling the international principle of helping in a rescue situation at sea. On the other hand, for the coastal State that accepts the rescued persons, it is important that certain arrangements have been made before disembarkation is allowed and that the latter is thus reasonably practicable.
- The place of safety must be ‘under the control’ of the Contracting Government responsible for the SRR. This does not mean that disembarkation must be allowed at a place under the jurisdiction of the State.

- Timely access to post-rescue support must be provided at the place of safety. The IMO Guidelines on the Treatment of Persons Rescued at Sea and the IMO/UNHCR Practical Guide on Rescue at Sea are already aimed at promoting post-rescue support, not only focussing on the period after the rescue and before disembarkation, but also after disembarkation. By laying down certain conditions for the place of safety, post-rescue support was guaranteed. Paragraph 6.12 of the IMO Guidelines stipulates that a place of safety is a location where the survivors' safety or life is no longer threatened, basic human needs such as food, shelter and medical needs can be met, and transportation arrangements can be made for the survivors' next or final destination.

These proposals are clearly based on the 2009 FAL Principles. According to Spain and Italy, the 2009 FAL Principles indeed address all the main aspects relating to procedures for disembarkation, fully balancing the requirement of protection of human lives at sea with the need of minimizing disruptions to those who assist persons in distress.<sup>79</sup> Nevertheless, one main difference can be recognized. The obligation on the Government responsible for the SRR to accept the disembarkation in accordance with its immigration laws and regulations, when it cannot be swiftly executed elsewhere, has disappeared. Indeed, this was the most controversial part of the 2009 FAL Principles and did not make it into the amendment proposals. Therefore, no duty to disembark is imposed upon States.

Malta argued strongly that disembarkation is a very delicate issue on which a lengthy debate had taken place in 2004, as a result of the negotiations for the SOLAS and SAR Amendments. It maintained that disembarkation is a multi-disciplinary matter that needs to be undertaken with an inter-agency approach.<sup>80</sup> But because FSI 17 considered the proposal by Spain and Italy, Malta submitted draft amendments as well.<sup>81</sup> It was suggested that paragraph 3.1.9 of Chapter 3 of the SAR Convention and paragraph 1–1 of Regulation 33 of Chapter V of the SOLAS Convention could be replaced by the following text:<sup>82</sup>

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<sup>79</sup> COMSAR 13/WP.5 'Draft Report to the Maritime Safety Committee' (22 January 2009), para. 10.9, available at: <http://docs.imo.org/>.

<sup>80</sup> *Ibid.*, at para. 10.10.

<sup>81</sup> FSI 17/15/2 'Measures to Protect the Safety of Persons Rescued at Sea. Comments on document FSI 17/15/1. Submitted by Malta' (27 February 2009), at para 3, available at: <http://docs.imo.org/>.

<sup>82</sup> *Ibid.*, at para. 16.

All parties involved shall cooperate and collaborate to guarantee the rapid disembarkation of persons rescued at sea and to ensure that masters of ships, when involved in search and rescue operations by embarking persons in distress at sea, are released from their obligations with minimum delay, provided that releasing the masters of the ships from their obligations under the current regulation does not further endanger the safety of life at sea.

The Contracting Government responsible for the search and rescue region, where the rescue operation takes place, shall exercise primary responsibility for ensuring that such coordination and co-operation occurs, so that the persons rescued at sea are disembarked from the vessel involved in the rescued operation and delivered to a place of safety, where persons rescued at sea can have timely access to post-rescue support.

All Contracting Governments involved shall co-operate to ensure that disembarkation occurs in the nearest safe haven, that is, that port closest to the location of the rescue which may be deemed a place of safety.”

The big difference with the 2009 FAL Principles and the proposal by Spain and Italy is that disembarkation should take place in the nearest safe haven, namely the port closest to the location of the rescue which may be deemed as a place of safety. The implementation of this suggestion requires that all Contracting Governments provide such a safe haven—when requested by the RCC involved in the rescue operation—on the basis of geographical proximity.<sup>83</sup> In this proposal a clear duty to disembark is incorporated.

### *Appraisal*

Spain and Italy already stressed at COMSAR 13 that they felt that the issue of disembarkation was not a matter for the COMSAR, because both countries had no problems with regard to communication during SAR operations, as they have sufficient resources and qualified personnel.<sup>84</sup>

Malta, on the other hand, argued that the FSI is not the right forum. Introducing proposals for amending the SOLAS and SAR Conventions at the FSI before they are first launched at COMSAR is—according to Malta—not in conformity with the MSC Decision. The reason that Malta did put forward a proposal at FSI 17 is because the FSI considered the proposal by Spain and Italy.

The MSC decided on purely practical grounds that the COMSAR should consider the matter first and after that to progress it in cooperation with the FSI.<sup>85</sup> We can thus conclude—because both Sub-Committees are competent

<sup>83</sup> *Ibid.*, at para. 15.

<sup>84</sup> COMSAR 13/WP.5, *op. cit.*, *supra* note 79, at para. 10.8.

<sup>85</sup> MSC/84/24, *op. cit.*, *supra* note 68, at paras. 22.25 and 22.36.

to deal with this matter—that the MSC did not intend to allocate a more important role to the COMSAR than to the FSI.

The proposal by Spain and Italy is characterized by the primary responsibility of the Government responsible for the SAR area where the persons were rescued. The fact that both countries have bilateral agreements with countries of transit, like Morocco and Libya, is probably the reason why they support the SAR State responsibility. This means that the burden is being shared. However, a real duty to disembark is not included. On the one hand, this is a more realistic approach, but on the other hand, no fundamental differences are included, compared to the 2004 SOLAS and SAR Amendments.

Malta's proposal takes into account the geographic realities of each case, which would also permit the rapid identification of a place of disembarkation without ambiguity, ensure the rapid delivery of rescued persons to a place of safety and ensure minimum disruption to commercial shipping activities, while respecting the value of human life.<sup>86</sup> Some SRRs—such as Malta's—indeed pose the challenge of extending considerable distances from the land territory of the Contracting States responsible for the coordination of SAR activities within their confines. It could be the case that such SRRs extend to areas near coasts of other Contracting States that would be in a better position to guarantee timely disembarkation of survivors than the coordinating State. Under the proposal by Spain and Italy, however, these third States are not obliged to do so. Malta's proposal again entails a duty to disembark and, as mentioned before, this will be difficult to realize.

The discussion ended in March 2010 at COMSAR 14. The United States stated that the 2004 Amendments of SAR and SOLAS are sufficient and that the discussion between Malta on the one hand, and Italy and Spain on the other hand, is based on a regional problem requiring a regional solution. Australia added that the focus must be on the implementation and the enforcement of the existing rules. The conclusion was that new amendments are not needed. The IMO Secretary-General will address the problem of disembarkation in the Mediterranean at the next Interagency Group meeting. The goal would be to develop a pilot project for a regional solution in the Mediterranean. If this project works, it could be applied in other parts of the world.<sup>87</sup> Although this initiative is welcomed, it is clear that the problem of seaborne migrants is not solely regional. Besides a regional project, additional international rules are certainly necessary.

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<sup>86</sup> FSI 17/15/2, *op. cit.*, *supra* note 81, at paras. 14–15.

<sup>87</sup> COMSAR 14/17 'Report to the Maritime Safety Committee' (22 March 2010), paras. 10.1–10.26, available at: <http://docs.imo.org/>.

Italy, Malta and Spain expressed their disappointment that other countries seemingly did not recognize that the problem was much wider than simply a problem between the three of them. Moreover, they argued that it is also not only a problem for the Mediterranean region, because other parts of the world are also confronted with similar difficulties and, even more importantly, ships of all flags are currently involved in the resulting rescue operations.<sup>88</sup>

### **Suggestions for Future Improvements**

At the fourth meeting of the Interagency Group in June 2008, involving IMO, UNDOALOS, UNHCR, OHCHR, ILO and IOM, the participants stated: “If States fail to meet their obligations, then masters of ships cannot fulfil their duties either”.<sup>89</sup> Therefore it is deemed crucial to solve the disembarkation problem. The suggestions mentioned above pose several difficulties. The ideal proposal would reflect the interests of the ship, flag States, coastal States and migrants.

The starting point is that States do not have the duty under international law to disembark migrants. Accepting such an obligation would thus mean that States voluntarily surrender part of their sovereignty. Coastal ports are in the internal waters of a State and therefore they are subject to national law.<sup>90</sup> Nevertheless, treaty rules make it possible to restrict this sovereignty.

The judgement in the *Aramco* case (1958), which deals with a dispute between Saudi Arabia and the Arabian American Oil Company (ARAMCO), stated:

According to a great principle of public international law the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require.<sup>91</sup>

This would also imply the existence of a right to access for merchant vessels carrying persons rescued at sea, even when these are migrants. Nevertheless, as there is no proof of such a principle of international customary law, this state-

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<sup>88</sup> *Ibid.*, at para. 10.19.

<sup>89</sup> UNGA ‘Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its ninth meeting’ (2008) UN Doc A/63/174, para. 100, available at: [http://www.un.org/Depts/los/consultative\\_process/consultative\\_process.htm](http://www.un.org/Depts/los/consultative_process/consultative_process.htm).

<sup>90</sup> *Nicaragua* case (*Nicaragua v. USA*) [1986] *ICJ Rep.*, paras. 212–213.

<sup>91</sup> *Aramco v. Saudi Arabia* (Arbitration Tribunal) (1958) 27 *ILR* 117, para. 27.

ment is not correct.<sup>92</sup> It is indeed true that most States have permitted merchant ships to enter their ports on economic grounds. However, first of all, bilateral agreements between States do not possess a ‘*norm-creating character*’.<sup>93</sup> Second, such an agreement does not imply that coastal States could not refuse the right to access.<sup>94</sup> Third, when no international agreement deals with the matter, the coastal State can freely regulate this access. The Statute on the International Regime of Maritime Ports of 1923 provides for a non-discrimination principle concerning access to coastal ports, but the latter depends on the reciprocity rule; hence no absolute right of access exists.<sup>95</sup>

The only exception to this rule could be for ships in distress.<sup>96</sup> The situation of distress must result from a *bona fide* emergency or *force majeure* and not, for example, from insufficient precaution at the beginning of the journey. Thus, can a ship that carries persons rescued at sea be seen as a ship in distress? This could perhaps be the case if, for example, an epidemic disease breaks out or the ship becomes unseaworthy due to the large number of people on board. The SOLAS Convention states that it is possible for a ship to become unseaworthy as a result of a rescue operation. Nevertheless, this can never be a reason to apply the SOLAS Convention rules on ships in distress.<sup>97</sup> On the other side, according to the UN International Law Commission (ILC), when human life is at stake or when the physical integrity of a person is being threatened, the ship is in distress.<sup>98</sup> This is not the case when only a few persons are ill, but when an epidemic disease spreads among the persons rescued and the crew, the ship itself can be regarded as being in distress.

But even if this were the case, does a ship in distress have an absolute right to enter foreign ports in order to attain safety? The Statute on the International Regime of Maritime Ports of 1923 is silent on this matter. Most academics rely on the *Rebecca Case* to conclude that a right of access for ships in

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<sup>92</sup> E. Somers, *Inleiding tot het Internationaal Zeerecht* (Kluwer, Mechelen, 2004) at 36.

<sup>93</sup> Barnes, *op. cit.*, *supra* note 3, at 58.

<sup>94</sup> R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester University Press, Manchester 1999) at 62; L. de La Fayette, ‘Access into Ports in International Law’ (1996) *IJMCL* 11(1):1–22, at 1.

<sup>95</sup> Convention and Statute on the International Regime of Maritime Ports (adopted 9 December 1923, entered into force 26 July 1926) 515 *UNTS* 350.

<sup>96</sup> C.J. Colombos, *Higgins and Colombos on the International Law of the Sea* (Longmans, London, 1951) at 329.

<sup>97</sup> SOLAS Convention, *op. cit.*, *supra* note 4, Art. IV(b).

<sup>98</sup> International Law Commission, *Yearbook of the International Law Commission* (ILC, New York, 1973) Vol. II, 134, para. 4. The United Nations International Law Commission was founded in 1948. It promotes the progressive development of international law and its codification.

distress does exist.<sup>99</sup> However, according to Somers, no right of entry for ships in distress exists in customary law.<sup>100</sup> This is a logical deduction from the existence of coastal sovereignty over internal waters, and appears to be the position generally adopted in State practice.<sup>101</sup> Article 11 of the Salvage Convention<sup>102</sup> confirms this by providing the right for a coastal State to refuse the vessel in distress entry into its port when there is a risk to that port (e.g., from pollution). Article V(b) of the SOLAS Convention also states that a State has the right to decide who enters its own ports, even in case of emergency. State practice is in line with these provisions.

As a consequence, by accepting a duty to disembark, States would surrender part of their sovereignty. However, during the last couple of years, States have done quite the contrary. They have assumed more and more competences by carrying out interception operations at sea—even on the high seas—in order to send back sea-borne migrants. The principle of freedom of navigation applies on the high seas.<sup>103</sup> Unless the flag State gives its consent, interception on the high seas is thus only permissible when the vessel to be intercepted flies no flag. In addition, certain interception measures against vessels are allowed when there are reasons to believe that these vessels are involved in specific and serious criminal activities, such as trafficking in human beings and smuggling of migrants.<sup>104</sup> It is, however, regrettable that the legal framework to combat trafficking in human beings and smuggling of migrants is used as a pretext to divert and return irregular migrants, without any identification of potential asylum-seekers or refugees in the context of mixed migration flows.<sup>105</sup> In their territorial waters<sup>106</sup> and in their contiguous zone,<sup>107</sup>

<sup>99</sup> *Rebecca Case (Kate A. Hoff v. United Mexican States)* (Mexico/USA General Claims Commission) (1929) *AJIL* 33:860-860 (only one page); See, for example, Churchill and Lowe, *op. cit.*, *supra* note 94 at 63.

<sup>100</sup> Somers, *op. cit.*, *supra* note 92 at 38–40.

<sup>101</sup> See, for example, the disasters involving the ships *Erika* in 1999 (see E. Somers & G. Gonsaes, ‘The Consequences of the Sinking of the M/S ERIKA in European Waters: Toward a Total Loss for International Shipping Law?’ (2010) *Journal of Maritime Law and Commerce*, 41:57–84), *Tampa* in 2001 (see S. Derrington & M. White, ‘Australian Maritime Law Update 2001’ (2002) *Journal of Maritime Law and Commerce*, 33:275–291) and *Prestige* in 2002 (see V. Frank, ‘Consequences of the *Prestige* Sinking for European and International Law’ (2005) *IJMCL* 20:1–64).

<sup>102</sup> International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 *UNTS* 193 (Salvage Convention).

<sup>103</sup> LOSC, *op. cit.*, *supra* note 2, Art. 87(1).

<sup>104</sup> *Ibid.*, Art. 110.

<sup>105</sup> ECRE, *op. cit.*, *supra* note 53 at 38–41.

<sup>106</sup> LOSC *op. cit.*, *supra* note 2, Arts. 19, para. 2(g) and 25, para. 3.

<sup>107</sup> *Ibid.*, Art. 33.

coastal States can in addition intercept seaborne migrants in order to prevent breaches of their immigration laws and regulations. Nevertheless, these powers should be exercised proportionally to the need to prevent or punish such infractions. However, all these conditions are not always met, so that States tend to exercise more powers than they actually possess.

The conclusion—given the current interception trend—is that it will be almost impossible to ask States to accept an obligation to disembark. A possible solution is to link this disembarkation duty to financial arrangements and/or burden-sharing agreements, as was done in the CPA of 1989. This would be in line with the principles of both burden- and responsibility-sharing promoted by the UNHCR.<sup>108</sup> However, nowadays a similar mechanism would face certain problems. The reason is that several circumstances have changed in the last couple of years. Two big differences can be identified. First of all, the problem of migrants at sea has geographically spread and their objective has changed. Where in the past the Vietnamese boat people arrived in neighbouring developing countries, current migrants often have developed States as their destination. A second difference is the fact that States have changed their opinion on migrants at sea. In the 1980s, the division between communists and non-communists still existed. As a result, the Vietnamese received a lot of support from developed countries. After big disasters like 9/11, States began to consider migrants as a possible threat to their security.<sup>109</sup> Although the CPA focused on controlling migration, its overall effect was not so much to halt movement, as to redirect the outflow.<sup>110</sup> However, because the current interception measures have the opposite aim and thus do want to halt movement, States will be reluctant to accept an identical plan of action for the situation as it is now. Furthermore, the late Mr. Sergio Vieira de Mello—then UNHCR Bureau Chief for Asia and Oceania—noted in 1996 that: “UNHCR cannot continue indefinitely to spend for one Vietnamese non-refugee nearly eight times as much as we spend for a Rwandan refugee. UNHCR cannot justify continuing its care and maintenance expenditure... for a caseload not in need of international protection.”<sup>111</sup> Nevertheless, a few core principles found in the CPA can be used again to set up a new plan of action.

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<sup>108</sup> UNHCR EXCOM Conclusion No. 22 (XXXII) ‘Protection of Asylum-Seekers in Situation of Large-Scale Influx’ (1981), available at: <http://www.unhcr.org/3ae68c6e10.html>; UNHCR EXCOM Conclusion No. 38 (XXXVI) ‘Rescue of Asylum-Seekers in Distress at Sea’ (1985), available at: <http://www.unhcr.org/3ae68c4358.html>.

<sup>109</sup> Migration Policy Institute, *op. cit.*, *supra* note 26 at 19–21; UNHCR EXCOM ‘Proposals for an Executive Committee Conclusion on Rescue at Sea’ (10 January 2007), available at: <http://www.unhcr.org/excom/EXCOM/45a752d12.pdf>, at para. 4.

<sup>110</sup> Robinson, *op. cit.*, *supra* note 22 at 324.

<sup>111</sup> UNHCR, *op. cit.*, *supra* note 25.

With respect to financial arrangements, we can think, for example, of capacity-building for RCCs, as well as for processing and reception centres. The European Union (EU), for example, is already funding projects to improve the capacities of EU Member States in the case of the arrival of large groups of irregular arrivals, e.g., the strengthening of reception capacity in Lampedusa. Likewise, the Communication on Strengthened Practical Cooperation, issued by the Commission in February 2006, proposed to set up rapid-reaction migration units to better respond to sudden influxes of irregular migrants.<sup>112</sup> With regard to the burden-sharing agreements, States should be encouraged to engage in resettlement and readmission agreements. When States know they can share the burden after disembarkation, they will be less reluctant to accept a duty to disembark sea-borne migrants. Normally the political, socio-economic and financial costs of asylum have to be carried by one State, namely, the State of disembarkation. However, due to burden-sharing agreements, this will not be the case.

Finally, which State should bear the duty to disembark? Is it the State of the closest port or the State responsible for the search and rescue? As long as a duty to disembark could be imposed (when linked to financial and burden-sharing agreements), compliance with the *non-refoulement* principle can be guaranteed and the definition of a place of safety becomes binding, it actually does not matter, as in practice this will often be the same port. Nonetheless, when the duty to disembark is legally connected to the duty to rescue, this could lead to several difficulties, as mentioned in the evaluation of the 2009 FAL Principles. Choosing the closest port would avoid these problems. Moreover, Malta—a State that must cope with a lot of migrants at sea nowadays<sup>113</sup>—could in this way be stimulated to sign and to ratify the SOLAS and SAR Amendments.

The European Parliament recently approved new Law of the Sea Guidelines addressing the interception operations at sea by Frontex, the specialized EU Agency tasked to coordinate the operational cooperation between Member States on border security. According to these new rules, priority should be given to disembarkation in the third country whence the ship carrying the

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<sup>112</sup> Commission (EC), 'Strengthened practical cooperation' (Communication) COM(2006)67 final, 17 February 2006, available at: [http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0067en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0067en01.pdf).

<sup>113</sup> Based on the first indicator (national population), between 2005 and 2009 the two Mediterranean islands of Cyprus and Malta received on average the highest number of asylum-seekers compared to their national population, i.e., 30 and 22 applicants per 1,000 inhabitants, respectively. Source: UNHCR, 'Asylum Levels and Trends in Industrialized Countries 2009—Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European countries' (23 March 2010) at 8, available at: <http://www.unhcr.org/4ba7341a9.html>.

persons departed, or through whose territorial waters or SAR region that ship transited, and if this is not possible, priority should be given to disembarkation in the host Member State, unless it is necessary to act otherwise to ensure the safety of these persons.<sup>114</sup> This means that the host country of the joint operation at sea carries the ultimate responsibility. Malta strongly opposes the Guidelines and stated that it refuses to host future Frontex operations. This situation makes it clear that choosing the closest port would indeed have been a better option.

## **Conclusion**

Disembarkation of persons—and especially migrants—rescued at sea is certainly a very sensitive issue, because States simply do not have a legally binding duty to grant these people access to their territory. Thus States would have to surrender part of their sovereignty to change the current situation. The discussions within the IMO show us that this is not likely to happen in the next couple of years. In the last decennium, States have transferred the issue from the IMO to the Interagency Group, and from the Interagency Group back to the IMO. At COMSAR 14, States even decided that this is only a regional problem and that no additional international rules are needed.

Although it is true that the focus should first be on the implementation and the enforcement of the existing rules, States must also take steps to improve and amend the legal framework. If States would accept a responsibility to disembark persons in the long term, this responsibility should definitely not be linked to the duty to rescue people in distress. Therefore, the closest port that can be regarded as a place of safety would be the best choice for both the seafarers and the persons rescued.

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<sup>114</sup> European Commission, Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final, available at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com%282009%290658\\_/com\\_com%282009%290658\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282009%290658_/com_com%282009%290658_en.pdf); Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, O.J. L 111/20 (4 May 2010).

