Unexpected Maritime Crossroads
The 'duty to rescue' and the human rights content of the Law of the Sea

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Abstract

Under maritime law, both State and private vessels must provide assistance to people in distress at sea. This "duty to rescue" is enshrined in several international treaties and reflects general customary law. It also entails the accessory obligation to disembark the rescued people in a "place of safety". This paper aims to demonstrate that these obligations entail correspondent human rights to be rescued and disembarked in a place of safety. This paper also shows the intersection and interdependence of the law of the sea and human rights in the field of duty to rescue.

Keywords:

Law of the Sea; Migrants; Rescue; Disembarkment; Place of Safety; Legal Theory

1. Introduction

The law of the sea is a body of international law governing the rights, duties and relations of States in the maritime context. The scope of this paper is to show that the law of the sea is premised on the need to ensure human safety and is inspired by principles of human rights. It aims to demonstrate that the law of the sea comprises human rights rules, in particular the right of people rescued at the sea to disembark in a safe place.

The author is not applying existing human rights provisions to the maritime context but rather intends to demonstrate the existence of a right to disembark within the law of the sea itself. This is relevant since it identifies an additional safeguard which applies to all rescuees in the maritime environment and is additional to other protections derived from human rights instruments or norms. In particular, this extends beyond refugee law protections, which apply only to asylum seekers.

This paper starts from a general exploration of intersectionality between the law of the sea and human rights law. It shows that these two areas of law are not strangers to each other and rather are often interconnected. The following section provides an overview of the duty to rescue people in distress at sea and its consequences and corollaries. It will be tentatively demonstrated that the duty to rescue entails also the duty to disembark rescuees in a safe place. The last parts of the paper develop the theory of a human right to be disembarked in a place of safety. This perspective, it is concluded, is coherent with the teleological role of international law and human rights as theorised by contemporary critical thinkers.

2. The humans in navigation: general correlations between the law of the sea and human rights law

In 2010, Professor Tullio Treves, Judge at the International Tribunal for the Law of the Sea (ITLOS) between 1996 and 2011, wrote that "Rules of the Law of the Sea are sometimes inspired by human rights considerations and may or must be interpreted in light of such considerations. The application of rules on human rights may require the consideration of rules of the Law of the Sea."[1] Human Rights courts can influence the interpretation of the law of the sea rules; and *vice versa*, the point of view of a maritime tribunal may influence the application of human rights.[2] Treves' influential opinion suggests that the law of the sea and human rights are closely interrelated.

However, this view is not universally endorsed by legal scholars. Irini Papanicolopulu observed that traditionally maritime legal scholarship only examines issues through the lens of the law of the sea regime and fails to devote any attention to the rights of persons at sea.[3] This reflects the traditional view that the creation of the law of the sea is primarily aimed to protect States' interests and resolve States' problems. Papanicolopulu claims that the traditional discourse around the law of the sea is pervasively 'State-centred' as opposed to 'human-centred': the law of the sea has been designed *by* States, *for* States, and obligations are generally due to other States instead of individuals.[4] As Papanicolopulu notes, this perspective reflects a fragmented view of international law where different legal regimes are

[1] Tullio Treves, *Human Rights and the Law of the Sea* in Berkeley Journal of International Law Vol. 28 Issue 1 (2010) at 12.
[2] Tullio Treves, *Law of the Sea*, in Max Planck Encyclopedia of Public International Law [MPEPIL] (April 2011) para. 130.
[3] Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press 2018) at 67-68.
[4] *Id*. at 84-86.

deemed to be parallel universes and most legal scholars of one sector never bother to look into other frameworks. Haines adds that this inadequate academic coverage of the maritime application of human rights law is both a cause and a consequence of the international community's failure fully to address the impunity for serious human rights abuses at sea.[5]

Nevertheless, neither the deliberate lack of human rights concerns of traditional maritime legal scholars nor the State-based nature of legal obligations proves the disengagement of the law of the sea from human rights law. The case-law of international courts confirm the partial overlap of these two bodies of law. This is also supported by relevant legal literature from those authors who have delved into the interplay of the law of the sea and human rights.

Human Rights Regime borrowing from Principles of the Law of the Sea

The first example of judicial cross-fertilisation between the law of the sea and human rights is the work of the European Court of Human Rights (ECtHR). The ECtHR applies a holistic approach to human rights, their sources and their interpretation. In its judgements, the Court takes into consideration a comprehensive set of norms and standards: not only the relevant national and supranational law, such as constitutional values or rights enshrined in applicable human rights treaties, but also the jurisprudence of other adjudicative bodies. For example, the ECtHR has established a 'judicial dialogue' with the Inter-American Court of Human Rights (IACtHR) where the two regional Courts mutually recognise the relevance of the other's case-law in advancing general human rights principles.[6] The ECtHR also borrows concepts and principles from other sectors of law, including the law of the sea. For instance, in the case *Mangouras v. Spain*, concerning a maritime environmental disaster caused by an oil tanker, the ECtHR explicitly took into consideration the approach taken by the ITLOS in similar disputes.[7] In other cases, the ECtHR utilised the law of the sea provisions and principles to adjudicate human rights matters. In *Women on Waves*, the Court showed that the law of the sea is relevant to frame the application of principles contained in the European Convention on Human Rights (ECHR), such as the principles of necessity and

[5] Steven Haines, *Developing human rights at sea* in Ocean Yearbook Vol. 35 (2021).
[6] For a list of cases where the ECtHR used the IACtHR's case-law, *see* Council of Europe/European Court of Human Rights, *Research Report 'References to the Inter-American Court of Human Rights and Inter-American instruments in the case-law of the European Court of Human Rights'* (2016).
See also Council of Europe/European Court of Human Rights & Inter-American Court of Human Rights, *Dialogue Across the Atlantic: Selected Case-Law of the European and Inter-American Human Rights Courts* (WLP 2015).
[7] ECtHR, *Mangouras v. Spain*, appl. No. 12050/04, Judgement of September 28, 2010, paras. 46-47.

proportionality.[8] The case concerned the decision of Portuguese authorities to prohibit the ship Borndiep from entering Portuguese territorial waters. The ship's crew had been chartered with a view to stage activities promoting the decriminalisation of abortion, which was illegal in Portugal at that time. The Court held unanimously that there had been a violation of Article 10 (freedom of expression) of the ECHR, and that the passage of Borndiep in Portuguese territorial waters had to be considered 'innocent' as per the definition of Articles 19 and 25 of the United Nations Convention on the Law of the Sea (UNCLOS).[9] A year later, in *Medvedyev v. France*, the Court validated France's exercise of enforcement jurisdiction over a Cambodian drug smuggling vessel on the high seas on the basis of the alleged 'universal jurisdiction' over piracy provided by the UNCLOS.[10] …….

For its part, the law of the sea also borrows principles from human rights law. The ITLOS itself has incorporated human rights ideas into its own judgements, as recently highlighted by Marta Bo and Anna Petrig.[11] As stressed by the ITLOS in *M/V Saiga 2*, "[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law."[12] And indeed, some law of the sea provisions arguably have human rights content. The 2005 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), for example, contains detailed human rights guarantees at sea that span from the safety of life to the protection of human dignity, and even from the right to effective remedies to the fair treatment of persons in custody.[13] The SUA Convention also contains a non-prejudice clause safeguarding human rights in general, stating: "Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international human rights, refugee and humanitarian law."[14]

Despite not being as explicit as the SUA Convention, the UNCLOS can be read as having human rights content too. This is highlighted in the analyses of some prominent

[8] ECtHR, *Women on Waves and Others v. Portugal*, appl. No. 31276/05, Judgement of February 3, 2009.
[9] United Nations Convention on the Law of the Sea (UNCLOS) signed in Montego Bay on December 10, 1982, entered into force on November 16, 1994.
[10] ECtHR, *Medvedyev and Others v. France*, appl. No. 3394/03, Judgement of March 29, 2010.
[11] Marta Bo and Anna Petrig, *The International Tribunal of the Law of the Sea and Human Rights* in HUMAN RIGHTS NORMS IN 'OTHER' INTERNATIONAL COURTS 253 (Martin Scheinin ed., Cambridge University Press 2019).
[12] ITLOS, *M/V Saiga (No. 2)* case (*Saint Vincent and the Grenadines v. Guinea*), Judgement of July 1, 1999, No. 2, para. 155.
[13] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted on March 10, 1988, as amended by the 2005 Protocol, Articles 7, 8bis, 10 and 12bis.
[14] *Id*. Article 2bis.

commentators: Oxman noted that the UNCLOS "addresses traditional human rights preoccupations with the rule of law, individual liberties and procedural due process;"[15] Treves noted that "concerns for human beings, which lie at the core of human rights concerns, are present in the texture of [UNCLOS] provisions;"[16] Papanicolopulu noted that the purpose of several UNCLOS provisions is the protection of the life and physical integrity of people at sea.[17]

The human rights concerns contained in the UNCLOS emerge in particular when States exercise extraterritorial jurisdiction in the matter of crime prevention at sea. Even in international waters, the Convention generally imposes that States observe human rights obligations.[18] For instance, when conducting counter-piracy enforcement operations, which are primarily regulated by UNCLOS rules,[19] States are expected to respect the right to life of apprehended pirates and the prohibition of torture and arbitrary detention.[20] Failure to ensure respect for human rights may attract the competence of human rights courts, as happened in the abovementioned *Medvedyev v. France.* The same applies to the fight against maritime drug trafficking, slave transport, human smuggling.[21]

The law of the sea also protects against arbitrary deprivation of liberty in cases concerning the arrest of crew members for violation of anti-pollution or fisheries rules: Art. 73 UNCLOS contains the 'principle of prompt release,' according to which "[a]rrested vessels and their crews shall be promptly released upon the posting of a reasonable bond or other security." The same provision also forbids imprisonment and corporal punishments and imposes a duty to notify the flag State of the arrested foreign vessels. The ITLOS has applied this principle of prompt release in several cases where it ruled in favour of the right to personal freedom of shipmasters and their crew.[22] Remarkably, in the *Juno Trader* case [2004] the Tribunal

[15] Bernard Oxman, *Human Rights and the United Nations Convention on the Law of the Sea* in Columbia Journal of Transnational Law Vol. 36 (1998) 401–02.
[16] Treves (2010) *supra* at 3.
[17] Papanicolopulu (2018) *supra* at 86.
[18] *See infra.*
[19] Tullio Treves and Cesare Pitea, *Piracy, International Law and Human Rights* in THE FRONTIERS OF HUMAN RIGHTS. EXTRATERRITORIALITY AND ITS CHALLENGES 90 (Nehal Bhuta ed., Oxford University Press 2016).
[20] *Id*. at 113-117.
[21] Treves (2010) *supra* at 7-9; Papanicolopulu (2018) *supra* at 86; ECtHR, *Medvedyev* [2010], *supra*. Cf. Haines, according to which Art. 99 of UNCLOS on slavery at sea is "the most obvious provision of the entire Convention having IHRL significance." (Haines (2021) *supra*).
[22] *See* ITLOS, *M/V Saiga* case (*Saint Vincent and the Grenadines v. Guinea*), Judgment of December 4, 1997, No. 1; *Camouco* case (*Panama v. France*), Judgment of February 7, 2000, No. 5; *Monte Confurco* case (*Seychelles v. France*), Judgment of December 18, 2000, No. 6; *Volga* case (*Russian Federation v. Australia*),

expressly acknowledged the human rights impact of Art. 73 UNCLOS and highlighted how the duty of prompt release "includes elementary considerations of humanity and due process of law."[23] The Tribunal also stressed that "fairness" is a core purpose protected by art. 73.[24] In the *Tomimaru* case [2007], the Tribunal went further into specifying that States confiscating foreign vessels should respect not only the duty to promptly release but also "international standards of due process of law."[25]

Another field where both the law of the sea and international human rights law have a role to play is migration by sea. In 1993, the US Supreme Court upheld an executive policy that regulated the interception of vessels transporting aliens seeking to enter the United States illegally by sea. [26] The policy imposed to return migrants to their country of origin without first determining whether they qualify as refugees. The Supreme Court assumed that human rights law, including the principle of non-refoulement, did not apply to the interception of boats on the high seas. This sentence was then overturned by the Inter-American Commission for Human Rights (IACHR), which concluded that the United States had impermissibly returned intercepted migrants without making an adequate determination of their potential refugee *status*.[27] In particular, the Commission recognised that human rights law prevails over general maritime policies on visit and entry into national waters. Further, that the United States had breached the rights to life, liberty, personal security, equality before the law, effective remedy and the right to seek and receive asylum.[28] Nowadays, it is almost undisputed that human rights law cannot be disregarded in the matter of migration by sea.[29] For instance, in the landmark case of *Hirsi Jamaa v. Italy*, the ECtHR was adamant in clarifying that States must comply with the prohibition of refoulement and collective expulsion during rescue operations in international waters too.[30]

Judgment of December 23, 2002, No. 11; *Hoshinmaru* case (*Japan v. Russian Federation*), Judgment of August 6, 2007, No. 14.

[23] ITLOS, *Juno Trader* case (*Saint Vincent and Grenadines v. Guinea-Bissau*), Judgment of December 18, 2004, No. 13 at para. 77.

[24] *Id*.

[25] ITLOS, *Tomimaru* case (*Japan v. Russian Federation*), Judgment of August 6, 2007, No. 15.

[26] USSC, *Sale v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155 [1993].

[27] IACHR, *The Haitian Centre for Human Rights et al. v. United States* [1997] Case No. 10.675, Report No. 51/96.

[28] *Id*. at paras. 183-188.

[29] Treves (2011) *supra* para. 131.

[30] ECtHR, *Hirsi Jamaa v. Italy*, appl. n. 27765/09, Judgement of February 23, 2012.

See also Efthymios Papastavridis, *The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm* in German Law Journal 21 (2020) 417–435. *See* also EU Charter of Fundamental Rights, *supra* art. 19; Protocol No. 4 to the European

Lastly, another intersection between the law of the sea and human rights arguably concerns vessels in distress at sea. Migrants, asylum seekers and any other seafarer may find themselves in hardship while navigating and may be rescued by other boats nearby. The obligation to provide assistance to persons or ships in distress is a core provision of the law of the sea and, as Treves noted, is clearly oriented towards the protection of the human right to life.[31] The next section will focus on the duty to rescue and its human rights content.

3. The duty to rescue and disembark in a "place of safety": a human rights theory

The law of the sea obliges shipmasters to help people found in distress at sea. This duty to rescue applies to both State and private vessels and thus binds captains of governmental ships, commercial carriers, rescuing NGOs boats.[32] It reflects the obligation to protect the fundamental right to life and the principle of solidarity informing general international law. Over centuries of ordinary and rather spontaneous application, the duty to rescue has been consolidated into a principle of customary maritime law.

In the 20th century, the duty to rescue was codified by a number of international treaties, such as the 1974 Convention for the Safety of Life at Sea (SOLAS),[33] the 1979 Convention on Search And Rescue (SAR),[34] the 1989 International Convention on Salvage of the International Maritime Organization (Salvage)[35] and the abovementioned UNCLOS. According to these conventions, shipmasters of either national or private vessels are required to provide assistance to endangered people on the high seas. These conventions confirm the binding force of the duty to rescue upon both public authorities and private actors, and emphasise the centrality of human life at the core of maritime norms: State responsibility

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Convention for the Protection of Human Rights and Fundamental Freedoms, *Securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto*, 16 September 1963, entered into force on May 2, 1968, as amended by Protocol No. 11, art. 4.

[31] Treves (2010) *supra* at 3.

[32] For a comprehensive analysis of the legal obligation of private actors when it comes to rescue, *see* Jean-Pierre Gauci, *When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations*, British Institute of International & Comparative Law (BIICL) (November 2020).

[33] International Convention for the Safety of Life at Sea (SOLAS) signed in London on November 1, 1974, entered into force on May 25, 1980, Regulation No. 15.

[34] International Convention on Maritime Search and Rescue (SAR) signed in Hamburg on April 27, 1979, entered into force on June 22, 1985, Regulation No. 2.1.10.

[35] International Convention on Salvage of the International Maritime Organization (Salvage) of April 28, 1989, entered into force on July 14, 1996, replacing the Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea of September 23, 1910.

towards all people entails State duty to ensure that companies, organisations and individuals perform rescues when necessary.[36]

Article 98 of the 1982 UNCLOS reads:

"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 […] Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose."[37]

This means that the convention not only introduces a duty to assist people intercepted by chance but also to actively look for people in need, at least for coastal States. This is confirmed by the SOLAS and SAR Conventions, according to which each coastal State must establish its own "SAR zone" ("Search and Rescue") in national waters where it is required to provide assistance to vessels and individuals at distress. Foreign flagged vessels are also allowed to enter the territorial sea and SAR zone of another State to carry out a rescue operation there, pursuant to the customary right-duty to render assistance to any ship in distress, wherever that is.[38] Arguably, there must be symmetry between duty-bearers and right-holders: the positive obligation to search and rescue opens to a correspondent, claimable right to be searched and rescued.[39]

This duty to rescue needs to be observed in a non-discriminatory fashion. According to Art. 98 of UNCLOS - "masters are obliged to assist and rescue *any* person at distress at sea; thus, no discrimination can be applied in relation to the *status* of those to be rescued."[40] The UN

[36] SOLAS Convention [1974] Chapter V, Regulation 33.1; Salvage Convention [1989] art. 10.
[37] UNCLOS [1982] *supra* art. 98. *See* also SAR Convention [1979] *supra.*
[38] Paolo Busco, *Another Perspective on Search & Rescue in the Mediterranean* Sea in Opinio Juris (May 11, 2020).
[39] Cfr. Papanicolopulu (2018) *supra* at 87.
[40] Ida Caracciolo, *Migration and the Law of the Sea: Solutions and Limitations of a Fragmentary Regime* in THE INTERNATIONAL LEGAL ORDER: CURRENT NEEDS AND POSSIBLE RESPONSES: ESSAYS IN HONOUR OF DJIAMCHID MOMTAZ 276 (James Crawford, Abdul G Koroma, Said Mahmoudi and Alain Pellet eds., Brill Nijhoff 2017).

Refugee Agency (UNHCR)[41] and the International Maritime Organization (IMO) issued similar policy resolutions: "survivors of distress incidents are given assistance regardless of nationality or *status* or of the circumstances in which they are found."[42] This commitment to equal treatment owes to the human rights principle of non-discrimination, which applies to the *erga omnes* obligation to protect everyone's life from arbitrary deprivation.

Further, the *Guidelines on the Treatment of Persons Rescued at Sea* issued by the Maritime Safety Committee (MSC) in 2004 clarify that the duty to rescue and render assistance under the law of the sea also entails respect for the fundamental rights of the rescued persons.[43] The MSC *Guidelines* prescribe that rescuing States should comply with humanitarian and other legal obligations and that rescued people are to be treated humanely and their immediate needs must be met.[44] In addition, *all* people are entitled to a right to be rescued in compliance with the principle of non-discrimination, regardless of their *status* or other conditions.[45]

The duty to rescue is not exhausted by the mere act of rescuing people and placing them on board. The adoption of the 2004 MSC *Amendments* to the SOLAS and SAR Conventions marked the introduction of the additional and complementary "duty to disembark" the rescued people in a "place of safety."[46] The amended text indicates that States bear the "primary responsibility" to ensure the success of rescue operations in their SAR zone where States have the duty to actively look for and assist people in distress. This includes making sure that the rescuing ship is timely released of its obligation and burden, and that rescued people are disembarked to a place of safety. Such disembarkation needs to be arranged as soon as reasonably possible. The MSC *Guidelines* further clarified the States' obligation to ensure that a place of safety for disembarkment is provided.[47] The duty to disembark appears

[41] *See* UNHCR Conclusions No. 15 (XXX) *Refugees without an Asylum Country*, 1979, para. (c); No. 23 (XXXII) *Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, 1981, para. 1; No. 38 (XXXVI) *Rescue of Asylum-Seekers in Distress at Sea*, 1985 at para. (a).

[42] IMO Assembly Resolution A.920(22), *Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea*, adopted on November 29, 2001, Point 1 2.

[43] Maritime Safety Committee, Resolution MSC.167(78) of May 20, 2004, *Guidelines on the Treatment of Persons Rescued at Sea*, amending the SAR Convention [2004] Regulation 5.1.2. *See* also IMO A.920(22) [2001] *supra*, Point 1.3.

[44] *Id*. at Regulation 5.1.

[45] *Id*.

[46] Maritime Safety Committee, Resolution MSC.153(78) *Adoption of Amendments to the International Convention for the Safety of Life At Sea, 1974*, of May 20, 2004, *Annex*, No. 4, and Resolution MSC.155(78) *Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979* of May 20, 2004, *Annex*, No. 3.1.9.

[47] MSC *Guidelines* [2004] Regulation No. 1.3.2..

See also IMO, International Chamber of Shipping (ICS) and UNHCR, *Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees (updated version)*, January 2015, 3: "Just as Masters have an

therefore as a functional continuation of the duty to rescue or as the conclusive activity. Just as the duty to rescue implies the right to be rescued, it seems that this duty to disembark would imply a right to be disembarked in a safe place.

However, the existence of a duty to disembark is not universally agreed upon by lawyers and legal scholars. Some commentators maintain that an unequivocal duty to disembark binding individual States cannot be found in international law of the sea.[48] In 2010, Coppens and Somers stressed that, although regrettably, provisions on the duty to rescue cannot be read as to imply an obligation for States to disembark rescued persons on their territory.[49] In their view, the fact that the relevant conventions do not mention explicitly a duty to disembark is a clear indication of States' intention not to be bound by such an obligation.[50] Further, coastal States are accorded the privilege to regulate access to their ports and waters by the principles of sovereignty and non-interference, as elaborated by the International Court of Justice in the *Nicaragua* case [1986].[51] Thus, these scholars claim that international law cannot impose an unequivocal duty to accept disembarkation upon any State unless vessels are under hardship at that given moment.[52] In other words, States are obliged to allow disembarkment only when the ship, its crew and the rescued people are still endangered in that given moment and a failure to ensure a safe harbour would result in losses and fatal casualties.

This perspective does not appear as fully convincing. The 1986 *Nicaragua* decision, although still a landmark case for international law, has not aged well in relation to sovereignty and disembarkment. More recent national and international case-law seems to consistently point in a different direction and the *Nicaragua* jurisprudence, at least on disembarkment, has been broadly left behind. For example, the abovementioned 2004 MSC *Amendments* and *Guidelines* to the SOLAS and SAR Conventions leave few doubts about the existence of a duty to allow disembarkment.[53] According to the amended SOLAS and SAR Conventions,

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obligation to render assistance, Member States have a complementary *obligation* to coordinate and cooperate so that persons rescued at sea are disembarked in a place of safety as soon as possible".

[48] Busco (2020) *supra*; Virginia Passalacqua, *The 'Open Arms' case: Reconciling the notion of 'place of safety' with the human rights of migrants* in EJIL:Talk! (May 21, 2018); Patricia Mallia, *The MV Salamis and the State of Disembarkation at International Law: The Undefinable Goal* in ASIL Insights Vol. 18 Issue 11 (May 15, 2014). *See* also Coppens and Somers *infra*.

[49] Jasmine Coppens and Eduard Somers, *Towards New Rules on Disembarkation of Persons Rescued at Sea?* In The International Journal of Marine and Coastal Law Vol. 25 (2010) at 387.

[50] *Id*. at 392.

[51] ICJ, Nicaragua v. U.S. (*Military and Paramilitary Activities in and against Nicaragua*), Judgement of June 27, 1986.

[52] *See inter alia* Busco (2020), Passalacqua (2018) and Mallia (2014) *supra*.

[53] *See supra*.

the State in whose SAR zone people have been saved bears the primary responsibility to identify a safe place for disembarkment. Carrera and Cortinovis add that the conventions must be read through the lens of the principle of effectiveness which supports the thesis of a "default obligation of disembarkation on the SAR responsible state ... if no other option ensuring the safety of the rescued people and the swift conclusion of the disembarkation operation exists."[54] Further, the *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* clearly indicate that "if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued."[55] While the *Principles* are not binding, they provide a key interpretation of the provisions contained in the amended SAR and SOLAS Conventions, which are mandatory for signatories. These Conventions, like UNCLOS, have been broadly ratified and are generally regarded as fundamental sources of law in maritime matters.[56] The adoption of the *Amendments*, the *Guidelines* and the *Principles* shows that the international community is now ready to accept a general duty to allow disembarkation. Arguably, if the failure to include such duty in the original SOLAS and SAR Conventions indicated that States were reluctant to accept such obligation, as Coppens and Somers maintain, then these subsequent amendments indicate that States now agree to be bound by this "primary responsibility" to ensure disembarkment in a safe place.

In summary, it is held that the duty to disembark is the necessary and logical termination of the duty to rescue without discrimination. A right to be safely disembarked is inferable from the right to be rescued, and full enjoyment of the latter is not achieved until the former is also satisfied. We can safely conclude that a State cannot be relieved of its responsibilities towards rescued persons until they have been disembarked in a place that can be considered safe. The next section will explore the notion of 'safety' for the purpose of disembarkment.

4. Safe disembarkation and human rights safeguards

It has been mentioned that, according to the 2004 MSC *Amendments*, States have the primary responsibility to ensure that rescued persons are effectively delivered to a place of safety as

[54] Sergio Carrera and Roberto Cortinovis, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean Sailing Away from Responsibility?* in CEPS Papers in Liberty and Security Vol. 10 (June 2019) at 13.
[55] IMO, Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, January 22, 2009, FAL.3/Circ.194, point 2.3.
[56] According to the UN Treaty database (https://treaties.un.org), 65 States are part of the SAR Convention and 162 are part of the SOLAS Convention.

soon as reasonably practicable.[57] Thus, the place of disembarkment must be identified based on the criteria of safety (a place that can be considered safe), promptness (as soon as possible) and feasibility or practicality (in a suitable port with no technical obstacles preventing safe disembarkment).

Normally, disembarkment is safer, faster and easier in the rescuing coastal State or in the State in whose waters the rescue was performed. Such a State is likely to be the closest one and disembarkment operations can be easily coordinated in its own ports. If that is the case, the State in question cannot refuse to comply with the duty to allow disembarkment. In some cases, however, there might be practical reasons for the disembarkment to take place in a different State. For example, another State may appear more promptly accessible and safer. In such a circumstance both States have the duty to cooperate in order to operate disembarkation quickly and without prejudice for safety.[58]

As a general norm, the criterion of safety shall prevail over that of proximity. Thus, timing should yield to safety concerns when identifying a place for disembarkment. Proximity prevails only when safety threats on land are marginal and prolonging the permanence on-board would compromise wellbeing and mental health. In other words, the "safe place" to disembark is not necessarily the closest port; rather, it is the closest place that can be considered safe.

In the words of the MSC *Guidelines,* a place of safety "is a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place where transportation arrangements can be made for the survivors' next or final destination."[59] Delimiting the notion of a safe place is not, however, an easy task – neither in theory nor in practice. Decisions on disembarkment need to be taken on an *ad hoc*, case by case basis considering the specific circumstances of each rescue operation. A viable criterion to implement should be one of the best interest of the rescued people: the disembarkment operation should be preferred that entails less risk to human life and less psychological distress.

[57] MSC *Amendmnets* [2004], No. 3.1.9.
[58] *Id.*
[59] MSC *Guidelines* [2004] *supra* Regulation 6.12.

The safety of a place must be assessed in the light of general standards of international law, which include human rights. This found confirmation, at the regional level, in 2019, when a Recommendation of the Commissioner for Human Rights of the Council of Europe called on rescuing States to be "able to fully meet [their] obligations under international maritime law and human rights law, including with regard to safe disembarkation", which cannot happen in a "[…] place that cannot be considered safe under maritime or human rights law."[60] The 2011 Resolution of the Council of Europe on interception and rescue at sea calls human rights directly into play and claims that "the notion of 'place of safety' should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights."[61] In the light of these considerations, the safety of a place needs to be assessed based on a respect for generally accepted human rights and *jus cogens* norms, such as the principle of non-refoulement, the prohibition of torture, persecution, inhuman or degrading treatment, the absence of threats to life, security and dignity, the recognition of fundamental freedoms and effective protections from discrimination or persecution.

The *ratio* of this set of norms and principles lies, once again, on the protection of human survival and dignity. This shows once again the connection and interdependence of human rights standards and the legal framework regulating seas and navigation. The duty to rescue is complied with only when the rescued people are disembarked in a place where they are not in danger, and in such a timely manner that would minimise their distress and sufferance. States are expected to cooperate in order to ensure prompt disembarkment in the most suitable port, including their own.

5. Conclusion: Unfolding duties and upholding rights

It has been mentioned in the second section of this paper that traditional law of the sea considers international law as a primarily inter-State matter, where obligations are due only towards other States. However, the author has exposed how the law of the sea contains express duties that States bear towards not only their citizens but humans in general.

It is held that States have the duty to rescue people in need and disembark them in a safe place. This obligation is mirrored by the correlative right of people to be rescued and

[60] Commissioner for Human Rights of the Council of Europe, Recommendation, *Lives Saved. Rights Protected* (June 2019) Nos. 4-5 22-23.
[61] Council of Europe, Resolution of June 21, 2011, No. 1821, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, Point 5.2.

disembarked, regardless of their origin, national belonging etc. Hence, the author suggests that this *erga omnes* subjective legal position constitutes a "human right to disembark in a safe place" which is a logical-juridical corollary of the duty to rescue. Thus, this paper claims that not only human rights and refugee law protections are to be applied in maritime contexts, but also that the law of the sea contains human rights norms itself, in particular the right to safe disembarkation. In other words, the law of the sea holds in itself a precise humanitarian and human rights content which is not borrowed from external legal frameworks, but rather is enshrined in maritime legal instruments and is rooted on the law of the sea's own legal principles, rationales and consuetudes. The rationale behind these norms lies on the centrality of human safety.

This paper adds to the growing literature seeking to overcome the traditional fragmentation of branches of international law. The embodiment of human rights within the law of the sea and *vice versa* is gradually starting to receive some recognition within legal scholarship.[62] Significant examples are the work of Itamar Mann on 'humanity at sea,'[63] and Papanicolopulu's conceptualisation of the 'special regime' of human rights at sea.[64] This is further supported by the advocacy and research work stemming from civil society organisations, such as the recent NGO Human Rights at Sea (HRAS), which prompted the development of the 2019 Geneva Declaration on Human Rights at Sea.[65]

Ultimately, a human rights interpretation of the law of the sea is coherent with the theoretical view on the role of general international law in current times. This joins critical international law scholarship in welcoming a central role for humans and human rights within the broad international legal discourse – what Theodor Meron would call "humanisation of international law".[66] This is premised on a human-centric understanding of international law, which acknowledges the necessity of a shift from the centrality of State sovereignty to the centrality of State responsibility towards its inhabitants and people in general. International law should "serve human beings" and be a "creative medium devoted to building a humane

[62] *See* Sofia Galani, *Maritime Security and Human Rights: The Role of the EU and its Member States in the Protection of Human Rights in the Maritime Domain* in International Journal of Marine and Coastal Law (2019); Bo & Petrig (2019) *supra.*
[63] Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge University Press 2016).
[64] Papanicolopulu (2018) *supra*; *see* also Haines (2021) *supra.*
[65] Retrievable at https://gdhras.com/.
[66] Theodor Meron, *The Humanization of International Law* (Brill 2006).

world public order… [and] advancing an enlightened global system dedicated to the promotion of human dignity."[67] Indeed, the specific role of international (human rights) law is that of protecting humans and preserving their wellbeing and existence; and the law of the sea is no exception to this.

[67] Harold Hongju Koh, *Is There a "New" New Haven School of International Law?* in The Yale Journal of International Law Vol. 32 (2007) 572.
Cf. Myres Mcdougal, Harold Lasswell and Lung-Chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980).