

General legal considerations: search-and-rescue operations involving refugees and migrants at sea

A. Introduction

This note sets out a number of legal considerations relevant to search-and-rescue (SAR) operations involving refugees and migrants at sea, including issues arising in the context of cooperation between the range of actors involved in SAR responses.¹

B. The principle of *non-refoulement*: general considerations

1. The principle of *non-refoulement* is a cardinal principle of international refugee law, most prominently expressed in Article 33 of the 1951 Refugee Convention.² It prohibits any State conduct leading to the return of a refugee ‘in any manner whatsoever’—including by way of interceptions of various kinds on land or at sea³ (whether in States’ territorial waters, contiguous zones, or the high seas)—to a place where they would be at risk of persecution related to a 1951 Refugee Convention ground or of other serious violation of human rights.⁴ The principle of *non-refoulement* applies wherever the State in question exercises jurisdiction, including when acting outside its territory (including outside its territorial waters) in the context of maritime search-and-rescue operations or interception at sea.⁵
2. UNHCR’s Executive Committee (“ExCom”) has emphasized the fundamental importance of fully respecting the principle of *non-refoulement* for people at sea, underlining that:

¹ Legal considerations set out in this note arise under relevant areas of international law. It does not consider in detail or specifically pronounce upon obligations arising under regional legal frameworks.

² Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137; as amended by the Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (together, “1951 Refugee Convention”).

³ See ExCom Conclusion No. 97 (LIV), 2003, para (a)(iv). *Refoulement* is generally understood to refer to return to a place other than one which is controlled by the State whose conduct is implicated in that return. In cases where a State returns persons to its own territory or blocks their departure (including as a result of ‘interception’ measures), other human rights may be engaged.

⁴ Return to risk of serious human rights violations is prohibited, for example, by Art 3 of the the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), 10 December 1984 (entered into force 26 June 1987); and under Arts 6 and 7 of the International Covenant on Civil and Political Rights (“ICCPR”), 16 December 1966 (entered into force 23 March 1976)—see, eg, UN Human Rights Committee, *General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, www.refworld.org/docid/478b26ae2.html, at para 12.

⁵ UNHCR, *UNHCR’s oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy*, 22 June 2011, Application No. 27765/09, www.refworld.org/docid/4e0356d42.html. UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paras 24, 26, 32-43, www.refworld.org/docid/45f17a1a4.html; UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy*, March 2010, paras 4.1.1-4.2.3, www.refworld.org/docid/4b97778d2.html; UNHCR, *UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR*, 17 February 2012, para 2(4), www.refworld.org/docid/4f4c959f2.html. See also UN Human Rights Committee General, above n 4, at para 10. The extraterritorial applicability of human rights obligations, including the principle of *non-refoulement*, is firmly established in international human rights law. See Judgment of the International Court of Justice in *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, (2005) ICJ Gen. List No. 116, 19 December 2005, para 180, www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf. Also, Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf, para 111, and International Court of Justice, *Order on the Request for the indication of provisional measures, Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, (2008), ICJ Gen. List No. 140, 15 October 2008, para 109, www.icj-cij.org/files/case-related/140/140-20110401-JUD-01-00-EN.pdf.

interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.⁶

3. To give effect in good faith to their obligations⁷ under the 1951 Refugee Convention and relevant international human rights instruments, including the prohibition against *refoulement*, States are obliged, inter alia, not to hand over those concerned to the control of a State where they would be at risk of persecution (direct *refoulement*), or from which there is a foreseeable possibility that they will be returned to another country where such a risk exists (indirect *refoulement*).⁸
4. Moreover, States parties are required to make independent inquiries as to the need for international protection of persons seeking asylum,⁹ a duty recognized in binding decisions of a wide range of national and regional courts.¹⁰ Courts, as well as ExCom, have underlined the obligation to provide persons seeking asylum with access to fair and efficient procedures for determining their status and protection needs.¹¹
5. Persons rescued or intercepted at sea cannot be summarily turned back or otherwise returned to the country of departure, including in particular where to do so would deny them a fair opportunity to seek asylum. Although search-and-rescue operations and interceptions at sea are distinct, *non-refoulement* obligations are engaged equally in both circumstances. A person who is rescued or intercepted at sea need not expressly indicate a desire or intention to seek asylum, or use any special form of words to express that desire or intent, in order for the principle of *non-refoulement* to be engaged.¹² If the State concerned is aware or ought to be aware of facts about the profile of persons in respect of whom return is contemplated, or of circumstances in the country to which return is contemplated, which indicate a risk that such return may constitute

⁶ ExCom Conclusion No. 97 (LIV), 2003, para (a)(iv).

⁷ Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, Art 26.

⁸ UNHCR, *Note on Non-Refoulement* (EC/SCP/2), 1977, para 4.

⁹ UNHCR, *UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, at paras 74-75.

¹⁰ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, paras 146-148, www.refworld.org/docid/4f4507942.html; *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, paras 286, 298, 315, 321, 359, www.refworld.org/docid/4d39bc7f2.html; *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004, para 26, www.refworld.org/docid/41c17ebf4.html; *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013, paras 56, 64, www.refworld.org/docid/515010a52.html.

¹¹ ExCom Conclusion No. 81 (XLVIII), 1997, para (h); ExCom Conclusion No. 82 (XLVIII), 1997, para (d)(ii) and (iii); ExCom Conclusion No. 85 (XLIX), 1998, para (q). *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, paras 146-148, www.refworld.org/docid/4f4507942.html; *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, paras 286, 298, 315, 321, 359, www.refworld.org/docid/4d39bc7f2.html; *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013, paras 56 and 64, www.refworld.org/docid/515010a52.html. Procedures need to allow for an examination of the relevant facts and the application of the eligibility criteria of Art 1 of the 1951 Convention, in order to help a State determine who should benefit from refugee protection, and who should not: see UNHCR, *B010 v. Minister of Public Safety and Emergency Preparedness: Factum of the Intervener* (UNHCR), 2 February 2015, para 13, www.refworld.org/docid/54d09bb44.html.

¹² *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para 133, www.refworld.org/docid/4f4507942.html. UNHCR, *UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, 29 March 2011, Application no. 27765/09, para 4.3.4, www.refworld.org/docid/4d92d2c22.html. UNHCR, *Oral intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, 22 June 2011, Application no. 27765/09, p 4, www.refworld.org/docid/4e0356d42.html.

refoulement, these must be taken into account—regardless of whether there has been an explicit and articulated request for asylum.¹³

6. Accordingly, before disembarking, transferring, or otherwise delivering or returning a person who may be in need of international protection to the territory or jurisdiction of another State, States need to ensure that the person concerned:¹⁴
 - will be admitted and protected against *refoulement* there;
 - will have access to fair and efficient procedures for the determination of refugee status or, as applicable, other forms of international protection (including the ability to benefit from previous recognition of refugee or similar protective status);
 - will be treated in accordance with international refugee law and human rights standards, including appropriate reception arrangements and safeguards against arbitrary detention, as well as appropriate assistance for persons with specific needs; and
 - if recognized as being in need of international protection, will be able to enjoy it in line with relevant standards.

Disembarkation may, however, be required in limited circumstances as a matter of urgency in order to protect human life in a situation of distress or force majeure (for example, if the rescuing vessel itself were at risk of sinking, or if the vessel were forced under duress to disembark people in a particular place, or required to do so to save their lives),¹⁵ where those considerations may take priority. In such cases, however, all possible measures need to be taken to ensure protection from *refoulement*, while seeking first and foremost to preserve human life. See also sections D and E below.

7. Substantive assessment of the admissibility or merits of an international protection claim ought **not** to take place at sea, unless reception arrangements and eligibility screening processes in line with international standards can be guaranteed.¹⁶ This holds *a fortiori* where a State involved in the rescue or interception operation is aware or ought to be aware that a proposed place of disembarkation may not meet relevant standards—as set out in paragraph 6 above—generally or in respect of a particular individual, or where any doubt subsists in that regard. International protection claims should ordinarily be processed on land in the territory of the State in which those concerned have arrived (including following their arrival in the State’s territorial waters) or which otherwise has jurisdiction over them (including where the State has exercised effective control over those concerned outside its territory).¹⁷ At the same time, a State which allows disembarkation on its territory of rescued persons—particularly in situations involving large numbers of people—need not, in UNHCR’s view, be solely responsible for providing durable

¹³ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para 133 and concurring opinion of Pinto Albuquerque J (p 66), www.refworld.org/docid/4f4507942.html. UNHCR, *Oral intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, 22 June 2011, Application no. 27765/09, www.refworld.org/docid/4e0356d42.html.

¹⁴ For relevant standards, see generally UNHCR, *Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, www.refworld.org/docid/51af82794.html (“Transfer Note”). It should be recalled in particular that the best interests of the child must be a primary consideration in any disembarkation or transfer decision affecting children, including unaccompanied or separated children.

¹⁵ Public law principles exclude responsibility of the author of an act when, in a situation of distress, there is no other reasonable way of saving the author’s life or the lives of other persons entrusted to the author’s care. Responsibility is also excluded in cases of force majeure (that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the author). See Articles 24 and 23 of the Annex to A/RES/56/83, 12 December 2001 (ARSIWA) available at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf. See below, n 38.

¹⁶ See for example, UNHCR, *High Commissioner’s Dialogue on Protection Challenges: Protection at Sea - Background Paper*, 11 November 2014, paras 6, 18 and 29, www.refworld.org/docid/54b8fa5d4.html; UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, www.refworld.org/docid/4cd12d3a2.html (“Maritime Interceptions Paper”), at para 56 and *passim*.

¹⁷ See, for example, UNHCR, *Transfer Note*, above n 14.

solutions on its own territory, if appropriate responsibility-sharing mechanisms are established in line with international law and applicable regional legal frameworks.

C. Search and rescue: general considerations

8. International maritime law and the law of the sea impose clear duties on flag States, coastal States, and shipmasters with regard to assisting persons in distress at sea.¹⁸ These duties, which reflect a longstanding maritime tradition, are set out in a number of key international treaties, complemented by guidelines developed by the International Maritime Organization (“IMO”).¹⁹
9. Flag States shall require masters of a vessel, in so far as they can do so without serious danger to the ship, its crew or passengers, to:
 - render assistance to any person found at sea in danger of being lost; and
 - 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 or her.²⁰

Similarly, the master of ‘any ship which is in a position to provide assistance on receiving information from any source that persons are in distress at sea is bound to proceed with all speed to their assistance...’²¹

10. Importantly, the duty to assist persons in distress at sea applies ‘regardless of the nationality or status of such persons or the circumstances in which they are found.’²² The duty to assist thus applies in respect of all refugees and migrants in distress at sea, regardless of their particular status or circumstances, and regardless of whether or not it is suspected that the vessel in distress is operated by smugglers. Given that refugees and migrants travelling by sea typically travel in overcrowded, unseaworthy boats without a professional crew, UNHCR’s view is that a humanitarian and precautionary approach to identifying and responding to potential distress situations will be consistent with good-faith implementation of relevant obligations under international law, whose fundamental objective is to prevent loss of life at sea.²³

¹⁸ See notably United Nations Convention on the Law of the Sea (“UNCLOS”) 1982, entered into force 16 November 1994, Art 98; International Convention for the Safety of Life at Sea (“SOLAS Convention”), 1974, entered into force 25 May 1980, Chapter V (as amended); International Convention on Maritime Search and Rescue (“SAR Convention”), 1979, entered into force 22 June 1985 (as amended).

¹⁹ IMO’s non-binding guidelines are relevantly set out notably in: IMO, Guidelines on the Treatment of Persons Rescued at Sea (“Rescue Guidelines”), 20 May 2004, MSC.167(78), www.refworld.org/docid/432acb464.html. The UN General Assembly has called on Member States to implement the Rescue Guidelines: see A/RES/61/222 at para 70.

²⁰ UNCLOS, above n 18, Arts 98(a) and (b).

²¹ SOLAS, above n 18, Annex, Chapter V, Regulation 33(1) (emphasis added). The SAR Convention, above n 18, which sets out the framework for the international search-and-rescue system, including with regard to the responsibilities of coastal States, provides for a range of similar and related obligations. Its Annex provides notably at para 2.1.1 that on ‘receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided.’ UNCLOS, above n 18, as well as the SOLAS and SAR Conventions all contain provisions relating to the responsibilities of coastal States to establish, operate and maintain adequate search-and-rescue services, including arrangements for distress communication and coordination, and adequate means of locating and rescuing persons in distress: see, for example, UNCLOS Art 98(2); SOLAS Annex, Chapter V, Regulation 7.1; SAR Annex Chapter 2 and generally.

²² See in particular SOLAS, above n 18, Annex, Chapter V, Regulation 33(1); SAR Convention, above n 18, Annex, para 2.1.10.

²³ The SAR Convention defines the ‘distress phase’ as a ‘situation wherein there is a reasonable certainty that a person, vessel, or other craft is threatened by grave and imminent danger and requires immediate assistance’: SAR Convention, Annex, para 1.3.13. A list of factors to be taken into account, for the purposes of determining whether a vessel is in an uncertainty, alert, or distress phase is included at Art 9(2)(f) of EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (‘EU Sea Border Regulation’). These include: seaworthiness and likelihood of reaching final destination; number of persons on board in relation to the type and condition of the vessel; availability of necessary equipment and supplies; presence of a qualified crew; presence on board of pregnant women, children, or persons in urgent need of medical assistance; presence of deceased persons on board; and the prevailing or forecasted weather and sea conditions. Although the EU Sea Border Regulation itself applies only to

11. In addition, relevant treaty law recalls that rescued persons must be 'treated with humanity, within the capabilities and limitations of the ship'.²⁴

D. Disembarkation: general considerations

12. When persons in distress are embarked in the course of a rescue operation, States are obliged to:

co-ordinate and co-operate to ensure that masters of ships providing assistance 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 the obligations under the current regulation does not further endanger the safety of life at sea.²⁵

13. Although international maritime law does not provide for specific obligations which would determine in all cases which State is responsible to allow disembarkation on its territory, key treaties indicate that the State responsible for the search-and-rescue region in which a rescue takes place is required to 'exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and relevant IMO guidelines'.²⁶ The States concerned are to arrange for such disembarkation to occur 'as soon as reasonably practicable'.²⁷

14. Further, IMO's non-binding guidance indicates that 'the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered'.²⁸

15. 'Place of safety' is not defined in the relevant treaty law. The IMO's 2004 Rescue Guidelines indicate that a place of safety is a place:

- where the survivors' safety of life is no longer threatened;
- where their basic human needs (such as food, shelter and medical needs) can be met; and
- from which transportation arrangements can be made for the survivors' next or final destination.²⁹

16. Proposed arrangements for the disembarkation or transfer of rescued persons (whether disembarkation to land territory or transfer to another vessel) should *not* be considered as meeting the requirements of delivery to a 'place of safety' if there is reason to believe that they may entail a risk of violating *non-refoulement* obligations under international refugee or human rights law.³⁰ IMO's relevant guidance notes that, in identifying a place of safety:

Frontex-coordinated operations, the factors it sets out may serve as a useful summary of relevant considerations for implementing SAR obligations at international law, consistent with the approach recommended here.

²⁴ SOLAS, above n 18, Annex, Chapter V, Regulation 33(6); see also, for example, IMO, Rescue Guidelines, above n 19 at para 5.1.2. In addition, international and regional human rights instruments, such as the ICCPR, provide that States must respect, protect and fulfil a range of pertinent rights, including the right not to be subjected to cruel, inhuman or degrading treatment, or to arbitrary detention.

²⁵ SOLAS, above n 18, Annex, Chapter V, Regulation 33(1-1); SAR Convention, above n 18, Annex, para 3.1.9.

²⁶ Ibid. For relevant non-binding IMO guidelines, see in particular IMO, Rescue Guidelines, above 19 and IMO, Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, 22 January 2009, FAL.3/Circ.194, www.refworld.org/docid/524be8244.html ("Disembarkation Principles"). The Rescue Guidelines indicate in this context (at para 6.15) that 'particular circumstances of the case' to be taken into account may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units.

²⁷ Ibid.

²⁸ Rescue Guidelines, above n 19, para 2.5. The Guidelines indicate that the intent of the relevant provisions of the SAR and SOLAS Conventions, as amended in 2004 (see above n 18), is to 'ensure that in every case a place of safety is provided within a reasonable time.'

²⁹ IMO, Rescue Guidelines, above n 19, para 6.12 ff.

³⁰ See above n 4 and accompanying text.

[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.³¹

17. In addition, identification of a place of safety for the delivery of rescued persons needs to take into account any risk that rescued asylum-seekers or refugees might subsequently be transferred or returned from that place to a place where they would be at risk (indirect *refoulement*; see paragraphs 3 and 6 above).

E. Considerations relating to coordination by a State's maritime rescue coordination centre (MRCC) of operations outside that State's search-and-rescue region (SRR), including where assets of another coastal State are involved

18. In cases where a possible distress incident is identified in a place where there is no declared SRR, or no functioning MRCC, the MRCC of a coastal State may assume responsibility for coordinating SAR responses outside its own SRR.³² In some regions, States have in the past assumed responsibility for coordinating SAR responses in international waters off the coast of other States where there is no SRR or functioning MRCC, including operations involving their own assets, merchant ships, NGOs, and assets of other States.

19. The authorities of coastal States which assume responsibility for coordinating rescue operations involving merchant vessels, NGOs, or assets of other States, need to act consistently with the implementation in good faith of their obligations under international law, including international maritime law, refugee law, and human rights law. It is consistent with those obligations, and with the imperative to protect human life at sea, that an MRCC coordinating a SAR response outside its own SRR will seek to mobilize those assets which are best able to respond in a timely and effective manner.

20. At the same time, an MRCC that coordinates SAR operations outside its own SRR should refrain from giving directions or advice³³ which it knows or ought reasonably to know would have negative human-rights implications for those requiring assistance, unless doing so is unavoidable in order to respond to serious and imminent risks to human life at sea in a situation of distress or force majeure.³⁴

21. A coastal State whose MRCC coordinates a SAR response outside its own SRR is not necessarily responsible, under international law, for the conduct of assisting vessels involved in that response.³⁵ Where the rescue operation involves the coordinating State's own assets (or assets acting directly under its control), relevant conduct is likely to be attributable to that State. Rescued persons in such cases will typically come under the jurisdiction of the coordinating State either *de jure* (by virtue of flag State jurisdiction), or because it has otherwise exercised effective control over them. By contrast, where the rescue operation involves private or public vessels flagged to another State, the State of the coordinating MRCC could not usually be said to be responsible for the conduct of those vessels,³⁶ or to exercise jurisdiction in respect of rescued persons.

³¹ IMO, Rescue Guidelines, above n 19, at para 6.17. See also IMO, Disembarkation Principles, above n 26, para 2.5 and accompanying footnote, and *passim*.

³² See Rescue Guidelines (above n 19) at para 6.7, which note that the first RCC contacted 'remains responsible for coordinating the case until the responsible RCC [viz. the RCC responsible for the SAR region in which assistance is being rendered] or other competent authority assumes responsibility.'

³³ For instance, under para 4.8.5 of the SAR Convention.

³⁴ See above n 15.

³⁵ Relatedly, the mere fact that a coastal State's MRCC coordinates a SAR response outside its own SRR, or transfers coordination as appropriate to the authorities of another coastal State, would generally speaking be unlikely, by itself, to amount to an exercise of effective control or jurisdiction over persons receiving assistance.

³⁶ Article 8 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (see n 38 below), provides that the conduct of a person or group of persons is attributable to a State under international law if the person or group of persons is 'in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.' It might be argued that the conduct of a private vessel flagged to another State could be attributed to the State coordinating a rescue operation, if the circumstances were such that those

22. States have duties to cooperate on SAR responses. Nonetheless, a State playing a role in SAR coordination would not, in general (but see section F below), be responsible under international law for the conduct of another State which undertakes SAR or law-enforcement activities off its own coasts on its own account (whether in its territorial waters, the contiguous zone, or the high seas).
23. It is recalled that the SAR Convention provides that SRRs 'shall be established by agreement among the Parties concerned.'³⁷ In reaching agreement to establish or formalize SRRs in areas not previously covered by an agreed SRR, States should take into account the considerations set out in this note, as well as the likelihood that proposed SAR arrangements between States could result in increased numbers of rescued persons being disembarked in the territory of the State responsible for the SRR, including in places where their lives or freedoms would be at risk, or in serious violations of human rights.

F. Considerations relating to support provided by other States to coastguards of a coastal State

24. In assessing whether States providing capacity-building or other forms of assistance to a coastal State—for instance, to support SAR or law-enforcement capabilities—may be responsible at international law in respect of human rights violations committed by the latter, regard should be had to Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts,³⁸ which addresses State responsibility in cases of aid or assistance in the commission of an internationally wrongful act by another State.

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in charge of the vessel were in fact acting on behalf of that State in carrying out its instructions. It is not at all clear, however, that such circumstances are capable of rising to the level of 'conduct directed or controlled by a State' as contemplated by Art 8. On the other hand, ordinarily, the conduct of an assisting vessel would not be attributable to the State of the coordinating MRCC merely by virtue of each playing its role in the international SAR system. It should be noted in addition that *flag states* will have obligations of due diligence to adopt appropriate measures to ensure that shipmasters of private vessels act in accordance with applicable obligations under international maritime, refugee, and human rights law. It should be noted, moreover, that pursuant to IMO's non-binding guidelines (see Rescue Guidelines, para 5.7), the shipmaster should comply with any relevant requirements of the Government responsible for the SAR region where the survivors were recovered, or of another responding coastal State, and seek additional guidance from those authorities where difficulties arise in complying with such requirements.

³⁷ SAR Convention, Annex, para 2.1.4. See also notably paras 2.1.3, 2.1.5-2.1.9.

³⁸ Annexed to A/RES/56/83, 12 December 2001. Although the Articles are not themselves a binding legal instrument, they are considered by many commentators to accurately codify the customary international law of State responsibility, and have been referred to with approval by international courts and tribunals as providing an authoritative statement of international law. See eg, James Crawford, *State Responsibility: The General Part*, 2013 (CUP), pp 42-43; James Crawford, *Brownlie's Principles of Public International Law*, 2012 (8th ed, OUP), p 44. The ICJ has, for instance, referred to the ARSIWA as reflecting the state of customary international law in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, ICJ, para 401.