



**UNHCR**

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

## Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum

*This note summarises key legal principles and State obligations under international refugee, human rights, and maritime law relevant to rescue and disembarkation situations affecting people who seek or may be in need of international protection.<sup>1</sup>*

### 1. LEGAL OBLIGATIONS FOR SEARCH AND RESCUE

**Search and rescue, like refugee protection, relies on effective international cooperation. Coastal States, flag States, other States, commercial shipping, and civil society all have a role to play.<sup>2</sup>**

- 1.1 **Shipmasters** are obliged under international law, following long maritime tradition, to provide assistance and where reasonable to do so come to the rescue of any person in distress at sea—regardless of their nationality, status, or the circumstances in which they are found; and to treat rescued persons with humanity. **Flag States** must require masters of ships flying their flags to meet this obligation, wherever it does not entail serious danger to the crew, ship or passengers.<sup>3</sup>
- 1.2 **Coastal States** are to promote the ‘establishment, operation and maintenance of an adequate 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.’<sup>4</sup> When information is received that a person is or appears to be in distress at sea, the responsible authorities are to ‘take urgent steps to ensure that the necessary assistance is provided.’<sup>5</sup>
- 1.3 Coastal States that have accepted responsibility for providing search-and-rescue services for a particular **search and rescue region** (SRR – see also para 2.2 below) are to ‘use search and rescue units and other available facilities for providing assistance’ to people who are or appear to be in distress at sea.<sup>6</sup> This does not necessarily mean that a State which has taken responsibility for a particular search-and-rescue region (SRR) must always intervene with its own assets in every possible distress incident arising within its SRR. However, it should establish and operate, individually or in cooperation with other States, rescue coordination centres (RCCs) to receive distress alerts originating in the SRR, make arrangements for communications with persons in distress and other RCCs, identify vessels and other facilities able to participate in search-and-rescue operations, and **coordinate rescue responses** as appropriate without undue delay.<sup>7</sup>
- 1.4 UNHCR has advocated, consistent with the understanding and practice of many maritime actors, for a *humanitarian and precautionary* approach to identifying and responding to possible **distress situations**, interpreting ‘distress’ broadly, notably where boats carrying asylum-seekers and migrants are unseaworthy, uncrewed, improperly equipped or overcrowded.<sup>8</sup>

### 2. DISEMBARKATION

**Speedy and safe disembarkation following rescue is imperative. Maritime law requires cooperation and coordination among States. It is not however specific as to which State must accept disembarkation on its territory.**

- 2.1 Rescued persons need to be **disembarked as soon as possible in a place of safety**. A **'place of safety'**, for the purposes of international maritime law,<sup>9</sup> is 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 [and] from which transportation arrangements can be made for the survivors' next or final destination.' International law does not place a binding legal obligation on a specific State to allow disembarkation to a place of safety within its territory. IMO's Rescue Guidelines indicate notably that an assisting ship 'should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship.'<sup>10</sup> It may serve as a temporary place of safety, but should be relieved as soon as possible. Importantly, identification of an appropriate place of safety is subject to other international legal standards and needs notably to be consistent with the requirements of international refugee and human rights law (see next section). See also the [joint statement](#) by UNHCR and other agencies of May 2022 on the concept of 'place of safety'.<sup>11</sup>
- 2.2 The SAR Convention, as amended in 2004,<sup>12</sup> obliges **all States parties** to **'co-ordinate and co-operate'** to ensure that ships that have embarked persons in distress at sea are released with minimum deviation from their intended voyage. The **State responsible for the SRR** where the rescue took place has 'primary responsibility for ensuring such co-ordination and co-operation occurs', so that those rescued are disembarked and delivered to a place of safety. All States concerned are to arrange for such disembarkation to occur 'as soon as reasonably practicable'.<sup>13</sup>
- 2.3 Non-binding guidelines issued by IMO indicate that the **responsibility to provide a place of safety**, or to ensure that one is provided, falls on the **government responsible for the SRR where the rescue took place**.<sup>14</sup>

### 3. RESCUE AT SEA AND THE RIGHT TO SEEK ASYLUM

**The search-and-rescue regime established under international maritime law needs to be implemented consistently with the requirements of international refugee and human rights law. Fundamental obligations including non-refoulement and the right to seek and enjoy asylum must be respected by all concerned.**

- 3.1 Following rescue, arrangements for disembarkation **must not result in direct or indirect refoulement**, or in preventing people who may be in need of international protection from being able to seek that protection in a fair and efficient procedure.<sup>15</sup>
- 3.2 The international legal principle of non-refoulement prohibits all States, including those that may not be party to relevant treaties, from engaging in conduct of any kind that risks leading to the removal of a person to a place where they would be at risk of persecution or serious human rights violations. The principle applies wherever States exercise jurisdiction (de jure or by exercise of effective control), including outside their territorial waters.<sup>16</sup> As such, **rescued persons must notably not be: (a) disembarked in a place where they would be at risk of persecution, torture or ill-treatment, or arbitrary deprivation of life; (b) disembarked in a place where they would be at risk of onward removal to such a place; or (c) transferred to the control of another State which may not protect them against such risks.**
- 3.3 If a State is aware or ought to be aware that individuals concerned may be in need of international protection or otherwise at risk, its non-refoulement obligations are engaged, whether or not the rescued persons have clearly articulated a claim to asylum.<sup>17</sup> Before steps are taken following rescue that could expose people to such risks, States concerned must fulfil their **duty of independent enquiry** into possible protection needs of the rescued individuals.<sup>18</sup>

3.4 In addition to ensuring protection against direct or indirect refoulement, disembarkation arrangements must not frustrate rescued persons' exercise of the **right to seek and enjoy asylum**, or of the **freedom to leave any country** particularly where escaping from armed conflict, persecution, or serious human rights violations. When post-rescue arrangements involve the **transfer**, in any manner, of rescued persons who may be in need of international protection from the control of one State to another, any such transfer must guarantee notably that these transferred persons will be able to claim asylum and have access to fair and efficient procedures for determination of their claim, treatment in accordance with international refugee and human rights law (including protection against arbitrary detention), and the ability to enjoy international protection if assessed as being in need of it.<sup>19</sup>

3.5 **All States** concerned have responsibilities and obligations under international law to ensure that people falling under their jurisdiction or effective control are not subject to refoulement or exposed to other treatment contrary to international refugee and human rights law. Specifically:

- **Flag States of State (or 'public') vessels** (including coast guard or navy vessels) have direct obligations under applicable refugee and human rights law, notably to protect against refoulement. Flag States of **commercial or other private vessels** would typically have, at minimum, obligations to take appropriate regulatory and administrative-control measures to ensure that shipmasters of vessels flying their flags do not subject rescued persons to treatment contrary to refugee and human rights law standards—including non-refoulement, and to take appropriate investigatory and remedial or sanctioning measures as needed. (See the following section on responsibilities of flag and other States regarding asylum.)
- **Coastal States**, including States that have responsibility for the relevant SRR or who are otherwise coordinating or participating in a rescue response (including through the relevant RCC), should ensure that responsibility for ensuring coordination and cooperation for timely delivery to a place of safety (as summarised in section 2 above) is exercised in accordance with applicable refugee and human rights law and secures access to international protection for those that require it. They should notably 'refrain from giving directions or advice' to vessels involved in rescue operations which they know 'or ought reasonably to know would have negative human-rights implications for those requiring assistance'.<sup>20</sup>
- **Other States** concerned should likewise ensure that their participation in necessary cooperation and coordination protects the human rights and access to asylum of rescued persons, and is aimed at sharing burdens for rescue responses and post-disembarkation needs with coastal States, particularly in circumstances where the search-and-rescue services and post-rescue reception capacity of certain States are under significant pressure due to movements and rescue activities involving refugees and migrants.

3.6 **Pushing boats carrying people who may seek or be in need of international protection out to sea** involves significant risks of violating obligations under international refugee and human rights law, whether the boat concerned is transporting rescued persons, is operated by those people themselves, or is operated by facilitators. These risks are especially pronounced if:

- the pushback could expose passengers or crew to dangers to their life or safety;<sup>21</sup>
- shipboard conditions—including for any passengers with particular vulnerabilities including medical needs or as result of the impacts of trauma—may deteriorate to the point of exposing those aboard to inhuman or degrading treatment;<sup>22</sup> or

- the absence of appropriate rapid and safe disembarkation arrangements may ultimately result in people aboard, who may be in need of international protection, disembarking in a place where they would be at risk of persecution or serious human rights violations, or onward removal to such a place, or where they would not have access to international protection.

3.7 Even if boats subject to such pushbacks are apparently seaworthy and in good condition, with all necessary supplies, and the safety of passengers and crew does not appear to be immediately at risk, States conducting them may be in breach of their non-refoulement and other obligations if they fail to inquire into the possible protection needs of those affected or deny them an effective opportunity to have their claims to international protection fairly assessed. People who are rescued at sea and may have possible international protection needs **cannot be summarily turned back**, including particularly where to do so would deny them a fair opportunity to seek asylum.

#### 4. DETERMINING ASYLUM CLAIMS AND PROVIDING PROTECTION

**Primary responsibility for ensuring access to international protection falls to the State under whose territorial jurisdiction or effective control an asylum-seeker finds herself. In most instances, this will be the State of disembarkation. However, in the context of rescue at sea, it is essential that other States contribute to finding solutions for disembarked asylum-seekers and migrants, not least to protect the integrity and humanitarian underpinnings of the search-and-rescue system and promote swift disembarkation in a safe place.**

4.1 Claims to international protection by rescued persons are best assessed in fair and efficient procedures **on dry land**, once disembarkation in a safe place has been secured and the immediate needs of rescued people, including those with specific vulnerabilities, have been addressed.

4.2 As a general principle, the **primary responsibility for assessing claims to international protection**, and affording that protection, rests with the State where a person arrives and seeks asylum or, in relevant cases (notably interception operations),<sup>23</sup> the State whose jurisdiction is otherwise engaged.<sup>24</sup> This typically means that the State allowing post-rescue disembarkation on its territory will be responsible in the first instance for providing access to international protection, or ensuring that it is provided elsewhere. UNHCR has repeatedly highlighted however that, in rescue contexts—particularly where an incident or ongoing pattern involves significant numbers of arrivals—States of disembarkation should not be solely responsible for providing international protection and, where rescued persons are not in need of international protection, other solutions; and that **suitable responsibility sharing arrangements** (intra-regional and beyond) are necessary to relieve burdens on particularly affected coastal States and protect the integrity of the search-and-rescue regime by avoiding disincentives to timely rescue and disembarkation. Disembarkation should **not**, however, be unduly delayed on the basis that a coastal State considers that insufficient support is forthcoming from the international community—particularly where such delay risks exacerbating humanitarian needs or could give rise to risks set out in section 3 above.

4.3 Disembarkation and post-disembarkation transfer arrangements which involve any **transfer** of possible asylum-seekers from the territory or control of one State to that of another must guarantee access to international protection and other relevant standards.<sup>25</sup>

- 4.4 **Shipmasters** are not generally competent to assess claims for international protection.<sup>26</sup> However, wherever there is concern on any basis that rescued persons may be in need of international protection, this should be brought to the attention of the coordinating authorities, as well as, where necessary, to the competent authorities of flag States and other concerned States (save where doing so may place possible asylum-seekers at further risk). Disembarkation should not be sought in a place where rescued persons may be at risk of persecution or serious human rights violations. The conduct of **shipmasters of State (public) vessels**, such as coastguard or military vessels, would in relevant cases directly engage the international responsibilities of flag States, including under refugee and human rights law. As such, it is *a fortiori* prudent for shipmasters of public vessels to refer to the competent flag State authorities in cases where rescued persons may be in need of international protection. More generally, flag States should provide such shipmasters, particularly coast and/or border guards and others in command of vessels likely to encounter asylum-seekers, with appropriate guidance on the treatment of rescued people who may be in need of international protection; including guidance where appropriate on positive enquiries that should be made to screen for potential protection needs and ensure compliance with non-refoulement obligations. The **shipmaster of a commercial or other private vessel** that has embarked rescued persons should not be tasked with assessing asylum claims,<sup>27</sup> and a private vessel assisting in the rescue operation is not an appropriate place for determining a claim to asylum. UNHCR considers that **processing claims to international protection on board vessels at sea**<sup>28</sup> is generally not appropriate, unless reception arrangements (including for vulnerable persons), eligibility screening processes, and procedural safeguards in line with international standards can be guaranteed.<sup>29</sup>
- 4.5 **Flag States** of assisting vessels, particularly in the case of commercial or other private vessels whose shipmasters are not acting under the control of the flag State concerned as its agent, could not ordinarily be said to come under a clear legal obligation—beyond the obligations discussed above to coordinate and cooperate to secure timely and safe disembarkation and to take appropriate measures to protect against human rights violations including refoulement—to assume responsibility in the first instance for receiving rescued persons, admitting them to an asylum procedure on their territory, and affording international protection. Flag States, under article 94 of UNCLOS, are to ‘effectively exercise [their] jurisdiction and control in administrative, technical and social matters’ over ships flying their flags.<sup>30</sup> As partly summarised in section 3 above, flag States must take appropriate measures to ensure that exercise of this jurisdiction and control is consistent with their international obligations under international maritime, refugee and human rights law—notably as regards non-refoulement and the right to seek asylum. Although the flag State of an assisting vessel cannot be said solely by virtue of its jurisdiction under article 92(1) of UNCLOS over ships on the high seas to have primary responsibility for affording territorial asylum to rescued persons, it must cooperate with other States to ensure disembarkation arrangements and access to asylum consistent with international law. In circumstances where disembarkation to a safe place where international protection needs can be met *cannot* be secured in a timely manner in cooperation and coordination with relevant coastal States as foreseen by international maritime law, disembarkation in or transfer to the flag State and access to asylum procedures there (or to immediate protection pending access to asylum elsewhere) may be necessary to ensure compliance with the flag State’s obligations under international refugee and human rights law.
- 4.6 Aside from legal and jurisdictional questions, from a policy perspective and to maintain the sustainability of the search-and-rescue system, it is undesirable all else being equal to locate primary responsibility for asylum unqualifiedly with flag States. Flag States should, however, be

prepared to participate in responsibility sharing measures alongside other States to ensure swift disembarkation and access to asylum. As noted above, flag State responsibilities for affording or ensuring access to international protection may be more directly engaged, depending upon the circumstances, in case of operations by public vessels, particularly where such operations are unilateral, part of an ongoing operation rather than an ad hoc emergency response, or are properly characterised as more akin to 'interceptions' than rescue.

## UNHCR, 1 December 2022

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<sup>1</sup> This document complements and should be read in conjunction with UNHCR, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea (2017 Legal Considerations)*, November 2017, [www.refworld.org/docid/5a2e9efd4.html](http://www.refworld.org/docid/5a2e9efd4.html).

<sup>2</sup> On the fundamental character of the obligation to rescue asylum-seekers in distress at sea, and the importance for facilitating this obligation of international cooperation between 'coastal States, flag States, countries of resettlement, and the international community as a whole' see eg ExCom Conclusion No. 26, paras (b)-(d). ExCom conclusions and UNHCR guidance have over many decades addressed these issues. A selection of these, up to December 2011, is included in *Rescue at Sea, Stowaways and Maritime Interception: Selected Reference Materials (2011 Protection at Sea Compilation)*, 2nd Edition, December 2011, [www.refworld.org/docid/4ee087492.html](http://www.refworld.org/docid/4ee087492.html). In November 2014, the [High Commissioner's Dialogue on Protection Challenges](#) was devoted to the theme of Protection at Sea, engaging States and other stakeholders notably on international cooperation and burden and responsibility sharing in rescue contexts.

<sup>3</sup> See eg *International Convention for the Safety of Life at Sea (SOLAS)*, 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980), as amended, Annex, ch V, regs 33.1 and 33.6; *United Nations Convention on the Law of the Sea (UNCLOS)*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), art 98(1).

<sup>4</sup> UNCLOS art 98(2). See also inter alia *International Convention on Maritime Search and Rescue (SAR)*, 1 November 1979, 1405 UNTS 97 (entered into force 22 June 1985), as amended, Annex, para 2.1.1 and ch 2 generally; and SOLAS V.7.

<sup>5</sup> SAR 2.1.1.

<sup>6</sup> SAR 2.1.9.

<sup>7</sup> See in particular SAR ch 2.

<sup>8</sup> See *2017 Legal Considerations*, at para 10, and accompanying footnotes.

<sup>9</sup> According to IMO's Maritime Safety Committee: see IMO, *Resolution MSC.167(78): Guidelines on the Treatment of Persons Rescued at Sea (Rescue Guidelines)*, 20 May 2004, at para 6.12, [www.refworld.org/docid/432acb464.html](http://www.refworld.org/docid/432acb464.html). The nonbinding Guidelines were endorsed by the UN General Assembly in A/RES/61/222, 16 March 2007.

<sup>10</sup> See *Rescue Guidelines* at para 6.13.

<sup>11</sup> IOM, OHCHR, UNHCR, UNICEF, UNODC, and UN Special Rapporteur on the Rights of Migrants, *The concept of place of safety under international law and the respect of the rights of migrants and refugees rescued at sea by all States*, May 2022, [www.unhcr.org/62824f564](http://www.unhcr.org/62824f564).

<sup>12</sup> Malta, notably, has not accepted and does not consider itself bound by the 2004 amendments.

<sup>13</sup> SAR 3.1.9, emphasis added. SOLAS contains a provision in substantially the same terms at V.33(1-1). Both provide in addition that arrangements for delivery to a place of safety are to 'tak[e] into account the particular circumstances of the case and guidelines developed by [IMO].' IMO's *Rescue Guidelines* relevantly indicate at para 6.15 that these include 'factors such as the situation on board the assisting ship, on scene conditions, medical needs ...'

<sup>14</sup> *Rescue Guidelines*, para 2.5. Further nonbinding guidance issued in 2009 by IMO's Facilitation Committee states 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 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.' See IMO, *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea (Disembarkation Principles)*, 22 January 2009, FAL.3/Circ.194, at para 2.3, [www.refworld.org/docid/524be8244.html](http://www.refworld.org/docid/524be8244.html).

<sup>15</sup> The *Rescue Guidelines* (para 6.17) acknowledge that the '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

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consideration in the case of asylum-seekers and refugees recovered at sea'. As a matter of international law, however, this is not simply a consideration: protection against refoulement is a binding obligation upon all States involved. See also *Disembarkation Principles* at para 2.5 and accompanying footnote.

<sup>16</sup> See eg *2017 Legal Considerations*, para 1.

<sup>17</sup> See eg *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09 (**Hirsi Jamaa**), ECtHR, 23 February 2012, at para 133.

<sup>18</sup> See *2017 Legal Considerations* at para 4. Failure to consider individual circumstances and possible protection needs may also result in international responsibility for applicable prohibitions of *collective expulsion*: see eg *Hirsi Jamaa*. See paras 4.1 and 4.4 below on shipboard processing of asylum claims.

<sup>19</sup> See *2017 Legal Considerations* at para 6.

<sup>20</sup> See UNHCR, *Submission by the UNHCR in the case of S.S. and Others. v. Italy (Appl. No. 21660/18) before the European Court of Human Rights (Submission in S.S.)*, 14 November 2019, paras 4.4 - 4.5, [www.refworld.org/docid/5dcebf54.html](http://www.refworld.org/docid/5dcebf54.html); *2017 Legal Considerations* para 20. Guidance on this point in those documents is directed in particular at situations where an RCC assumes coordination, formally or factually, outside its own SRR, but the principle holds more generally. Both acknowledge that there may be circumstances where the exigencies of protecting human life at sea against serious and imminent risks would take precedence over other considerations.

<sup>21</sup> ICCPR art 6(1).

<sup>22</sup> ICCPR art 7.

<sup>23</sup> See also paras 4.4 - 4.6 below.

<sup>24</sup> See eg UNHCR Note on the "Externalization" of International Protection, 28 May 2021, para 9(a), [www.refworld.org/docid/60b115604.html](http://www.refworld.org/docid/60b115604.html); *Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers (Transfer Note)*, May 2013, para 1, [www.refworld.org/docid/51af82794.html](http://www.refworld.org/docid/51af82794.html).

<sup>25</sup> See para 3.4 above; *2017 Legal Considerations* at para 6; *Transfer note*, at para 3(vi) and generally.

<sup>26</sup> See eg UNHCR, IMO and International Chamber of Shipping (ICS), *Rescue at Sea: A Guide to Principles and Practice as Applied to Refugees and Migrants (Joint Rescue Guide)*, January 2015, p 11, [www.refworld.org/docid/54b365554.html](http://www.refworld.org/docid/54b365554.html). This however does *not* mean that shipmasters may disregard the non-refoulement obligations of flag States; see para 3.5 above.

<sup>27</sup> But see n 26 above and accompanying text. The *Rescue Guidelines* encourage shipmasters to 'seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized' (see para 5.1.6).

<sup>28</sup> Asylum processing aboard vessels affording suitable facilities which are *in port* may present, in some respects, a slightly different case. Many of the concerns arising with respect to shipboard processing at sea arise there also; it may be possible to mitigate some of them, depending upon the circumstances. Asylum processing aboard a vessel in port could amount to processing in detention, under the jurisdiction of the Port State; the legality and appropriateness of such proposals should accordingly be assessed on a case-by-case basis in line with relevant UNHCR guidance, including on detention and border procedures generally.

<sup>29</sup> See eg *Annex to UNHCR Note on the "Externalization" of International Protection: Policies and practices related to the externalization of international protection*, 28 May 2021, para 7, [www.refworld.org/docid/60b115b64.html](http://www.refworld.org/docid/60b115b64.html); *2017 Legal Considerations* at para 7, and accompanying references.

<sup>30</sup> Flag States, under customary law as codified by UNCLOS art 92(1), exercise 'exclusive jurisdiction' over ships flying their flag, which per art 91(1) must have a 'genuine link' with the flag State in question. This means that generally speaking, and subject to other UNCLOS provisions allowing notably for rights of visit and hot pursuit in certain stipulated circumstances (as well as other relevant international law), other States cannot exercise enforcement jurisdiction over foreign vessels in international waters. However, the mere fact that a ship bears a certain nationality does not mean, by itself, that the shipmaster acts as agent for the flag State in the sense that his or her conduct would be, without more, directly attributable to that State. Nor is a ship on the high seas necessarily assimilable, by virtue of flag State jurisdiction, to the 'territory' of that State for the purposes of international law, including international refugee law. In cases of unresolved questions regarding disembarkation of potential asylum-seekers in accordance with international maritime law and other relevant legal obligations, shipmasters should consult the coordinating authorities of the relevant coastal State (provided this does not put rescued asylum-seekers at additional risk), as well as the flag State.