

An Examination of the Principal Rights of the Refugees at Sea: Right to be Rescued and Non-Refoulement

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Abstract

The sea pathways are extensively considered as a way to reach a safe zone for the forced people, whose lives are threatened for many reasons. A large number of the irregular migrants, asylum seekers and refugees are drowned daily in the sea, particularly in the Mediterranean Sea. The numbers of the deaths are worrying and alarming. It requires urgent and effective actions by states to prevent this disastrous human crisis. This paper adopts a descriptive and analytical research method to qualitatively examine the international legal framework for the protection of irregular migrants, asylum seekers and refugees' rights and focuses on two essential rights of their rescue at sea and its related right of non-refoulement. The paper concludes that the security and military ironic measures of the coastal States, particularly those of certain European States, are considered as a serious risk for the rights of the people trafficked through the sea in order to be moved from the place of danger to a safe zone. Accordingly, states must play a more responsible role in assisting and protecting the desperate irregular, asylum seekers and refugees at sea in order to guarantee their fundamental rights.

Keywords: Irregular migrants, Asylum seekers, Rescue at sea, Human rights law, Refugee's law.

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1. Introduction

Unexpected number of recorded deaths of irregular migrants, asylum seekers, and refugees (IMASR (s))¹ in the seas, particularly in the Mediterranean Sea, illustrates that the human trafficker's activities in order to transfer them from their States of origin to other destinations and particularly to Europe are very disquieting. It clearly shows that the security of the sea's corridors and borders is weak and this causes huge human casualties every year. Meanwhile, the European Union (EU)² State members actions to set up the fences and close the lands and sea borders only affect the lives of the thousands of trafficked IMASR(s).

The number of refugees under the United Nations High Commissioner for Refugees (UNHCR)³ raised for the sixth year to about 20 million in 2017. Because of the civil war in Syria, the Syrians remained the main nationality of refugees at the end of 2017. More than 6.3 million Syrian people have been forced to flee their country of origin, accounting for almost one-third of the world's total refugee



¹ Hereinafter cited as "IMASR(s)".

² Hereinafter cited as: "EU", Consists of 27 Member States located in Europe. For the further information refer to : https://europa.eu/european-union/index_en

³ Hereinafter cited as: "UNHCR", The United Nations High Commissioner for Refugees is a UN agency mandated to aid and protect refugees, forcibly displaced communities, and stateless people. For the further information refer to: <https://www.unhcr.org>



population (UNHCR, 2017, 13). The related statistics of the major source countries of refugees are shown in Figure 1 as follows:

Figure 1: Major Source Countries of Refugees, Source: UNHCR, Global Trends¹

Until the end of 2017 the host country with the most refugees has been Turkey. The total refugee population hosted in Turkey comprised Syrians (3,424,200), Iraqis (37,300), Iranians (8,300), and Afghans (5,600) (UNHCR, 2017, 17). The numbers of refugees in the major host countries are displayed in Figure 2:

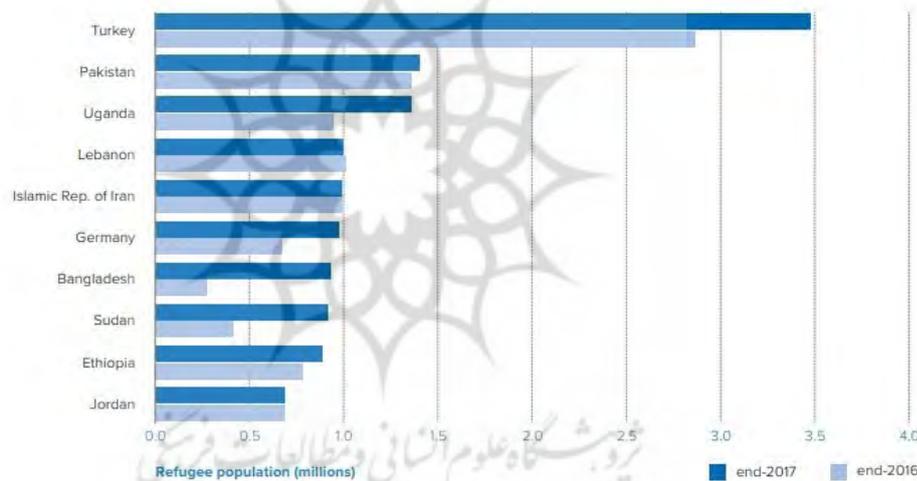


Figure 2: Major Host Countries of Refugees, Source: UNHCR, Global Trends

As far as the deaths and casualties of the IMASR(s) are concerned, the Mediterranean Sea is the maritime region which has witnessed most of these deaths and casualties. The number of recorded deaths of the IMASR(s) from 2014 to 2020 in merely a specific area, that is the Mediterranean Sea, is highly concerning. As the following chart shows, 20212 cases of the IMASR(s)' deaths have been recorded in the Mediterranean Sea from 2014 to middle of 2020, excluding the drowned ones who were never found. (See Figure 3 below.)

¹ For the further information refer to: <https://www.unhcr.org/statistics/unhcrstats/5ee200e37/unhcr-global-trends-2019.html> , Date Accessed: 12/01/2020

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Figure 3: Number of Recorded Deaths of the IMCASR(s), In the Mediterranean Sea from 2014 to 2020 Source: Statista

Statistics published by the “Eurostat”¹ indicates increasing amount of asylum seekers applications in the recent years. For instance, only in 2019, 612700 first time asylum seekers applied for international protection (in the Member States of the EU). Syrian, Afghan and Venezuelan are the main citizenship of asylum applicants. The following graph shows the increasing wave of asylum applications from 2008 to 2019 in EU.

¹ Eurostat is the statistical office of the European Union. For the further information refer to: <https://ec.europa.eu/eurostat/home>, Date Accessed: 12/01/2020

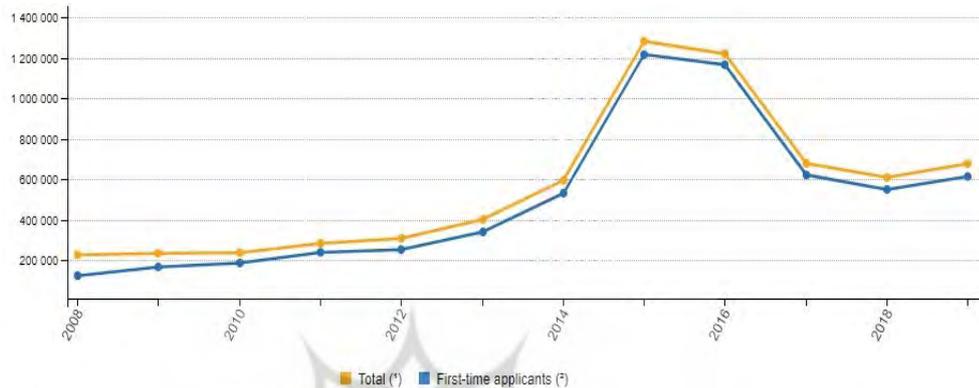


Figure 4: Number of Asylum applicants, EU, from 2008 to 2019, Source: Eurostat¹

The shift of the EU policies based on securitization of the issue from protective to defensive actions in the Save and Rescue Region (SAR)² against the IMASR(s) in the recent years, put their rights at risk of violation including the right to life and security. On one hand the IMASR(s), trafficked by sea, are facing the threat of sinking (despite the coastal guard's ability to save them based on the EU defensive policies) and on the other hand despite being rescued they are facing the violation of their instrumental rights when disembarked in the land including refoulement, *i.e.* danger of deportation to their States of origin where their lives are at threat. This is despite the fact that the international treaty obligations stress on the respect to principle of non-refoulement by States, particularly by certain European States. Accordingly, the fragile conditions of the IMASR(s) requires that a special attention to be made to their fundamental rights as enshrined within

¹ For the further information refer to: https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics, accessed dated 12/01/2020

² Hereinafter cited as: "SAR", Refers to the area of aid the people in distress danger. For the further information refer to https://www.researchgate.net/figure/Search-and-Rescue-Regions-SRR-in-the-Mediterranean-according-to-the-2004-amendments_fig2_280880592

a number of instruments such as the Universal Declaration of Human Rights¹ (UDHR) and the 1951 Refugee Convention².

In this context, this paper examines rights of the IMASR(s) to be rescued at Sea based on the International Law of the Sea and also their rights not to be deported after being rescued in accordance with International Law of Human Rights Laws and the Refugees' law that is the right to non-refoulement.

- The main presumption of this research is that as a result of the lack of determination by certain coastal States, particularly those in Europe, to save and rescue the IMASR(s), who are in distress situation at sea, their rights to life and to security are clearly violated. Therefore, it is obligatory for States, in accordance with treat obligations and related international customary rules, to respect and fulfil their rights to be saved from the sea and their right to stay at a safe zone without the threat of refoulement.³ Although in accordance with international law it is a legal norm that any one in distress at sea should be rescued, certain States in Europe has not fulfilled their obligations towards the IMASR (s)).
- In line with the purposes of this paper, it is first necessary to determine who are irregular migrants, asylum seekers and refugees. Accordingly, it is essential to define these terms before discussing the legal framework to protect them from dangers at sea.
- **Definitions of (Irregular) Migrant, Asylum Seeker and Refugee**

¹ Hereinafter cited as: "UDHR". The UDHR was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 by the General Assembly Resolution (217 A) as a common standard of achievements for all peoples and all nations, for the further information refer to: <https://www.un.org/en/universal-declaration-human-rights>

² Also known as the "Convention Relating to the Status of Refugees" sets out the rights of individuals who are granted asylum and the responsibilities of nations that grant asylum. As of 20 January 2020, there were 146 parties to the Convention. It was approved on 28 July 1951 and entered into force on 22 April 1954.

³ Violations of these rights result from various factors such as the political changes and tendencies in the EU political positions, and the nature of international human rights laws in the shape of soft laws and non-binding obligations against the States.



- As mentioned above, in this part of the paper and within its context, it is necessary to briefly define the terms “migrant” (and irregular migrants), “asylum seeker” and the “refugee”.
- The United Nations defines “*migrant*” as an individual who has resided in a foreign country for more than one year irrespective of the causes, voluntary or involuntary, and the means, regular or irregular, used to migrate¹ (IOM, 2011, 62). The International Organization for Migration (IOM)² defines the migrant an umbrella term as a person who moves away from his or her place of usual residence, temporarily or permanently for many of reasons (IOM, 2019, 132).³ However, the focus of this research is on the “*forced and irregular migrants*” due to the prosecution, war or violence, such as asylum seekers and refugee who require international protection.
- The term “*asylum-seeker*” refers to a person whose refugee status has not yet been determined by the authorities, however whose claim to asylum entitles him/her to a certain protective status to be determined via full and fair procedures, since she/he could be a refugee (IOM and UNHCR, 1997,

¹ Under such a definition, those travelling for shorter periods as tourists and businesspersons would not be considered migrants. However, common usage includes certain kinds of shorter-term migrants, such as seasonal farm-workers who travel for short periods to work in planting or harvesting farm products (IOM, 2011, 62).

² The International Organization for Migration, herein abbreviated as “IOM”, is an intergovernmental organization that provides services and advice concerning migration to governments and migrants, including internally displaced persons, refugees, and migrant workers. In September 2016, IOM became a related organization of the United Nations.

³ In 1998, the United Nations Department of Economic and Social Affairs (UN DESA)³ defines “international migrant” as “any person who changes his or her country of usual residence” (UN DESA, 1998, para 32). According to this definition, an immigrant must not have been a usual resident and will establish usual residence in the country he or she has entered. A migrant should have been a usual resident of the country from which he or she is departing and is establishing usual residence in another country (UN Department of Economic and Social Affairs Statistics Division, 2017, 5). A migrant, in comparison, may leave his or her country for many reasons that are not related to persecution, such as for the purposes of employment, family reunification or study. A migrant continues to enjoy the protection of his or her own government, even when abroad Guterres mentioned. But the situation for irregular migrants is an unsafe and dangerous (Guterres, Antonio, 2011, 3).

Para 10).¹ Asylum seekers have the rights to be considered as refugee in order to enjoy the refugees' humanitarian rights.²

- The third concept which should be defined for the purpose of this paper is “refugee”. In general, refugees are all persons who leave their country of origin for reasons of feared persecution, armed conflict, generalized violence, foreign aggression or other circumstances which have seriously disturbed public order and who, as a result, require international protection (IOM and UNHCR, 1997, Para 8). Article 1 of the 1951 *Convention relating to the Status of Refugees* defines a refugee as a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him or herself of the protection of that country, or to return there, for fear of persecution. Accordingly, refugees are forced to flee because of a threat of persecution and because they lack the protection of their own country (Guterres, 2011, 3).³ The rights related to refugees have been enshrined in a number of international instruments including the 1948 Universal Declaration of Human Rights UDHR (Article 14,) the 1966 International Convent on Economic, Social and Cultural

¹ Tribe believes asylum-seekers are considers as individuals who may describe themselves as refugees, as this is what they hope to attain, but they remain asylum-seekers until the decision is made on their application for refugee status by the relevant agencies, For further information refer to: Tribe, Rachel (2002). Mental health of refugees and asylum-seekers. *Advances in Psychiatric Treatment*, Vol. 8, No. 4, pp 240-247.

² For the further information refer to: Edwards, Alice. "Human rights, refugees, and the right 'to enjoy' asylum." *International Journal of Refugee Law* 17.2 (2005): 293-330. Accessible at: <https://academic.oup.com/ijrl/article-abstract/17/2/293/1548262?redirectedFrom=PDF> Worster mentions that treaty obligations show that there is a “right to asylum” but some have argued that there is no right to receive asylum inherent in the way the “right” to asylum has been articulated. This right might be seen as merely a right to receive asylum from a State willing to grant it (Worster, 2014, pp 477-479).

³ According to the 1951 Convention some elements are extracted as the basic requirements to consider a person as a refugee including “well-founded fear”, “persecution”, and “non-diplomatic protection”. A refugee is a displaced person who through a registration process acquires a suitable legal protective situation under the international human rights and refugee laws.



Rights (ICESCR- Article 2 (2)¹, and the Charter of Fundamental Right of the European Union (CFR - Article 19)².

- **The IMASR(s)' Rights at Risk in the Sea**
- The sea pathways are considered as safer areas to use by human traffickers because of the less boarder tracking than the land. Therefore, the rights of the IMASR(s) are strongly threatened. The migration of citizens from a variety of countries, particularly as asylum seekers and refugees who cross several other countries before they arrive at the external borders of EU countries has become of increasing concern.
- The International Centre on Migration Policy Development (ICMPD)³ reported that every year between thousands of migrants required protections cross the Mediterranean to enter the Europe (ICMPD, 2019).
- Since⁴ the huge number of human casualties of the migrants in the way to Europe in 2004 the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)⁵ was established in Europe. It complements and provides particular added value to the national border management systems of EU States. The member States have extended their controls to the High Seas as well (FRONTEX, Regulation No 1168/2011, 2011).
- **4. The Rights of the IMASR(s) in Danger in the Sea to be Rescued and Non-Refoulement: Peremptory Duties of States**

¹ Herein cited as: "ICESCR" was approved on 16 December 1966 and entered into force on 22 April 1954

² Herein cited as: "CFR" was approved on 7 December 2000 and entered into force on 3 January 1976.

³ Herein cited as: "ICMPD" was established by Austria and Switzerland in 1993 and has since grown to 18 Member States is located in Vienna. It works to create efficient cooperation and partnerships along migration routes. Priority regions include Africa, Central and South Asia, Europe and the Middle East. For the Further information refer to: <https://www.icmpd.org/home>

⁵ Hereinafter cited as: "FRONTEX". For the further information refer to: https://ec.europa.eu/home-affairs/e-library/glossary/european-agency-management_en

- It is a duty of all States to rescue those who are in distress at sea and those whose lives are in danger and the IMASR(s) are of no exception. ¹It is for this purpose that States are obliged to establish Search and Rescue (SAR)² services. SAR services refer to duty of international shipping to assist anyone in distress at sea. From the historical review, the foundations of SAR may be found in early Judeo-Christian writings which then were expounded by the earliest scholars of international law (Ghezelbash, 2018, 320).
- Saving the distressed travelers smuggled from the sea by the coast guards is reflected in a number of international instruments under the various categories of laws, including the Law of the Sea, Maritime Law, Human Rights Law and Refugees Laws. In addition, it is considered as a norm of customary international law. This discussion is of significance when due attention is made to the urgent need of the IMASR(s) to be rescued at sea and particularly in the Mediterranean Sea.

In the followings, the right to be rescued at sea as reflected in the international documents of various legal disciplines are discussed.

4.1 The IMASR(s) and Right to Rescue at Sea from the International Law of the Sea and the Maritime law Perspective

As a long time maritime tradition, the master of the ship has been under an obligation to render assistance to those in distress at sea without regard to their nationality, status or the circumstances in which they are found (IOM and UNHCR, 2015, 4). No doubt, this obligation extends to the IMASR(s).³

¹ As Erik Rosoeg of the University of Oslo writes: "... States have clear obligations towards refugees and migrants before they cross the border, including assistance at sea." (Rosoeg, 2020, 1)

² Hereinafter cited as: "SAR".

³ "*Ships collect people in need*" is a clear principle in the International Law of the Sea doctrine. Notwithstanding, the international community has witnessed in the recent years, and particularly after the Syrian Crisis, that certain European States has refused to help sinking migrants and refugees boats, occurring within their maritime zones. This refusal can be considered as clear violation of the International Law of the Sea and International Law of Human Rights by the EU Member States concerned.



Accordingly, the provisions of the following international instruments related to rescue at sea should be read with particular attention to the IMASR(s).¹

Under the International Law of the Sea and Maritime Law's instruments, there are a number of conventions referring to the duty of aiding at the sea. They mainly include:

1. The 1958 Convention on the High Seas²;
2. The International Convention for the Safety of Life at Sea of 1974, as amended, (SOLAS)³;
3. The International Convention on Maritime Search and Rescue of 1979, as amended, (SAR)⁴;
4. The United Nations Convention on the Law of the Sea of 1982, (UNCLOS)⁵;

According to Article 12 of the 1958 Convention on the High Seas, State parties have two obligations with regard to rendering the assistance in the High Seas as reflected in its two following Paras.:

“1. Every State shall require the master of a ship sailing under its flag, insofar 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, insofar as such action may reasonably be expected of him;

¹ While some of these international instruments focuses on the rescue of persons in danger and distress in the high seas, the rescue activities do not be limited to the high seas and it will be meaningful when these activities be extended to all maritime areas from internal waters, to the territorial seas, contiguous zones, and exclusive economic zones. Accordingly, the IMASR(s) should be rescued at sea wherever they are. This means that all coastal States and flag States are under obligation to make their outermost efforts in saving and rescuing the IMASR(s) all over the seas and oceans.

² It was approved on 27 April 1958 and entered into force on 30 September 1962.

³ Hereinafter cited as: “SOLAS”. It was approved on 26 May 1974 and entered into force on 25 May 1980.

⁴ Hereinafter cited as: “SAR”, It was approved on 27 April 1979 and entered into force on 22 May 1982.

⁵ Hereinafter cited as: “UNCLOS”. It was approved on 10 December 1982 and entered into force on 16 November 1994.

(c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

2. Every coastal State shall promote the establishment 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 neighboring States for this purpose.”

As mentioned within the 1958 Convention, three main responsibilities are defined for the master of a Ship: (a) to assist the persons in need of, (b) to act as fast as possible, and (c) to inform the other ships and coastal authorities. In addition to the duties of the Master, the coastal states are committed to promote effective search and rescue services for the persons in distress that could include IMASR(s).

The next significant international instrument in the area of rescue at sea is SOLAS and its special Regulations. SOLAS has a particular position in assisting and rescuing persons in distress at sea, including the IMASR(s). The followings are examples of actions under the SOLAS Regulations which should be taken by the master of a ship and member States in providing assistance and to engage in rescue operations.

The adoption of the SOLAS Convention has been the first step to ensure the safety of life at sea. As far as maritime security is concerned, the main step forward to enhance such security of the seas to protect the lives of endanger persons (Talaie and Javidbakht, 2020, p 131).

Code as part of the SOLAS Convention

Regulation 7 of the SOLAS (Search and Rescue Services) requires each Member State to:

‘... Ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the



establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary.

In addition, Regulation 10 of the SOLAS provides the following duties for the master of a ship in providing assistance for a ship, air craft or survival craft in distress with certain exceptions:

“The master of a ship at sea, on receiving a signal from any source that a ship or air craft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress.”¹

Regulation 33(1) of the SOLAS Convention also clearly refers to the duty of the master of a ship to do as follows:

“...the master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so”

The SAR Convention is the next significant international instrument in the field of rescue at sea. Chapter 2.1.10 of the SAR Convention obliges State Parties to:

‘... ensure that assistance [is] provided to any person in distress at sea ... regardless of the nationality or status of such a person or the circumstances in which that person is found’

¹ Papanicolopulu mentions this Regulation includes three exceptions to the duty to assist and rescue, identified by the words “unable”, “unreasonable” and “unnecessary”. The first concerns cases in which a ship is unable. This may be due to the atmosphere situation, or the vessel conditions. The second is related to cases in which it is unreasonable to expect the vessel to proceed to the rescue. The difference between this and the first case resides in the degree to which the external or internal impediment affects compliance with the duty (Papanicolopulu, 2016, 414).

It is clear that this part of the SAR Convention focuses on the duties of States based on non-discriminatory manners for persons in distress. It should be noted that the legal framework governing SAR covers all protection shelter needed groups such as the IMASR(s). In other words, a key obligation under the SAR Convention since its adoption in 1979 is that States must ensure that assistance is provided to any person in distress at sea “regardless of the nationality status of such a person or the circumstances in which that person is found”. This means that the IMASR(s) are covered by the provisions of the SAR Convention.

The 1998 revisions to the SAR Convention also contain definitions of “search” and ‘rescue’. “Search” is an operation to locate persons in distress, and “rescue” is an operation ‘to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a “place of safety”. A “place of safety”, however, is not defined, and it is clear from other provisions that disembarkation lies in the discretion of the coastal State.

The definitional concerns and ambiguity on the time of rescue created a discussion between the related international organizations and States on a better certainty. Concerns about the definition of distress as well as ambiguity about when rescue is completed prompted a dialogue between States and international organizations to provide greater certainty for stakeholders. In 2004, the IOM issued Guidelines on the Treatment of Persons Rescued at Sea (IOM Guidelines) and amended the SOLAS Convention, with operative effect from 2006 (Ibid).

In line with the above mentioned provisions of international instruments, the UNCLOS defines certain obligations for States members for rendering assistance and rescue services to those in danger or in distress. Article 98 (1) of the UNCLOS, *inter alia*, provides that:

“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.” ...¹

This provision contains two different obligations for two groups of States: the duty of flag States to oblige masters of vessels flying their flag to rescue people at risk of being lost at sea, and the duty of coastal States to establish and maintain search and rescue services. The only exception to the duty to rescue life at sea, as provided in UNCLOS, is the necessity not to endanger the rescuing vessel, its crew and its passengers (Papanicolopulu, pp 493-497).²

When requested to provide assistance to the rescue of persons in distress at sea and diverting to the location, the master of the ship should, if possible:

1. identify the ship's equipment and life-saving appliances that may be appropriate for the rescue operation;
2. determine if any special arrangements, additional equipment or assistance may be required for the rescue operation;
3. implement any plans and procedures to safeguard the safety and security of the crew and the ship;
4. Inform the ship's owner/operator and agent at the next intended port of call of the rescue operation (IOM and UNHCR, 2015, 10).

¹ Article 98(2) of the UNCLOS also provides that “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 neighboring States for this purpose.” Article 98 of the UNCLOS is entitled “Duty to render assistance”. Although this duty is defined in the provisions related to the high seas, this duty is also extended to coastal States in its maritime zones. It is the primary responsibility of coastal States to render assistance to all persons in distress or in danger in its internal waters, territorial sea, contiguous zone and exclusive economic zone. As far as foreign ships exercising innocent passage in the territorial sea of the coastal States are concerned, they are considered to exercise their right of innocent passage even if they stop in the territorial sea to render assistance to persons, ships and aircraft in danger and distress (See Article 18 of the UNCLOS). It is certain that reference to persons can be interpreted in a way to include the IMASR(s). This interpretation can extend to those ships and aircraft in danger and distress carrying the IMASR(s).

² Ghezalbash emphasizes that obligation is not absolute: a master's obligation arises only upon receiving a distress signal, and does not extend to giving assistance considered to be unreasonable or unnecessary (Ghezalbash, 2018, 322).

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As the coastal States' responsibilities, they have to coordinate and cooperate to ensure that masters of ships provides assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage, and have to arrange disembarkation as soon as reasonably practicable.

As recognized in the Guidelines on the Treatment of Persons Rescued at Sea¹, the Government responsible for the SAR region in which the rescued persons were recovered is primarily responsible for providing a place of safety or ensuring that such a place of safety is provided.

The first Rescue Coordination Center (RCC)² contacted should immediately begin efforts to transfer the case to the RCC responsible for the region in which the assistance is being rendered. When the RCC responsible for the SAR region in which assistance is needed is informed about the situation, that RCC should immediately accept responsibility for coordinating the rescue efforts, since related responsibilities, including arrangements for a place of safety for rescued persons, fall primarily on the Government responsible for that region. The first RCC, however, is responsible for coordinating the case until the responsible RCC or other competent authority assumes responsibility.³

From UNHCR's perspective, the pressing humanitarian challenge in any rescue situation is to ensure an immediate life-saving solution for the plight of severely traumatized persons, without an over-emphasis on legal and practical barriers. It is crucial that ship masters are actively facilitated in their efforts to save lives,

¹ It was adopted on 20 May 2004 by Resolution MSC.167 (78) UN General Assembly.

² Hereinafter cited as: "RCC". It is a primary search and rescue facility in a country that is staffed, which equipped for coordinating and controlling search and rescue operations.

³ While an assisting ship may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made. Disembarkation of rescued IMASR(s) in territories where their lives or freedoms would be threatened must be avoided. While rescued persons are still aboard the assisting ship issues related to nationalities, status or circumstances of the rescued persons, including temporary provisions for hosting rescued persons should be resolved in a reasonable period of time and measures should be taken to relieve the ship as soon as practicable, avoiding undue delay, financial burden or other difficulties incurred by assisting persons at sea.



confident that safe and timely disembarkation will be guaranteed (UNHCR, 2002, 4-5).

4.2 The Rescued IMASR (s) and the Right to Non-Refoulement

International Law of Human Rights also contains important standards in relation to those in distress and rescued at sea. The safe and humane treatment of all persons rescued regardless of their legal status or the circumstances in which they were rescued is of paramount importance. Basic principles such as the protection of the right to life, freedom from cruel, inhuman or degrading treatment and respect for family unity by not separating those rescued must be upheld at all times (Ibid, 9). Therefore, all aforementioned rights should be applied the IMASR(s) in all situations during the SAR and later in the coastal zones or on land of the rescuer countries.¹

Generally, once persons in distress are saved, there are two duties incumbent upon the master of the ship which has saved them. The first is to treat these people humanely, in conformity with obligations arising under human rights treaties. Humane treatment is mandated, taking into account the practical limitations encountered on board vessels, such as lack of space and the need to avoid the spreading of diseases. The second is to deliver these people to a place of safety, an issue that will be discussed below in the context of search and rescue operations (Papanicolopulu, Ibid, 498).

The principle of the non-refoulement is one of the important rules of international Law of Human Rights and the Refugee Law and is a rule of customary

¹ For further information refer to: Aspinall, Peter J., and Charles Watters. Refugees and asylum seekers: a review from an equality and human rights perspective. Research Report 52. Equality and Human Rights Commission, 2010, accessible at: https://kar.kent.ac.uk/24337/1/refugees_and_asylum_seekers_research_report.pdf, accessed date: 12/05/2020. In addition Hathaway mentions that from the view of the international law philosophy, the conventional fundamental human rights laws 'obligations the universally applicable human rights might also be established as general principle of law. It established not on the basis of uniform State practice as under custom but the virtue of the domestic laws of the different range of countries around the globe (Hathaway, 2005, 26).

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international law which cannot be breached under any circumstances (The New Humanitarian).¹

Non-refoulement means that no person should be forced to return to a place where he/she is at risk of persecution. Such a return constitutes a violation of his/her basic human rights. Accordingly, States are prohibited from transferring or removing persons from their jurisdiction or effective control when there are substantial grounds for believing that these persons would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations (UN Human Rights, Office of the High Commissioner, 2015, p 1). The IMASR(s) after being rescued are at risk of refoulement. The principle of non-refoulement are reflected in a number of international instruments such as the 1951 Convention, the Fourth Geneva Convention², the Principles Concerning Treatment of Refugees³, the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU)⁴ and the Cartagena Declaration⁵.

In addition, the prohibition of refoulement is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁶ and the International Convention for the Protection of All Persons from

¹ "United Nations High Commissioner for Refugees' Executive Committee (has emphasized the fundamental importance of fully respecting the principle of non-refoulement for people at sea, underlining that: 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." (UNCHR – The UN Refugee Agency, pp.1-2)

² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNTS 287 (entered into force Oct. 10, 1950)

³ Bangkok Principle 31 December 1966.

⁴ It is a regional legal instrument governing refugee protection in Africa. Convention was approved on 10 September 1969 and entered into force on 20 June 1974.

⁵ It is a non-binding regional Latin-American, instrument for the protection of refugees. It adopted in 1984 by 10 Latin-American states including Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela.

⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was approved on 4 February 1985 and entered into force on 26 June 1987.



Enforced Disappearance (ICPPED)¹. As far as regional instruments are concerned, principle of non-refoulement is explicitly found in the Inter-American Convention on the Prevention of Torture², the American Convention on Human Rights³, and the Charter of Fundamental Rights of the European Union.

A refugee's right to be protected from forced return, or refoulement, is the cornerstone of international refugee protection. As Article 33(1) of the 1951 Convention⁴ provides:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”

The words ‘in any manner whatsoever’ mean that the principle of non-refoulement applies to any conduct by the State that would place a refugee at risk of being returned, whether directly or indirectly, to his or her country of origin (UNHCR, 2017, 20).⁵

Meanwhile international maritime law assumes that the nationality and status of the individual are of no relevance vis-a-vis the obligation to rescue. By contrast, international refugee law also guarantees that if the rescued IMASR(s) has a well-founded fear of persecution he or she can avail of international protection.

¹International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) was approved on 6 February 2007 and entered into force on 23 December 2010.

² Inter-American Convention on the Prevention of Torture was approved on 9 June 1994 and entered into force on 28 March 1996.

³ American Convention on Human Rights was approved on 22 November 1969 and entered into force on 18 July 1978.

⁴ The 1951 Convention relating to the Status of Refugees and its 1967 Protocol is the most related international convention to the rights related to the IMASR(s).

⁵ Worster writes the capability of applying the principle of non-refoulement for asylum seekers is controversial. Under international law, a State will have an obligation, not necessarily to grant asylum, but an obligation to refrain from refoulement (among other obligations) when the person qualifies under the Refugee Convention or otherwise qualifies for subsidiary protection. Therefore, it is important to observe that asylum is a grant of a certain status under municipal law and the obligation of non-refoulement is an obligation of international law. However, we can wonder whether the right to non-refoulement for those who do qualify under the Refugee Convention or other conventions may have evolved into a true right to asylum (Worster, 2014, p 486).

Accordingly, clarification of status is crucial in the IMASR(s) context to determine obligations owed to them. No doubt, a ship master is not the competent authority to determine the status of those who fall under his/her temporary care after a rescue operation (UNHCR, 2002, 5).

It should be noted that in addition to RCCs and other State agencies and services, State-controlled vessels (such as coast guard vessels and warships) have direct obligations under international refugee law (notably, the obligation not to engage in or allow refoulement) which bear upon their obligations under international maritime law (IOM and UNHCR, 2015, 12-14).

5. IMASR New Challenges: EU's Securitization and Militarization Actions

The high number of human casualties regarding the irregular migrants in the Mediterranean Sea illustrates the inefficiency of EU State's activities to save the boat IMASR(s) under the SAR regime. Prohibition of the wandered boats of migrants to reach the coast by the coastguards more happened following the European Council and Turkey agreement on March 2016 on returning the new irregular migrants crossing from Turkey into Greek islands from 20 March 2016 to Turkey¹.

The EU States learned from the Australia's experience to avoid migrant people to enter the coast of the country about 20587 persons in 2013 only, which called Australia as "no-go" are of uninvited (Roshan Lall, 2018). In this regards the main challenge of the EU State Members is the lack of a comprehensive common strategy to combat irregular migrants and also the conflicts between domestic and EU laws and regulations (Kadkhodaie and Rostami, 2019, p 35).

5.1. EU Securitization Actions

The reason of EU to apply the Australia's experience, links to the security problems inside the EU States. The unknown backgrounds of the migrants who authorized to enter the coastal country following the document registering of

¹ EU-Turkey statement, 18 March 2016, for the further information refer to: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement>



asylum seekers threaten the life of EU's residence by terrorist activities in the recent years.¹

It is also the result of an increasing amount of high-profile attacks and attempted attacks in EU States and the widespread reports across the continent of refugee men robbing and sexually assaulting European women in public open spaces. The crisis has fundamentally altered the way that European citizens currently view the free movement of people, and offering safe haven to those escaping war zones (The UNC Center for European Studies, 2016, 1).

Over 4000 fighters related to the Islamic State of Iraq and Al-Sham (ISIS) have been smuggled into the Western countries so far, hidden among other refugees from the Middle East. The ISIS makes its presence known in Europe by organizing e.g. the attacks in Paris (13th November 2015) and Brussels (22nd March 2016) in response to the air raids on ISIS positions in Syria and Iraq (Bak, 2016, 7). However, the recent rise in the terrorist threat necessitates long-term approaches beyond traditional and kinetic means of counter-terrorism (Vakilpour and Rastegari, 2018, p 17).

5.2. EU Militarization Actions

The UN Security Council Resolution 2240² as an action against threat to the peace allows any types of actions against the suspected vessels for human trafficking and smuggling on the high seas from the Libyan coast. This resolution could be considered as a legal base for any ironic actions against the unseaworthiness boats of migrants who was the subject of aforementioned legal international protections. EU increased the on-water military reactions against the migrant vessels in the form of "Ten point Action Plan"³ that allows the EU's Naval Force to operate against the migrants. These types of actions by the EU reflect a shifting strategy from a series of soft and legal actions to hard and ironic reaction which harm the

¹ For the further information refer to: Hynes, T. (2003). New issues in refugee research. *The issue of 'trust' or 'mistrust' in research with refugees: choices, caveats and considerations for researchers*. Geneva: Evaluation and Policy Analysis Unit, The United Nations Refugee Agency, accessible at: <https://www.unhcr.org/5823489e7.pdf>

² Adopted by the Security Council at its 7531st meeting, on 9 October 2015.

³ European Commission, Ten point action plan on migration, 20 April 2015, for the further information refer to: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4813

international human rights laws and will be resulted to lack of transparency under the shadow of security.

6. Conclusion

Undoubtedly, the right to be rescued is one of the most important rights enshrined within international law of the sea, maritime law and international human rights law. It is important to understand that the interface between these legal disciplines regarding the right to be rescued is of significance. All treaty obligations in these legal fields aim to maximize protection of distressed persons including the IMASR(s) at sea.

Today the duty to rescue is a mandatory legal and universal duty under the international law of the sea. Clearly it is not acceptable from any States to prevent the vessels to carry out the rescue activities based on their tough migration prevention policies preventing the IMASR(s) to enter their territories. These policies are considered to be clear violation of international law obligations.

In particular, the EU' countries as the major final destinations of the IMASR(s) should review their recent migrant's policies and play an active role in rescuing the IMASR(s) and comply with their international obligation as to non-refoulement principle. It should be noted that the IMASR(s) consist of innocent and vulnerable persons, including children, who are in search of a safe place to survive. This means that States, and particularly European States, must act more responsible towards their humanitarian duties and revise their migration policies so as to protect their security on one hand and to rescue the IMASR(s) in distress and in danger at seas without risking the principle of non-refoulement.¹ With the hope to see a world free of the IMASR(s).

¹ As far as shipping industry is concerned, it is emphasized that "... Ship-owners should ... provide training to their crew to safeguard their safety and the safety of those being rescued ... Care needs to be taken to ensure that Masters stay on the right side of the line and only become involved in rescue where occupants are truly "in danger of being lost"." (The rescue of migrants at sea-obligations of the shipping industry, 2016, 1).



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