

BETWEEN A “GO BACK!” AND A HARD (TO FIND) PLACE
(OF SAFETY): ON THE RULES AND STANDARDS
OF DISEMBARKATION OF PEOPLE RESCUED AT SEA

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Abstract

The State with the shore closest to the place of the maritime accident. The State where the humanitarian NGO scouring the seas to save the lives of migrants is registered. The flag State of the rescue vessel run by the NGO. The State of nationality of the shipowner or the charterer. These are all options that, in recent times, have surfaced in the comments of politicians and public officials, sometimes insistently, when speaking about the due place of disembarkation of people rescued at sea – the well-known place of safety. It can be doubted, however, that all these stances are sincere manifestations of legal convictions, as, for instance, it is hard to believe that a government can deem as lawful the pushing back of migrants to a State where their physical and psychological integrity is at risk, in spite of the principle of non-refoulement, just because such a country took on the coordination of the rescue mission. Therefore, it is likely that the confusion that reigns on this matter serves political purposes, to a great extent. This notwithstanding, the current situation may also be the result of a certain reticence of the existing international norms on the place of disembarkation of rescuees. This contribution aims at dispelling some misconceptions on the issue and advances the argument that, in general, the shipmaster retains a great deal of liberty in deciding where to make landfall.

Keywords: disembarkation; place of safety; search and rescue; closest port; state of necessity.

1. THE RETURN OF THE LEPER SHIPS

The period since 2017 has been difficult for boat people crossing the Mediterranean Sea needing a safe place to land. Several European States, in particular – but not only – Italy and Malta, have refused to grant migrants access to their ports, maintaining that the duty to provide safe harbour was the remit of another State. On a number of occasions some States avoided their (real or alleged) responsibility to allow incoming migrants to enter their ports, so that the ships carrying them were left at the mercy of the sea for a prolonged time: a new kind of “leper ship”.¹ These episodes, which are reprehensible in themselves, are

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¹ In modern legal jargon, the expression appears in an environmental context, with reference to ships transporting a toxic cargo, but the concept is historical and describes the alleged use of ships as a solution to epidemics.

even less excusable given the small number of migrants involved in most cases. The reason for this behaviour is well-known to legal scholars: since the country of first entry into the European Union is the one which bears responsibility for processing the asylum applications of a migrant, and ultimately granting him or her a residence permit, welcoming boat people into one's port becomes even more onerous than it would already be absent the Dublin regulation.

This led the European Council, at the end of June 2018, to encourage the exploration of the notion of “regional disembarkation platforms”, with the aim of promoting “a truly shared regional responsibility on replying to the complex migration challenges”.² Burden-sharing and cooperation in the management of migratory crises, and the severance of the link between disembarkation and hospitality, are not new, and an example can be found in the Disembarkation Resettlement Offers (DISERO) scheme implemented by the United Nations High Commissioner for Refugees (UNHCR) in the late Seventies.³ However, the feasibility of such a model, or one akin to it, can be doubted, considering how difficult it is to move away from the European *status quo* whenever migration issues are discussed. Therefore, it is both useful and imperative to outline the current rules on the place of disembarkation, which are somewhat different than those believed to exist and invoked by governments in recent years.

2. A MULTIPLICITY OF SOURCES FOR A MULTIPLICITY OF PLACES

Customary international law is reputed to provide a long-standing obligation to save human life at sea. Treaty law came about to support this duty quite early, when the 1910 Brussels Convention was adopted.⁴ It primarily focuses on the salvage of ships rather than people, as does the subsequent 1989 London Convention,⁵ but both of them include a provision concerning the rescuing of persons “*trouvée[s] en mer en danger de se perdre*”.⁶ Although neither treaty mentions the place where rescuees are to be disembarked,⁷ the International Maritime

² European Council, “Non-paper on regional disembarkation arrangements”, 2018, available at: <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-regional-disembarkation-arrangements_en.pdf>.

³ See, e.g., INELI-CIGER, “An Examination of the Comprehensive Plan of Action as a Response to Mass Influx of ‘Boat People’: Lessons Learnt for a Comprehensive Approach to Migration by Sea”, in MORENO-LAX and PAPANASTAVRIDIS (eds.), *‘Boat Refugees’ and Migrants at Sea: A Comprehensive Approach*, Leiden-Boston, 2016, p. 408 ff., pp. 412-413. See also the contribution by FANTINATO in this Symposium.

⁴ Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, 23 September 1910, entered into force 1 March 1913 (Brussels Convention).

⁵ International Convention on Salvage, 28 April 1989, entered into force 14 July 1996 (London Convention).

⁶ According to the words of Art. 11 Brussels Convention, on which Art. 10 of the London Convention was modelled.

⁷ To my knowledge, the word “disembarkation” does not appear in the literature on salvage, which, in addition, cannot always be distinguished with ease from search and rescue, where disembarkation is key. The alleged difference is that the latter concerns cases where life is at risk,

Organization (IMO) has issued a guide detailing the procedures for identifying the most apt “place of refuge”,⁸ and shortly thereafter received a proposal for a binding convention on the matter.⁹ Pending a treaty solution, the European Union has recently published its own standards.¹⁰

These conventions, however, see the rescue of persons as almost incidental to the salvage of ships and the protection of the marine environment. On the contrary, facilitating the rescue of people lost at sea is a major goal of the 1974 London Convention for the Safety of Life at Sea (SOLAS Convention)¹¹ and the main purpose of the 1979 Hamburg Convention on the establishment of search and rescue (SAR) services (SAR Convention).¹² Both treaties were amended in 2004 with the addition of new text, part of which is identical and refers to the duty to bring survivors to a “place of safety”.¹³

The meaning of the notions of “place of refuge” and “place of safety” is unclear, however. The “nearest port of call” quoted in Article 98 of the 1982 Convention on the Law of the Sea (UNCLOS)¹⁴ – another provision imposing the obligation to save the lives of seafarers – fits within those expressions, although it is just one of many possibilities. These will be analysed in the following subsections, with a view to identifying their sources. Here lies the main problem in determining the opportune place of disembarkation. There are many conventions, whose scope of application – which depends on both their material content and membership – differs. Treaty law is complemented by a number of non-binding resolutions, which may at best have an interpretive (yet relevant) value, and is challenged by State practice, that can give rise to a diverging international cus-

but one may wonder how a vessel could be “in danger” or “in distress” without the lives of her passengers being too. That lives can be at risk in salvage operations is also implied by Art. 16 of the London Convention. Conversely, the SAR Convention, as amended, considers people who have already found refuge in an inaccessible area to also be “in distress” (para. 2.1.1).

⁸ International Maritime Organization – Assembly, “Guidelines on Places of Refuge for Ships in Need of Assistance”, A 23/Res.949 (2004).

⁹ Comité Maritime Internationale, Report submitted by the CMI to the IMO Legal Committee in April 2009, Annex.

¹⁰ European Maritime Safety Agency, “EU Operational Guidelines on Places of Refuge”, 1 February 2018, available at: <<http://www.emsa.europa.eu/implementation-tasks/places-of-refuge.html>>. The ambiguous relationship between assistance of ships in distress and SAR is exemplified by the guidelines affirming they do not cover SAR operations (p. 3) and, at the same time, they apply only insofar as they are compatible with SAR rules (pp. 3 and 26) – rules that they *potentially* contradict (p. 24, on coordination duties when the ship to be rescued is outside waters under the jurisdiction of the State coordinating the SAR mission).

¹¹ International Convention for the Safety of Life at Sea, 1 November 1974, entered into force 25 May 1980.

¹² International Convention on Maritime Search and Rescue, 27 April 1979, entered into force 22 June 1985.

¹³ International Maritime Organization (IMO), Resolution MSC.155(78), MSC 78/26/Add.1 (2004), amending Chapter 3 SAR Convention – but the notion of “place of safety” was already present in Chapter 1, under the definition of “rescue”; Resolution MSC.153(78), MSC 78/26/Add.1 (2004), amending Chapter V, Regulation 33, SOLAS Convention.

¹⁴ United Nations Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994.

tomary norm or complement the law as it stands now. More layers are added to this stratification in complex regimes like the European Union, where regulations¹⁵ collide with the rules of engagement of SAR missions¹⁶ and the competences of the Member States and the Union clash.¹⁷ Given the difficulties, the aim of this article is merely to review the solutions envisaged at the international level relating to the place of disembarkation.

2.1. *The place of safety*

There is little help in defining the notion of place of safety in either the SOLAS Convention or the SAR Convention, neither of which provides any definition.¹⁸ Important disclosures, however, are made by the IMO in a couple of its resolutions. There, we learn that the rescuing ship can be seen as a place of safety only provisionally, until a final destination is reached.¹⁹ Such destination 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”.²⁰ But physical integrity is not the only aspect to be taken into account, as “ensuring the safety and *dignity* of those rescued [...] must be the overriding consideration”.²¹

The resolutions containing such information are not, in a strictly formal perspective, binding. But their reference to the protection of the life and health of those who are transferred elsewhere recalls an analogous principle which is co-

¹⁵ Regulation (EU) 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, L 189/93, Art. 10. See also Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, L 251/1.

¹⁶ Despite their classified status, some information has surfaced through the press: see *infra*, Section 2.3.

¹⁷ “The Council recalls that search and rescue at sea is a competence of the Member States”: Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System, L 295/11. Southern Europe’s coastal States care a lot about this: Council of the European Union, Interinstitutional File No. 2013/0106 (COD), 2013.

¹⁸ A thorough interpretation of the relevant provision is in RATCOVICH, “The Concept of ‘Place of Safety’: Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?”, *Australian Year Book of International Law*, 2015, p. 81 ff.

¹⁹ IMO, Resolution MSC.167(78) (Guidelines on the Treatment of Persons Rescued at Sea), 2004, paras. 6.13-6.14.

²⁰ *Ibid.*, para. 6.12.

²¹ United Nations High Commissioner for Refugees (UNHCR), “Background Note on the Protection of Asylum-seekers and Refugees Rescued at Sea”, 2002, para. 30 (emphasis added).

gent, the duty of *non-refoulement*. It is true that the features which render a State unsuitable for repatriation do not necessarily overlap with those that allow for it to be treated as a “place of unsafety”, since the normative bases for the respective obligations are different. This issue is not dealt with here, where the focus is on possible destinations for rescuees rather than non-destinations. However, this aspect deserved a mention, if only to remember that, in principle, the duty of *non-refoulement* is not breached if the State having jurisdiction on the rescuing ship refuses to welcome those who were saved to its territory and sends them to a safe third Country.²²

2.2. *The next port of call*

Writing in 2004, Barnes noted that, although it is common maritime practice to disembark persons rescued at the next port of call, “there is no definite rule providing that this must be the case, [as] it is merely commercially expedient for vessels to do this”.²³ This may sound odd, given that Article 98 UNCLOS explicitly demands States to enact laws requiring the master of a ship rendering assistance to another to inform the latter, and her passengers, of the “nearest port at which it will call”.²⁴ Perhaps, the author was convinced that this provision made reference to the closest port, rather than the closest one among those already listed in the schedule of the journey (that is, the port he was writing about). However, that the latter option was most likely envisaged by the drafters of UNCLOS can be inferred from the fact that scholars read into the requirement a mere expression of cooperation between the flag States in the event of an inquiry into an incident of navigation.²⁵ Put simply, the rescuing ship’s crew is free to sail to its next scheduled port of call, where, if needed, it will be interrogated by the investigating authorities.

Underlying this solution is the necessity of avoiding costly and time-consuming diversions from the course of the (private) ship,²⁶ especially in light of the fact that the rescue of people is, under certain circumstances, a duty for a ship’s captain. This is stated in clear terms by the IMO, which requires governments “to co-ordinate and co-operate to ensure that masters of ships providing assistance

²² BANK, “Introduction to Article 11 – Refugees at Sea”, in ZIMMERMANN (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p. 815 ff., p. 848.

²³ BARNES, “Refugee Law at Sea”, ICLQ, 2004, p. 47 ff.

²⁴ Remarkably, the “next port of call” was seen as the destination to be reached after a rescue even before UNCLOS was finalised, in accordance with “established international practice”: UNHCR – Executive Committee, Conclusion No. 23 (XXXII)e, 1981, para. 3.

²⁵ NORDQUIST et al. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III, Leiden-Boston, 1995, p. 175.

²⁶ SCHAFFER, “The Singular Plight of Sea-Borne Refugees”, *Australian Year Book of International Law*, 1980, p. 213 ff., pp. 226-227. This is why the shipping industry advocates for the right of the shipmaster to decide where to dock: BUTTON, “International Law and Search and Rescue”, *Naval War College Review*, 2017, p. 25 ff., p. 56, footnote 61.

by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage".²⁷ The IMO has been quite consistent in taking this view, and affirmed that when choosing the place of safety consideration will be given, together with the basic needs of the rescued people,²⁸ to "the master's preferred arrangements for disembarkation".²⁹ The latest edition of the IMO's international manual on SAR missions (the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual) also implies the rescuer's right to decide where disembarkation is to take place by saying that "the [on-scene coordinator] should inform the [SAR mission coordinator] of the conclusion of the search and give the [...] destinations of ships with survivors"³⁰ – and the same bottom-up approach is taken by some national manuals.³¹

One might wonder whether the same rules apply to SAR in the context of migratory flows. A positive answer is reasonable. It is true that, in the most detailed of its resolutions on this issue – the Background Note of 2002 – the UNHCR traced a number of options back to the notion of "next port of call".³² But it is equally true that, absent particular needs of the rescuees, the next scheduled port of call emerged as the natural choice for disembarkation. Indeed, both before and after the approval of that Background Note, the UNHCR made statements along these lines. In 1988, it published instructions on the disembarkation of asylum-seekers, where it recalled that the vessel that picked up refugees "should normally proceed to the next *scheduled* port of call".³³ And in the 2015 guidelines issued together with the IMO, it stressed the assisting ship's obligation to inform the rescue coordination centre of her "next intended port of call".³⁴ Again, in 2005, the director of a UNHCR office, referring to the ship *Clementine Maersk*, openly spoke of "the captain's prerogative to continue to the next scheduled port of call".³⁵

²⁷ See *supra* note 13.

²⁸ These needs lie at the heart of the notion of state of necessity, on which, in turn, the closest-port principle is grounded: see *infra*, Section 2.3.

²⁹ IMO, Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, FAL.3/Circ.194 (2009), para. 2.3. See also IMO, *cit. supra* note 19, para. 6.10.

³⁰ IMO, "International Aeronautical and Maritime Search and Rescue Manual – 2016 Edition", Vol. III, pp. 3-42.

³¹ See, e.g., Australian Government, "National Search and Rescue Manual", 2018, s. 5.6.8 ("It must be ensured that [...] the location where the survivors are to disembark are known to the [mission coordinator]").

³² UNHCR, *cit. supra* note 21, para. 30. On some of these possibilities see *infra* in this article.

³³ UNHCR, "Guidelines for the Disembarkation of Refugees", 1988, p. 2 (emphasis in the original text). Other guidelines had been issued previously.

³⁴ UNHCR and IMO, "Rescue at Sea: A guide to principles and practice as applied to migrants and refugees", 2015, p. 10.

³⁵ UNHCR, "UNHCR thanks Danish ship for rescuing asylum seekers stranded at sea", 8 June 2005, available at: <<https://www.unhcr.org/news/latest/2005/6/42a70b5a4/unhcr-thanks-danish-ship-rescuing-asylum-seekers-stranded-sea.html>>.

Concerning the use of the term “prerogative”, it is likely that the shipmaster’s decision to dock in a port of their choice³⁶ is ultimately based on a faculty, or privilege, rather than an enforceable right.³⁷ This means that if binding rules imposing a different destination exist, the conflict does not need to be solved through the *lex posterior* or the *lex specialis* principles. In the following pages it is maintained that there are no such general rules, and that a given place of safety – the closest one – is imposed by international law only where human lives are at risk.

2.3. *The closest safe haven*

Back in 2001, following the famous *Tampa* case that saw a Norwegian cargo vessel trying to disembark hundreds of rescuees on an Australian island and Australia refusing permission to enter its territorial waters, the then Norwegian Ambassador to Australia is reported to have said that “[t]he Norwegian position is that we have fulfilled all our obligations, that we have rescued the people and brought them to the closest harbour”.³⁸ The idea that people saved from the sea are to be offloaded onto the nearest shore is familiar to all those who have followed the news on migration issues in the last few years. Indeed, it has become so popular that it is now professed also by some lawyers.³⁹ This is so despite the impossibility of finding a treaty basis for it, and notwithstanding the fact that the UNHCR had already made clear that even though the place of safety “will usually be the closest safe port”,⁴⁰ “safe port” does not necessarily mean the closest

³⁶ Ships hired by NGOs to rescue migrants at sea do not have a “scheduled port of call” in the same sense that commercial vessels have. In the author’s view, however, the lack of a predetermined place of safety when necessity does not command one allows these ships to choose their preferred destination, without this being an abuse of right.

³⁷ This has nothing to do with the non-self-executing nature of UNCLOS (on which see BARNES, “The International Law of the Sea and Migration Control”, in RYAN and MITSILEGAS (eds.), *Extraterritorial Immigration Control: Legal Challenges*, Leiden-Boston, 2010, p. 103 ff., p. 107 and especially footnote 10).

³⁸ BARNES, *cit. supra* note 23, p. 59, footnote 60.

³⁹ TURCO BULGHERINI, “Soccorso, controllo delle frontiere e contrasto alla criminalità nel traffico via mare dei clandestini”, in AMATO MANGIAMELI et al. (eds.), *Immigrazione marginalizzazione integrazione*, Torino, 2018, p. 123 ff., p. 156 (the author shared the same thesis with a much wider audience during a tv show at the end of January 2019). See also Mr Paolo Turci’s opinion in “Salvini calls Sea Watch a ‘yacht’ in latest anti-NGO propaganda”, *Il Manifesto – Global Edition*, 4 February 2019, available at: <<https://global.ilmanifesto.it/salvini-calls-sea-watch-a-yacht-in-latest-anti-ngo-propaganda/>>. From a *lex ferenda* perspective see TESTA, “Safeguarding Human Life and Ensuring Respect for Fundamental Human Rights: A Consequential Approach to the Disembarkation of Persons Rescued at Sea”, *Ocean Yearbook*, 2014, p. 555 ff., pp. 606-607.

⁴⁰ UNHCR, “Irregular Migration by Sea: Frequently Asked Questions”, 29 May 2009, available at: <<https://www.unhcr.org/subsites/euasylum/4a1e48f66/irregular-migration-sea-frequently-asked-questions.html>>; see also UNHCR, *cit. supra* note 21, para. 25.

one,⁴¹ as it can only be so if migrants are disembarked where their lives are not threatened. It is thus a question whether this idea has crystallised into custom.

Recent declarations of members of European governments provide a good source for *opinio juris*, where the *jus* is the obligation to disembark boat people in the closest safe place. Therefore, although one has often – but not always – to rely on secondary sources such as newspapers, which may leave doubts as to the precision of quotations, finding statements in support of this alleged rule is not difficult at all. For example, States that have maintained that the vessel carrying people rescued at sea should reach the closest port are the United Kingdom,⁴² France,⁴³ Italy,⁴⁴ Spain,⁴⁵ Malta⁴⁶ and perhaps, outside Europe and much earlier, the United States.⁴⁷ Most of these stances were taken in general terms and accompanied by the vocal (albeit vaguely formulated) conviction that such destination is demanded by international law. Scant references are made to European rules,⁴⁸ too, and this is quite strange, as there are no general provisions in EU law to that effect, and the choice of the closest safe haven was dictated – sometimes as a second-best destination – only by the rules of engagement of some Frontex-led

⁴¹ UNHCR et al., “Praesidium Project – Recommendations and good practices in the management of mixed migratory flows by sea”, 2012, p. 12.

⁴² House of Lords of the United Kingdom – European Union Committee, “FRONTEX: the EU external borders agency (9th Report of Session 2007–08)”, Minutes of Evidence, p. 145.

⁴³ “Migranti: amb. Francia, sbarchi nel porto sicuro più vicino. ‘Lo dice il diritto internazionale. E insieme viene solidarietà’”, ANSAmed, 14 January 2019, available at: <http://www.ansamed.info/ansamed/it/notizie/stati/francia/2018/11/22/migranti-amb.-francia-sbarchi-nel-porto-sicuro-piu-vicino_4a7bc2b4-9d15-42a7-b05b-c9bdd901be40.html>; “‘Aquarius’: France et Italie s’accusent de ‘cynisme’ en matière d’immigration”, Le Monde, 13 June 2018, available at: <https://www.lemonde.fr/international/article/2018/06/12/les-migrants-de-l-aquarius-vont-finalement-etre-accueillis-en-espagne_5313368_3210.html>. See also *infra* note 48.

⁴⁴ “Sea Watch, Danilo Toninelli: ‘Migranti sbarchino a Malta, prenderemo la nostra parte’”, fanpage.it, 8 January 2019, available at: <<https://www.fanpage.it/politica/sea-watch-danilo-toninelli-migranti-sbarchino-a-malta-prenderemo-la-nostra-parte/>>. See also “‘Give us the migrants or we will kill you,’ The front lines of Criminalized Solidarity”, Medium.com, 19 April 2018, available at: <<https://medium.com/are-you-syrious/ays-daily-digest-18-4-18-give-us-the-migrants-or-we-will-kill-you-the-front-lines-of-4a84d6762437>>.

⁴⁵ “Spanish NGO says rescue boat blocked from operating in Mediterranean”, Reuters, 14 January 2019, available at: <<https://www.reuters.com/article/us-europe-migrants-spain/spanish-ngo-says-rescue-boat-blocked-from-operating-in-mediterranean-idUSKCN1P82C2>>. See also *infra* note 93.

⁴⁶ Government of Malta, “Statement by the Government of Malta”, 16 June 2018; “No country will order Malta around on migration – Muscat”, Times of Malta, 17 June 2018, available at: <<https://timesofmalta.com/articles/view/no-country-will-order-malta-around-on-migration-muscat.682038>>; “Latest Set of Frontex rules make no sense – PM”, The Malta Independent, 29 March 2010, available at: <<http://www.independent.com.mt/articles/2010-03-29/news/latest-set-of-frontex-rules-make-no-sense-pm-272376/>>.

⁴⁷ SOHN et al., *Cases and Materials on the Law of the Sea*, 2nd ed., Leiden-Boston, 2014, p. 108.

⁴⁸ “France upholds refusal to allow migrants to disembark NGO ship in Marseilles”, EFE, 25 September 2018, available at: <<https://www.efe.com/efe/english/world/france-upholds-refusal-to-allow-migrants-disembark-ngo-ship-in-marseilles/50000262-3760561>>.

missions.⁴⁹ Moreover, how such rules of engagement are believed to relate to the surrounding landscape of international law is far from clear. A spokesperson for Frontex is credited with having said that the mission *Themis*, by granting the Maritime Rescue Coordination Centre (MRCC) involved in a rescue the right to decide the place of disembarkation, does not contradict international maritime law, which would require migrants to be taken to the nearest place of safety.⁵⁰ But a spokesperson of the EU Commission has declared that *Themis*, and also *Triton* – the mission that preceded it – are in compliance with international law.⁵¹ Unfortunately, the rules of *Triton* said that whomever was rescued was to be taken to Italy, wherever the rescue had taken place. And things get even more confusing when the same spokesperson apparently affirmed that international law does not specify the State where people have to be disembarked.⁵²

It is hard to extract a coherent *opinio juris* from the stances quoted above, in particular because they are sometimes taken jointly with a variety of other positions.⁵³ Nonetheless, one can be tempted to see whether they are backed up by State practice, such as in national search and rescue manuals. For instance, the 1991 United States Manual notes that the “closest safe delivery point” is usually selected, although distance to the distress scene is to be considered alongside other factors such as “suitability for receiving survivors or accepting delivery of a distressed craft”.⁵⁴ A 2013 Addendum speaks, more concisely, of the “nearest safe haven that has an available means of communication”, even though it allows for other solutions that are warranted by humanitarian or other concerns.⁵⁵ The same expression (“nearest safe haven”) is used by the Finnish Manual with reference to the saving of property in SAR missions, whenever such actions are just a means for saving human lives.⁵⁶ The Canadian Manual, too, requires that the

⁴⁹ MALLIA, *Migrant Smuggling by Sea. Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*, Leiden-Boston, 2010, p. 214. Frontex is the European Border and Coast Guard Agency, established in 2004 (under a different name) by means of Regulation (EC) 2007/2004, and reborn in its current form through Regulation (EU) 2016/1624 (*cit. supra* note 15). It is entrusted with the duty to coordinate the Member States’ efforts in controlling the external borders of the EU.

⁵⁰ “CORRECTED-In new EU sea mission, ships not obliged to bring migrants to Italy”, Reuters, 1 February 2018, available at: <<https://af.reuters.com/article/commoditiesNews/idAFL8N1PR76E>>.

⁵¹ “New EU operation Themis responds to Italian appeal”, ANSAmEd, 1 February 2018, available at: <http://www.ansamed.info/ansamed/en/news/sections/politics/2018/02/01/new-eu-operation-themis-responds-to-italian-appeal_31aef67c-4c10-45b8-8dc8-fca611c6744.html>.

⁵² “Migranti: Ue, mandato Themis non indica Paese sbarco”, ANSA, 11 June 2018, available at: <http://www.ansa.it/europa/notizie/rubriche/altrenews/2018/06/11/migranti-ue-mandato-themis-non-indica-paese-sbarco_b0d76539-6d71-4284-bca5-2781d02cde6b.html>.

⁵³ See *infra* Section 2.4.

⁵⁴ US Departments of the Army, the Navy and the Air Force, “National Search and Rescue Manual – Volume I: National Search and Rescue System”, 1991, s. 721.

⁵⁵ US Department of Homeland Security, “U.S. Coast Guard Addendum to the United States National Search and Rescue Supplement (NSS) to the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR)”, 2013, s. 4.1.6.5.

⁵⁶ Finnish Ministry of the Interior, “Maritime Search and Rescue Manual”, 2010, p. 28.

“closest safe haven” be identified in rescue missions⁵⁷ as well as when escorting vessels in trouble.⁵⁸

These guidelines can certainly count as practice and therefore complement the *opinio juris* or *necessitatis* manifested in the governmental statements mentioned above. However, this practice suffers from many limitations. First, to date, a comprehensive analysis of such operational manuals from all over the world is missing; some of them – such as those of Australia⁵⁹ and Singapore⁶⁰ – provide “neutral” evidence by simply stating that the SAR mission ends when a “place of safety” is reached, and one can expect that most States have never issued such guiding documents, so that their role in the formation of a custom may be debated. Second, sometimes these guidelines refer to particular cases (like escorting ships in distress or engaging in a mission to salvage property), and one is left wondering whether, and to what extent, their scope can be generalised to cover all situations. Third, they often use non-normative language such as “should”, “usually” or “normally”, which reveals their nature as suggestions or recommendations rather than obligations – and the fact that they explicitly provide for exceptions as well as competing factors can be seen as further proof of this. Fourth, they sit in the lowest rung of the hierarchy of sources, so that – as recalled by the IAMSAR Manual⁶¹ – what they suggest is only valid as long as it does not conflict with higher-level instruments and international law.

All in all, a custom imposing the closest port as the proper destination of SAR operations cannot be established, due to *opinio* tainted by inconsistency and practice debased by inadequacy. This does not mean that in no case is the master of the rescuing ship required to reach the nearest destination. It means that such duty must be better qualified as to both its content and its conditions of application. In addressing the former, it must be noticed that many factors shape the duty. The way the nearest place of safety is conceptualised – a real port, or merely a haven or refuge, and its features – has a bearing on what destination is eligible as a place for disembarkation.⁶² Also, the weather and other factors able to influence the time it takes to reach a place are relevant, so that the closest place is, in fact, the one that can be arrived at earliest, irrespective of any purely spatial considerations.

⁵⁷ Canadian Minister of Public Works and Government Services, “SAR Seamanship Reference Manual”, 2000, s. 11.12.1 (spelled as “heaven” – but it can be doubted that the threshold is that high!).

⁵⁸ *Ibid.*, s. 11.14.8.1.

⁵⁹ Australian Government, “National Search and Rescue Manual”, 2018, ss. 2.1.3, 5.1.1, 6.2.1 and *passim*.

⁶⁰ Civil Aviation Authority of Singapore, “Manual of Standards – Search and Rescue”, 2011, s. 5.5.1.

⁶¹ IMO, *cit. supra* note 30, Vol. I, para. 1.5.8.

⁶² For instance, Malta defines the nearest safe haven as a “port where they can be reasonably easily disembarked – it does not require a helicopter disembarkation or something of the sort – [and] where they are assured of medical treatment and all their basic needs will be seen to”: House of Lords of the United Kingdom – European Union Committee, *cit. supra* note 42, p. 100.

This is strictly dependent on the conditions of application of the duty, which can only be appreciated in light of what is expected from the States involved as well as from the captain of the ship. Indeed, it is stipulated that the “Contracting Governments shall arrange for [the] disembarkation to be effected as soon as reasonably practicable”.⁶³ Similarly, the crew of the rescuing ship should be relieved of its responsibility “as soon as practicable” or at least “within a reasonable time”,⁶⁴ and survivors “must be delivered to a place of safety as quickly as possible”.⁶⁵ Although it might seem, *prima facie*, that only the safe port nearest to where assistance was rendered meets these requirements, in fact the “reasonableness test” is satisfied for any place that can be reached without jeopardising the lives and health of those who were rescued.⁶⁶ In other words, it is the existence of a state of necessity – whatever that may mean in this context – that commands the choice of the closest port, as all other considerations leave ample leeway to the actors taking the decision. This has another, tremendously important consequence on how the duty is to be conceived. If it is necessity, and only necessity, that demands that the closest safe harbour be selected, then it becomes evident that the same condition of necessity will require disembarkation in the port nearest to the actual position of the ship, rather than to the place where the rescue occurred. The closest port is not a fixed reference, it moves as the ships sails on. This is of utmost importance whenever a ship boarding people in distress is denied access to a port, as well as when the health conditions of survivors become critical during the journey.

2.4. Other destinations

The absence, under international law, of a duty for the assisting ship to head to a given, pre-determined place of disembarkation is well exemplified by the stances taken, even though only in non-binding terms, by two key international organisations. The IMO has suggested that, in order to identify a place of safety, the State hosting the MRCC in charge of the rescue mission should coordinate with “the Government responsible for the SAR area where the persons are rescued, other coastal States in the planned route of the rescuing ship, the flag State, the shipowners [...], States of nationality or residence of the persons rescued, [and] the State from which the persons rescued departed”.⁶⁷ On its part, the UNHCR, when advancing some proposals to fill in the ambiguous notion of “next port of call”, suggested as potential terminuses the closest port, the port

⁶³ Regulation 33, para. 1.1, SOLAS Convention (as amended by Resolution MSC.153(78), *cit. supra* note 13).

⁶⁴ IMO, *cit. supra* note 19, paras. 6.3 and 2.6, respectively.

⁶⁵ IMO, *cit. supra* note 30, Vol. III, pp. 2-39; also, Vol. II, para. 6.16.1.

⁶⁶ Cf. UNHCR, *cit. supra* note 21, para. 30.

⁶⁷ IMO, *cit. supra* note 29, para. 2.3.

best equipped for receiving traumatised and injured victims,⁶⁸ the next scheduled port of call, a port of the State whose flag flies on the public vessel having rescued people in distress, and the port of embarkation.⁶⁹

As is evident, both lists make reference to the place from which the rescuees left dry land – an option that can be found elsewhere in the grey literature concerning this issue⁷⁰ and may have a basis in actual practice.⁷¹ The reason, according to the UNHCR, stems from “the responsibility of the country of embarkation to prevent un-seaworthy vessels from leaving its territory”,⁷² although it is unclear whether the word “responsibility” is used here in strictly legal terms. This seems unlikely, and it is certain that the European Union did not invoke such responsibility in its Regulation 656/2014, where it told Frontex vessels that, in case of interception, “disembarkation may take place in the third country from which the vessel is assumed to have departed” and, if this is not possible, in the Member State hosting the mission.⁷³ Prospects of reform, however, indicate that the EU might put about (to resort to the nautical jargon) by ordering that migrants are disembarked and promptly transferred to reception facilities “established as far away as possible from points of irregular departure”, to avoid them leaving again.⁷⁴

An alternative option – one cropping up frequently in the comments of politicians⁷⁵ – is disembarkation in the State of the flag flown by the rescuing vessel.⁷⁶ This solution was advocated by Italy in relation to the ships *Astral* and *Aquarius*, both flying the UK flag⁷⁷ (which eventually led to the latter being stripped of her

⁶⁸ For instance, the ship *Bourbon Argos* was not authorised to berth in Sicily at first, and then in turn her captain refused to make landfall there, due to lack of capacity of the reception system: see MSF, “Migration: Bourbon Argos not authorised to land 700 rescued migrants in Sicily”, 17 July 2015, available at: <<https://www.msf.org/migration-bourbon-argos-not-authorised-land-700-rescued-migrants-sicily>>.

⁶⁹ UNHCR, *cit. supra* note 21, para. 30. See also para. 7.

⁷⁰ See, e.g., Regional Support Office of the Bali Process, *Comprehensive Approaches for Addressing Irregular Movements of People by Sea*, 2017, p. 159.

⁷¹ It seems that the port of origin may have played a role in the cases of the vessels *Marine I* and *Happy Days*: on both occasions, the rescued ships’ flag States, the rescuing ships’ flag States, and the States having jurisdiction over the waters where the rescue had place were different from the State of embarkation. See “Mauritania aceptaría el desembarco de los inmigrantes si luego son trasladados a Guinea Conakry”, *El País*, 8 February 2007; “España negocia con Senegal y Guinea la vuelta al puerto de origen del barco con 300 inmigrantes”, *Hoy*, 25 March 2007; “España abandona al ‘Happy Day’”, *El País*, 4 April 2007.

⁷² UNHCR, *cit. supra* note 21, para. 30.

⁷³ Regulation (EU) No. 656/2014, *cit. supra* note 15, Art. 10(1)(b). It must be remarked, however, that the regulation establishes different consequences for the cases of interception and SAR missions.

⁷⁴ European Council, *cit. supra* note 2.

⁷⁵ In addition to the examples that follow in the main text, see *infra* note 91.

⁷⁶ On the practice (and an alleged, inchoate – at that time – duty) of flag States to accept refugees, SCHAFFER, *cit. supra* note 26, p. 228 (of course, acceptance of refugees can be logically decoupled from the choice of the place of disembarkation).

⁷⁷ “Rescued migrants reach Sicily after Italy, UK squabble for three days”, *Xinhua*, 11 May 2018, available at: <http://www.xinhuanet.com/english/2018-05/11/c_137170648.htm>.

flag⁷⁸), but something similar was suggested by Italian ministers also when dealing with the docking of the ship *Sea Watch 3*, flying a Dutch flag,⁷⁹ as well as the ship *Open Arms*, flying a Spanish flag.⁸⁰ This, however, can hardly be taken as a point of law as the Italian Minister of the Interior, speaking about the *Open Arms*, provided several possible criteria for the choice of the place of disembarkation, adding to those already mentioned – the closest port (Malta) and the place of registration (Spain) – the nationality of the humanitarian NGO on board of the ship (Spain) and the SAR area where the rescue took place (Libya).⁸¹ He took the same position when he denied the *Aquarius* access to Italian ports, since he reiterated his “anywhere but in Italy” policy by referring to the ownership of the vessel (Germany), its flag (United Kingdom), the nationality of the NGO (France), that of the crew (“foreign”) and the waters where the ship was sailing at the time of the Minister’s declaration (Malta).⁸² This panoply of parameters is impossible to sort out hierarchically – although the words of the Italian Minister of Transport seemingly imply that the flag governs the choice of the place of disembarkation⁸³. However, the fact that all such positions are taken opportunistically and on a case-by-case basis is apparent, so that Italy’s erratic invocation of the rules of international law is quite pointless.⁸⁴

⁷⁸ “Gibraltar’s decision to strip flag from Aquarius rescue ship undermines ancient seafaring principle of solidarity”, *The Conversation*, 7 September 2018, available at: <<http://theconversation.com/gibraltars-decision-to-strip-flag-from-aquarius-rescue-ship-undermines-ancient-seafaring-principle-of-solidarity-101928>>.

⁷⁹ “Toninelli: Sea Watch, nave olandese, vada in Olanda”, *Firenze Post*, 25 January 2019, available at: <<https://www.firenzepost.it/2019/01/25/toninelli-sea-watch-nave-olandese-vada-in-olanda/>>; “Sea Watch 3, Salvini: ‘Sta navigando verso Malta, in Italia porti chiusi’, ma la nave è a poche miglia dalla Sicilia”, *TPI News*, 24 January 2019, available at: <<https://www.tpi.it/2019/01/24/sea-watch-3-sicilia-malta-posizione/>>.

⁸⁰ “Migranti, nuovo scontro Italia-Malta”, *Adnkronos*, 30 June 2018, available at: <https://www.adnkronos.com/fatti/politica/2018/06/30/nave-ong-imbarca-migranti-salvini-scordatevi-italia_6riAIMOzGVFB0KBz6QEFjL.html>.

⁸¹ *Ibid.* The Minister referred to the presence of the ship in the Libyan SAR zone, but he might have intended the place where the rescue occurred (but see next footnote and related text, as well as note 85). The distinction is crucial, because the former criterion is mobile, whereas the latter is fixed.

⁸² “Aquarius, no di Italia e Malta. Si offrono Barcellona, Napoli e Palermo”, *Repubblica*, 13 August 2018, available at: <https://www.repubblica.it/cronaca/2018/08/13/news/aquarius_e_il_soccorso_rifutato-204002144/>.

⁸³ *Ibid.* But his colleague, the Minister of the Interior, was more Solomonic: “Dutch ship, German NGO: half of the migrants to Amsterdam, the other half to Berlin”. He too, however, spoke of responsibility in relation to the flag State only: “Sea Watch, ricorso a Strasburgo: ‘Italia consenta sbarco’. Ue: ‘Stati siano solidali’ Salvini: ‘Ci pensino Olanda e Germania’”, *Il Fatto Quotidiano*, 24 June 2019, available at: <<https://www.ilfattoquotidiano.it/2019/06/24/migranti-sea-watch-da-12-giorni-in-mare-con-43-migranti-chiede-intervento-della-corte-di-strasburgo-per-sbarcare-in-italia/5277773/>>.

⁸⁴ See, most recently, the case of the ship *Mare Jonio*, flying an Italian flag. There, not unexpectedly, Italy did not raise the responsibility of the flag State, but that of the State of the closest port (*rectius*: many States, including Libya!), although the NGO operating in the Mediterranean affirmed that Italy’s coasts were nearer. Italy also remarked that the rescue did not occur in the Italian SAR region, so that the requisites for the identification of a place of

As to the SAR region where the rescue occurred, such criterion so far has provided a dual argumentative basis, as it may be construed as an element that directly determines the place of disembarkation (i.e., the State supervising the area is the one required to allow disembarkation⁸⁵) or only as a factor indirectly governing the choice of that place, the first step of a two-tier identification process. The former option had already been put forth by Italy in 2009,⁸⁶ well before the *Open Arms* and *Aquarius* affairs. The latter resembles the policy adopted by Malta, which will not open its ports to people rescued outside its SAR area – unless “overriding humanitarian reasons” are present – while in the case of people saved in the area it will use the “nearest safe haven” criterion to select the place of disembarkation.⁸⁷ Thus, apparently, even if such people are picked up in the Maltese SAR area, if Maltese ports are not the closest safe harbours Malta would not grant permission to dock (which is significant, given the large extent of its SAR zone).⁸⁸ Since Malta explicitly maintains it is acting in compliance with its

safety in Italy were not fulfilled – a clear misunderstanding of the rules governing the choice of a refuge. See Italian Ministry of the Interior, Directive No. 14100/141(8), 18 March 2019, p. 7; SARZANINI, “La Ong Mare Jonio soccorre 49 migranti: ‘Diretti a Lampedusa’. Stop di Salvini: ‘Porti chiusi’”, *Corriere della Sera*, 19 March 2019.

⁸⁵ According to the SAR Convention, it is in fact necessary to choose a place of safety (see *infra* Section 3), but in some cases States used this criterion as a “proxy” for the outcome of such a choice. Moreover, the text of the relevant provisions does not clarify whether what is relevant is the SAR zone where the incident occurred or where assistance was rendered (which may not overlap). Based on the report of the Italian Prime Minister before the Senate, on the facts relating to the ship *Diciotti*, one may suppose that the decisive factor is the SAR region where the incident took place or, perhaps, where the vessel in distress called for help (see, in this Volume, the contribution by ANTONIAZZI in the section on the Italian Diplomatic and Parliamentary Practice). But in the case of the ship *Lifeline*, the Minister of Transport asked Malta to permit disembarkation because the vessel had moved to the SAR area of that State, despite the rescue having occurred outside the area (for Malta, it was a “post-SAR” situation). See “Lifeline, Toninelli: ‘È in acque maltesi’. Ma La Valletta: ‘La nave con i migranti non può attraccare qui’”, *Il Fatto Quotidiano*, 22 June 2018, available at: <<https://www.ilfattoquotidiano.it/2018/06/22/lifeline-toninelli-e-acque-sar-maltesi-ma-la-valletta-la-nave-con-migranti-non-puo-attraccare-qui/4443579/>>; “Lifeline, Malta rifiuta di fare attraccare la nave con 239 migranti”, *La Repubblica*, 22 June 2018, available at: <https://www.repubblica.it/cronaca/2018/06/22/news/lifeline_fuorilegge_vera_la_bandiera_olandese-199687625/>. It must be noticed that this criterion may be construed more strictly or loosely: that is, a government can maintained that the State responsible for a SAR region is the one that have to accept the rescuees, so that if these were saved outside any SAR region such government must find other reasons to disclaim responsibility; or, a government can affirm that in no case it feels obliged to let the rescuees in if these were saved outside its own SAR area. In the Mediterranean Sea, which is covered by SAR regions almost in its entirety, this distinction is scarcely relevant.

⁸⁶ GHEZELBASH et al., “Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia”, *ICLQ*, 2018, p. 315 ff., p. 316. See also *supra* note 84.

⁸⁷ House of Lords of the United Kingdom – European Union Committee, *cit. supra* note 42, p. 100.

⁸⁸ In 2009, Malta resorted to this argument in the case of the ship *MV Pinar E*, which had rescued people in distress in the Maltese SAR region, but nearer to the Italian coast. Eventually, these people were disembarked in Italy. See BARNES, *cit. supra* note 37, p. 142.

international obligations,⁸⁹ its stance contributes to shaping custom on the place of disembarkation. This is not without consequences, as under this rule a State would be able to deny access to its ports, even if they were the closest ones to the place of rescue, merely because such place were outside its SAR area⁹⁰ – a clear incentive to establish small areas and to reduce those already declared. Moreover, disembarkation would be even more difficult if the discriminating factor were not the SAR zone but the far narrower strip of territorial waters, as a spokesman of the Maltese government suggested.⁹¹

Finally, a somewhat curious qualification for the place of disembarkation has surfaced fitfully, the idea of the “safest” port.⁹² At a glance such denomination might be attributed to a slip of the tongue of some government representatives. For instance, based on one such declaration, the option might be reduced to other, more conventional criteria: “Spain is not the safest port, because it is not the closest according to what is set out under international law”⁹³ (a sentence entailing the identification of “safest” with “closest”). Although it is likely so, it is worth stressing that the notion of a safest port is actually sensible, as destinations can, sometimes, be classified according to varying levels of safety for given rescuees. If a ship saves and takes on board people of different nationalities, the harbour where all of them would be protected is certainly safer than one where the physical and psychological integrity of some of them would be threatened. In such a scenario, it would be reasonable for the ship’s commander to head directly to the

⁸⁹ House of Lords of the United Kingdom – European Union Committee, *cit. supra* note 42, p. 100.

⁹⁰ This is precisely what happened in the case of the ship *Francisco y Catalina*, which was denied access despite its being nearer to the Maltese shores: “Stranded migrants finally leave”, *Times of Malta*, 22 July 2006, available at: <<https://timesofmalta.com/articles/view/stranded-migrants-finally-leave.46984>>. Malta had asked that the migrants be returned to Libya (the State responsible for the SAR zone) and, as a second-best alternative, sent to Spain (the flag State): TESTA, *cit. supra* note 39, p. 561.

⁹¹ “Malta had no obligation to take them because they were not picked up in Maltese waters and Malta was not the closest port” (emphasis added to stress that, presumably, the two conditions are not to be seen as alternative): “Migrants stuck at sea for 10 days disembark in Malta”, *Euronews*, 2 December 2018, available at: <<https://www.euronews.com/2018/12/02/migrants-stuck-at-sea-for-10-days-disembark-in-malta>>. The Italian Minister of the Interior also seemingly referred to territorial waters as a pertinent parameter: ZININI, “Sea Watch, autorizzato lo sbarco per le famiglie. Salvini: ‘Porti chiusi e non c’è presidente del consiglio che tenga’”, *Repubblica*, 17 May 2019, available at: <https://www.repubblica.it/cronaca/2019/05/17/news/sea_watch_diffidata_ad_entrare_in_acque_italiane-226489812/>.

⁹² See, e.g., Government of Malta, “Statement by the Government of Malta”, 16 June 2018; “Migranti, scontro Italia-Malta. Salvini: ‘Porti chiusi all’Aquarius’ Conte: ‘Noi lasciamo soli’”, *Corriere della sera*, 10 June 2018. The “safest port” is presented as a self-standing criterion also by the Regional Support Office of the Bali Process, *cit. supra* note 70, p. 159.

⁹³ “Spain will not accept NGO ship ‘Aquarius,’ which is carrying 141 rescued migrants”, *El País*, 13 August 2018, available at: <https://elpais.com/elpais/2018/08/13/inenglish/1534146930_578482.html>. Also, later, “Spain ignores pleas to not send rescued migrants back to Libya”, *El País*, 28 November 2018, available at: <https://elpais.com/elpais/2018/11/28/inenglish/1543393941_790926.html>.

safest place, even if further, rather than stopping at a closer port where only some of the rescuees could be disembarked.

3. THE ALLOCATION OF THE DECISION-MAKING POWER

From the survey above a precise obligation cannot be drawn that imposes under all circumstances a given place of disembarkation, despite allegations to the contrary on the part of some States. Quite the opposite, it appears that, at present, international law does not seriously curtail the leeway of shipmasters in deciding where to stop, other than through a couple of paramount considerations: the duty of *non-refoulement* and the compulsory choice of the closest safe harbour inasmuch as a swift disembarkation is demanded by necessity. Outside these two cases, the captain of the rescuing ship is free to take the preferred course and to ask for a place of safety from any State.

This means that the MRCC responsible for the rescue mission might have a say in the choice of the place of disembarkation not by imposing a specific place of safety but, rather, by sensibly determining that the target of the mission was not delivered to a safe place and thus a journey to a new place of disembarkation is needed,⁹⁴ or by warning that the next scheduled port of call is too far to be reached and that the conditions of the survivors imperatively require that a nearer place be selected. Conversely, the shipmaster can discard the place of safety suggested by the MRCC anytime it was not chosen solely having regard to the current or prospective health of rescuees – that is, not just due to a motivated fear that human rights abuses would be committed there,⁹⁵ or because of an emergency situation calling for the ship to dock at the closest place of safety.⁹⁶

In essence, it is generally up to the shipmaster to decide, as the State hosting the MRCC coordinating the mission can only recommend a place of safety. This is clear from a textual reading of the SAR Convention and the SOLAS Convention, which only entrust the State supervising the relevant SAR region with a power of coordination.⁹⁷ Such State can, of course, enact a law to bind the shipmaster to the

⁹⁴ This faculty would resemble the undiscussed capacity of SAR authorities to keep an operation ongoing until they soundly determine that the target is no longer in distress.

⁹⁵ Arguably, this is what the ship *Nivin* could have done when asked to bring those rescued back to Libya (see, further in this Volume, the contribution by ANTONIAZZI in the section on the Italian Diplomatic and Parliamentary Practice).

⁹⁶ See the “log book chronicle” of the *Teesta Spirit*, whose master was instructed to reach a port much further than the closest one; available at: <<https://crewmirror.com/2014/12/02/search-and-rescue-operation-by-teesta-spirit>>. For the general principle, CARTNER et al., *The International Law of the Shipmaster*, London, 2009, p. 158.

⁹⁷ Therefore, the MRCC’s instructions cannot be seen as directives whose violation entails a breach of international law, contrary to what the Italian Government has repeatedly maintained, also in official documents: see Italian Minister of the Interior, *cit. supra* note 84, pp. 5 and 7-8, as well as a later directive ordering the *Sea Watch* not to disregard, *inter alia*, the instructions of the competent MRCC, whose “prerogatives” the ship must respect. This latter directive, of 13 June 2019, has not been officially published yet (at the date of writing), but its content has been made known by the press: “Sea Watch-Salvini, è scontro”, Adnkronos,

government’s choice, but this would affect only those private ships flying its flag, as public vessels are required to follow their State’s orders anyway. This, however, would not diminish the cogency of the two considerations pointed out above, that would remain overriding and would continue to operate also through the legal systems of the countries passing such (possibly unconstitutional) laws.

Of course, no State can be forced to open its ports (apart from in the case of a ship in distress, which retains her incontestable right to put into the closest haven: the state of necessity entails a two-way obligation, and people whose lives are at risk at sea must receive medical treatment on land).⁹⁸ So, what about those circumstances when no State is willing to allow disembarkation? The IMO has tried to find a solution by saying that, “[i]f 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”.⁹⁹ However, this provision is expressed in soft terms in a soft law instrument, and many parties to the SAR Convention manifested their concerns on it becoming binding.¹⁰⁰ Therefore, no obligation to this effect can be said to exist at the moment.¹⁰¹ This is not necessarily a bad thing. Since States are required to take action even beyond their own SAR regions, when the distressed vessel is in a “no-SAR zone” or in the area under the responsibility of a State unwilling to act – it is unclear whether this is a binding requirement,¹⁰² but a State like Italy deems it part of its international obligations¹⁰³ – then, if the State proceeding to the rescue were also

13 June 2019, available at: <https://www.adnkronos.com/fatti/cronaca/2019/06/13/seawatch-rifiuta-porto-sicuro-offerto-libia_MuFs8WAK0dnqCC3w0q1OgO.html>. In the same press release, see also the words of the Italian Minister of the Interior, who threatens consequences should the Sea Watch “disobey” the Libyan authorities’ commands. On the role of the MRCC under the law of the sea, see also the Italian Minister of Transport in “Sea Watch, Toninelli: ‘Non sbarca da noi’. Salvini: ‘Se ne frega delle leggi e delle vite’”, *fanpage.it*, 19 June 2019, available at: <<https://www.fanpage.it/politica/sea-watch-da-8-giorni-in-mare-toninelli-ha-violato-le-regole-non-puo-approdare-in-italia/>>.

⁹⁸ Although relief may be given to these people on the rescuing ship, sooner or later the time will come when treatment will be needed that can only be provided on land. Moreover, a prolonged, grievous, forced stay on the ship might entail violations of fundamental rights, not least the right to life and – possibly – the right to liberty and freedom of movement. These considerations are likely to remain valid irrespective of any censurable or even abusive conduct on part of the ship (a thorny issue that cannot be dealt with here due to space constraints).

⁹⁹ IMO, *cit. supra* note 29, para. 2.3.

¹⁰⁰ COPPENS and SOMERS, “Towards New Rules on Disembarkation of Persons Rescued at Sea?”, *The International Journal of Marine and Coastal Law*, 2010, p. 377 ff., pp. 389-392.

¹⁰¹ See, *inter alia*, PASTAVRIDIS, “‘We Saved Them, Now What?’: The Unresolved Question of Disembarkation of Rescued Persons at Sea”, in SOBRINO HEREDIA (ed.), *La contribution de la Convention des Nations Unies sur le Droit de la Mer à la bonne gouvernance des mers et des océans*, Napoli, 2014, p. 587 ff., p. 598 (for a doctrinal view); Regional Support Office of the Bali Process, *cit. supra* note 70, pp. 150-151 (for an intergovernmental perspective). See also the contribution by NERI in this Symposium.

¹⁰² The SAR Convention does not state this in clear terms, and the specification is in IMO, *cit. supra* note 19, paras. 6.5-6.7.

¹⁰³ See the official note by the Italian Coast Guard, available at: <<http://www.guardiacostiera.gov.it/servizi-al-cittadino/Pages/operazioni-in-mare-a-distanze-lontane-dalle-coste-italiane.aspx>>.

charged with the duty to accept those saved, this might turn into a disincentive to remedy other States' omissions. This is another reason that makes an agreement on burden-sharing compelling.