ASSESSING HUMAN RIGHTS VIOLATIONS IN MIGRANT RESCUES: A COMPARATIVE ANALYSIS

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ABSTRACT

In the last decade, the Mediterranean Sea has emerged as one of the main migratory routes used by thousands of people who, in search of better opportunities and a safer life, face the dangers inherent to these crossings in the hope of reaching Europe. However, the precariousness of the conditions in which these crossings are carried out is a determining factor that has contributed significantly to the tragic outcomes in the Mediterranean. In this context, the search and rescue (SAR) services of coastal States play a crucial role in safeguarding human life at sea, underscoring the urgent need to reinforce such operations to address this humanitarian crisis.

This study aims to conduct a comprehensive analysis of the regulatory framework governing SAR operations in order to identify its main shortcomings and the challenges that have hindered the incorporation of humanitarian considerations in its implementation and development. A mix of research methods is employed for this purpose: the comparative legal research and the doctrinal research. This approach allows for an in-depth analysis of SAR cooperation between States from both a theoretical and practical perspective.

In this regard, a comparative analysis of joint SAR operations between Italy and Malta in the central Mediterranean, and between Spain and Morocco, in the western Mediterranean has been carried out. The results reveal the main differences in the practice of SAR cooperation in these two migratory contexts, as well as the fundamental challenges to be overcome in order to achieve a more effective SAR regulation, in which humanitarian considerations and the interest in the protection of human life at sea prevail over the traditional sovereignty and security interests of States in the face of irregular immigration.

Keywords: Search and Rescue, State Cooperation, Human Rights, Law of the Sea, Irregular migration

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- Convention relating to the Status of Refugees (Geneva, adopted 28 July 1951, entered into force 22 April 1954) (Refugee Convention) and Refugee Protocol (Geneva, adopted 31 January 1967, entered into force 4 October 1967) (Refugee Protocol)
- European Convention for the Protection of Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
- International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278.
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
- International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97.
- International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 40 ILM 384.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime) adopted 15 November 2000, entered in force 25 December 2003) 40 ILM 335.
- United Nations Convention on the Law of the Sea (adopted ¡10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

Other instruments:

- IMO Maritime Safety Committee, 'Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended', Resolution MSC.153 (78) (adopted 20 May 2004).
- IMO Maritime Safety Committee, 'Adoption to the International Convention on Maritime Search and Rescue, 1979, as amended', Resolution MSC.155 (78) (adopted 20 May 2004).
- Guidelines on the Treatment of Persons Rescued at Sea, Maritime Safety Committee MSC. 167(78), 78th session, Agenda Item 26, IMO Doc MSC 78/26/Add.2 Annex 34 (adopted 20 May 2004).
- Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, signed on 2 February 2017.
- Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combating Illegal Immigration, signed on 28 May 2020.

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United Nations Human Rights Committee:

- UN Human Rights Committee, 27 January 2021, Communication Nº 3042, S.A et al V. Italy.
- UN Human Rights Committee, 27 January 2021, Communication Nº 3043, S.A et al V. Malta.

LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EUA	European Union Asylum Agency
FRONTEX	European Border and Coast Guard Agency
ICJ	International Court of Justice
IMLI	International Maritime Law Institute
IMO	International Maritime Organisation
IOM	International Organization for Migration
MRCC	Maritime Rescue Coordination Centre
MSC	Maritime Safety Committee
MoU	Memorandum of Understanding
NGOs	Non-Governmental Organizations
NRCC	National Rescue Coordination Center
RCC	Rescue Coordination Center
SAR	Search and Rescue
SAR Convention	International Convention on Maritime Search and Rescue
SASEMAR	Sociedad de Salvamento y Seguridad Marítima
SEMAR	Maritime Service of the Spanish Civil Guard
SIVE	Integrated System of External Surveillance
SOLAS Convention	International Convention for the Safety of Life at Sea
UNCLOS	United Nations Convention on the Law of the Sea
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees

CHAPTER I: INTRODUCTION

1. Contextualization of the research

This research, entitled *'Assessing Human Rights Violations in Migrant Rescues: A Comparative Study'*, is a final dissertation of the Master of Laws (LL.M) in International Law, taught at the Faculty of Law of the University of Malta.

This study provides a comprehensive comparative study on the cooperation between States in the conduct of maritime search and rescue (SAR) operations in a context of large-scale irregular migration, analyzing how human rights issues influence the regulation and implementation of such operations.

Through this approach, the study seeks to identify the main shortcomings and challenges 'facing international regulation in the protection of the rights of persons rescued at sea, offering proposals for improving State cooperation in this area.

This research is situated in the context of Migration and Refugee studies, as it focuses on the movement of people across European maritime borders and the corresponding legal and humanitarian responses. The study encompasses several disciplines, integrating key aspects of International Human Rights Law, Law of the Sea and, specifically, maritime SAR operations.

Geographically, this study focuses on the Mediterranean region, an area of critical importance due to the high migratory influx experienced since the early 2010s. In particular, the analysis focuses on the maritime borders of southern European countries, where the complexity of the migratory phenomenon has required intense cooperation between States to manage emergencies at sea.

The study is temporally set in the context of the most recent European maritime migration crisis, which started at the beginning of the last decade and has been ongoing until the present day. This period has been marked by a complex socio-political scenario in which European Union (EU) Member States have faced numerous challenges in terms of border control, humanitarian assistance and international cooperation.

2. Research problem

With three clearly differentiated migratory sea routes in terms of influx and control — the western route, the central route and the eastern route— the Mediterranean Sea has established itself as one of the main migratory pathways towards Europe. This sea stands as the gateway for thousands of people who, in search of better opportunities and a safer life, face dangerous crossings in the hope of reaching the European continent.[1]

However, the precariousness of the conditions in which these crossings are carried out is a determining factor that has contributed significantly to the tragic outcomes in the Mediterranean Sea.

The vessels used for these crossings are often far from seaworthy, posing serious risks to the safety of migrants. In most cases, they are small, old wooden boats, originally designed for fishing in coastal waters, and not for long crossings in the open sea. In recent years, there has been a worrying increase in the use of plastic inflatable boats, which, although more affordable, are extremely unsafe. This structural deficiency is compounded by passenger overloading, as vessels often carry far more people than their capacity, without guaranteeing access to necessary safety equipment.[2]

In this context, the most recent data collected by the Missing Migrants Project of the International Organization for Mi¡gration (IOM) reflect an alarming reality. Since the start of this initiative in 2014, the number of deaths and disappearances in the Mediterranean Sea has reached 30,000 people.[3]

Particularly relevant is the high number of shipwrecks and sinkings recorded in the region, highlighting the crucial role played by the maritime SAR services of coastal States

[1] See FRONTEX, 'Migratory Routes' <https://www.frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/migratory-routes/ > accessed 5 March 2024.

[2] Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press 2018) 15.

[3] Since the launch of the Missing Migrants Project in 2014, led by the International Organization for Migration (IOM) to gather information on the number of missing migrants along global migration routes, over 30,000 deaths and disappearances have been documented in the Mediterranean Sea migration routes. The essential role of the IOM in this project, considering the challenges in accurately estimating data and information, lies in revealing the reality of the migration phenomenon. Furthermore, it plays a crucial part in providing solace to families of immigrants living in uncertainty about the fate of their relatives, partners or children. See IOM, "Mediterranean | Missing Migrants Project" <https://missingmigrants.iom.int/region/mediterranean> accessed 15 August 2024.

in safeguarding human life at sea.[4] These incidents underscore the urgency and importance of developing and strengthening SAR operations to address this humanitarian crisis.

However, essential cooperation between States in this area is hampered by the absence of clear normative provisions defining the SAR responsibilities of each party.

In an effort to avoid international protection obligations that may arise from the disembarkation of migrants in their ports, some coastal States have chosen to disregard distress calls or delay their response, in order for another State to assume responsibility for rescue, thus allowing coastal States to escape the legal and humanitarian implications associated with the disembarkation of persons in vulnerable situations.[5]

More than a decade after a significant increase in the influx of migrants by sea began to be recorded, the situation remains extremely complicated. Irregular arrivals on European shores remain a daily reality, showing that the challenges persist with no effective solution on the horizon. Migrant smuggling networks, which manage these migratory flows, have demonstrated a remarkable ability to adapt to the new controls and surveillance measures implemented by European States.[6]

Despite efforts to regulate these arrivals, the lack of a common and effective response has led many countries to adopt a border securitization approach, prioritizing security and state sovereignty over safeguarding human life at sea. States have opted for strategies that seek to prevent the arrival of migrants on their shores, often at the expense of the protection of human rights and the lives of those facing extremely dangerous crossings.[7]

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[4] Of the more than 30,000 deaths and disappearances recorded in the Mediterranean Sea, approximately 28,000 have been caused by sinkings and shipwrecks of the vessels carrying these migrants. See: <https://missingmigrants.iom.int/region/mediterranean>

[5] Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control – Legal Challenges* (Martinus Nijhoff Publishers 2010) 144.

[6] Patricia Vella de Fremeaux (Mallia), 'The Human Element of Maritime Crime: Stowaways, Human Trafficking, and Migrant Smuggling' in David Joseph Attard and others (eds), *The IMLI Manual on International Maritime Law Volume III: Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 500.

[7] Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 6.

In addition, cooperation initiatives with third States to manage migration flows have resulted in a significant transfer of responsibilities to these countries. However, the ability of these third States to ensure respect for human rights is questionable, raising serious concerns about the conditions under which migrants are treated. In the meantime, by delegating responsibilities to these third countries, European states tend to evade their own obligations in terms of maritime rescue and human rights.[8]

3. Research objectives

In this context, the present study aims to conduct a comprehensive analysis of SAR regulation in order to identify the main shortcomings in the regulation and the challenges that have prevented the incorporation of humanitarian considerations in its development and implementation.

To achieve this objective, the study uses two case studies to compare the joint actions of different pairs of States: Italy and Malta in the Central Mediterranean region, and Spain and Morocco in the Western Mediterranean region.

Through these case studies, the aim is to examine the practices adopted in the management of migrant rescue operations in each region in order to assess how the responsibilities and challenges associated with the fulfilment of human rights in SAR cooperation have been handled.

This approach will allow for a deeper understanding of the operational situation in each region, as well as the identification of areas to improve effectiveness in maritime SAR operations.

4. Significance and limitations of the research

The significant reduction of European naval operations tasked with providing assistance at sea, coupled with the reluctance of European States to carry out these rescues while

[8] Barnes (n 5) 148.

criminalizing Non-Governmental Organizations (NGOs) at sea, has left migrants in vulnerable situations at Europe's southern maritime borders.[9]

In this context, it is essential to analyze the role of States in ensuring the protection of migrants' rights during maritime rescue operations. State action and cooperation in this field is particularly relevant as the number of cases brought before international courts and committees has highlighted possible human rights violations, underlining the urgent need for a more humanitarian approach and compliance with international standards in the management of these rescues.[10]

In this sense, this study seeks to focus attention on the joint action of neighbouring States in the coordination and execution of rescue operations at sea, as well as on the assessment that international courts and committees have made on the protection and guarantee of human rights compliance during these operations at sea.

By resorting to a comparative study, this research aims to expand the existing literature on the subject by clearly and precisely exposing practical examples of cooperation between States in rescue operations at sea. This approach seeks to identifies the main challenges and areas for improvement in this area, offering a critical view on how international cooperation can be optimized to better protect the rights of migrants and ensure their safety at sea.

However, it is important to note some limitations of this research. Data collection in the maritime environment presents significant challenges. Despite efforts by international organizations to track deaths and disappearances at sea, the nature of the marine environment makes it difficult to accurately record shipwrecks and human rights violations in the Mediterranean. Therefore, this research is based on information that, while valuable, is approximate and may not fully reflect the magnitude of the events under investigation.

[9] Eugenio Cusumano and Matteo Villa, 'Sea Rescue NGOs: a Pull Factor of Irregular Migration? (2019) 22 European University Institute, 2.

[10] See: Ainhoa Campàs Velasco, 'Vulnerability and marginalisation at sea: maritime search and rescue, and the meaning of 'place of safety' (2022) 18 International Journal of Law in Context; Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press 2018).

5. Dissertation outline

To achieve the objective of this research, the study has been organized into six chapters.

The first introductory chapter (Chapter I) focuses on contextualizing the research and presenting the problem statement, as well as the general objective of the study. In addition, this chapter addresses the significance and limitations of the work, providing an overview of the structure of the study.

The next chapter, entitled 'Literature Review' (Chapter II), will be devoted to a comprehensive review of previous studies and theories on the subject. This chapter will identify gaps in the existing literature, highlighting areas that have not been sufficiently explored and that the proposed research will attempt to address.

The 'Methodology' chapter (Chapter III) will then be devoted to justifying the choice of the methodological approach adopted for this research. In this chapter, the originality of the study will be defended and the data and information collection process used in the study will be detailed.

In the chapter entitled 'Comparative Case Studies' (Chapter IV), two case studies will be presented and analyzed, with the aim of illustrating and examining in detail the migratory situation and the mechanisms of SAR cooperation in different regions of the Mediterranean.

The following chapter, entitled 'Research Findings' (Chapter V), will present the main insights obtained from the analysis of the current legal regulations on SAR operations and the relevant academic doctrine. This section will be organized around the key issues addressed in the research, with the aim of providing a clear and structured view of the information analyzed.

Finally, the conclusions section (Chapter VI) will compile and synthesize the final ideas derived from this study.

CHAPTER II: LITERATURE REVIEW

1. Introduction

Given the relentless increase in the number of deaths and disappearances in the Mediterranean Sea over the last decade,[11] it is not surprising that the majority of political initiatives by EU Member States have included references to the need to regulate SAR operations at sea.[12]

In this context, numerous authors and scholars have addressed the maritime migration phenomenon from various approaches. In this chapter, the intention is to provide a comprehensive review of the diverse studies conducted by renowned scholars concerning irregular migrations and their evolution within the maritime context.

From conceptualizing irregular immigration as a threat to State security to highlighting the lack of a humanitarian perspective in the Law of the Sea, this chapter is structured into four sections that highlight the academic literature on the study of maritime rescue operations in the context of a migration crisis. Through this analysis, this chapter aims to illustrate how the challenges of SAR cooperation among states are a subject that requires further development, and comparative studies, such as the one proposed in this research, could contribute to a more complete understanding of its reality and analysis.

2. Maritime migration in the Mediterranean Sea: A perspective from SAR operations

Maritime migrations have become the predominant method of irregular entry into Europe over the last decade, following the rise in the number of individuals seeking to cross the Mediterranean Sea.[13] This trend is driven by the need to escape armed

[11] See <https://missingmigrants.iom.int/region/mediterranean> accessed 15 August 2024.

[12] European Commission, "Search and Rescue | Migration and Home Affairs" <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/search-and-rescue_en> accessed 14 March 2024.

[13] Since the onset of this crisis, the migratory trend towards Europe has been characterized by a significant influx via sea routes. Reaching its peak in 2016 with over 350,000 arrivals, it can be observed that the number of arrivals by sea far surpasses those by land routes. See: IOM, "Mixed Migration Flows to Europe by Sea and Land | Displacement Tracking Matrix" <https://dtm.iom.int/content/europe-migration-arrivals-dashboard> accessed 5 March 2024.

conflicts, political instability, and the resulting poverty. Additionally, other factors such as the effects of climate change have also contributed to this phenomenon.[14]

The significant influx of irregular arrivals, a growing concern since the early years of the previous decade, culminated in the central Mediterranean in 2015, with an overwhelming number of 1,032,408 migrants arriving in a single year.[15] The high intensity of arrivals, coupled with the EU's difficulties in providing a unified response, highlighted the magnitude and scope of a problem that the EU was facing for the first time. In the face of this challenge, EU Member States demonstrated their lack of capacity to react.

In this scenario of incessant irregular arrivals by sea, the academic doctrine has focused its research on examining the scope and implications of the policies approved by the EU concerning these irregular movements. Likewise, they have been defending the need to improve legal pathways to Europe, with the aim of reducing the number of deaths and disappearances during these journeys.[16]

Precisely, the scarcity of legal entry routes into Europe has been identified by authors like Kosmas and others as a key factor in the rising numbers of individuals turning to illicit networks of human traffickers to attempt to cross the Mediterranean.[17] This leads to their exposure to deplorable conditions and subjects them, in many cases, to abuse and violations during the migration process.[18]

Despite the efforts to prevent and combat migrant smuggling, as highlighted in successive statements by the European Commission, dismantling these criminal

[14] Inmaculada González García, 'La ruta migratoria de África occidental hacia Canarias. De la crisis de los Cayucos de 2006 a la crisis migratoria 2020-2021. Análisis y valoraciones' (2022) Ordine Internazionale e Diritti Umani 373, 395.

[15] UNHCR, 'Situation Mediterranean Situation' (Operational Data Portal) <https://data.unhcr.org/en/situations/mediterranean> accessed 4 March 2024.

[16] Alejandro Del Valle Gálvez, 'Inmigración, derechos humanos y modelo europeo de fronteras. Propuestas conceptuales sobre "extraterritorialidad", "desterritorialidad" y "externalización" de controles y flujos migratorios' (2020) Revista de Estudios Jurídicos y Criminológicos 145, 201 < https://revistas.uca.es/index.php/rejucrim/article/view/6877> accessed 02 February 2024.

[17] Vasileios Kosmas, Michele Acciaro and Maria Besiou, '"Saving migrants" live at sea: Improving search and rescue operations' (2022) POMS 1872, 1876 <https://onlinelibrary.wiley.com/doi/full/10.1111/poms.13653> accessed 10 February 2024.

[18] UNGA 'Report of the Secretary-General on Oceans and the law of the sea' (1 September 2023) 78th session (2023) UN Doc A/78/339.

networks is a real challenge.[19] These networks have shown their ability to rapidly alter their *modus operandi*, responding to control measures imposed by border authorities and adapting their tactics, as well as changing the migratory routes used to avoid detection.

Hence, it becomes increasingly evident that there is a need to address the actions and measures taken by the involved actors to prevent or mitigate these situations of vulnerability at sea. This leads us to consider the efforts to develop search and rescue operations for people in peril at sea, commonly referred to as SAR intervention.

Despite its relevance, the exploration of SAR operations in the context of migration, particularly in the Mediterranean Sea over the last decade, has been relatively scarce in existing literature. As Kosmas and others point out, studies have primarily focused on examining the various actors involved in rescue operations, as well as their assets and positioning in a specific region.[20]

Examples of this can be found in studies focusing on the activities of humanitarian rescue organizations in the Mediterranean, such as those carried out by Janer Torrens[21] or Cusumano and Villa.[22] These studies highlight the ongoing stigmatization faced by humanitarian organizations at sea from political authorities and the media. They have often been portrayed as collaborators with criminal networks engaged in migrant smuggling, leading to legal proceedings and fines that have hindered their rescue efforts at sea. The work of NGOs in the Mediterranean has progressively encountered obstacles due to measures and restrictions imposed by Southern European governments, mainly Italy and Malta, while far-right factions have invoked the controversy of the 'pull factor' to justify these measures.[23]

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[19] European Commission, 'Commission Launches a Global Alliance to Counter Migrant Smuggling and Proposes a Strengthened EU Legal Framework' (European Commission Press Corner, 28 November 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_6081> accessed 4 March 2024.

[20] Kosmas, Acciaro and Besiou (n 17) 1873-1874.

[21] Joan David Janer Torrens, 'Migrant Search and Rescue Operations in the Mediterranean by Humanitarian Organizations_ Migrants Smuggling or Humanitarian Assistance?' (2020) 8 Peace and Security – Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations) <https://revistas.uca.es/index.php/paetsei/article/view/6817> accessed 11 February 2024.

[22] Eugenio Cusumano and Matteo Villa, 'From "Angels" to "Vice Smugglers": the Criminalization of Sea Rescue NGOs in Italy' (2021) 27 European Journal on Criminal Policy and Research 23-40.

[23] The controversy of the "pull factor" for irregular immigration to Europe has been widely studied in economic doctrine. However, studies such as those by Cusumano and Villa in 2019 claim that there is no

Another focus that has characterized the study of SAR operations is the examination of controversies arising from the disembarkation of migrants after their rescue, and the definition of a 'place of safety.' This includes the challenges associated with interpreting these terms and attributing responsibilities in this context, which will be developed in subsequent sections.

Cooperation between States for the development of rescue operations lacks an extensive existing literature. When addressed, it has typically been approached from other perspectives, such as that provided by Coppens and Somers on determining a 'safe disembarkation place' for persons rescued at sea.[24]

In his study titled 'Saving Migrants' Lives at Sea', Kosmas and others delve into the efficacy of cooperation between stakeholders in rescue operations within the Mediterranean. The study employs the number of lives lost at sea as a crucial metric for evaluating the effectiveness of such collaborative efforts.[25]

Building upon this foundation, this study aims to expand the discourse by incorporating a critical consideration: the respect for the human rights of migrants during these rescue operations. While the existing literature has extensively addressed the operational aspects of search and rescue missions, there remains a notable gap in understanding the nuanced human rights implications of these operations. This is precisely what this comparative study aims to add to the existing literature. Through the examination of two real case studies, developed in two different areas of the Mediterranean Sea, this research aims to assess how these actors did or did not take into account humanitarian considerations during the collaborative rescue of migrants at sea.

correlation between SAR operations carried out by NGOs and the number of migrants leaving Libya. See: Eugenio Cusumano and Matteo Villa (n 9).

[24] Jasmine Coppens and Eduard Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25 The International Journal of Marine and Coastal Law 377.

[25] Kosmas, Acciaro and Besiou (n 17) 1872-1873.

3. Challenges in SAR cooperation: The balance between State sovereignty and humanitarian responsibilities

After outlining the critical aspects surrounding maritime migrations that have been extensively addressed in academic literature, the emphasis here turns to studies focusing on more specific challenges within the regulation of rescue operations. Particularly noteworthy are those studies that scrutinize the diametrically opposed interests between state sovereignty and the protection of individuals at sea. Additionally, studies examining EU Member States' responses to this critical migration scenario are highlighted.

3.1. Maritime security challenges: Balancing States interests and humanitarian considerations in the face of a migration crisis

The exponential rise of irregular maritime migration underlines the global and inherently challenging nature of this phenomenon. As mentioned above, the phenomenon of irregular migration encompasses migratory movements driven by multiple reasons of diverse nature. Searching for better economic and employment opportunities in another country tends to stand out as one of the main motives, but there are also people who resort to migration to seek international protection, asylum, or refuge, because they find themselves in a situation of danger in their countries of origin.[26]

Despite differing from the concept of migrant smuggling, which has been categorized as a threat to maritime security,[27] irregular migration has been conditioned by the negative connotations associated with it.

In this regard, numerous scholars have undertaken an examination of maritime security and the scope and impact of the threats and risks present in today's seas around the world.

[26] Marie McAuliffe and Anna Triandafyllidou (eds.), World Migration Report 2022 (2021) International Organization for Migration (IOM) Geneva, 21.
[27] UNGA, 'Report of the Secretary-General on Oceans and the law of the sea', (10 March 2008), 63rd session (2008) UN Doc. A/63/63.

Bearing in mind that the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[28] places a primary emphasis on the peaceful uses of the world's seas and oceans, as expounded by Attard, the significance of maritime security emerges as a key concern for UNCLOS drafters. Given the increase in maritime activity witnessed in recent decades, the author acknowledges that maritime risks and threats have seemingly grown in both scope and diversity, requiring, in many instances, a swift and worldwide response.[29]

In the absence of a definition provided by the provisions of UNCLOS, the efforts of various authors to narrow down the concept of maritime security leave us with valuable insights into understanding the international community's response to these maritime threats. In fact, the analysis of various studies on the subject reveals that the majority of international actors define maritime security by identifying a series of threats.

Stating that a universally accepted definition of the term 'maritime security' is lacking, and acknowledging its dependence on context and user perspectives, former UN Secretary-General, Ban Ki-moon, enumerated a total of seven threats to maritime security in the contemporary landscape.[30]

According to the relevance of the context when assessing maritime security risks, Attard does an excellent job in analyzing the seven types of threats to maritime security identified by the former UN Secretary General in 2008. For this purpose, the author conducts a comprehensive analysis delineating how each threat manifests within the provisions of UNCLOS and through the divisions of maritime spaces outlined by this instrument.[31]

Considering this variety of types, ranging from piracy, terrorism, drugs, arms, and human trafficking and the smuggling of migrants to illegal, unreported, and unregulated fishing or environmental harm, Klein concludes by defining maritime security as the 'protection

[28] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.
[29] Felicity Attard, 'Maritime Security Under the 1982 United Nations Convention for the Law of the Sea' (2014) 12 Benedict's Maritime Bulletin 162.
[30] UNGA, 'Report of the Secretary-General on Oceans and the law of the sea', (10 March 2008), 63rd session (2008) UN Doc. A/63/63.
[31] Attard (n 29) 164-166.

of a State's land and maritime territory, infrastructure, economy, environment, and society from certain harmful acts occurring at sea.'[32]

Another perspective, presented by Bueger, interprets maritime security as the understanding of oceans and seas as spaces of insecurity or objects requiring protection. Consequently, the author concludes that the most precise definition of this concept is rooted in the absence of these threats.[33]

The observation made by James Kraska and Raul Pedrozo while analyzing these threats to maritime security is of particular interest, as they highlight the increasingly common presence of international criminal organizations, insurgencies, or non-state armed groups in controlling and driving such illicit activities.[34]

Focusing on irregular migratory movements by sea, the transnational nature of this phenomenon, affecting the so-called countries of origin, transit, and destination, has made the irregular movement of persons by sea a major international maritime concern. The figures show how dramatically the impulse of the most oppressed segments of society to migrate in search of a better life has increased. Many of these individuals pay traffickers to help them enter another State illegally. In this context, the rising success rates fuel the demand, enabling smugglers to strengthen their control over the human trafficking market as more migrants seek assistance in illegally crossing international borders.[35]

While not a primary aim of the present research, it may be relevant to identify the different cases in which this threat to maritime security may occur. In this regard, Guilfoyle categorizes the three instances in which an illegal movement of people by sea can take place, namely, slave trade, human trafficking, and migrant smuggling.[36]

[32] Klein (n 7) 11.
[33] Christian Bueger, 'What is maritime security?' (2015) 53 Marine Policy 159.
[34] James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff Publishers 2013) 2-3.
[35] *Ibid.* 657.
[36] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 180.

Migrant smuggling is defined as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.'[37]

On the other hand, human trafficking has been defined as 'the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.'[38]

Despite their similarities, as both cases involve a significant human element, Guilfoyle acknowledges that illicit migrant smuggling has a greater impact as a threat to State sovereignty. This is attributed to the higher volume of such movements, presenting a formidable challenge for the State in determining who enters its territory and under what conditions.[39]

The scope of transnational smuggling and human trafficking by sea has been extensively studied by authors such as Vella de Fremeaux, identifying how this risk to national sovereignty poses a greater challenge due to both the use of more sophisticated techniques to avoid detection, as well as the need to consider the protection of people, their welfare and human dignity during their response to this threat.[40]

As a result, the political climate surrounding this issue has created an intricate scenario in which the conflicting interests of numerous international actors come together. The responses received so far have prioritized combating immigration, viewing it as a threat to the State's territorial integrity, security, and public health. At the same time, this

[37] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 40 *ILM* 384 (Smuggling Protocol), art 3.
[38] Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime) adopted 15 November 2000, entered in force 25 December 2003) 40 *ILM* 335 (Trafficking Protocol), art 3.
[39] Guilfoyle (n 36) 180.
[40] Vella de Fremeaux (Mallia) (n 6) 500.

emphasis on security concerns has overshadowed the attention given to the humanitarian considerations that may arise from this phenomenon.

In light of these challenges, a discernible trend emerges in which the so-called destination states of this irregular maritime traffic have directed their efforts to counter this maritime threat with an emphasis on maintaining and strengthening effective border control. In this context, scholars such as Klein underline the overriding interest of these states in enhancing the security of their borders to combat the illegal entry of individuals, vessels, or certain types of cargo, which they see as posing potential threats to internal decision-making processes, community values and governance in general.[41] Klein establishes a nexus between maritime security and State territorial security by elucidating how dangers at sea can impact on activities on land.[42]

Due to the transnational character of these threats, academic doctrine agrees that maritime security is a shared interest, in that no state has the capacity or power to address them alone. Therefore, international cooperation and the ability to provide a coordinated response take on great importance. However, Klein is not wrong in pointing out that while cooperation can be seen as a key mechanism for providing operational responses to maritime security threats, it is how we weigh each state's self-interest and prioritize the general interest that will be the critical starting point.[43]

This notion holds particular significance in this study. Through the comparative analysis of different States' performance in collaborative SAR operations, it is possible to discern how certain actors have prioritized specific interests (such as reducing migrant arrival statistics) over other considerations, like ensuring the safeguarding of human life at sea.

Particularly, another challenge inherent in combating the irregular movement of persons by sea, as highlighted by Bueger, lies in the perilous consequences of exclusively considering the solution of migrant smuggling and human trafficking from a security standpoint.[44] This approach neglects humanitarian perspectives while advocating the application of tough border control measures that obscure the harsh humanitarian

[41] Klein (n 7) 6.
[42] *Ibid.* 4.
[43] *Ibid.* 18.
[44] Bueger (n 33) 161-162.

realities at sea. In this context, the urgency accompanying securitization efforts can foster extreme and costly short-term solutions, potentially overshadowing the imperative to address the human rights and individual protection aspects inherent in cases of irregular migration.

With this idea in mind, this research specifically aims to examine how the emphasis on the securitization of maritime borders is impacting the international legal commitment to safeguard the lives of individuals in distress at sea, as well as the international protection of those seeking refuge and asylum through these maritime routes.

3.2. The response of the European Union and its Member States during the 2015 refugee crisis: A failure of solidarity

As mentioned above, since the beginning of the 2015 refugee crisis, the migratory influx towards Europe has been characterized by a high number of irregular arrivals by sea. Although with reduced intensity, the trend persisted in the subsequent years, giving rise to an unstable situation within the EU. Particularly, the designated Southern States, notably Greece, Italy, Spain and Portugal, witnessed their shores becoming landing ports for thousands of migrants, simultaneously being compelled to provide emergency assistance to vessels originating from North Africa that were perilously close to sinking in the vicinity of their waters.

The massive influx of arrivals initially caused a destabilizing impact on the coastal States, revealing significant shortcomings in the humanitarian assistance provided to migrants. Subsequently, this instability spread throughout the EU, as these arrivals led to subsequent movements of immigrants among Member States, primarily targeting countries in Northern and Central Europe. This situation of complete imbalance among States underscored the urgent need for a decisive stance from the EU, which, in turn, grappled with considerable discrepancies among its Member States, hindering the attainment of a unanimous solution to this crisis.

Disputes arose over the distribution of burdens and responsibilities related to the reception, identification, and repatriation of these immigrants. The majority of them had

no intention of staying in the first-entry States, considering them solely as transit States to reach their desired destinations.[45]

The inability to manage the situation, often marked by insufficient or inadequate measures, highlighted the lack of solidarity among European countries, as well as the incapacity to provide a collective and effective response to the phenomenon devastating their external borders.

This complex scenario has been the subject of insightful studies that have addressed the political and operational response provided by the EU and its Member States regarding the management of their maritime external borders.

In this context, Cusumano and Villa conducted a study on migration flows in the Central Mediterranean from 2014 to 2019, aiming to examine the effectiveness of maritime operations launched by EU Member States. The authors particularly highlight the initiation of the *Mare Nostrum* operation, implemented between 2013 and 2014 by Italy, as the first humanitarian response to the emergency occurring in the Central Mediterranean Sea. However, the lack of operational and financial support, coupled with opposition from other European States, led to the termination of this operation.[46]

Authors such as Esteve identified the reluctance of other EU Member States to contribute to this operation as one of the reasons for its discontinuation.[47] Additionally, the excessive cost and the perception that it acted as a 'pull factor' for irregular immigration were contributing factors to its termination.

Thus, the *Mare Nostrum* operation was succeeded by subsequent naval operations characterized by a more focused approach to surveillance and control of European maritime borders, largely lacking the objective of proactively conducting SAR operations.

In particular, Operation Triton, coordinated by the current European Border and Coast Guard Agency (FRONTEX), took over in the Central Mediterranean. However, it was

[45] Guilfoyle (n 36) 209.
[46] Cusumano and Villa (n 9) 2.
[47] Francina Esteve, 'The Search and Rescue tasks coordinated by the European Border and Coast Guard Agency (FRONTEX) regarding the surveillance of external maritime borders' (2017) 5 Peace and Security – Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations) 93, 112 <https://revistas.uca.es/index.php/paetsei/article/view/4654> accessed 3 March 2024.

primarily conceived as a surveillance mission and far less ambitious than *Mare Nostrum*. Subsequently, the high migratory pressure along the Central Mediterranean required reinforcing these activities, leading to the establishment of Operation EUNAVFOR MED Sophia in 2015, followed by Operation EUNAVFOR MED IRINI in 2020.[48]

Examining naval operations implemented by EU Member States, Kosmas and others contend that these were primarily designed to combat terrorism and migrant smuggling. Additionally, they note that the SAR component was at times included in the mandates of these operations but fell far from constituting the primary objective or receiving the necessary priority compared to other declared goals.[49] As a result, the scaling down of operations primarily designed with the aim of saving lives at sea created a gap in maritime rescue capabilities that was gradually filled by a multitude of humanitarian organizations deploying in the Mediterranean to rescue migrants in distress.

Their performances were most prominent at the beginning of this migration crisis. However, from 2018 onwards, the escalation of measures taken by the governments of Italy and Malta, mainly, to restrict their operations led many of these organizations to cease conducting these rescues, fearing legal proceedings and fines.[50] In addition, the refusal of European States to allow the disembarkation of rescued migrants in their ports, coupled with the NGOs' decision not to return them to Libya due to documented instability and human rights violations, complicated the execution of these operations.[51]

All these issues signify a trend towards strengthening the EU's maritime external borders in response to the relentless irregular flow into Europe. This trend, quite popular among Southern European States, has led to a transformation of the southern border, primarily

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[48] *Ibid.* 113.

[49] Kosmas, Acciaro and Besiou (n 17) 1876-1877.

[50] It is noteworthy that, despite the response from some EU Member States, the European Commission has chosen to criticize the criminalization of NGOs providing support and humanitarian assistance to migrants in distress at sea. In doing so, it urges Member States to distinguish between activities aimed at humanitarian assistance and those employed to facilitate the irregular entry of migrants into Europe. The Commission emphasizes that neither EU law nor legal instruments against illegal immigration seek the criminalization of humanitarian aid. See: European Commission, 'Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence' 2020/C 323/01.

[51] Times of Malta, 'Rescued migrants must not be sent back to Libya, NGOs insist' *Times of Malta* (Malta, 28 November 2018) <https://www.timesofmalta.com/article/rescued-migrants-must-not-be-sent-back-to-libya-ngos-insist.695364> accessed 4 March 2024.

through the militarization of the bodies responsible for its management.[52] An example of this can be found at the Italian's external borders, where search and rescue services have a militarized nature, led by the Italian Coast Guard.[53] Similarly, France has a semi-civil rescue corps, where naval operations are civilian, but the chain of command lies within the military.[54]

Likewise, one of the most significant effects stemming from the trend of strengthening external borders has been cooperation with third countries, such as Libya and Turkey. In exchange for support and funding, they have been tasked with halting irregular migration flows heading towards Europe through the Mediterranean. This collaboration has faced significant criticism from experts, NGOs, and civil society, as there are doubts regarding whether the practices implemented by these countries align with respect for the human rights of immigrants and the protection of the rights of refugees and asylum seekers.

In connection with the transformation of the EU's external borders, Vives conducts a pioneering and innovative study analyzing the Spanish Maritime Search and Rescue Service (known as SASEMAR) and the Spanish government's attempts to harmonize and militarize maritime rescue in line with the trend in the southern border of Europe. Vives identifies three strategies for the case of Spain: the precariousness of rescue crews, the externalization of territorial SAR responsibilities to Morocco, and the transfer of SAR decision-making powers to national, supranational, and international agencies closely linked to the military.[55]

Building on the findings of this study, the present research aims to advance the analysis of SAR cooperation between States, focusing particularly on the case of Spain and

[52] Luna Vives, 'Death at Sea: Dismantling the Spanish Search and Rescue System' (2023) Geopolitics, 641.
[53] With a long history dating back to the establishment of the Corps of Harbor Masters in the 11th century, the Italian 'Guarda Costiera' was created by Ministerial Decree on June 8th, 1989. See: Storia del Corpo (Guarda Costiera) <https://www.guardiacostiera.gov.it/chi-siamo/Pages/storia-del-corpo.aspx> accessed 15 March 2024.
[54] In France, the 'Société Nationale de Sauvetage en Mer' (SNSM) has its origin in the 19th century, following several tragic shipwrecks such as 'L'Amphitrite' in 1833 and 'Le Sémillante' in 1855. See: Les grandes dates du sauvetage en mer (Société Nationale de Sauvetage en Mer) <https://www.snsm.org/lassociation/les-grandes-dates-du-sauvetage-en-mer> accessed 15 March 2024.
[55] Luna Vives (n 52) 641-666.

Morocco as one of the selected practical case studies. The goal is to address the visible humanitarian consequences resulting from these initiatives.

4. The legal framework of maritime SAR operations

When addressing the legal framework governing SAR operations at sea, the doctrine agrees to identify as its central point the duty to assist any person in distress at sea. This obligation to safeguard human life at sea is constituted as customary law, meaning that it derives from a repeated and general practice that is accepted as law.[56] Furthermore, this obligation entails the duty to be complied with regardless of the nationality of the persons assisted or the jurisdiction of the maritime area in which they find themselves.[57]

Aside from its customary nature, this duty has been codified in several international legal instruments, including the 1982 UNCLOS, the 1974 International Convention for the Safety of Life at Sea (SOLAS), the 1979 International Convention on Maritime Search and Rescue (SAR Convention)[58] and the 1989 International Convention on Salvage.[59]

As set out in Article 98 of UNCLOS, the duty to render assistance establishes:

> 1. 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;
> > (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
>
> 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

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[56] Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans'* (Hart Publishing 2013) 294.
[57] International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (1974 SOLAS Convention) Chapter V. Regulation 33.
[58] International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (1979 SAR Convention)
[59] International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165 (1989 Salvage Convention)

As Papastavridis points out, although this provision is included in the section dedicated to the regulation of the High Seas, it is worth clarifying that this duty applies to all maritime areas.[60]

However, according to Kosmas and others assistance to people in distress at sea, despite being recognized as an obligation under international law, and often perceived as a moral duty, has failed to provide effective operational responses to address today's complex migration phenomenon.[61]

In this regard, authors such as Cataldi highlight how the principal instruments regulating the duty to render assistance at sea were originally adopted with a focus on rescues in which passengers and crew on board the ship were presumed to consent voluntarily to be returned to their countries of origin.[62] Asylum and refugee issues were not considered in the adoption of these instruments, so it has only recently become necessary to make certain clarifications through amendments to the original texts.[63]

The reality is that UNCLOS limits the normative implementation of the obligation to render assistance at sea to these two paragraphs of Article 98, and thus needs to be supplemented by other instruments for its further development, as noted below.[64]

In his research entitled 'International Law of the Sea and Migration Control', Barnes sets out to identify the obstacles that hinder the development of more satisfactory regulations to address irregular immigration at sea. In his analysis, the author highlights poor drafting and insufficient practical implementation of the duty to render assistance at sea as one of the key problems in this context.[65] The author attributes this problem to

[60] Papastavridis (n 56) 295.
[61] Kosmas, Acciaro and Besiou (n 17) 1885.
[62] Giuseppe Cataldi, 'Euro-Mediterranean experiences on management of migration governance' (2021) 9 Peace and Security – Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations) 1-7 <https://revistas.uca.es/index.php/paetsei/article/view/8099> accessed 15 March 2024.
[63] A special mention of the amendments adopted by the IMO Maritime Safety Committee in the framework of the regulation on Search and Rescue at sea should be made to: 'Adoption to the International Convention for the Safety of Life at Sea, 1974, as amended', Resolution MSC 153(78) (20 May 2004); 'Adoption to the International Convention on Maritime Search and Rescue, 1979, as amended', Resolution MSC 155(78); 'Guidelines on the Treatment of Persons Rescued at Sea', Resolution MSC 167(78) (20 May 2004).
[64] Papastavridis (n 56) 216.
[65] Barnes (n 5) 103, 104.

the fragmentation of international law into subfields of study and the consequent isolation of these subfields from the rules that regulate it as a whole. This is a conclusion shared by authors such as Papanicolopulu.[66] Barnes explains that the common practice whereby a jurist specialised in one specific field cannot intervene in other legal fields has affected the study of the Law of the Sea. This has been particularly evident when attempting to incorporate issues of international human rights law in this context. Barnes highlights how irregular migration has been systematically ignored or indirectly addressed by UNCLOS as a clear example of this disconnect between the Law of the Sea and human rights issues.

Given this problem, Barnes acknowledges the existence of significant difficulties in modifying or amending UNCLOS, leading to the normative development of the duty of care at sea in the migration context to seek support in other instruments. This situation is mainly due to the complexities inherent in the negotiation process for the adoption of UNCLOS, where States parties were forced to make concessions on certain issues in exchange for advantages in other areas. Thus, the need to maintain a delicate balance between the interests already negotiated in this convention has limited the ability to make substantial modifications to deal more comprehensively and specifically with assistance at sea in the migration context.[67]

Despite the limitations, this area has managed to be complemented by various instruments that, within the general normative framework provided by UNCLOS, have preferred the use of *soft law* instruments for its development. The use of these soft law norms, characterised by their flexibility, has facilitated the alignment of interests among states by adapting more effectively to the geographical, socio-economic and political circumstances of nations affected by irregular migration at sea.[68] A notable example of this is the proliferation of instruments such as the Guidelines issued by the International Maritime Organisation (IMO) on the Treatment of Persons Rescued at Sea.[69] These 'IMO Guidelines', which will be addressed in the chapter on Research Findings, have made a

[66] Papanicolopulu (n 2) 6-8.
[67] Barnes (n 5) 107.
[68] *Ibid.* 113.
[69] Guidelines on the Treatment of Persons Rescued at Sea, Maritime Safety Committee MSC. 167(78), 78th session, Agenda Item 26, IMO Doc MSC 78/26/Add.2 Annex 34 (adopted 20 May 2004) ('IMO Guidelines').

significant contribution to the consideration of human rights in the field of the Law of the Sea.

However, guidelines are not the only *soft law* instruments used in this field. With varying degrees of success, non-binding agreements between States, under the denomination of Memoranda of Understanding (MoU), have been a recurring instrument in migration control and cooperation for the development of rescue operations in the Mediterranean Sea. In this regard, it is worth noting the MoU signed by Libya and Italy in 2017[70], as well as the one signed by Malta and Libya in 2020[71], both focused on containing illegal flows towards the EU.[72] In these cases, however, the humanitarian considerations were not so clear.

Other instruments which have proved to be increasingly sensitive to humanitarian considerations and which, as mentioned above, have contributed to complementing the duty to render assistance at sea, are the conventions adopted within the framework of the International Maritime Organisation, specifically the SOLAS and SAR Conventions. Although differing in their objectives, both instruments have been of crucial importance in the development of the duty to render assistance to persons in distress at sea. The SOLAS Convention, while being an instrument aimed at ensuring safety at sea, focusing on construction standards and safety measures, has also incorporated significant provisions related to rescue obligations. In turn, the SAR Convention stands as the instrument designed to implement the system of international cooperation in Search and Rescue operations. For this purpose, it regulates the organization and cooperation of search and rescue services for coastal states worldwide.

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[70] Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, signed on 2 February 2017, available on <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 27 June 2024.

[71] Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combating Illegal Immigration, signed on 28 May 2020, available on <https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf> accessed 27 June 2024.

[72] Lorena Calvo Mariscal, Cooperation Initiatives by EU Member States with Third Countries for the Control of Migratory Flows: The Case of the Memorandum of Understanding Between Malta and Libya (2022) Cuadernos Europeos de Deusto 6.

Both instruments have been extensively analysed by the doctrine, both in terms of their objectives and their provisions. Moreover, the more flexible nature of these instruments has facilitated the adoption of various amendments throughout their term. Among these, those that took place in May 2004 should be highlighted for their particular contribution to search and rescue duties.[73] A particularly noteworthy aspect of this amendment, as noted by authors such as Papastavridis, is the introduction of the requirement for States Parties to promptly provide a 'place of safety' for the disembarkation of rescued persons.[74] This amendment represented a significant step towards incorporating humanitarian considerations into the rules governing rescues at sea. However, the precise development of this requirement has not been entirely clear and, as later chapters of this research seek to assess, there remains a gap as to how this responsibility should be distributed among States cooperating in the conduct of a search and rescue operation.

It is worth highlighting an instrument that, despite being initially designed to prevent and combat the maritime smuggling of migrants and promote cooperation among the State Parties for that purpose, has been a pioneer in demanding the protection of the fundamental rights of the migrant individuals involved in such smuggling. In her study 'The Human Element of Maritime Crime', Vella de Fremeaux highlights the commendable nature of the 2000 Smuggling Protocol, praising not only the regulatory framework it provides but also its recognition of the human element that is crucial in these offenses.[75] In this regard, its provisions have gone beyond merely regulating migrant smuggling, requiring the boarding State to ensure "safety and humane treatment" for the individuals on board. Since these considerations can also influence scenarios of rescue at sea, for example, as disembarkation is common to both processes, it may be useful to consider this instrument to provide a broader legal framework that addresses all types of maritime migration journeys.

Finally, another point of interest to emphasize in the analysis of the legal framework regulating SAR operations is precisely the delimitation of SAR responsibility zones. As

[73] 'IMO Guidelines' (n 69) para 6.12
[74] Papastavridis (n 56) 216.
[75] Vella de Fremeaux (Mallia) (n 6) 505.

anticipated in the objectives of this study, this research plays a significant role in examining SAR regions, where coastal states bear the responsibility for conducting search and rescue operations for individuals in distress at sea. The demarcation of these maritime regions is left to the discretion of individual states, as stipulated by the SAR Convention.[76] However, this flexibility has resulted in undesirable effects, hindering an effective response to emergencies at sea. Specifically, when the delimitation of these regions is unilaterally undertaken by a state, it can lead to their overlap, giving rise to legal issues regarding which state is responsible for disembarking rescued people at its ports.

Similar to authors such as Koka and Veshi, who have addressed the overlapping SAR regions of Greece and Turkey due to a lack of bilateral agreements in their delineation,[77] this study aims to explore the consequences of these overlapping SAR regions on the distribution of responsibilities between the states of Italy and Malta, as well as Spain and Morocco, respectively.

Nevertheless, the academic literature addressing the regulation of SAR regions remains limited. Among the few authors who have tackled these issues,[78] the question of overlapping SAR regions and, consequently, the overlapping responsibilities between neighbouring states, has proven to be a gap in the literature that this research aims to fill.

In line with this lacuna, a review of existing studies also reveals a theoretical dearth in understanding how the phenomenon of migration resonates with the principles and regulations of cooperation between states for search and rescue at sea, emphasizing the need for further exploration.

[76] 1979 SAR Convention, Annex Chapter 2, para 2.1.4.
[77] Enkelejda Koka and Denard Veshi, 'Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation' (2019) 21 Eur J Migration & L 26.
[78] See: Simone Marinai, 'The action of Greece and Spain against Irregular Migration by Sea', in Angela del Vecchio (ed), *International Law of the Sea. Current trends and controversial issues* (2013) Eleven Publishing, 29-58.

5. International Human Rights Law and humanitarian principles of protection at sea

Upon examining the legal framework for SAR operations at sea, it becomes evident that many scholars agree on the Law of the Sea's significant deficiency in addressing humanitarian aspects in regulating maritime migrations. Conversely, the interest in the interaction between these two realms of international law, the Law of the Sea and the International Law of Human Rights, has been gaining traction in legal discourse in recent years. There is a growing number of authors emphasizing the crucial role that the human element should play within this legal framework.

In this context, Papanicolopulu attributes this heightened interest to the increased visibility of real-life stories brought to light by the media, where thousands of individuals jeopardize their lives by crossing the sea in search of better opportunities in Europe. Secondly, the author also highlights the increase in the number of litigation cases before international courts related to situations in which a state's performance towards people at sea has been assessed.[79]

Furthermore, authors such as Trevisanut also address the lack of humanitarian provisions in the regulation of maritime migration, especially with regard to rescue operations and the duty of assistance at sea. The author argues for the recognition of a right to be rescued and explores the relationship between the principle of safety of life at sea and the right to life under international law.[80]

Given the increasing use of the sea for a variety of purposes, ranging from the transportation of goods and people to its use as a source of food or natural resources, it is not surprising that there has been an inevitable rise in human presence at sea. However, the dangers inherent at the sea are ever-present, not only because of the risks arising from adverse weather conditions, for instance, but also because of the challenges associated with maritime surveillance and patrolling.

In her work 'International Law and the Protection of People at Sea', Papanicolopulu categorizes the types of individuals encountered at sea, summarily distinguishing three

[79] Papanicolopulu (n 2) 1-2.
[80] Seline Trevisanut, 'Recognizing the Right to be Rescued at Sea' (2017) Ocean Yearbook Online, 139.

primary motives: work, travel, or criminal activities. Focusing on the second category encompassing maritime migrations, the author differentiates between migrants, refugees, and asylum seekers.[81] These are the three profiles that have been central to the myriad migratory movements across the Mediterranean Sea in recent years. These movements stem from the need to escape violence in their home countries, seek asylum, or pursue better opportunities and a brighter future elsewhere. Consequently, their vulnerability becomes apparent due to these personal reasons, but also because of the desperation that makes them susceptible to smugglers seeking to exploit them for financial gain.[82]

Therefore, it is evident that the maritime migration journey as a whole is filled with dangers and threats faced by migrants. In the context of our research, SAR operations are also not exempt from the necessity to protect individuals during their execution.

The effective development of a SAR operation yields various humanitarian considerations to be taken into account before, during, and after its execution.

Firstly, the swift decision of whether or not to initiate a rescue operation may result in either a successful or failed rescue, consequently leading to the loss or saving of lives at sea. As Koka and Veshi highlight, failed rescues and states' reluctance to initiate rescue operations raise questions about the legal guarantees provided by international human rights law regarding the right to life and the duty to rescue.[83] Hence, the right to life stands out as a right codified in the law of the sea through provisions on the duty to render assistance at sea.

Likewise, with the conclusion of rescue operations, other issues arise that implicitly require the consideration of humanitarian concerns. We are referring to the disembarkation in a ‘safe place’ and the adherence to the principle of *non-refoulement*.[84]

The challenge of providing a legal definition for a safe place has made the cooperation among states involved in a rescue operation to choose the disembarkation location a significant challenge. In this regard, Barnes links the possibility that the right of asylum

[81] Papanicolopulu (n 2) 17-22.
[82] Vella de Fremeaux (Mallia) (n 6) 501-502.
[83] Koka and Veshi (n 77) 49.
[84] This will be discussed further below in Section 2 and 4 of Chapter V.

may crystallize once the disembarkation of rescued individuals takes place with the reluctance of coastal states to allow the landing of migrants in their ports.[85] In other words, to avoid international protection responsibilities that may arise if an immigrant disembarked in their ports seeks asylum, coastal states are increasingly unwilling to engage in rescue operations.

Similarly, amid the migration crisis experienced in the last decade in the Mediterranean Sea, interceptions of irregular vessels by the coast guards of Southern European countries have led to situations where migrants were returned to the countries they departed from, such as Libya in the Central Mediterranean.[86] The fact that these are countries accused of serious human rights violations highlights a possible violation of the principle of *non-refoulement*, mentioned above.

Under these hypotheses, this study aims to address how the challenges identified during rescue operations hinder SAR cooperation between states in prioritising the protection of people at sea.

Finally, Papanicolopulu breaks new ground by dedicating an entire book to the concept of protection of people at sea in a broad sense. While other scholars have opted to address the protection of the individual in specific areas, such as piracy, migrant smuggling, or maritime labour, etc., the author offers a comprehensive and common perspective on the human being at sea. She chooses to address the rights of persons at sea from a collective perspective, as well as the obligations of states to ensure this protection at sea.[87]

In this context, the Geneva Declaration on Human Rights at Sea also emerges as a useful instrument to affirm that human rights apply at sea just as they do on land. Under the premise that human rights are universal, this declaration seeks to promote respect for human rights at sea, without discrimination, and without territorial jurisdiction limits detracting from such protection.[88]

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[85] Barnes (n 5) 144.
[86] Kosmas, Acciaro and Besiou (n 17) 1886.
[87] Papanicolopulu (n 2) 15.
[88] Human Rights at Sea, 'Geneva Declaration on Human Rights at Sea', <https://www.humanrightsatsea.org/GDHRAS> accessed 25 April 2024.

Building on this basis, the aim in this research is to carry out a specific analysis dedicated to the protection of persons at sea during search and rescue operations carried out by coastal states. Given the current migratory context, our interest is to analyse how this protection in terms of human rights and obligations presented by Papanicolopulu is applied to the treatment of migrants who are assisted during a rescue operation.

6. Conclusions

In conclusion, this literature review aids in understanding the significance and scope that academic discourse has contributed to irregular maritime migrations, with a particular focus on SAR operations at sea.

The exhaustive review of the existing literature on this topic has shown that maritime migrations constitute a phenomenon widely addressed by numerous authors and scholars. This increase in academic research has been in line with the increase in the use of the sea as a migratory route in recent years.

Beginning with a series of studies dedicated to the analysis of the migration crisis in the Mediterranean since 2015, the doctrine has focused on examining the impact of this phenomenon on the policies adopted by the EU in relation to these migratory movements. In particular, the lack of legal pathways is highlighted as a determining factor motivating irregular migrations, leading migrants to resort to criminal networks to cross to Europe, which exposes them to vulnerable conditions that seriously endanger their lives at sea.

However, despite the importance of addressing the vulnerability of migrants during these journeys, aspects related to SAR operations have not been widely addressed in the existing literature. Instead, studies have mainly focused on the performance of specific actors, such as NGOs, or on specific challenges, such as the disembarkation of migrants or the definition of a ‘place of safety.’

A considerable portion of academic literature has also linked these irregular maritime movements to a threat to maritime security. In doing so, it has highlighted the inherent tension between states' interests in controlling their borders and the need to consider

humanitarian aspects in their management and surveillance. This includes issues related to international protection sought by these individuals, such as refuge or asylum.

Identifying these challenges and complexities, this study addresses the legal framework governing rescue operations as a necessary response to the rise in deaths and disappearances at sea. The regulatory development of such operations has been limited and hindered, as their origin did not foresee these situations of applicants for international protection at sea.

Ultimately, the examination of the incorporation of humanitarian considerations in these types of actions makes it possible to explore an area for improvement in SAR regulations, an aspect that has been gaining interest but still requires further development.

In this context, this study aims to innovate through the comparison of two practical case studies on rescue operations in the Mediterranean. By analyzing the coordinated actions of multiple States, this study seeks to complement existing literature on migrant rescue operations at sea, specifically addressing cooperation in overlapping SAR responsibility regions. Additionally, it aims to meticulously examine the adherence to humanitarian and human rights considerations intertwined with the execution of migrant SAR operations by the involved actors.

CHAPTER III: RESEARCH METHODOLOGY

1. Introduction

As Camilleri-Cassar points out, proper use of methodology of research is demonstrated in the ability to analyze a problem involving a narrowly focused question of law and, through data collection, provide a conclusion to the exploration.[89]

Legal research today encompasses a broad spectrum of motivations beyond the traditional resolution of specific legal problems. From the pragmatic approach of the lawyer solving a client's needs to politically driven research into the implications of current or forthcoming legislation, the range of reasons for undertaking legal research has expanded considerably.[90]

In this sense, the importance of methods of legal research is becoming increasingly significant. A growing number of legal scholars are moving beyond the traditional method of analyzing and commenting on case law and drafting legislation. Now, it appears essential for legal research to consider the analysis of rapidly evolving socio-economic, political, and technological contexts.[91]

In specific fields of law, the growing interaction between national and international legal frameworks has generated the need to resort to non-traditional research methods capable of jointly analyzing how various jurisdictions address certain issues. In this context, legal comparative research has emerged as one of the most far-reaching research methods in recent years, facilitating the understanding of how international law operates and its impact on national legal systems.[92]

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[89] Frances Camilleri-Cassar, *Academic Research Methods for the Law Student: a practical guide* (2nd edition, Department of Media, Communications and Technology Law, Faculty of Laws, University of Malta 2022) 31.

[90] Mike McConville and Wing Hong Chui, 'Preface and Acknowledgements to First Edition' in Mike McConville and Wing Hong Chui (eds.), *Research Methods for Law* (2nd edition, Edinburgh University Press 2017) 1.

[91] Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michale Milo, Wibo van Rossum, 'Methodology of Legal Research: Challenges and Opportunities' (2017) 13 Utrecht Law Review 1, 2.

[92] Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds.), *Research Methods for Law* (2nd edition, Edinburgh University Press 2017) 7.

In this study, the interest in comparing and analyzing the interaction of various national and international legal systems under the principles of two fields of law, namely Law of the Sea and International Human Rights Law, has led to the choice of this research method as the main one for this work. Simultaneously, to ensure the reliability of the findings of this study, the international legal comparative method will be combined with the traditional legal doctrinal approach. Through black-letter research, an in-depth understanding of the law governing a specific legal system on a specific topic would be obtained through a thorough evaluation of legislation and primary sources.[93]

The choice of an appropriate research method is key to addressing a research question.[94] Methodology of research reflects the range of approaches an author may take in a study, helps to identify the originality of the work, distinguishes it from others, and highlights limitations or opportunities for future research directions. All these aspects will be addressed in this chapter based on the selected research methods.

2. Research questions and their relevance to the field of study

Traditionally regulated within the Law of the Sea framework, SAR operations have become essential for safeguarding human life at sea, particularly in the context of high migratory flows such as that experienced in the Mediterranean Sea over the last decade.[95] Consequently, the need to update SAR regulations with a humanitarian approach to address the dangers these people face at sea has generated significant interest in the intersection of the two legal systems involved: the Law of the Sea and the International Human Rights Law.

This study examines two case studies to compare the joint actions of two pairs of States —Spain and Morocco in the Western Mediterranean, and Italy and Malta in the Central Mediterranean— in carrying out a migrant rescue operation within their respective SAR regions.

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[93] Camilleri-Cassar (n 89) 147.

[94] *Ibid.* 31.

[95] See: European Council, 'Irregular arrivals to the EU 2008-2024' (2024) <https://www.consilium.europa.eu/en/infographics/irregular-arrivals-since-2008/> accessed 15 August 2024.

By this approach, this study aims to conduct a comparative study of how the actors involved implement human rights provisions regarding the protection of human life at sea during the execution of joint rescue operations.

Therefore, the overarching research questions identified are as follows:

1. To what extent do deficiencies in current Search and Rescue (SAR) regulations hinder the development and implementation of humanitarian considerations in collaborative efforts among neighbouring States?
2. Based on the comparative study of SAR cooperation in different regions of the Mediterranean, what differences emerge in the responses of these neighbouring states concerning compliance with humanitarian provisions?

When addressing the adequacy and relevance of the research question formulated within the context of the field of study in which this work is framed, it is important to note that this study addresses the intersection of two areas of law that have historically been separate, as mentioned above, the Law of the Sea and the International Law of Human Rights. Traditionally, these disciplines have developed independently, both in terms of drafting their provisions and in their interpretation by judges and tribunals[96]. However, the formulation of these research questions aims to relate them to each other, recognizing that actions taking place at sea have significant legal and humanitarian implications.

Likewise, the purpose is to address a critical and current issue by directing focus to the scarcity of provisions that include the consideration of human rights when coordinating joint action between states to rescue people in distress at sea. In this scenario, the high influx of migration experienced in the Mediterranean Sea in the last decade underscores the urgency of seeking solutions to potential violations of the rights of migrants who are detected in a distress situation. In particular, the inclusion of the study of two specific case studies in two regions of the Mediterranean allows for a comparative approach that enriches the analysis of maritime migration routes to Europe and enhances understanding of the issue from a more comprehensive perspective.

[96] Barnes (n 5) 103, 104.

Therefore, with the formulation of these research questions, this study aims to go beyond the analysis of regulations regarding maritime search and rescue and the humanitarian deficiencies identified. It also seeks to reflect on how these provisions are applied in real situations of cooperation between states and how they differ across different regions of the Mediterranean Sea.

3. Contextualizing the research within the existing literature

Once the research question aimed at resolving the problem posed in the study has been identified, the next step involves determining the theories that have been applied to that specific topic. Through the literature review, the research can be contextualized within a theoretical framework that provides an understanding of the key concepts and theories that have already been discussed by other scholars in this field, particularly in the chosen topic.[97]

A literature review is defined by Fink as 'a systematic, explicit and reproducible method for identifying, evaluating and synthesizing the existing body of completed and recorded work produced by researchers, scholars, and practitioners.'[98]

Conducting a literature review also avoids merely paraphrasing the work of other authors when analyzing an issue. Instead, it enhances critical analysis in research.[99] By understanding what has already been written on the topic under investigation, one can identify the gap that can be filled while promoting the originality mentioned earlier.

In this context, a comprehensive review of the main scholars who have addressed the issue of irregular migration by sea was conducted. Recognizing the considerable attention it has received in recent years, especially since the onset of the refugee crisis in 2015, it has been observed that these studies have adopted a variety of perspectives when it comes to examining maritime migrations to Europe. Some authors, such as Vella

[97] Camilleri-Cassar (n 89) 32.
[98] Arlene Fink, *Conducting Research Literature Reviews: From the Internet to Paper* (2nd edition) (Sage, Thousand Oaks, CA 2005) 3.
[99] Camilleri-Cassar (n 89) 77.

de Fremaux,[100] have focused on studying migrant smuggling by sea as a threat to maritime security, highlighting the consequent tension between state sovereignty interests, which seek to control and strengthen their borders in the face of mass arrivals by sea, and the humanitarian responsibilities that may arise from protecting asylum seekers and refugee seeking safety in European countries.

Regarding rescues at sea, this review identified a gap in the existing literature. Although this topic is highly relevant due to the urgent need for a coordinated and effective response, the number of studies dedicated to cooperation between states in this context is limited. While there are studies that have analyzed the actors involved in these rescues, such as humanitarian NGOs, and the challenges they have faced in carrying out their operations at sea, SAR cooperation between states has received less attention and lacks extensive prior literature.

In this context, some authors have begun to draw attention to the need to implement human rights in the characteristic application scenarios of the law of the sea. A relevant example is the work carried out by Papanicolopulu, who breaks new ground in research by examining the concept of protecting individuals at sea in a broad sense, addressing the rights of individuals at sea from a collective perspective, as well as the obligations of states to ensure this protection at sea.[101] Additionally, other authors have chosen to address individual protection in more specific areas, such as the smuggling of migrants by sea, which has been extensively analyzed by Vella de Fremeaux and Attard.[102] Building on these pioneering works, this study seeks to contribute to the existing literature by focusing on the application of human rights in the conduct of cooperative SAR operations at sea.

It has also emerged from this review that comparative legal research is an underdeveloped research approach in the existing literature. However, as will be discussed below, this method presents several opportunities to provide a comprehensive

[100] See Patricia Vella de Fremeaux (Mallia), *Migrant smuggling by sea: combating a current threat to maritime security through the creation of a cooperative framework* (Martinus Nijhoff Publishers & VSP, Netherlands 2010).
[101] Papanicolopulu (n 2) 6-8.
[102] Patricia Vella de Fremeaux (Mallia) and Felicity Attard, 'Smuggling of migrants and trafficking in person by sea' (2023) in Simone Borg, Felicity Attard and Patricia Vella de Fremeaux (Mallia), *Research handbook on ocean governance law,* (Cheltenham: Edward Elgar Publishing Ltd, 2023).

overview that contributes to complementing the existing literature on this subject. To this end, this study aims to leverage the comparative analysis of two case studies on the subject to examine how the coordinated responses of these international actors have adhered to or deviated from the provisions of international human rights law during migrant rescue operations.

4. Research method

As mentioned earlier, this study has opted to employ a combination of two methodological approaches to achieve its results: doctrinal research or 'black-letter' law and comparative legal research. Through the combination of these two methods, this research aims to delve into the analysis of SAR cooperation between states from both a theoretical and practical perspective.

In pursuit of greater reliability and enriched outcomes, the use of these mixed methods allows for an examination of the doctrinal principles derived from the analysis of the law, while comparing the different approaches adopted in different legal systems.

4.1. Doctrinal research or black-letter

Doctrinal research is defined as research that seeks to find out what the law is within a specific field. This is achieved through the collection and analysis of what is known as primary sources (treaties, conventions, case law, etc).[103] To conduct this method, Dobinson and Johns offer a step-by-step guide, summarized as follows: selecting the research question; choosing databases to search for legislation, case law, and relevant cases; determining search terms to narrow down results; applying selection criteria to relevant information; and finally, reviewing and synthesizing the results.[104]

In this work, the choice of doctrinal research has sought to provide a deeper understanding of the current legislation governing search and rescue at sea, at the international, regional, and national levels. Taking into consideration the stated research

[103] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds.), *Research Methods for Law* (2nd edition, Edinburgh University Press 2017) 20-21.
[104] *Ibid.* 26-35.

questions, this method enables an exploration of the scope of humanitarian provisions in current legislation, particularly concerning the protection of certain human rights such as life, physical and moral integrity, asylum, or refuge, among others.

Despite the opportunities that this method can offer in terms of understanding the law, there is an academic debate about whether purely doctrinal research can reveal additional information about the external context in which the law is applied. Hence, various authors argue that doctrinal research pays greater attention to the law on paper than to the law in action and its impact on society.[105] In this regard, the failure to go beyond what the law states and to determine its effectiveness in practice is perceived as a significant weakness of this method.

In line with the academic trend of incorporating interdisciplinary approaches from the social sciences and humanities,[106] this limitation is aimed to be addressed. To achieve this, the present research has chosen to complement the doctrinal method by conducting interdisciplinary legal research, introducing the comparative legal method. In this sense, this approach seeks to delve into not just what the law dictates but also the rationale behind its provisions and their societal implications.[107]

4.2. Comparative legal research

When conducting a study in the field of international law, comparative legal research contributes to the examination of international cooperation and helps to understand the different jurisdictions involved.[108]

For an international student, leveraging prior experience regarding the operation of the law in other jurisdictions, particularly their home country, holds significant interest for research purposes. The use of this method facilitates not only the application of prior knowledge of legal practices in a given legal system but also provides avenues for comparative analysis.

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[105] Camilleri-Cassar (n 89) 148.
[106] *Ibid.* 27.
[107] Rob Van Gestel, Hans-Wolfgang Micklitz, Miguel Poiares Maduro, 'Methodology in the New Legal World' (2012) European University Institute Working Papers LAW 2012/13 5.
[108] Camilleri-Cassar (n 89) 139.

By focusing the analysis on other legal systems, legal scholars and legislators aim to utilize the findings to enhance their national legal system. Consequently, the analysis of foreign law proves invaluable in drafting new legislation, providing suggestions for forthcoming legal reforms, or highlighting potential challenges and issues to address. This approach enables the observation of how a legal system addresses diverse common issues, allowing the detection of which provisions have been critical in reaching an effective solution or, conversely, have hindered the anticipated outcomes.[109]

The comparative method enjoys significant acceptance in international legal research, as it has enabled scholars from different legal systems to come together to seek a common solution to a shared problem. This is what Geoffrey Wilson refers to as the harmonization of laws, an issue in which the Member States of the EU have been a clear example to study. [110]

As this research focuses on the comparative actions of various EU Member States, this method can facilitate analysis of whether there is harmonization of laws among them on a particular issue. The present interest in employing this research method is to compare legal measures related to issues shared by both European Central Mediterranean countries and Western Mediterranean countries.

Through this method, the aim is to highlight the similarities and differences in the responses of various states to the same problem: the obligation to fulfil their rescue responsibilities while protecting and guaranteeing the human rights of migrants at sea during SAR operations. Specifically, considering the interest in understanding how different countries respond to these obligations, this cross-national research enables the comparison of relevant norms and understanding of each jurisdiction in more detail. [111] Thus, through this comparative method, it is possible to determine whether the respect for human rights during rescue operations at sea is afforded greater protection or coverage in one legal system than in another.

[109] Geoffrey Wilson, 'Comparative Legal Scholarship' in Mike McConville and Wing Hong Chui (eds.), *Research Methods for Law* (2nd edition, Edinburgh University Press 2017) 163.
[110] *Ibid.* 164.
[111] Camilleri-Cassar (n 89) 140.

As highlighted by Camilleri-Cassar, the relevance of this method lies in its ability to provide insights into what the law ought to be. By empirically comparing it with other legal systems, this method tests the extent to which the law has been effective in addressing potential issues. In this regard, the use of this research method allows the conclusions chapter to incorporate a series of recommendations or potential reforms to the law aimed at improving the effectiveness of current regulations.[112] Thus, this research concludes with a series of recommendations regarding the coordination of SAR operations, emphasizing the importance of incorporating humanitarian provisions into SAR regulations and clarifying certain terms and definitions, along with assigning clearer responsibilities to the involved States.

To implement this research method in the current study, it has been essential to commence with a comprehensive examination of the background of each legal system under comparison, as well as the branches of law slated for analysis.

Through an exploratory process that begins with broader readings on the Law of the Sea and International Human Rights Law, the focus has gradually narrowed down to the specific realm of legal regulations governing SAR operations at sea. In doing so, the aim has been to identify potential gaps in the integration of human rights within this regulatory framework.

This study thus begins with an overview of the international regime governing maritime SAR operations. An analysis is conducted of various international instruments tasked with regulating this matter, such as conventions adopted within the framework of the International Maritime Organization[113] or the United Nations Convention on the Law of the Sea of 1982,[114] to present the normative development in this field. More specifically, amendments made to some of these instruments are examined to ascertain whether they have been ratified by the states under comparison and to assess how they have contributed to the integration of humanitarian considerations into his regulation.

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[112] *Ibid.* 142.

[113] International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165 (1989 Salvage Convention); International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (1979 SAR Convention).

[114] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

In addition, to effectively implement this research method, it has not only been necessary to present the legal regulations to which each comparing state is subjected but it has also been crucial to delve into the historical and social background surrounding maritime migrations in these states. To achieve this, various books and academic articles have been consulted to obtain a clearer picture of the migratory situation in each of the countries under analysis. Thus, gaining a deeper understanding of the migratory context these countries have faced in recent years has enabled a comprehensive grasp of the reasons behind the adoption of specific norms, how they have been interpreted, and consequently, how these states have acted.

Based on this preliminary analysis of the context, the introduction of two case studies on SAR cooperation among States in the Mediterranean Sea has facilitated the application of the comparative legal method more tangibly, offering insights into the practical implementation of this regulation by each State within two distinct geographical, political, and social contexts.

5. Originality of the research

Originality stands as an essential element in academic writing. It serves not only to prevent plagiarism but also as a compelling factor in attracting potential readers. In this regard, the research methodology plays a pivotal role. For example, opting for an interdisciplinary approach, which combines the traditional method of doctrinal analysis with empirical legal research, not only broadens the scope of investigation but also enriches the obtained results.[115]

To emphasize the originality of this work, this study has embraced a variety of research techniques.

Firstly, it has adopted a mixed-method approach. In order not to limit the study to doctrinal analysis, this work intends to go beyond the doctrinal analysis and employ the comparative legal method as well. The international nature of this project, addressing a global issue spanning multiple countries, has made it possible to choose the comparative

[115] Van Gestel, Micklitz, Poiares Maduro (n 107) 5.

legal research method to expand and enrich the work. As Camilleri-Cassar points out, the use of a mixed-method approach lends greater credibility to the research results by enabling an understanding of the law in books and its impact on society simultaneously.[116]

In addition, originality has been sought by proposing new interpretations of concepts relevant to the research. In this regard, definitions have been included for concepts such as overlapping SAR responsibilities and distress at sea, among others.

6. Data collection

In the process of preparing this research work, it has been necessary to address the extensive existing literature on the development of SAR operations in the context of the migratory crisis in the Mediterranean. This material has been consulted in the databases of the University of Malta and the IMO International Maritime Law Institute (IMLI), to establish the state of the question of the problem posed.

It has also been necessary to identify and systematize the policy and legal instruments relevant to the issue, most of these primary sources can be found in the electronic databases of international organizations, such as the United Nations, the International Maritime Organisation (IMO), as well as the governments of the States involved in the study. Also, at EU level, the EU publications service, among others, has been used. In addition, the case law databases of the International Court of Justice (ICJ), the Council of Europe (CoE), the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have been consulted in order to approach international case law.

The annual reports of various NGOs operating on the ground, such as Amnesty International, Human Rights Watch, Human Rights at Sea, among others, as well as various international organizations such as the IOM, the United Nations High Commissioner for Refugees (UNHCR), the EU Asylum Agency (EUA) and the United Nations High Commissioner for Human Rights (UNHCHR) has also been consulted.

[116] Camilleri-Cassar (n 89) 96.

7. Ethical considerations

The present study is grounded in the analysis of international, regional, and national legislation concerning maritime SAR operations in the context of high migratory flows, as well as their practical implementation across different geographical, social, and political settings.

Given the purely legal and analytical focus of this study, it is considered that there are no significant ethical considerations to be addressed in the conduct of this research. Personal data or sensitive information requiring specific treatment, preservation, and disposal have not been used in its preparation. Therefore, no significant ethical concerns are identified.

8. Conclusions

This research aims to delve into an area of study that has received limited attention from existing literature while employing a combination of research methods that seeks to offer original insights.

By using mixed methods, particularly doctrinal research and comparative legal research, a deeper understanding of practical and theoretical realities is pursued. This approach not only allows for a doctrinal analysis of legal frameworks for maritime search and rescue, but also examines their application across different regions facing a common challenge: high maritime migration flows towards Europe.

By presenting two case studies for analysis, this study aims to facilitate comparison between affected regions and highlight how each legal system interprets and applies existing international regulations on SAR operations. Most importantly, it provides insights into how humanitarian considerations are observed and safeguarded during rescue operations.

In pursuit of more comprehensive results, this study could be expanded to include interviews with authorities involved in SAR operations in the regions under study. This approach would allow for capturing the perspective of national entities involved in the conduct of rescue operations in those areas. Examples of such actors to interview could be the Spanish Guardia Civil, the Spanish Maritime Safety and Rescue Society

(SASEMAR), humanitarian rescue NGOs, customs, or the Italian and Maltese coastguards, among others. Such an approach would help to gain insights into the day-to-day operations and ascertain whether humanitarian considerations are factored into the planning and execution of these rescue operations in practice.

Therefore, this study lays the groundwork for future research. With time and available resources, it aims to serve as a launching pad for broader and more in-depth research. For example, by integrating new research methodologies that could strengthen the findings obtained, or by exploring additional case studies from different countries in the Mediterranean region.

In summary, all these efforts aim to enhance understanding of the rules governing maritime search and rescue and to promote the evolution of a robust legal framework incorporating humanitarian provisions, thereby addressing the critical needs of vulnerable people at sea.

CHAPTER IV: COMPARATIVE CASE STUDIES: SEARCH AND RESCUE COOPERATION AT THE EXTERNAL BORDERS OF SOUTHERN EUROPE

1. Introduction

The interest of this research in holistically presenting the migratory reality of the Mediterranean has led to the inclusion of this comparative chapter, which aims to introduce and contrast the two Mediterranean regions under study. Specifically, this chapter will analyze cooperation in search and rescue operations between Italy and Malta in the Central Mediterranean region, and between Spain and Morocco in the Western Mediterranean region.

With distinct socio-political and geographical characteristics, both regions, along with the eastern route, have emerged as the three maritime routes that divide the Mediterranean Sea in terms of migration. This division presents three differentiated areas where migratory pressure has varied depending on factors such as time and the variety of maritime border controls and surveillance operations at sea.

However, it is worth highlighting how the migration routes of the Mediterranean, along with the so-called Atlantic route, which will also be referred to as the main irregular arrival route to Spain, are deeply interconnected.

With increased and intensified surveillance and migration controls by Member States and the EU in a specific area, this connection implies that migratory flows are displaced to other routes or pathways that are less guarded and monitored. In this context, criminal networks that target and promote the smuggling of migrants analyze the different paths to take as surveillance patrols and controls increase in each area.

These practices have led to the identification of periods of high migratory pressure on each route, with the tragic result of an increase in the number of shipwrecks and, consequently, an increase in the number of deaths and disappearances at sea.[117]

As mentioned earlier, this chapter focuses on the central and western regions of the Mediterranean, specifically due to the presence of shared areas of SAR responsibility

[117] See: IOM, 'Mediterranean | Missing Migrants Project' (2024) <https://missingmigrants.iom.int/region/mediterranean> accessed 15 August 2024.

between the States of Italy and Malta, and Spain and Morocco, respectively. It is interesting to note that the overlapping of these areas of responsibility is not an isolated case in the Mediterranean. In fact, Greece and Turkey also share SAR regions in the eastern Mediterranean, which poses significant challenges for cooperation due to territorial claims and maritime delimitations between the two states.[118]

Based on this premise, the focus of this study is to comparatively analyze the performance of these southern European countries in different regions and moments of migratory crisis. To this end, the scenario in each of these regions after the outbreak of the refugee crisis in 2015 will be contextualized. Subsequently, the cooperation mechanisms adopted in search and rescue operations will be evaluated, as well as their evolution over the last few years. Finally, the analysis will conclude with the examination of two actual shipwreck cases, allowing for an assessment of both the differences and similarities in the distribution of SAR responsibilities in the overlapping regions of the Mediterranean. In doing so, the aim is to detail specific cases that highlight the adopted policies while analyzing the effectiveness of responses in each particular situation.

2. Cooperation in the Central Mediterranean Sea: The case of SAR cooperation between Italy and Malta

2.1. Introduction

The Mediterranean Sea has been the focal point of the most significant migration crisis in recent years. Since the early 1990s, opportunities for individuals seeking better living conditions to enter Europe have become increasingly restricted due to the implementation of the Schengen acquis, the legal and operational framework governing free movement within the Schengen Area.[119] Consequently, the abolition of internal border controls between EU Member States and the consequent need to tighten control of external ones resulted in a highly securitized and militarized border.[120] Due to the

[118] Marinai (n 78)29-58.
[119] Silja Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea' (2011) 23(3) International Journal of Refugee Law, 542.
[120] Daniela DeBono, 'The Libya-Italy migration corridor' in Tanja Bastia and Ronald Skeldon (eds) *Routledge handbook of migration and development* (2020) New York: Routledge, 463.

limitation on legal avenues to entry, migrants have had to resort to irregular and more dangerous routes to reach Europe.[121]

In particular, the Central Mediterranean route has stood out for its significant migratory influx over the past decade.[122] It has become a complex scenario where the southern European States' border control interests must be balanced against protecting human lives at sea.

This migratory route includes journeys departing from the coasts of North African countries, such as Tunisia and Libya, and heading, primarily, towards the coasts of the EU Member States of Italy and Malta. This route under study stands out as one of the most frequently used maritime passages for irregular migration towards Europe in the Mediterranean.

Focusing on the countries to be analyzed in this section, the arrivals of irregular migrants in Malta have often been unintended, as they originally aimed to reach the coasts of Spain or Italy.[123] Consequently, Malta is not typically considered a destination country by migrants, but its central position in the Mediterranean has led many to land on its shores.[124]

Similarly, since the early 21st century, the majority of arrivals in the Central Mediterranean have been recorded on the island of Lampedusa, a small Italian territory located southwest of Malta,[125] which has experienced a complex situation of high migratory influx in recent years.

On the other side of the Mediterranean, originally considered a destination country in the context of African migration, Libya has now become a significant transit point for

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[121] Daniela Debono, 'Migrants in Malta' in Sue Vella and Edgar Galea Curmi (eds) *Social policy in Malta: An introduction* (2022) 392.

[122] In 2023, a total of 210,717 vessels departed from the coasts of North Africa on the central Mediterranean route. Of these, only 150,653 reached the European coast. See: UNHCR, 'Global Focus. West and Central Mediterranean situation' (2024) <https://reporting.unhcr.org/operational/situations/west-and-central-mediterranean-situation> accessed 15 August 2024.

[123] Guilfoyle (n 36) 220.

[124] Klepp (n 119) 545.

[125] *Ibid.* 542.

hundreds of migrants from Sub-Saharan African countries, seeking to depart from the Libyan coasts towards Europe.[126]

By the late 2000s, maritime migration from Libya to Italy had already become particularly concerning.[127] As a precursor to the complex migratory situation established in the Central Mediterranean following the 2015 Syrian refugee crisis, in 2008, Italy and Malta experienced their first massive influx of irregular migrants seeking to reach Europe, with approximately 2,000 arrivals in Malta and 37,000 in Italy that year.[128]

Although these figures are statistically less significant compared to current numbers, it is important to consider the size of the island and the substantial socio-political impact this influx had on it, being a new phenomenon with no prior experience in dealing with it.

Since then, the Central Mediterranean route has consistently maintained a high profile of arrivals over the years, reaching striking figures in the early years of the 2015 refugee crisis. In particular, the figures for irregular arrivals in Italy resemble and even exceed, those recorded in 2015. Meanwhile, as will be discussed, the figures for Malta have been on a downward trend since 2020.

[126] *Ibid.* 543.
[127] Guilfoyle (n 36) 212.
[128] Klepp (n 119) 542.

Figure: Irregular arrivals to Italy and Malta (2015-2023)[129]

	Italy	Malta
2015	153,842	104
2016	181,436	25
2017	119,369	23
2018	23,370	1,445
2019	11,471	3,406
2020	34,154	2,281
2021	67,477	832
2022	105,131	444
2023	157,651	231

It should be noted that the arrivals recorded over the last decade have been defined as the result of socio-political and economic developments, such as the Arab Spring and the emergence of various conflicts around the world.[130] In addition, the high instability caused by an asymmetric economy between the two shores of the Mediterranean and the continuous perception of better opportunities in Europe has emerged as key reasons for the establishment of a migratory corridor between the so-called 'global South' and 'global North.' The complexity of these regions, exacerbated by the interference of third-party international actors with competing interests, has created a zone of great volatility in which humanitarian assistance to migrants features as one of the main gaps and needs.[131]

The vulnerability of these individuals is heightened when considering that the Central Mediterranean is home to active criminal networks involved in migrant smuggling based in Libya. In addition, significant threats to the security of these migrants, such as being subjected to torture, have been widely documented and denounced.[132]

[129] Author's compilation. Data collected from: UNHCR, "Situation Mediterranean Situation" (Operational Data Portal) <https://data.unhcr.org/en/situations/mediterranean> accessed 20 May 2024.
[130] DeBono (n 121) 392.
[131] DeBono (n 120) 463.
[132] *Ibid.* 464.

Currently, the profile of migrants arriving via the Central Mediterranean route is predominantly male, accounting for 84% of the total. Women represent 16% of these arrivals. Additionally, minors comprise 9% of the migrants, with the majority being unaccompanied at the time of disembarkation.[133]

Regarding their origins, the most represented nationalities among arrivals in Malta are from Bangladesh (65%) followed by Syria (9%) and Guinea (8%). Migrants from Cameroon, Egypt, Sudan, and Palestine are also notable.[134] Similarly, Italy primarily receives nationals from Guinea (12%), Tunisia (11%), and Côte d'Ivoire (10%), followed by Bangladesh, Egypt, and Syria.[135]

In this regard, it is significant to note that irregular departures from the Tunisian coast have increased considerably in the past year, with a 202% rise compared to the previous year. In contrast, departures from Libya have decreased by 2%.[136]

Many of these individuals are in danger during their migratory journeys.[137] Primarily, the conditions under which these trips are undertaken —in small, unseaworthy boats overloaded with passengers— create highly perilous situations at sea. Additionally, adverse weather conditions and the migrants' general lack of prior experience with the sea significantly increase the risk of capsizing during these voyages.[138]

In this context, it is undeniable that irregular migration by sea constitutes a matter of urgent and significant relevance on the agendas of national governments in European coastal states, facing both the necessity and the obligation to provide an effective response in the maritime domain.

Due to their location as frontline states, Italy and Malta have experienced growing political tension in recent years. In this regard, the equitable distribution of

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[133] UNHCR, Malta Factsheet January-August 2023.
[134] *Ibid.*
[135] UNHCR, Italy Sea arrivals dashboard, December 2023
[136] *Ibid.*
[137] IOM, 'New UNHCR/IOM/MMC Report Highlights Extreme Horrors Faced by Migrants and Refugees on Land Routes to Africa's Mediterranean Coast' (2024) <https://www.iom.int/news/new-unhcr-iom-mmc-report-highlights-extreme-horrors-faced-migrants-and-refugees-land-routes-africas-mediterranean-coast#:~:text=Among%20the%20litany%20of%20risks,detention%2C%20collective%20expulsions%20and%20refoulement> accessed 15 August 2024.
[138] Klepp (n 119) 543.

responsibilities and burdens among EU Member States is crucial for Malta, given its limited capacity to manage these arrivals.[139]

Specifically, Malta has reiterated its vulnerability by referencing the EU's adoption of the Dublin System. This system establishes that the country responsible for assessing asylum applications lies with the country where asylum seekers first enter the EU.[140]

In this context, Malta argues that the Dublin System puts it at a position of disadvantage, accentuating the lack of infrastructure and means necessary to deal with all these claims since, due to its geographical location, Malta is often the country of first entry for these persons.[141] Compared to other EU States, Malta has received almost 60 times the EU average in terms of asylum claims.[142]

Based on this premise, Malta has adopted a governmental approach that emphasizes the perception of irregular arrivals as a European-wide issue, rather than exclusively Maltese.[143] On this basis, Malta has repeatedly denounced the need to boost solidarity between states, arguing that a more equitable sharing of responsibilities would ensure stronger protection for the EU asylum system, as well as for the interests of asylum seekers.[144]

This has resulted in a continued reluctance on the part of southern states to take charge of rescues that take place close to their shores, in order to avoid the consequent responsibilities arising from the disembarkation of these people in their ports. Therefore, this perspective has complicated cooperation in search and rescue operations for migrants in the region, requiring the involvement of third states on the southern shores of the Mediterranean, among other measures.

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[139] *Ibid.* 545-546.

[140] Regulation (EU) Nº 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

[141] Ivan Sammut, 'A tug of war between rights and obligations: the case of migration from Malta's perspective' in Francesca Ippolito, Gianluca Borzoni and Federico Casolari (eds) *Bilateral Relations in the Mediterranean: Prospects for Migration Issues* (Edward Elgar Publishing Limited 2020) 49.

[142] *Ibid.* 55.

[143] DeBono (n 121) 392.

[144] Sammut (n 141) 49.

2.2. Cooperation mechanisms

In light of the imminent increase in maritime emergencies following the outbreak of the refugee crisis in 2015, the necessity for a unified response from EU Member States to protect lives in the Central Mediterranean became evident.

Conversely, in the years immediately following the onset of the crisis, SAR operations aimed at saving migrants in distress at sea were significantly reduced. Most rescue vessels were withdrawn from the Central Mediterranean and replaced by policies aimed at reducing the arrival of migrants to EU Member States shores.[145] A clear example of the reduction in naval rescue operations in the Central Mediterranean was Italy's *Mare Nostrum* operation, conducted between 2013 and 2014. Its withdrawal created a protection gap that NGOs attempted to fill in the region, and a range of other cooperation measures began to be considered in response to the complex situation at sea.[146]

In this regard, it is worth starting by analyzing the search and rescue influence of the States under examination in the region.

Despite its small size, Malta plays a crucial role in Mediterranean migrations. Its location as the southernmost member state of Europe, and therefore in close proximity to the African continent, has effectively assigned it the role of containing and receiving a significant portion of irregular arrivals to Europe.[147]

In matters related to rescues at sea, this small island also stands out for its responsibility in handling emergency calls in the Mediterranean Sea. Specifically, Malta has one of the largest SAR regions Europe relative to its small size, a remnant of British colonial rule. Covering approximately 250,000 square kilometers, this SAR region extends from Tunisia in the west to nearly the Greek island of Crete in the east.[148]

This geographical arrangement means that almost all migration attempts from North Africa to Europe pass through Malta's SAR zone. However, as previously mentioned,

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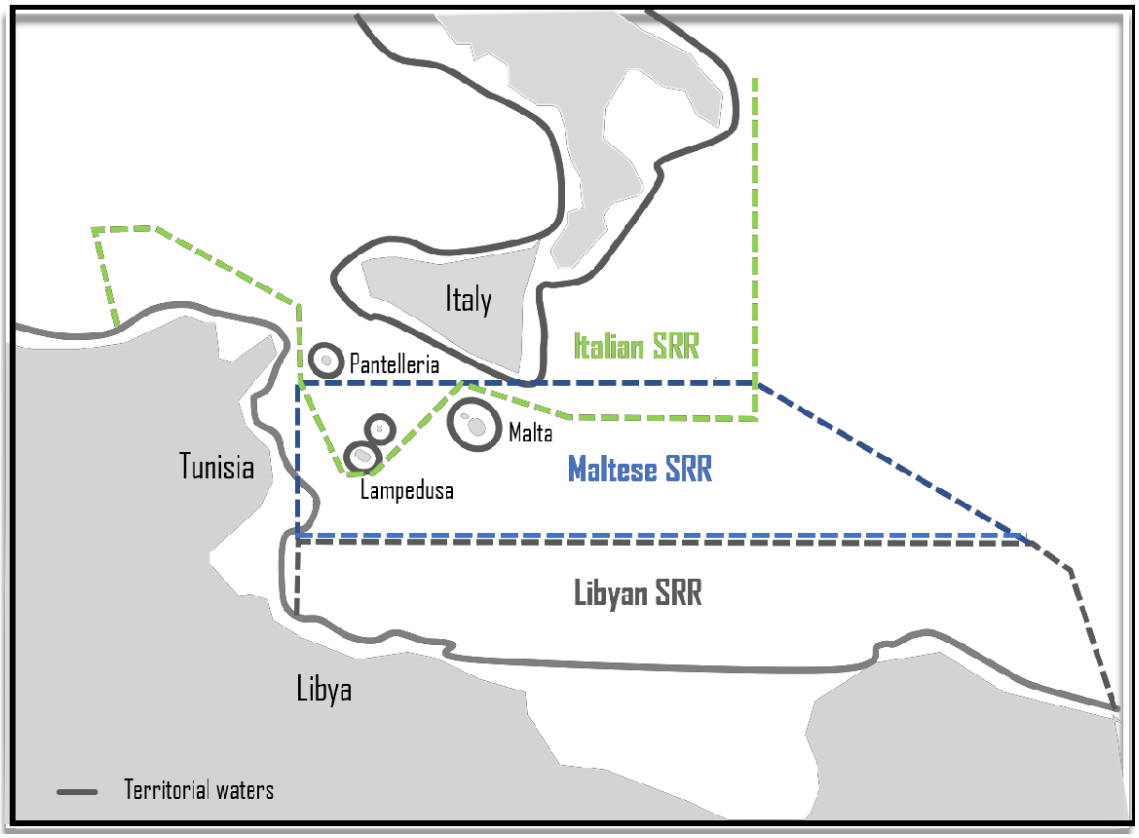
[145] Daniel Mainwaring, 'Adrift at Sea: Laws, Morals, and Policies in Malta's Search and Rescue Region' (2022) Think Magazine <https://thinkmagazine.mt/adrift-at-sea-laws-morals-and-policies-in-maltas-search-and-rescue-region/> accessed 20 June 2024.
[146] Cusumano and Villa (n 22) 25.
[147] DeBono (n 121) 392.
[148] Koka and Veshi (n 77) 41.

most of these migrants aim to reach Italy but end up arriving in Maltese territory either accidentally or, more commonly, after being rescued in this region and disembarked in Malta.[149]

Figure: Maltese SAR region[150]



Particularly, the reason behind the delimitation of this extensive SAR zone lies in Malta's Flight Information Region (MFIR), inherited from the British Flight Identification Region. In this sense, Malta generates an annual revenue of approximately 8.23 million euros from air traffic flying through this region, a significant reason behind the decision not to change the delimitation of its SAR region.[151]

[149] Ángeles Jiménez García-Carriazo, 'Small Island, Big issue': Malta and its Search and Rescue Region – SAR' (2019) 7 Peace and Security – Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations) 302.
[150] Civil Maritime Rescue Coordination Centre (CMRCC), 'ECHOES: From the Central Mediterranean' (2022) July-August, available on <https://issuu.com/civilmrcc/docs/cmrcc_echoes_issue_1_jul_aug_2022> accessed 25 June 2024.
[151] Klepp (n 119) 545.

Another characteristic of this region is the overlapping of SAR responsibility zones between Italy and Malta. Both regions have been unilaterally declared by each state to the Maritime Safety Committee (MSC) of the IMO.[152]

In this regard, as will be discussed shortly, the overlapping of SAR regions between both States has resulted in significant delays in responding to emergency calls and has even been cited as a reason for not intervening in situations where migrants are in distress at sea.[153]

In particular, an aspect that has strongly affected cooperation in the overlapping SAR regions has been the interpretation of the obligation regarding the disembarkation of rescued persons in a place of safety. In this regard, Italy and Malta disagree on the allocation of responsibilities for disembarking rescued persons. While Malta interprets that rescued individuals within its SAR region should be disembarked at the nearest place of safety, Italy interprets that disembarkation should occur in the State responsible for the SAR region where the emergency takes place.[154] Thus, diplomatic rows and discrepancies arise between these neighbouring States over which one is responsible for rescuing or disembarking rescued migrants, especially in cases where individuals are rescued within Malta's SAR region but are geographically closer to Lampedusa.[155]

Despite this, there have been instances of cooperation where Italy, in response to Malta's limited capacity to handle all vessels navigating its waters, has conducted SAR operations in the Maltese SAR zone. However, the informality under which this cooperation takes place, lacking formal instruments or mechanisms to regulate SAR responsibilities in overlapping regions, leads to discussions on who should act, ultimately delaying the effective conduct of SAR operations and costing the lives of migrants.[156]

In an area with a high migratory influx, as previously mentioned, the involvement of coastal States has been particularly limited, revealing a lack of solidarity that has

[152] Koka y Veshi (n 77) 41.
[153] *Ibid.* 41.
[154] This will be discussed further below in Section 2 and 3 of Chapter V.
[155] Jiménez García-Carriazo (n 149) 309
[156] Klepp (n 119) 550.

characterized the cooperation in the development of search and rescue operations for migrants at sea.

In this scenario, the significant decrease in SAR activity over recent years, along with the gradual removal of SAR obligations from the mandates of naval operations under the European Border and Coast Guard Agency (Frontex), have contributed to the failure of SAR efforts in the region.[157]

Especially concerning has been the situation of humanitarian NGOs, which, in response to the reduced SAR efforts by the EU Member States, have taken to the sea to carry out rescue missions. The Italian government, in particular, has imposed significant restrictions on the activities of these NGOs.

This began with the adoption of the 'Code of Conduct for NGOs undertaking Activities in Migrants' Rescue Operations at Sea' on 18 July 2017,[158] and has since intensified with the approval of various decrees. These decrees limit the entry of NGO vessels into Italian territorial waters and more recently, have expanded the requirements these vessels must meet to conduct rescue missions.[159] They also increased monetary penalties and included provisions for the confiscation and administrative immobilization of the vessels.[160]

This policy of criminalizing NGOs in the Central Mediterranean has coincided with increasingly established practices of forced returns and the delegation of search and rescue responsibilities to third states, such as Libya. These practices shifted the focus of naval operations from saving lives at sea to deterring departures from the North African

[157] Beginning with Italy's termination of the *Mare Nostrum* naval operation and its replacement by Operation Triton, under the direct mandate of Frontex, the disappearance of SAR obligations in the mandates of EU naval operations has been accentuated. This can be seen in how each successive operation in the central Mediterranean has shifted from a more focused approach to rescuing people to more border control and migration management. See: Frontex | Operations <https://www.frontex.europa.eu/what-we-do/operations/operations/> accessed 25 June 2024.

[158] 'Code of Conduct for NGOs undertaking Activities in Migrants' Rescue Operations at Sea' (2017) available on <https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf> accessed 15 August 2024.

[159] Decreto Legge n.53 del 14 giugno 2019, approvato in via definitiva il 5 agosto 2019.

[160] Decreto Legge n.1 del 2 gennaio 2023, Disposizioni urgenti per la gestione dei flussi migratoria.

coast and thereby reducing arrivals in Europe, turning the region into one of the deadliest migration routes in the world.[161]

This approach, which emphasizes the strengthening of external borders, has been pivotal in the development of cooperation with third states in the region. Starting with the signing of an agreement between the EU and Turkey in 2016,[162] the EU and its Member States ensured that, in exchange for support and funding, these third states would be responsible for curbing irregular migration flows heading towards Europe on the eastern route, ensuring their return to North Africa.[163]

In doing so, EU Member States began outsourcing the tasks for intercepting, rescuing, and disembarking migrants to the Libyan Coast Guard, providing funding for resource and equipment improvements, as well as training for their agents. This cooperation with Libya reached its peak with the signing of a MoU between Libya and Italy in 2017[164], aimed at further enhancing the capabilities of Libyan authorities in managing migration in the central Mediterranean.[165]

With the main objective of combating illegal immigration, this cooperation was intended to contain migratory flows crossing Libyan territory to reach Europe by sea, either at the Libyan land border or through the interception of vessels at sea.[166]

This is a controversial mechanism of cooperation, as it does not refer to the possibility of detecting refugees or asylum seekers among the migration flows that it describes as

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[161] IOM | Making migration work for all. 'Deadliest Quarter for Migrants in the Central Mediterranean Since 2017' (2023) (International Organization for Migration) < https://www.iom.int/news/deadliest-quarter-migrants-central-mediterranean-2017> accessed 21 June 2024.

[162] European Council | Press Releases 'EU-Turkey Statement and Action plan, 18 March 2016' available on: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 24 June 2024.

[163] Anja Radjenovic, 'BRIEFING EPRS | European Parliamentary Research Service: Search and Rescue in the Mediterranean' (2021) EPRS 1-8 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659442/EPRS_BRI(2021)659442_EN.pdf> accessed 15 August 2024.

[164] Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, signed on 2 February 2017, available on <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 27 June 2024.

[165] Mainwaring (n 145) 1.

[166] Lorena M. Calvo Mariscal, *Inmigración, Externalización de Fronteras Europeas y Derechos Humanos en Libia* (Reus Editorial 2023) 149.

irregular or clandestine, and which it seeks to control. Furthermore, it lacks any mechanism to ensure that the enhancement of Libyan capacities does not result in serious human rights violations.[167]

In line with establishing greater SAR cooperation in the region, the Libyan authorities officially registered their own SAR zone with the IMO and, following the provisions of the SAR Convention, established their Rescue Coordination Center (RCC) in Tripoli. The coordination in this area was assumed by Italy until Libya could meet the necessary conditions. In this regard, in 2018, Libya's SAR region was recognized by the IMO.[168]

In the same vein of cooperation with third countries, Malta signed a MoU with Libya in May 2020[169], establishing coordination centers for combating illegal immigration based in Tripoli and Valletta.

Dating back to 2009, cooperation between Malta and Libya in this field began with the signing of an agreement to collaborate on SAR operations in the central Mediterranean region. This agreement provided a political framework within which both states accepted joint coordination of any rescue emergency occurring in their respective SAR regions.[170] Shortly after, in 2011, the difficult situation in Libya hindered the continuation of this cooperation, being stalled during the initial years of the Syrian refugee crisis but gradually resumed, culminating in the signing of the most recent MoU in 2020.[171]

As previously mentioned, the basis of this recent MoU is to establish two coordination centers, one in Valletta and one in Tripoli, to combat illegal immigration in Libya and the Mediterranean region. The plan involves staffing each center with six officials: three located in Valletta (two assigned by the Maltese government and one by the Libyan government) and three in Tripoli (two assigned by the Libyan government and one by the Maltese government). Both centers are funded by the Maltese government, aiming

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[167] *Ibid.* 150-151.
[168] *Ibid.* 170.
[169] Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combating Illegal Immigration, signed on 28 May 2020, available on <https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf> accessed 27 June 2024
[170] Malta Independent, 'MOU Signed in Tripoli: Malta, Libya, to cooperate in search and rescue operations' (2009) available on: <https://www.independent.com.mt/articles/2009-03-21/news/mou-signed-in-tripoli-malta-libya-to-cooperate-in-search-and-rescue-operations-222104/> accessed 27 June 2024
[171] Calvo Mariscal (n 166) 153.

to support the coordination of rescue operations and assist Libya in managing rescue efforts through authorities financed and equipped by Malta. Similar to the Italy-Libya agreement, the MoU lacks provisions for addressing the presence of asylum seekers and refugees among the intercepted individuals. Additionally, it does not include any mechanisms for monitoring and controlling cases involving potential refugees.[172]

The cooperation mechanisms in the region have ultimately been based on individual initiatives by the Maltese and Italian states in their cooperation with Libya, focusing on migration management in the central Mediterranean with a common objective: to reduce the irregular entry of migrants into Italy and Malta by strengthening the capacity of the Libyan authorities and creating infrastructures for them to intercept migrants at sea.[173]

As a result, the number of migrants intercepted at sea and forcibly returned to Libya has increased drastically in recent years. In 2023, over 15.000 migrants were intercepted in the central Mediterranean Sea and returned to Libya,[174] while discussions about the safety of these migrants in Libya continue. Allegations of inhumane and degrading treatment are documented in the region, while critics argue that the EU and its Member States are complicit by funding Libyan capacities and operations at Europe's external borders.[175]

Despite these allegations, cooperation in this field has recently focused on the support that these third states can bring to the management of unwanted migration in the region.

[172] *Ibid.* 154.
[173] Calvo Mariscal (n 43) 156.
[174] Swissinfo, 'Más de 15.700 migrantes fueron interceptados este año y devueltos a Libia, "país no seguro"' (2023) available on <https://www.swissinfo.ch/spa/m%C3%A1s-15-700-migrantes-fueron-interceptados-este-a%C3%B1o-y-devueltos-a-libia-pa%C3%ADs-no-seguro/49085932> accessed 24 June 2024.
[175] Mainwaring (n 145) 1.

2.3. Case Law: Italy and Malta before the UN Human Rights Committee – Communication Nº 3042/2017 S.A. et al. v ITALY and Communication Nº3043/2017 S.A. et al. v MALTA

The chosen case to illustrate the challenges of SAR cooperation between Italy and Malta involves the shipwreck of a fishing boat on the central Mediterranean route on 11 October 2013. This small vessel departed from the Libyan coast towards Italy with approximately 400 people on board. However, 113 kilometers south of the Italian island of Lampedusa and 218 kilometers from Malta, within the Maltese SAR region, the vessel capsized, resulting in the estimated loss of over 200 lives at sea.

The present case was analyzed by the United Nations Human Rights Committee, which pronounced itself on the application of human rights to maritime rescue operations in response to the communications submitted against Malta[176] and Italy,[177] both states involved in the failed rescue operation for this shipwreck.

In particular, according to the authors of the communication—passengers of the vessel and relatives of the deceased and missing—they alleged that both Malta and Italy had violated the substantive and procedural aspects of the right to life by failing to take all appropriate measures to safeguard the lives of their relatives and by not thoroughly investigating the incident.

The facts were presented by the parties as follows. According to the authors, the passengers of the fishing boat contacted the Italian emergency services at 11:00 a.m. Around 1:00 p.m., the Maritime Rescue Coordination Centre in Rome (MRCC) contacted the RCC of Malta, as the vessel was located in the Maltese SAR region, according to the coordinates provided in the distress call.

According to Italy, the Rome MRCC informed the Maltese RCC about the presence of a vessel in distress at sea and provided information about the three Italian ships closest to the emergency, namely, two commercial vessels and an Italian navy ship, the *Libra.*

Around 13:17, the people on board the vessel in distress called the Rome MRCC again. This time, they were informed that they needed to contact the Maltese RCC, as the Rome

[176] UN Human Rights Committee, 27 January 2021, Communication Nº3043/2017, S.A et al. v. MALTA
[177] UN Human Rights Committee, 27 January 2021, Communication Nº3042/2017, S.A et al. v. ITALY

MRCC had formally requested the Maltese RCC to take over the coordination of the rescue. Malta formally assumed coordination as the RCC responsible for the SAR area where the distress incident occurred and requested that the Rome MRCC confirm the availability of Italian vessels nearby to assist in the rescue. In response, the Rome MRCC stated that it had no units available at the time, although the Italian Navy ship, *Libra*, was in the vicinity of the emergency.

Malta, in turn, requested Italy to instruct the *Libra* to proceed to the emergency location, as it was the closest vessel. However, Italy denied these requests, citing that the *Libra* was engaged in surveillance activities that it could not abandon. Nevertheless, the Rome MRCC finally confirmed to the Malta RCC that the *Libra* would proceed to the rescue.

The fishing boat's sinking occurred at 17:07 hours. The first units to reach the emergency location were a Maltese vessel, the P61, and a small boat launched from it, arriving approximately 40 minutes later. Both boats managed to rescue 147 people. Just ten minutes later, the *Libra* arrived and rescued an additional 56 people. Sadly, 200 lives were lost, including 60 minors.

In this context, the authors' communication alleged the following facts.

According to Malta, they complained that the Maltese RCC had not responded with the required urgency to the distress calls and, despite knowing that they had no rescue units available, had delayed the request for help from Italy. In this regard, they thought that a request and a prompt response could have changed the fate of their relatives. The complaint also stated that Malta had failed to carry out any investigation into the shipwreck.

Concerning Italy, the authors denounced Italy's delay in notifying the competent SAR authority of the distress call received, as well as the failure to instruct the persons on board from the first contact of the need to contact the Maltese RCC. Regarding the deployment of units, they denounced the reluctance of the Italian authorities to order the Libra, the closest vessel to the emergency, to go to the scene of the danger, which could have prevented the fateful outcome. Finally, they also denounced the failure to launch an investigation to identify and punish those responsible for the failed rescue and the consequent loss of 200 lives.

In response to the authors' petitions, the UN Human Rights Committee issued the following pronouncements. In the case of Italy, the Committee concluded that Italy had not fulfilled its due diligence obligations to protect people at sea, nor had it conducted an investigation into allegations of a violation of the right to life. On the contrary, in the case of Malta, the Committee declared the communication inadmissible as the remedies available in Malta had not been exhausted and therefore refrained from examining Malta's obligations.

The UN Human Rights Committee's pronouncement in both cases was accompanied by dissenting and concurring opinions from several Committee members. The novelty was that, for the first time, a human rights body affirmed as sufficient the relationship of dependency between persons in distress at sea and states receiving calls for assistance to interfere with extraterritorial jurisdiction and the consequent application of the International Covenant on Civil and Political Rights (ICCPR).[178]

For this reason, this case has attracted a great deal of interest from experts, academics, and the legal community in general, who have contributed with comments to the analysis of this decision, such as Vella de Fremeaux and Attard,[179] Milanovic,[180] Busco,[181] and Citroni.[182]

Focusing on SAR cooperation between the states of Italy and Malta, this particular case allows us to draw the following insights.

a) The outcome of the present shipwreck has been defined as a consequence of ineffective action and coordination of the Maltese and Italian rescue services in the conduct of the rescue operation. In particular, a delayed start of the rescue operation, affected by the continuous transfer of calls as an attempt to evade

[178] Patricia Vella de Fremeaux (Mallia) and Felicity Attard, 'Rescue at sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part I' (2021) OpinioJuris.
[179] See Patricia Vella de Fremeaux (Mallia) and Felicity Attard, 'Rescue at sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part I and II' (2021) OpinioJuris.
[180] See Marko Milanovic, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations' (2021) Ejiltalk.
[181] See Paolo Busco, 'Not All that Glitters Is Gold: The Human Rights Committee's Test for the Extraterritorial Application of the ICCPR in the Context of Search and Rescue Operations' (2021) OpinioJuris.
[182] See Gabriella Citroni, 'No More Elusion of Responsibility for Rescue Operations at Sea: The Human Rights Committee's Views on the Case A.S., D.I., O.I. and G.D. v. Italy and Malta' (2021) OpinioJuris.

the responsibilities of disembarking rescued persons in their ports, was pointed to as a cause of the delay in assistance and, consequently, the increased danger faced by the rescued persons.[183]

b) The responsibilities of both rescue services were extensively examined in the pronouncements of the UN Human Rights Committee.
    a. In the case of Malta, it was undisputed that the emergency took place in the Maltese SAR area and that, under the SAR Convention, the Maltese authorities formally agreed to take over the coordination of the rescue efforts and did so by requesting support from Italy and mobilizing their vessel, the P61. Therefore, the Committee considered that Malta exercised effective control over the rescue operation, giving rise to a direct and reasonably foreseeable causal link to understand that the actions and omissions of its rescue services directly affected the outcome of the operation.[184]
    b. In the case of Italy, the committee relied on a different argument to establish Italy's responsibility. In this regard, the Committee referred to a relationship of special dependence between the persons on board the vessel in distress and the Italian rescue services. Specifically, the committee relied on the fact that the passengers had initial contact with the Rome MRCC, continued contact on several occasions with the Rome MRCC, and the vessel with the closest proximity was the Libra, to consider that the persons in distress at sea were directly affected by the decisions taken by the Italian authorities. Accordingly, the Committee considered that the delay in action by the Italian rescue services and the lack of effective cooperation with Malta manifested a breach of Italy's obligation of due diligence. In other words, Italy did not take all the measures that it could reasonably be expected to take to prevent harm

[183] Koka and Veshi (n 77) 42-43.
[184] Kristof Gombeer, 'Rescue operations at sea and human rights' (2021) Cahiers de l'EDEM 3.

or minimize the risk that may arise from a breach of its international obligations.[185]

c) Finally, the Committee's interpretation raised concerns among experts and academics that it could have the effect of potentially deterring States from taking on obligations, thereby discouraging them from cooperating and exercising SAR obligations in the SAR regions of other States. In this regard, the experts reiterate that SAR regions are not equivalent to jurisdictional zones and do not give rise to a presumption of jurisdiction. [186] In the same vein, they dismiss the notion in the Committee's pronouncement that because Italy intervened in the rescue, it is therefore responsible. To this end, they emphasize that under the SAR Convention, any SAR unit alerted of a distress situation is obliged to immediately undertake action to ensure that assistance at sea is provided. Accordingly, they highlight that, while the responsibility lies with the SAR State - that is, the responsibility to cooperate in rescue efforts that can only end with disembarkation in a place of safety - the first contacted RCC must act until the SAR State assumes that responsibility.[187]

In conclusion, examples such as the present case show evidence of the reluctance of both coastal states to act in the face of emergencies at sea of concern about having to deal with the responsibilities and burdens arising from the disembarkation of migrants in their ports. In this respect, while the Committee's pronouncement leaves avenues open for more effective coordination of rescue activities, it also raises concerns about the potential consequence of increased risk of greater reluctance on the part of coastal states to respond to rescue calls or attempts to avoid approaching vessels in distress at sea.

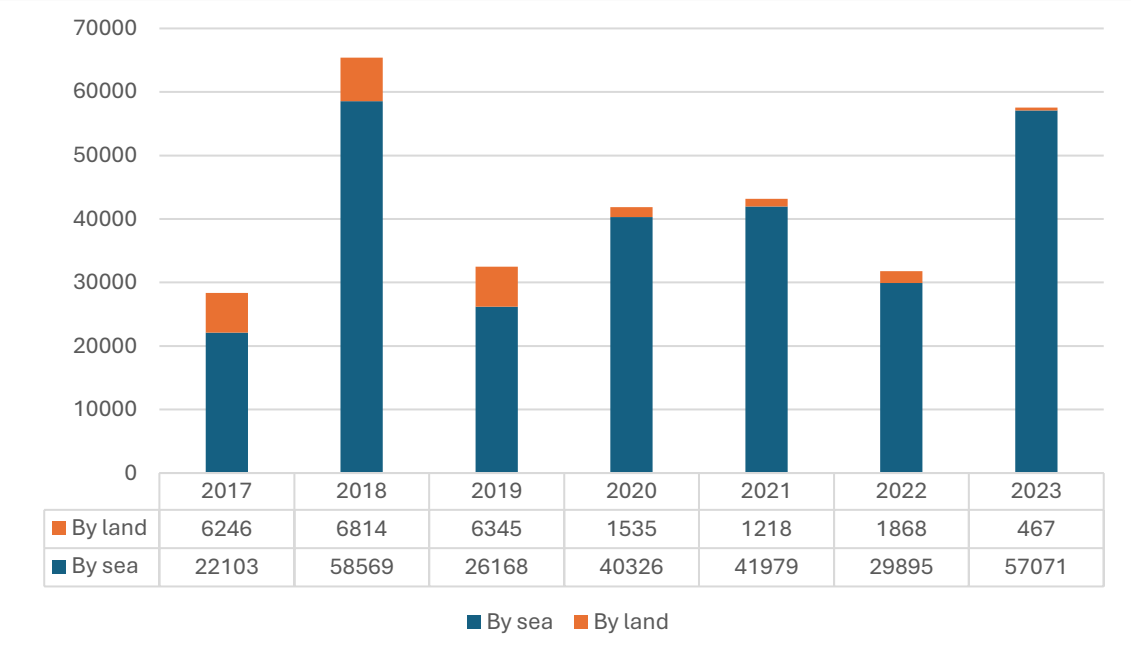
[185] Patricia Vella de Fremeaux (Mallia) and Felicity Attard, 'Rescue at sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part II' (2021) OpinioJuris.
[186] Busco (n 181) 1.
[187] Vella de Fremeaux (Mallia) and Attard (n 178) 1.

3. Cooperation in the western Mediterranean Sea: The case of SAR cooperation between Spain and Morocco

3.1. Introduction

When analyzing irregular migratory flows in Spain, it becomes evident that there are diverse routes used to access Spanish territory. Land and maritime arrivals have received the most media coverage in recent years, with situations of massive influx such as the well-known "jumps" over the fences in the autonomous cities of Ceuta and Melilla, or the constant arrival of small boats on the Canary Islands' shores in the last quarter of 2023.

Figure: Irregular arrivals to Spain (2017-2023)



	2017	2018	2019	2020	2021	2022	2023
By land	6246	6814	6345	1535	1218	1868	467
By sea	22103	58569	26168	40326	41979	29895	57071

Focusing on irregular arrivals by sea, data provided by the UNHCR show a fluctuating evolution of irregular migration flow to Spain since 2015, with a significant increase over the past decade.[188]

[188] UNHCR, 'Spain: Mediterranean Situation' (Operational Data Portal) <https://data.unhcr.org/en/situations/mediterranean/location/5226> accessed 20 May 2024.

With a sharp increase in sea arrivals in 2018 nearly surpassed by the irregular arrivals of the past year 2023, the data table above shows how this figure has been stabilizing in the subsequent years, but with a strong predominance of arrivals by sea over land.

González García links the increasing arrivals of small boats to the Spanish coasts, starting in early 2017, to a joint reaction stemming from the migration control measures and cooperation in monitoring the central Mediterranean route. In this regard, the author associates the previously mentioned agreements between Italy and Libyan authorities, and the relaxation of controls on the Moroccan coasts, as reasons for this shift in migratory flows towards the western route.[189]

Based on these data, maritime migration has emerged as the primary route to arrival to Spain for irregular migrants predominantly from Sub-Saharan countries, such as Mali, but mainly departing from the coasts of Morocco and Western Sahara.[190]

Regarding the gender and age profiles of migrants arriving in Spain, the migration is predominantly male, with approximately 89,75% men compared to 4,95% women. Additionally, a significant percentage of minors, around 5,3%, face these migratory journeys.[191]

Regarding the points of entry to Spain, they can be classified into two migratory routes. On the one hand, there is the Western Mediterranean route, including the region of the Strait of Gibraltar and the Alboran Sea with access to the peninsula through the Andalusian coast and, more recently, the Levantine coast and the Balearic Islands, as well as though the Spanish cities in the northern African continent. On the other hand, there are the Atlantic or West African routes, with access through the Canary Islands.[192]

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[189] Inmaculada González García, 'Immigration in Spain: Migratory Routes, Cooperation with Third Countries and Human Rights in Return Procedures', (2019) 7 Peace and Security – Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations) 203-206.

[190] European Council, 'Migration flows: Eastern, Central and Western routes. Yearly irregular arrivals (2015-2024)' <https://www.consilium.europa.eu/en/infographics/migration-flows-to-europe/> accessed 20 May 2024.

[191] Asociación Pro Derechos Humanos de Andalucía (APDHA), 'Percentage distribution of undocumented male, female adults or children immigrants that arrived in Spain in 2023' (2024) Statista. <https://www.statista.com/statistics/1213068/illegal-migration-share-of-men-women-or-children-that-arrived-in-spain/> accessed 4 June 2024.

[192] González García (n 189) 201–230.

It is important to highlight that, despite their considerable popularity, the migratory routes leading to Spain are characterized by being extremely dangerous for migrants undertaking these journeys. The Strait of Gibraltar presents powerful marine currents that hinder navigation in its waters, despite the apparent proximity of only 14.4 kilometers separating the coasts of both continents, which can deceive the perception of those who decide to venture on such crossing. Furthermore, journeys bound for the Canary Islands are often long-distance, starting even from Mauritania or Senegal, which implies covering hundreds of kilometers and significantly increases the risk. Additionally, the common use of fishing boats, which are precarious and unseaworthy for this type of journey, has contributed to this route being considered the deadliest in the past four years.[193]

When analyzing this region, authors such as Del Valle-Gálvez have emphasized the incorporation of these territories and maritime spaces under a common term, the Strait Area or Region. This refers, broadly speaking, to the geographical space that includes the maritime passage of the Strait of Gibraltar, and its accesses and exits up to the Canary and Balearic Islands. It also encompasses the land and maritime borders of Spain with the United Kingdom in Gibraltar and with Morocco and Algeria in North Africa.[194]

This conceptualization highlights the Strait Area as an enclave of undeniable strategic value and one of the most important shipping lanes in the world. Additionally, this area is characterized by the convergence of various actors with their own interests, including Spain, Morocco, the United Kingdom, and the EU. In this regard, the EU has a strong interest in the area given the fundamental role of the strait as Europe's southern border, where cooperation between neighbouring states is of paramount importance, particularly as it constitutes a place of vital interest in terms of migration surveillance and control.[195]

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[193] Miguel Ángel Acosta Sánchez and Alejandro del Valle-Gálvez "La crisis de los cayucos. Frontex y el control marítimo de la inmigración clandestina", (2006) 83 Tiempo de Paz, 19–30.

[194] Alejandro Del Valle-Gálvez, 'Política exterior española en el Área del Estrecho. Gibraltar, Ceuta y Melilla, Marruecos' (2019) Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz, 1.

[195] Alejandro Del Valle-Gálvez, 'Ceuta, Melilla, Gibraltar y el Sáhara Occidental. Estrategias españolas y europeas para las ciudades de frontera exterior en África, y los peñones de Vélez y Alhucemas' (2022) 10 Peace and Security – Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations) 4-6.

3.2. Cooperation mechanisms

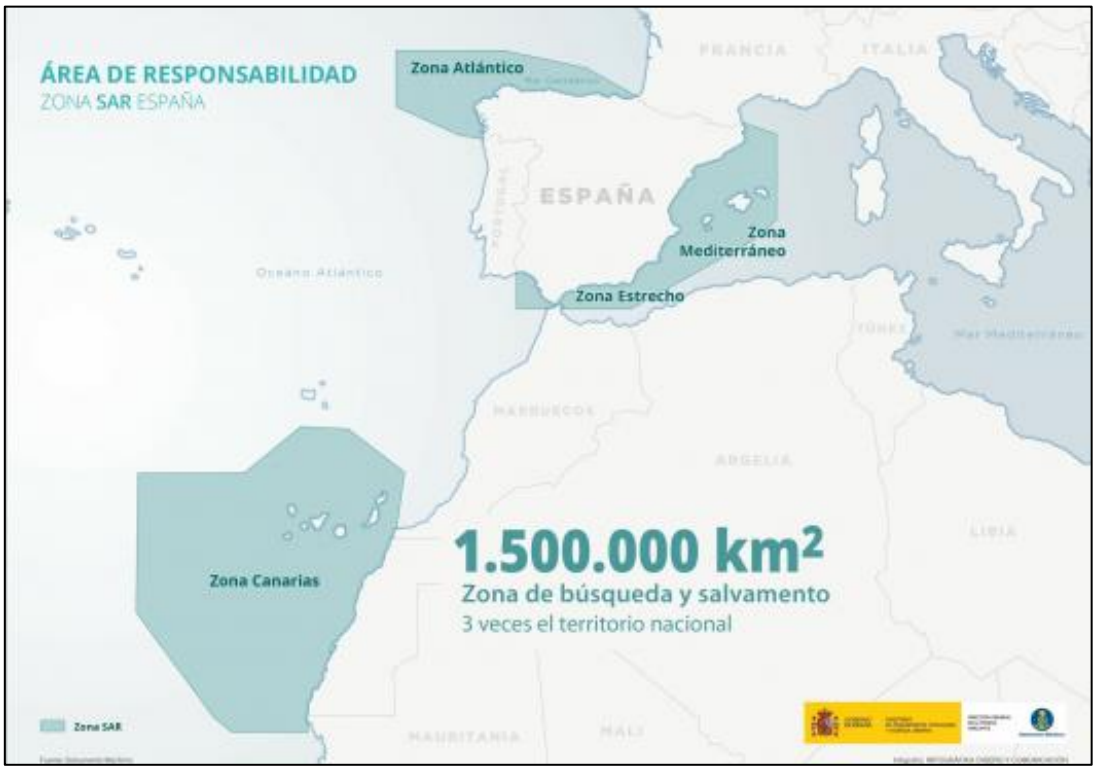
Cooperation between the EU, notably Spain, and the origin countries of these irregular migratory flows began in the early 2000s. In 2006, Spain's first major migration crisis on the Atlantic route highlighted the lack of experience in managing large migratory flows, causing the overwhelming of public services in providing healthcare and social assistance to arriving migrants. The so-called "cayuco crisis" underscored the need for Europe and Spain to adapt to changing migration patterns.[196]

As a result, post-crisis objectives included improving planning and coordination among EU Member States and with third countries. Priority areas were the reinforcement of maritime borders, the fight against migrant smuggling, and the prevention and dismantling of criminal networks that promote and organize irregular immigration. Since then, agreements were signed between Spain and states of origin such as Mauritania, Senegal, and Cape Verde to tackle irregular immigration, strengthening repatriation efforts and increasing police cooperation in Africa. These efforts resulted in an increase in apprehensions on land and a consequent reduction in arrivals in Spain.[197]

In addition, cooperation between Spain and Morocco in search and rescue operations has developed over time, although it is only recently that Morocco has increased its involvement in this area.

[196] Acosta Sánchez and del Valle-Gálvez (n 193) 19-30.
[197] González García (n 14) 373–398.

Figure: Spanish Search and Rescue (SAR) regions[198]



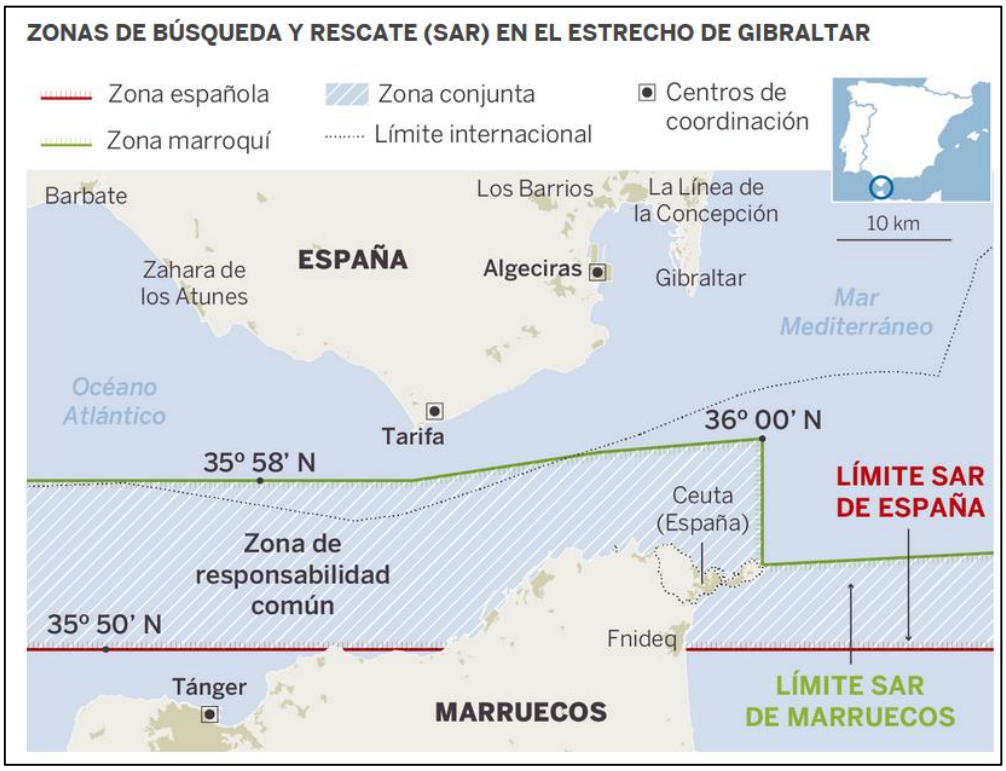
With over 3,000 kilometers of coastline and an area of 1.5 million square kilometers, Spain's SAR responsibility region is three times the size of the country's land area.

As with the Italian and Maltese SAR regions in the Central Mediterranean, the SAR regions between Spain and Morocco create an overlapping area in which both States declare that they would provide these services. Specifically, the SAR area indicated by Spain in the Alboran Sea eventually extended to latitude 35º50' North, while Morocco published in the IMO that its area of responsibility would extend to latitude 35º55' North.[199]

[198] Salvamento Marítimo | Misión y Área de Responsabilidad (2024) available on <http://www.salvamentomaritimo.es/conocenos/nuestra-actividad/mision-y-area-de-responsabilidad> accessed 25 June 2024.

[199] IMO, 'GISIS: Global SAR Plan. Rescue Co-ordination Centre. Spain' (2023) available on <https://gisis.imo.org/> accessed 15 August 2024.

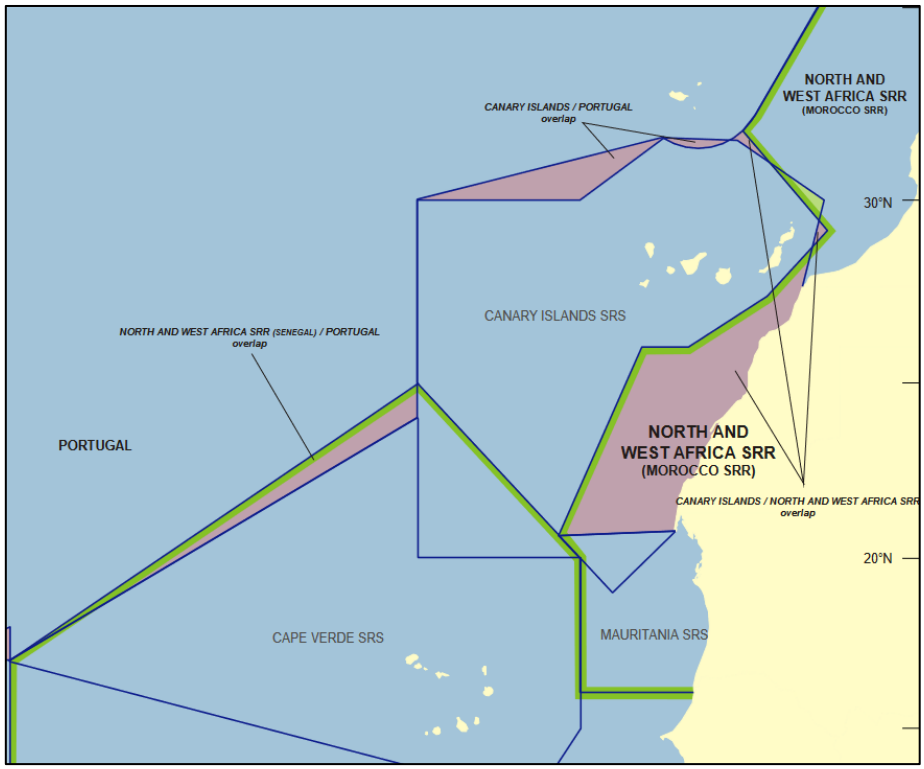
Figure: Overlapped SAR regions in the Strait of Gibraltar region[200]



In fact, in the Atlantic region, there is also an overlap of SAR regions between those waters surrounding the Canary Islands and those bordering the coasts of Western Sahara.

[200] Lucía Abellán and María Martín, 'España acuerda con Marruecos devolver pateras a sus costas' (2019) El País, availabe on: <https://elpais.com/politica/2019/02/20/actualidad/1550682280_062643.html> accessed 15 May 2024.

Figure: Overlapped SAR regions in the Atlantic route[201]



To provide effective service in these SAR regions, both states have established their search and rescue services, deploying dedicated rescue units equipped with the necessary means and equipment for these operations.

In Spain, the 'Sociedad de Salvamento y Seguridad Marítima' (SASEMAR), a public business entity under the Ministry of Transport, Mobility, and Urban Agenda, was established to coordinate, together with other agencies such as the Maritime Service of the Spanish Civil Guard (SEMAR),[202] SAR activities in Spanish SAR region.

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[201] United States Coast Guard, 'IMO Maritime SAR Regions' (2013) available on <https://www.dco.uscg.mil/Portals/9/CG-5R/nsarc/IMO%20Maritime%20SAR%20Regions.pdf> accessed 25 June 2024.

[202] SEMAR was created in 1991 with the mission of exercising the powers attributed to the Civil Guard in Spanish maritime waters within the outer limit of the territorial sea and, exceptionally, beyond these limits by the provisions of international treaties in force. Its functions include activities in the underwater environment and, in particular, coastal surveillance and control of irregular maritime immigration. In SAR matters, SEMAR maintains cooperative relations with other Spanish organizations with competencies at sea, such as SASEMAR. See: Guardia Civil | Información Institucional (2022) available on <https://www.guardiacivil.es/es/institucional/Conocenos/especialidades/ServicioMaritimo/index.html> accessed 5 June 2024

Since its inception in 1993, SASEMAR has been dedicated for almost thirty years to controlling maritime traffic, fulfilling Spain's obligations in search and rescue, and protecting and conserving the maritime environment.[203] This entity is notably civilian in nature. However, the significant migratory pressure experienced in Spain in recent years has prompted the Spanish government to take steps to advance its plans for reshaping migration control on the southern border, aligning it with other Southern European States.

In 2018, centralized coordination and monitoring of all actions related to irregular immigration in the Strait of Gibraltar, the Alboran Sea, and adjacent waters were approved through the establishment of a Coordination Authority led by a General Officer of the Civil Guard. This decision to transfer coordination powers to this military security body aligns with trends observed in other Mediterranean European states, where maritime rescue and SAR operations are also coordinated under a unified operational command.[204]

In Morocco, SAR services were established in 2002 through Decree No. 2-01-19891 of October 9, which deals with the organization and coordination of search and rescue operations at sea for human lives.[205] Initially, these services were coordinated by the Department of Maritime Fisheries. However, the direction and execution of their operations now fall under the Royal Moroccan Navy Inspection, highlighting another example of the militarization of SAR activities.[206]

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[203] Real Decreto Legislativo 2/2011, de 5 de septiembre, por el que se aprueba el Texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante, available on <https://www.boe.es/eli/es/rdlg/2011/09/05/2/con> accessed 24 June 2024.
[204] Vives (n 52) 653.
[205] Décret n° 2.01.1891 du 2 chaabane 1423 (9 octobre 2002) relatif à l'organisation et à la coordination de la recherche et du sauvetage des vies humaines en mer, disponible en: Département de la pêche maritime, Ministère de l'Agriculture, de la Pêche Maritime, du Développement Rural et des Eaux et Forêts, available on <http://www.mpm.gov.ma/wps/wcm/connect/729b62b2-2da8-436a-a304-656781fb84eb/39_n%C2%B02-01-1891.pdf?MOD=AJPERES> accessed 18 May 2024.
[206] Vives (n 52) 653.

To ensure the proper development of the SAR operations and facilitate cooperation between neighboring states, SASEMAR established a total of 19 RCC along the Spanish coast. Additionally, a National Rescue Coordination Center (NRCC) was set up in Madrid to oversee all RCCs operations and manage international relations with other coordination centers. Of particular interest are the RCC located in the Strait of Gibraltar region, specifically Algeciras on the Spanish coast and Tangier on the Moroccan coast. These centers are tasked with jointly coordinating efforts for effective SAR cooperation in the region. [207]

In this regard, it is particularly interesting to note the signing of an operational procedure between the RCC of Tarifa and Tangier. This agreement focuses on the exchange of relevant information for executing search and rescue operations, as well as sharing information related to maritime traffic, weather conditions, and the marine environment in the Strait of Gibraltar region.[208]

As one of the few action plans signed between the two parties, the value of this agreement lies in the role communications between both RCCs play in ensuring navigation safety in the region. Special attention is given to dedicated communication lines for secure and confidential information transfer, which must be conducted in English using the IMO standard phrases for maritime communications. Furthermore, this cooperation protocol includes provisions for annual meetings between the heads of both centers to evaluate and potentially modify the operational agreement.

However, this cooperation, which remains essential in the region, is relegated to the informality in which the two neighboring countries have been deciding to coordinate their actions.

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[207] Salvamento Marítimo, 20 Centros de Coordinación de Salvamento (2021) available on <http://www.salvamentomaritimo.es/conocenos/nuestros-medios/20-centros-de-coordinacion-desalvamento> accessed 24 June 2024.

[208] Procedimiento operativo entre el Centro de Coordinación de Salvamento Marítimo de Tarifa (CCS TARIFA) y el *Centre de Surveillance du Trafic Maritime de Tanger* (CSTM TANGER/VTS TANGER) firmado en Tarifa el 27 abril 2011, in Alejandro Del Valle Gálvez and Juan Domingo Torrejón Rodríguez (eds), *España y Marruecos: tratados, declaraciones y memorandos de entendimiento (1991-2013)*' (2011) Servicio de Publicaciones de la Universidad de Cádiz, 417-422.

Regarding the evolution of SAR operations in the Strait of Gibraltar area, Spain's predominant role has significantly influenced the cooperation achieved between both countries along their maritime borders. Since the inception of SASEMAR, cooperation with Morocco in the region has largely been driven by this entity's involvement in emergencies occurring in both overlapping zones and Moroccan areas of responsibility.

This intervention in the responsibility zones of an adjacent state is a practice endorsed by the SAR Convention. The Convention specifies that cooperation between neighboring countries includes the provision of rescue services from one country to access the responsibility zones of another, including territorial waters if their assistance and coordination are necessary to fulfill the duty of maritime assistance.[209] This form of cooperation is crucial when the rescue units of the other country have limited or insufficient capacity to handle emergency situations, as has been the case with Morocco.

Although the disparity in the capabilities of both rescue services has not hindered their joint operations, maritime rescue has not been extensively developed at the regional level by these neighboring countries. Instead, the focus has been on migration control and the surveillance of external borders.

In fact, regarding SAR matters, the instruments adopted have consistently been tied to enhancing the control of Spain's, and consequently the EU's, external borders in the fight against migrant smuggling, terrorism, and organized crime, which are prevalent in the area.

Tracing back to 1996, Spain and Morocco signed the Cooperation Agreement on Combating Marine Pollution and Maritime Rescue. [210] Through this agreement, and following international regulations governing the duty of assistance at sea, both parties committed to coordinating available resources to adequately respond to maritime emergencies. However, beyond the previously mentioned operational protocol between

[209] 1979 SAR Convention, Annex Chapter 3, para 3.1.

[210] Acuerdo de cooperación en materia de lucha contra la contaminación y salvamento marítimo entre el Reino de España y el Reino de Marruecos, hecho «*ad referendum*» en Rabat el 6 de febrero de 1996. «*BOE*» núm. 253, de 22 de octubre de 1999.

the RCCs of Algeciras and Tangier, no additional action plans have been signed within the framework of this cooperation.

With a focus on migration control, the Integrated System of External Surveillance (SIVE) was established on the Spanish coast in 2002, controlled by the Guardia Civil. [211] This Spanish initiative aimed to leverage new technologies, such as radar and thermal sensors, to reinforce maritime border control and manage irregular immigration to Spain. These mechanisms have been beneficial for the long-distance detection and subsequent interception of vessels suspected of involvement in drug or arms trafficking, or migrant smuggling.[212]

Initially conceived to facilitate the control of Spain's maritime borders, this instrument is now presented as a device to ensure the protection of human life at sea. The use of SIVE on the western route has facilitated the detection of migrant vessels in distress and the prompt response of Spanish and Moroccan rescue services.[213]

Similarly, in December 2003, during a bilateral summit held in Marrakech with representatives from both governments, Spain and Morocco agreed to create joint maritime patrols led by the Spanish Guardia Civil and the Moroccan Royal Gendarmerie. Recognizing the mutual need for collaboration in migration management in the region, these Hispano-Moroccan patrols were established as an ad hoc cooperation mechanism aimed at reducing migratory pressure and increasing control in the Strait of Gibraltar, the Andalusian coast, and the Canary Islands.[214] Under this mechanism, two Guardia Civil agents were deployed to the Moroccan coast to conduct patrols with members of the Royal Gendarmerie, both on land and at sea, to monitor the coast, exchange information, and dismantle criminal networks involved in migrant trafficking. Conversely, two

[211] Guardia Civil | Gabinete de Prensa, Sistema Integrado de Vigilancia Exterior (SIVE), available on <https://www.guardiacivil.es/es/prensa/especiales/sive/introduccion.html> accessed 14 June 2024.
[212] Paula García Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (2010) 21 Immigration and Asylum Law and Policy in Europe, 311-346.
[213] Agencia EFE, 'El SIVE detecta el 70% de las pateras que llegan a las costas canarias' (2020) Canarias7, available on <https://www.canarias7.es/canarias/sive-detecta-embarcacioens-20200917203449-nt.html> accessed 23 June 2024.
[214] González García (n 189) 207-208.

Moroccan gendarmes performed similar duties alongside SEMAR to control the opposite shore of the Strait of Gibraltar.[215]

In practice, this measure saw limited activity, with patrols occurring approximately twice a month on average. Nonetheless, similar to the introduction of the SIVE, this mechanism initially contributed to reducing the number of boats arriving in Spain by up to 40%. However, it did so at the cost of redirecting migratory flows towards the Atlantic route. [216]

Thus, it is observed how the cooperation mechanisms mentioned were originally conceived for migration and border control. Still, in practice, they have been used to develop search and rescue operations.

All these mechanisms have been essential due to the lack of resources in the neighbouring country to handle emergencies in its SAR responsibility areas. The effectiveness of Moroccan rescue services has largely depended on resource availability. Despite over twenty years of operation, it wasn't until recent years that Morocco bolstered its rescue units, notably with assistance from the EU and Spain. However, the absence of a formal, public agreement explicitly outlining practices for these emergencies has led Morocco's response to be sporadic, imprecise, and delayed, thereby placing the burden of responsibility for these operations on Spain.

Over the past decades, Spain's ongoing intervention in the Moroccan SAR area of responsibility and overlapping areas, as the only service with capabilities to ensure proper SAR operations in the region, remained largely uninterrupted without significant changes in its execution. However, it was during the surge in irregular arrivals in 2018 that this practice led to a situation of collapse, highlighting the deficiencies in the SAR cooperation framework in place at the time.

[215] La Voz de Galícia, 'Patrullas mixtas de Marruecos y España vigilan ya las aguas canarias', (2004) *La Voz de Galicia,* available on <https://www.lavozdegalicia.es/noticia/espana/2004/02/19/patrullasmixtas-marruecos-espana-vigilan-aguas-canarias/0003_2435878.htm> accessed 23 June 2024.
[216] García Andrade (n 212) 316-317.

In 2018, the intervention of Spanish rescue services in areas of Moroccan responsibility exceeded 30% of their total actions.[217] These action rates, which reflected an intense Spanish intervention in the Moroccan SAR zone highlighted the need to strengthen cooperation in this area to mitigate the lack of resources of the neighbouring country and increase Morocco's commitment to rescue activities.

Since then, the search for greater Moroccan involvement in the area triggered a system of support and funding granted by the EU and Spain to the neighbouring country, which was set up in a similar way to that previously established with other third States in the search to stop unwanted irregular immigration entering Europe through the southern border.[218] Specifically, these investments have included equipment upgrades, training, and financial support, with a total of 148 million euros transferred by the EU between 2018 and 2019. These funds were aimed at improving the capacities of Morocco's rescue units, as well as enhancing border control and management in the region.[219]

In this context, it is crucial to highlight that, although the EU has emphasized the importance of monitoring and coordinating these measures, it remains challenging to find documents that report and evaluate the improvements resulting from these aids. Moreover, the lack of conditionality attached to these funds reduces the control over how the funds received by Morocco are used, as well as the ability to assess their outcomes.

As a result of this support, an initial analysis of the recent distribution of rescues conducted in the region has revealed notable changes in Morocco's response. While Spain's actions in the overlapping areas have shown a decreasing trend, the most relevant change is observed in Morocco's operations within its SAR region. Taking on a more proactive stance, Morocco's interventions have increased both in its SAR region and in the overlapping areas. In 2022, Spanish interventions in the Moroccan SAR zone

[217] María Martín, 'España deja en manos de Marruecos el rescate de pateras en sus aguas', (2019) El País, available on <https://elpais.com/politica/2019/07/26/actualidad/1564157921_749346.html> accessed 23 June 2024.
[218] Claudia Jiménez Cortés, 'La desnaturalización de la zona SAR en el Mediterráneo central: de pieza clave para salvar vidas a instrumento contra los derechos humanos' (2022) 74/2 Revista Española de Derecho Internacional, 248.
[219] European Commission | Western Mediterranean Route: EU reinforce support to Morocco (2018) available on <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6705> accessed 24 June 2024.

did not reach 5%, a drastic reduction compared to the data before the start of this funding.[220]

While the Spanish government has welcomed these measures as an improvement in cooperation between both parties, this new scenario appears to limit the operational area of Spanish rescue services. Consequently, it encourages Morocco to take charge of emergencies occurring in overlapping zones where Spain also holds SAR responsibilities.

Additionally, SASEMAR has ceased conducting patrols in the neighbouring country's SAR zone, leading to a reduction in the ability to anticipate emergencies and an inability to monitor the vessels and individuals rescued by Morocco.[221]

In this context, critical voices link Morocco's increased involvement in migration control in the region with a rise in abuses and violations of fundamental rights by Moroccan security forces towards migrants rescued at sea. In recent years, various NGOs have reported, through their annual publications, incidents of unwarranted violence, mistreatment, and assaults by Moroccan authorities and security forces against migrants attempting to reach Europe. This alarming situation of human rights violations has prompted these groups to demand that the Spanish government not consider Morocco as a safe place for disembarking rescued individuals and to ensure their transfer to Spanish ports to prevent possible abuses once they have disembarked in Morocco.[222]

As a result, this greater involvement in the region raises questions about the ultimate purpose of this financial support. It appears to be aimed more at reducing the number of immigrants arriving in Spain rather than focusing on the stated goal of improving the rescue capabilities of Moroccan services.

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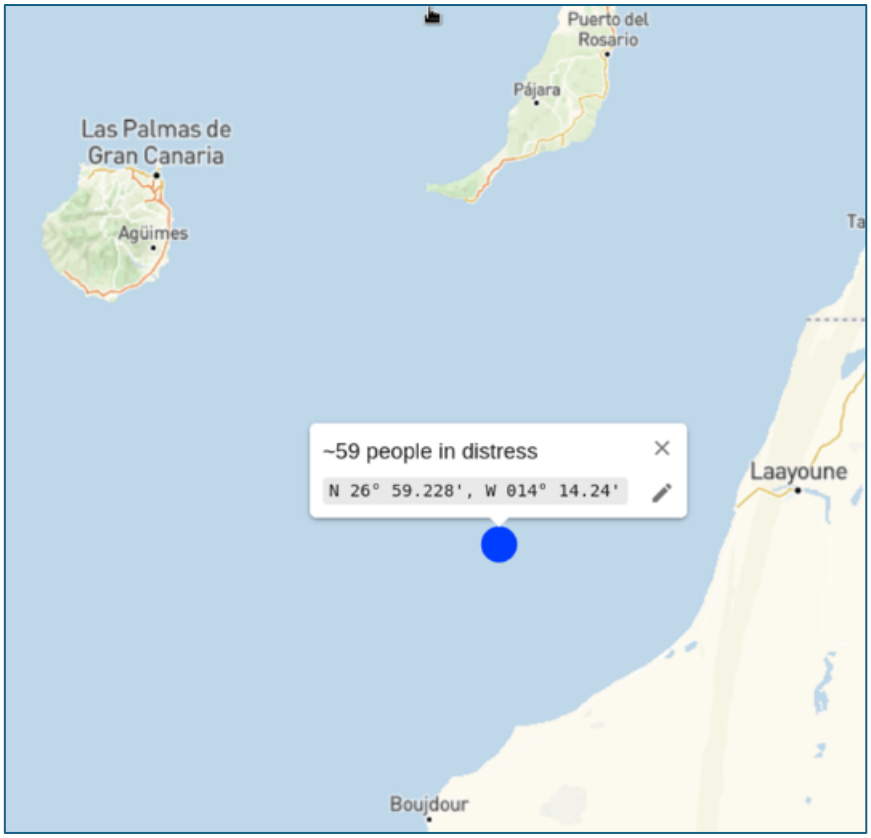
[220] María Martín, 'El acuerdo con Rabat reduce al mínimo los rescates de Salvamento Marítimo en aguas marroquíes' (2020) El País, available on < https://elpais.com/politica/2020/01/09/actualidad/1578596085_608071.html> accessed 25 June 2024.
[221] Beatriz Martínez, 'España-Marruecos: del rescate de inmigrantes a las muertes en el mar' (2019) El Faro de Ceuta, available on <https://elfarodeceuta.es/espana-marruecos-rescate-inmigrantes-muertes-mar/> accessed 24 June 2024.
[222] Statewatch Analyses, 'Aid, border security and EU-Morocco cooperation on migration control' (2019) Statewatch, available on <https://www.statewatch.org/analyses/2019/aid-border-security-and-eu-moroccocooperation-on-migration-control/> accessed 24 June 2024.

3.3. Case Law: Spanish-Moroccan cooperation on the Atlantic Route - The shipwreck of 21st of June 2023 off the coast of the Canary Islands

The chosen case study to illustrate Spanish-Moroccan SAR cooperation involves a shipwreck that took place on the 21st of June 2023, on the Atlantic route to the Canary Islands. On that day, Spanish media reported a tragic shipwreck that occurred just 162 kilometers from the Canary Coast, in which an inflatable boat carrying approximately 60 people collapsed, resulting in the loss of two lives, including a minor, while another 36 individuals remained missing.

Although such tragic events have unfortunately become common amidst Europe's increasing migratory influx over the past decade, the controversy in this particular case focused on the decisions made by the Spanish rescue services and the subsequent delay in the response provided by the Moroccan rescue services.

Figure: Map of the 21st of June 2023 incident on the Atlantic route[223]



[223] Caminando Fronteras (2023)

Focusing on the facts, the inflatable boat was initially detected by a pilot from the Spanish air rescue services. Following the provisions of the SAR Convention, the pilot reported the situation to the designated RCC, which in this case was Las Palmas de Gran Canarias. At this point, conflicting opinions were exchanged between the operators regarding whether or not the boat was within the Spanish SAR zone.

This conversation significantly impacted the media, as the recordings were later released to the media. In the recordings, the pilot asserted that the boat was in the Spanish responsibility zone, while the RCC ordered him not to approach and decided to transfer responsibility for the emergency to the Moroccan rescue services, citing the proximity of the boat to the Moroccan coast.

Morocco formally assumed responsibility for the rescue but did not mobilize its resources until more than 10 hours later, claiming that upon detecting the boat, they did not perceive any imminent risk. Tragically, by the time they arrived, it was too late: the inflatable boat had collapsed, resulting in the shipwreck.

The outcome of this incident was a consequence of a failure in the rescue operation, specifically due to the delay in initiating the rescue. Under this premise, Spain's decision not to act immediately after detecting the inflatable boat in distress at sea, and the subsequent decision to delegate the rescue to Morocco, has been interpreted as a possible omission of the duty to render assistance by the Spanish rescue services. Therefore, the Canary Islands Prosecutor's Office has requested an investigation into this possible omission, summoning the pilot of the Spanish air rescue service who detected the boat and the controller operator of the RCCs who have the order not to act to testify.

This request marks the second investigation into this tragedy, as the Spanish Ombudsman has also decided, on its own initiative, to investigate the incident. The Ombudsman has requested explanations from SASEMAR and the Regional Coordination Center of the Canary Islands regarding the coordination measures adopted and the actions taken during the rescue operation.

Despite the investigation being in its early stages, some general ideas can be presented based on the analysis of the current SAR cooperation between Spain and Morocco.

a) After years in which Spain has played a predominant role in cooperation along its maritime borders with Morocco, responding to emergencies in both overlapping zones and Moroccan SAR regions, the dynamics of this collaboration have undergone significant changes. Analyzing the evolution of SAR cooperation in the region in recent years, and with clear examples such as the aforementioned shipwreck, there are suspicions that the Spanish rescue services' decision to delegate rescues to Morocco might be part of a broader strategy by the Spanish government to prevent the unwanted arrival of irregular migrants through its maritime borders.

   In this context, the response to the incident —preventing Spanish rescue services from acting and instead delegating the response to Morocco— has become a normalized practice for Spain regarding emergencies in overlapping SAR regions where both States share responsibility for responding to distress situations at sea. Specifically, under the premise of proximity to Moroccan coasts, Spain has established a practice of reducing its intervention in these overlapping SAR regions, thereby avoiding the need to manage rescues and the subsequent disembarkation of migrants on its shores.

b) Secondly, this case exemplifies how Morocco's response to such distress situations at sea remains ineffective and imprecise, with significant delays in action. Consequently, there have been criticisms regarding the effectiveness of the financial support provided to Morocco by Spain and the European Union in recent years. It is highlighted that the aid received has not led to a tangible improvement in Morocco's resources, while the transparency in the use of these funds is questioned, attributable to the opacity that characterizes Morocco's operations. Additionally, there is criticism of the interpretation given by Morocco on the existence or absence of imminent risk in this maritime emergency, which was crucial to the failed outcome of the rescue.

c) Finally, the exposed incident has revealed challenges in the coordinated actions between Spain and Morocco, especially concerning the interpretation of

responsibilities of both actors in emergencies occurring in overlapping SAR regions. In this context, the informal nature of the cooperation between both countries and the lack of a legal framework regulating Spanish-Moroccan SAR cooperation in this region prevent the identification and attribution of responsibilities in significant incidents like the present one, highlighting the urgency of establishing joint action protocols to prevent further loss of life in future similar incidents. Conversely, this informality has facilitated a scenario where Spain has opted to externalize rescue responsibilities to Morocco, as well as to use an ambiguous interpretation of the SAR regions in the region according to the particular interests of each State.

4. Conclusions

In conclusion, the existence of similarities between both cases is evident. Both incidents involve precarious, unseaworthy and overloaded vessels, used in the context of a high migratory affluence departing from North Africa to European territories.

Both emergencies occurred in waters belonging to the SAR regions of the European States analyzed. In both cases, the first contact or detection and alerting of the emergency was made by one of these States. In the incident off the coast of the Canary Islands, the Spanish air rescue services pilot was the one who initially identified the situation, while in the case off Maltese waters, the Italian rescue services received the distress call.

In both cases, there was an essential delay in the response provided by the States involved, a key factor in assessing the fulfillment of their legal and humanitarian obligations. This delay was fundamental to understanding the tragic outcomes in both incidents, underscoring the need to rigorously examine the responsibilities of each party in the management of maritime emergencies.

The essential delay in response in both cases is attributed to the decision to delegate responsibilities to other entities. In the incident off the Canary coast, the Spanish rescue services chose to delegate SAR action to the Moroccan services, despite the fact that the emergency was taking place in an overlapping SAR region where Spain also had rescue

competencies and obligations. Similarly, in the case of the central Mediterranean, Italy delegated the action to Malta, arguing that the emergency was within its SAR waters, despite having vessels close to the scene of the incident that could have assisted at short notice.

Consequently, the decisions made by the rescue services involved caused a significant delay in the response needed to address these emergency situations. It follows from this interpretation that the fate of the people in distress at sea was left to the decisions taken by the States involved. The lack of a prompt and effective response by these States was a determining factor in the failure of the rescue and the tragic loss of life.

This clearly illustrates how an earlier response could have mitigated the risk and possibly prevented the fatal outcome. Thus, the implementation of a formal protocol for action among the parties involved could have been very useful in helping to share responsibilities in these cases where several actors are involved or where the emergency occurs in waters where several actors have SAR responsibilities.

CHAPTER V: RESEARCH FINDINGS

1. Introduction

The main objective of this study was to explore the regulations related to the rescue of migrants at sea, with the purpose of identifying their shortcomings and challenges, as well as determining whether the current legal framework hinders the development and implementation of humanitarian considerations in collaborative efforts between neighbouring States. Following the analysis of the proposed SAR cooperation case studies, exemplifying a number of relevant aspects in this area, this section is devoted to the presentation and analysis of the results obtained throughout this research.

The results presented here are central to understanding the dynamics and complexities inherent to SAR operations in a context of mass irregular migration at sea and seek to provide a comprehensive view of how they are carried out in practice. Throughout this chapter the most significant conclusions obtained from the analysis of the current SAR legal regulations and the academic doctrine on the subject will be detailed, organized around the main topics addressed in the research, in order to offer a clear and structured view of the information analyzed.

To this end, this chapter will address four fundamental aspects that contribute to the research objective.

First, a number of key concepts in the regulation of maritime SAR operations will be analyzed in order to identify the gaps in their definitions, the challenges that these deficiencies have posed, and the measures adopted for an in-depth development.

This will be followed by an analysis of the main international legal instruments regulating SAR, commenting on their implementation over time, examining their most relevant provisions and highlighting the aspects that require improvement to ensure comprehensive protection of human life at sea.

Thirdly, the study will focus on the application of human rights in the field of rescue operations, addressing the main provisions on human rights and refugee law, and the problematic that their application has entailed in the maritime environment, especially in the context of large-scale irregular maritime migrations.

Finally, a space will be devoted to the analysis of SAR cooperation between States, exploring its scope, recent practices and the challenges they face, to conclude with a series of proposals to enhance such cooperation.

2. Defining key terms

In the field of maritime search and rescue operations, certain key terms and concepts, despite their importance, lack a precise and universally accepted definition. This lack of clarity may hinder the interpretation of regulations and, consequently, affect the effectiveness of rescue operations. This is the case of the concept of distress at sea, the definition of SAR regions, and the interpretation of the safe place of disembarkation.

For this reason, this section aims to provide a series of key ideas that allow a better understanding and application of these terms, as well as their challenges, thus contributing to the improvement of interventions in emergency situations at sea.

2.1. 'Distress'

The concept of 'distress' is of paramount importance in the context of rescue operations. This term describes an essential quality that determines the need for a rapid and effective response to critical situations at sea.

However, it is relevant to note that UNCLOS, the main instrument regulating the law of the sea, does not include a specific section defining the concept of peril at sea. In contrast, other legal instruments have provided a definition for this concept.

The SAR Convention defines the concept of distress as 'a situation wherein there is a reasonable certainty that a person, a vessel, or other craft is threatened by grave and imminent danger and requires immediate assistance.'[224]

On the basis of this definition, the Convention requires the master of the ship responding to a distress call to decide, on a case-by-case basis, whether the vessel is in need of

[224] 1979 SAR Convention, Annex Chapter 1, para 1.3.13.

immediate assistance.[225] Therefore, the implication of this definition would only apply in exceptional situations.[226]

This flexible interpretation has led to great complexity in deciding when to act, especially when it is left to their discretion to interpret the concept of distress at sea in the context of vessels related to irregular immigration. In such scenarios, some states consider that the vessel must be close to sinking in order to intervene, while others consider it sufficient that the vessel is unseaworthy.[227]

The 'reasonable certainty' referred to in the SAR Convention definition requires consideration of the context in which the vessel is located, as well as the existence of certain factors that enable a situation of distress to be identified.[228]

For this purpose, a number of elements have been defined that must be present in order to establish that a situation of distress at sea is occurring. This is the case of EU Regulation No 656/2014, known as the Sea Border Regulation, which in its ninth article attempts to provide several elements to identify whether a vessel is in a phase of uncertainty, alert, or distress. In this context, the regulation identifies three different phases to classify search and rescue situations, thus determining when the obligation to render assistance at sea is triggered.[229]

In this regard, the factors defined by the regulation to classify search and rescue situations include the existence of a distress call; the seaworthiness of the vessel; the number of passengers according to the type and condition of the vessel; the availability of essential supplies such as fuel, water, and food; the presence of qualified crew; the capacity of safety, navigation, and communication equipment; the presence of

[225] Koka and Veshi (n 77) 47.
[226] Lisa-Marie Komp, 'The duty to assist persons in distress: an alternative source of protection against the return of migrants and asylum seekers to the high seas?' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach'* (Brill Nijhoff 2016) 232.
[227] Klepp (n 119) 553-554.
[228] Ainhoa Campàs Velasco, 'Adrift in international law: towards a place of safety for sea migrants' (2020) University of Southhampton, Faculty of Social Sciences, Law School, PhD Thesis, 155.
[229] Koka and Veshi (n 77) 45.

passengers requiring urgent medical assistance; the presence of deceased passengers; the presence of pregnant women or children; and weather and sea conditions.[230]

With this classification, the regulation contributed to a more specific definition of the concept of distress at sea, although it failed to establish a common and universally accepted definition.[231]

The main consequence is therefore that, in the absence of a clear definition of what constitutes a distress situation for a vessel at sea, the start of a rescue operation may be delayed, increasing the risk to persons in distress at sea.

This has allowed for continued inconsistent interpretations by EU member states, who often use this discretion to avoid the responsibilities associated with irregular migration. Coastal states have shown reluctance on several occasions to initiate rescue operations, arguing that they have not identified the vessel as being in distress.[232] An example of this is the June 2023 shipwreck off the Canary Islands, described in the previous chapter, where Morocco took more than 10 hours to intervene on the grounds that it had not identified an imminent risk. Moreover, in these cases, the SAR Convention fails to provide a solution for scenarios where responsible states do not act promptly and adequately in rescue situations.

Bearing this possibility in mind, the interpretation of the term 'threatened by grave and imminent danger' in the SAR Convention definition includes two key factors for the identification of a situation of distress at sea, namely the intensity of the danger threatening the vessel and the time element.[233] This term suggests that the person or vessel is in danger, not just any kind of danger, but one that is grave and imminent. To clarify this interpretation, Campàs Velasco points out that 'threat of serious and imminent danger' refers to the possibility of damage or injury. [234] This interpretation reinforces the preventive approach that characterizes search and rescue services, aimed

[230] COUNCIL DECISION of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external 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 (2010/252/EU) para 1.3, Part II, Annex.
[231]Koka and Veshi (n 77) 45.
[232] *Ibid.* 47.
[233] Komp (n 226) 233.
[234] Campàs Velasco (n 228) 157.

at acting on the prospect of significant and imminent damage, and not only after such damage has occurred.[235]

Furthermore, despite the broadness of the term 'danger' and its requirement for a contextualised interpretation, when analysing an irregular immigration scenario such as the current one, it is not unreasonable to conclude that the mere crossing at sea in overloaded and unseaworthy vessels constitutes a situation of danger requiring urgent, as well preventive, response.[236]

Therefore, the presence of these simple characteristics of irregular immigration at sea could be considered sufficient to identify grave and imminent danger in the maritime context and, consequently, a situation of distress at sea requiring urgent action or assistance.

It follows from this analysis that the situation of distress at sea requires a case-by-case analysis, where reasonable certainty must be assessed according to the context or scenario in which the emergency occurs. As regards the threat of grave and imminent danger, this refers to the possibility of significant harm occurring, without the need for actual suffering of pain, injury or loss to the persons or the vessel in question. It is sufficient that it is foreseen that such damage or risk may occur at sea, justifying the need for immediate assistance.

In this regard, the most relevant aspect to highlight is the preventive approach that the rescue operation must have in order to avoid loss of life at sea. Therefore, the existence of a distress call should not be necessary to initiate a rescue operation,[237] nor should it be necessary to wait until the vessel is sinking to understand that there is danger. The very situation of vulnerability in which irregular migrants travel constitutes that reasonable certainty that danger may occur, thus requiring an urgent response.

[235] *Ibid.* 167.
[236] Papastavridis (n 56) 295.
[237] COUNCIL DECISION of 26 April 2010 (n 230) para 1.4, Part II, Annex.

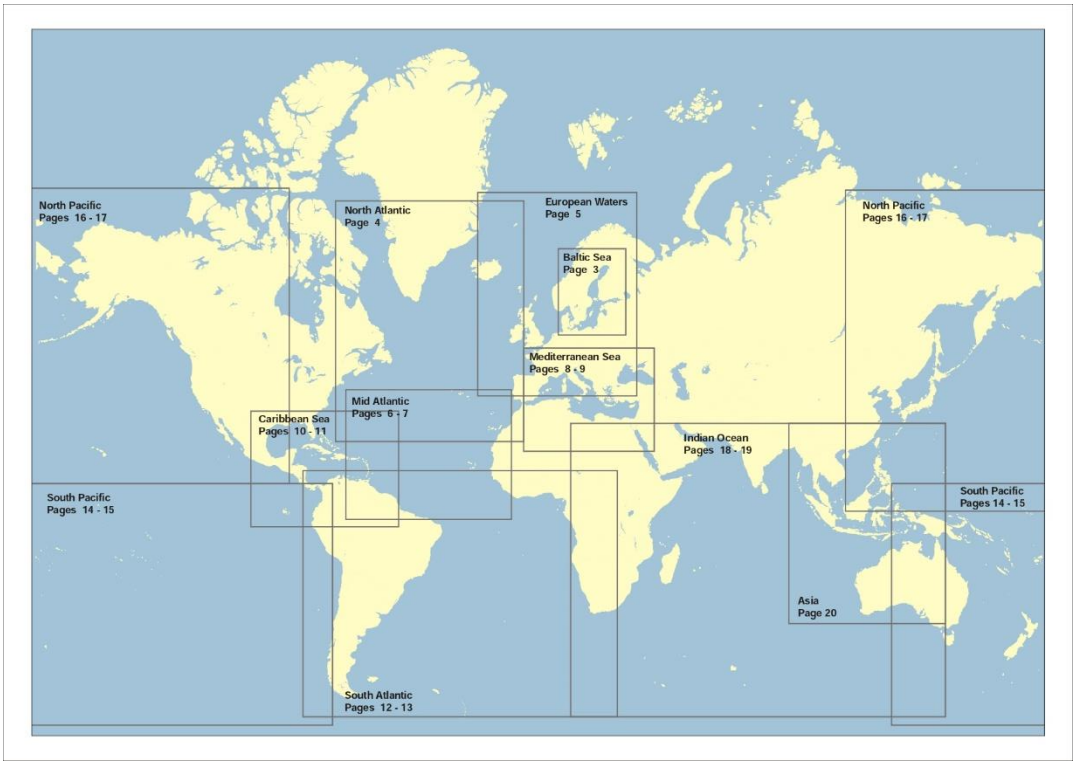
2.2. 'SAR regions'

Another concept of great importance when considering rescue operations in the context of irregular migration by sea is that of Search and Rescue (SAR) regions.

SAR regions are defined by the SAR Convention as 'an area of defined dimensions associated with a rescue coordination centre within which search and rescue services are provided.'[238]

With the adoption of the SAR Convention in 1979, the IMO divided the world's oceans into thirteen SAR regions. In each of these regions, the most relevant coastal countries delimited search and rescue zones, in which they are responsible for coordinating the conduct of search and rescue operations to ensure assistance to all persons in distress at sea.[239]

Figure: World's SAR regions[240]



The declaration of a SAR region is a unilateral right of States Parties to the SAR Convention. Under its provisions, States are encouraged to enter into bilateral

[238] 1979 SAR Convention, Annex Chapter 1, para 1.3.4.
[239] 1979 SAR Convention, Annex Chapter 2, para 2.1.1.
[240] United States Coast Guard (n 201) 1.

agreements with their neighbouring countries in order to delimit SAR regions and to agree on cooperation in the conduct of rescue operations. [241]

Once delimited, these regions are notified to the IMO Secretary-General[242] and are available for consultation in the IMO Global Search and Rescue Plan.[243]

A matter of particular interest for the interpretation of this concept is the understanding that the delimitation of SAR regions is not related to and does not affect the delimitation of borders between states,[244] nor does it constitute jurisdictional areas where the responsible state may exercise sovereignty.[245]

In this sense, and as will be discussed in depth in the following subsections, one of the major questions surrounding the establishment of these regions is whether they entail any kind of obligation or responsibility for the state that delimits them.

These regions imply only the acceptance of responsibility by the coastal state to provide search and rescue services in a given area.[246] To this end, the States commit themselves to designate rescue units, organise the means available and, above all, establish RCCs to facilitate the reception of distress calls, as well as communications and coordination between different RCCs.[247]

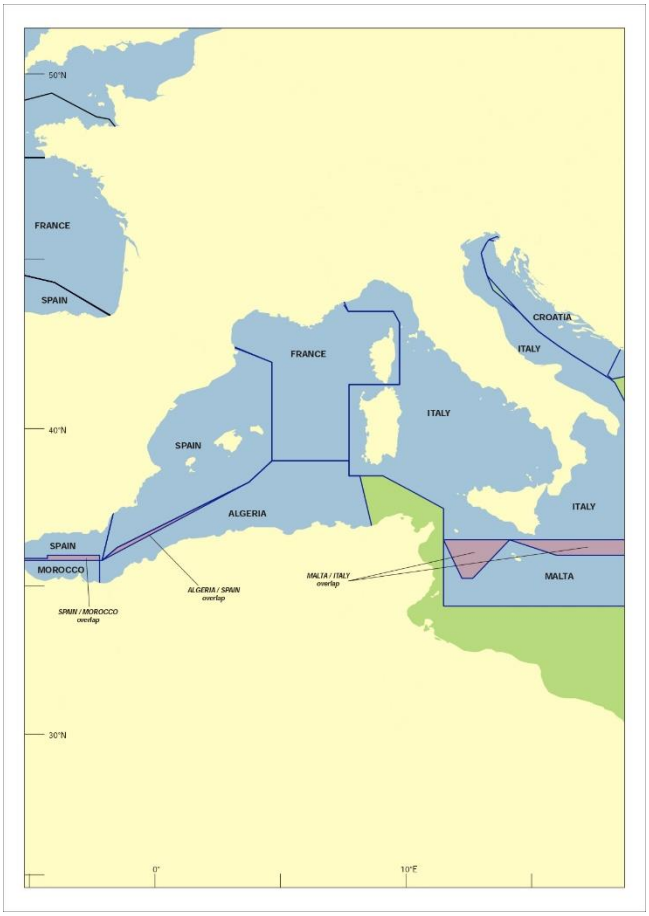
In order to ensure adequate and efficient coordination to support the SAR services established in these regions, the SAR Convention recommends that such regions be contiguous and as far as possible, not overlapping.[248]

However, this issue has been particularly complex in the Mediterranean region. Particularly, overlapping SAR regions can be found between the states of Turkey and Greece, Italy and Malta, and Spain and Morocco, the latter both on the Mediterranean

[241] García-Carriazo (n 149) 301.
[242] 1979 SAR Convention, Annex Chapter 2, para 2.1.4.
[243] IMO | GSIS:Global SAR Plan, available on <https://gisis.imo.org/Public/COMSAR/Default.aspx> accessed 25 July 2024.
[244] 1979 SAR Convention, Annex Chapter 2, para 2.1.7.
[245] Komp (n 226) 231.
[246] 1979 SAR Convention, Annex Chapter 2, para 2.1.9.
[247] 1979 SAR Convention, Annex Chapter 2, para 2.3.1.
[248] 1979 SAR Convention, Annex Chapter 2, para 2.1.3.

side in the region of the Strait of Gibraltar and on the Atlantic side, off the coast of the Canary Islands.

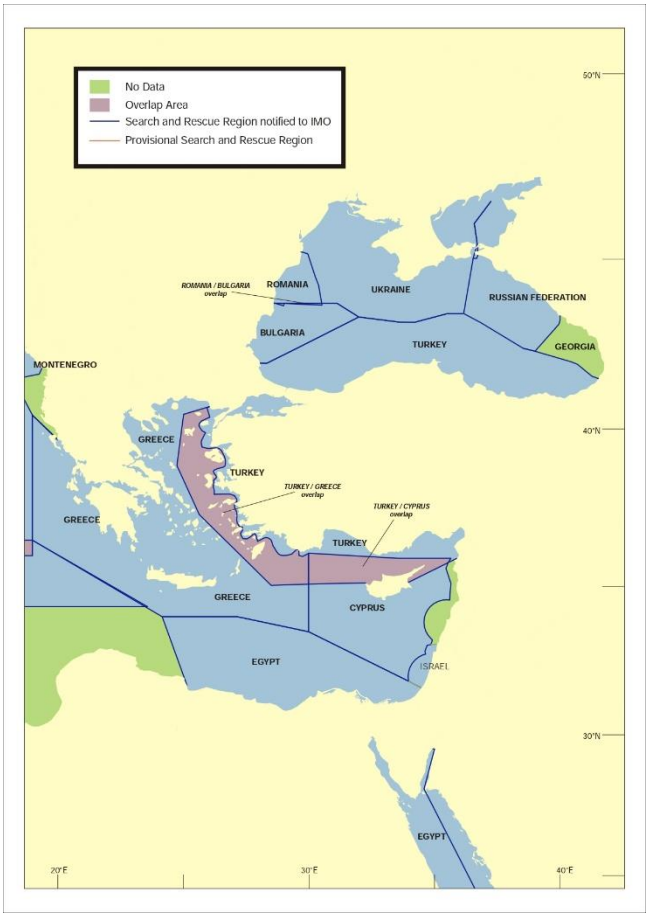
Figure: Western Mediterranean's SAR regions[249]



As mentioned above, these regions should not prejudice border delimitation between neighbouring states. However, countries with a disputed historical record on border delimitation, such as Spain and Morocco or Greece and Turkey, have shown reluctance to reach agreements on the delimitation of these SAR regions.

[249] United States Coast Guard (n 201) 7.

Figure: Eastern Mediterranean's SAR regions[250]



In this sense, the overlapping of SAR regions has exacerbated existing territorial disputes between these pairs of States, making it difficult to reach bilateral agreements for the delimitation of these regions, while prioritizing political and geostrategic interests.

A significant example can be seen in the delimitation of SAR regions on the IMO Global Search and Rescue Plan website, where Morocco includes the entire coast of Western Sahara in its SAR region, as does Spain. This inclusion reinforces Morocco's position in defence of its sovereignty over a territory still pending decolonisation.[251]

[250] *Ibid.* 8.
[251] Del Valle-Gálvez (n 196) 11.

Figure: Moroccan SAR regions (IMO Global SAR Plan)[252]

However, a SAR area is created and managed for the sole purpose of carrying out search and rescue services, and therefore should not have 'territorialization' implications.[253]

However, the real consequences of this overlapping of SAR regions have manifested themselves in coordinating rescue operations in emergency situations that have occurred in these areas, especially those widely affected by a high influx of migrants. These overlaps have generated significant challenges in the sharing of responsibilities among the States involved, as will be discussed in later sections.

2.3. 'Place of safety'

A rescue operation at sea involves searching for and intercepting the person or vessel in distress at sea, rescuing them, and finally disembarking them in a place of safety.

[252] IMO | GSIS:Global SAR Plan 'Rescue Co-ordination Centre/Morocco' available on <https://gisis.imo.org/Public/COMSAR/RCC.aspx?CID=MAR&Action=View&ID=954> accessed 25 July 2024.

[253] Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 The International Journal of Marine and Coastal Law, 532.

Disembarking in a place of safety is, in fact, a key element in understanding that a rescue operation is complete. However, there is no international obligation for the state to accept the disembarkation of survivors on its territory, as this would contravene the state's prerogative to regulate the admission of non-citizens to its territory.[254]

In this sense, when dealing with an irregular migratory context, the decision to disembark people rescued at sea depends on the efforts that the state in question is willing to make, depending on its border control and migration policies. [255] As a result, reluctance and refusal to disembark migrants rescued at sea are common responses among coastal states.

Disembarkation, the last phase of a rescue operation, is defined in the SAR Convention as 'an operation to recover persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.'[256]

However, the interpretation of the term 'place of safety' has been a particularly complex issue, leading to disagreements between States and making it difficult for the State responsible for the SAR area where the rescue takes place to fulfill its primary responsibility to ensure such disembarkation.[257]

In this context, the risk and vulnerability experienced by migrants during their journey at sea are presented to support the argument that the interpretation of the place of safe disembarkation must ensure the protection of migrants' fundamental human rights. As Campàs Velasco points out, the interpretation of the notion of a place of safety in the SAR context must be guided by the advancement of humanitarian considerations in this field.[258]

In this respect, International Human Rights Law and Refugee Law have a key role to play in interpreting this concept.

As mentioned in previous sections, the first approach to humanitarian considerations in the field of maritime rescue is to be found in the 'Guidelines on the Treatment of Persons

[254] Barnes (n 5) 144.
[255] Campàs Velasco (n 10) 85.
[256] 1979 SAR Convention, Annex Chapter 1, para 1.3.2.
[257] 1979 SAR Convention, Annex Chapter 3, para 3.1.9.
[258] Campàs Velasco (n 10) 86.

Rescued at Sea', adopted by the IMO to provide guidance to States Parties to the SAR Convention and shipmasters on humanitarian obligations regarding the treatment of persons rescued at sea.

This instrument notes that the SAR Convention does not provide a definition of 'place of safety', but establishes that, in keeping with the intent of the Convention, this concept should be determined by what it can provide for survivors, and not only by its geographic location. In this sense, it rejects the sole use of the proximity criterion as a determinant of a place of safety. It further recognizes that the place of safety must ensure the safety of the lives of survivors and provide for their basic human needs, such as food, shelter, and medical care.[259]

Similarly, this interpretation of a 'place of safety' must be incompatible with a location at sea, meaning that the rescue vessel cannot be considered a place of safety. This is particularly relevant given that the safe place must allow migrants to process their claims for international protection, asylum, and refuge, if applicable, following international standards.[260]

In this line, the IMO Guidelines add the reference to 'the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened,' considering this particularly relevant for asylum seekers and refugees rescued at sea.[261]

This refers in particular to the principle of non-refoulment in the field of maritime rescues, an aspect that will be analyzed in depth in the following subsections, and which has been of particular relevance in denouncing the disembarkation of migrants in Libyan territory, for example, where systematic human rights violations have been reported by many institutions and organizations.[262]

[259] 'IMO Guidelines' n (69) para 3.
[260] Campàs Velasco (n 10) 91.
[261] 'IMO Guidelines' n (69) para 6.7.
[262] Amnesty International, 'The state of the world's human rights' (2024) Amnesty International, 240-245.

The controversy surrounding the classification of a port as a place of safety, as well as the reluctance of southern European states to accept the disembarkation of migrants in their ports, has led to high tensions and harmful situations for migrants.

Illustrative examples of this problem were the decisions taken by the Italian and Maltese governments during the Covid-19 pandemic to declare their ports unsafe for disembarkation. Alleging that their ports did not meet the sanitary requirements to receive people rescued at sea, humanitarian rescue NGOs in the Central Mediterranean faced rejection of their requests to disembark in these ports. This resulted in rescued people having to spend hours or even days trapped at sea.[263]

This refusal to disembark rescued migrants has been deeply influenced by European states' fear of facing the applications for international protection, asylum, and refuge that could result from the entry of these people into their territory. In a context of high migratory influxes, such as the one recently experienced, this would imply a great effort and a considerable allocation of resources.[264]

This has made cooperation between States for the designation of a safe place of disembarkation considerably more difficult, with devastating consequences for migrants at sea when such cooperation has not been achieved.[265]

In this regard, the exchange of updated information on a state's failure to comply with human rights obligations is essential to determine a place of safety. This exchange makes it possible to exclude as potential ports of disembarkation those territories where there are substantial grounds for believing that migrants would be exposed to a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment, or to threats to their life, liberty and security.[266]

[263] Gabriella Sanchez and Luigi Achilli, 'Stranded: The Impacts of COVID-19 on Irregular Migration and Migrant Smuggling' (2020) European University Institute, Policy Brief, 5.
[264] Komp (n 226) 231.
[265] Campàs Velasco (n 10) 87.
[266] Campàs Velasco (n 228) 289.

3. International legal regime of Search and Rescue operations: The duty to render assistance at sea

The duty to render assistance at sea is widely recognized as a maritime tradition, whereby seafarers have, over the years, acknowledged a moral obligation to rescue persons in distress at sea.[267] This duty has therefore traditionally been constituted as a customary law, derived from a repeated and generally accepted practice as a right.

Currently, the scenario of high migratory flows by sea experienced in recent decades has shifted the focus of attention to the existing regulation of this duty, highlighting the need to reinforce its regulation in the legal instruments where it is codified.

As a starting point, contemporary law of the sea is largely identified with UNCLOS, the international instrument that regulates all the world's seas and oceans. However, UNCLOS, formally known as 'the constitution for the oceans',[268] has found it very difficult to provide a comprehensive set of rules for the wide range of issues involved in regulating the maritime environment. In this regard, some issues have found normative support in other more specialised instruments, while customary international law has continued to evolve outside the convention's structures.[269]

This section will provide an analysis of the main contemporary instruments regulating the duty to render assistance at sea, their scope and the main challenges associated with their implementation.

3.1. United Nations Convention on the Law of the Sea (UNCLOS)

Located in section VII on the regulation of the High Seas, UNCLOS includes the duty to render assistance at sea in Article 98.1, with a provision citing:

> 1. 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:

[267] Felicity Attard, 'The contemporary significance of the early efforts to codify the Duty to Render Assistance at Sea' (2017) 15-2 The Quarterly Bulleting of Benedict on Admiralty, 61.
[268] Tommy T.B Koh, 'A Constitution for the Oceans', Remarks of the President of the Third United Nations Conference on the Law of the Sea at the Conference at Montego Bay (December 1982).
[269] Barnes (n 5) 107.

> (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;
>
> (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

This first paragraph of the provision contained in Article 98 of UNCLOS requires States to oblige masters of ships of their nationality to assist persons in danger of being lost at sea and to proceed, as soon as possible, to a vessel in need of assistance if informed of such need, so far as can reasonably be expected of the master.[270]

It follows from this first reading that the master of the ship has a responsibility to comply with this obligation, provided he/she does not put his/her own ship, crew and passengers at serious risk.

However, since international law generally does not impose direct obligations on individuals, it is understood that this provision imposes an obligation on flag States. It will therefore be up to these States to integrate this obligation into their national legislation by adopting the necessary legislative and administrative measures to ensure that masters of their ships comply with the duty to render assistance at sea.[271]

Furthermore, the text of Article 98.2 of UNCLOS states:

> 2. Every coastal State shall promote the establishment, operation, and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

The second paragraph of this provision then imposes an obligation on coastal States to implement and develop a search and rescue system to coordinate and assist rescue operations at sea. To this end, the IMO adopted the International Convention on Search and Rescue (SAR Convention), with the aim of providing the necessary legislative framework to carry out this task effectively.

[270] Komp (n 226) 229.
[271] *Ibid.* 229.

As regards the geographical scope of this duty to render assistance at sea, it can be stated that this obligation is not subject to any geographical limitation.[272] In other words, the duty to assist at sea obliges both the State and the master of the ship to render assistance to any person or vessel in danger of going missing at sea, regardless of the location of the vessel in distress or the nationality or legal status of the person at risk.[273]

The duty to render assistance at sea has been classified by various authors, such as Papastavridis, as essentially an obligation of conduct for the state.[274] In other words, this duty implies an obligation to act in accordance with the normative texts that regulate it. This includes, for example, the obligation to act as promptly as possible or to report assistance needs, in order to ensure that the necessary relief is provided.[275]

Following this debate, other authors, such as Trevisanut, have argued that the duty to assist at sea should be recognized not only as an obligation of conduct for the state but also as an obligation of result. According to this perspective, recognizing this individual right to be rescued would contribute to strengthening the implementation of the duty of care and improving the adequacy and efficiency of search and rescue services.[276]

This position reinforces the humanitarian basis inherent in rescue obligations,[277] where the primary objective of the duty to assist is to prevent loss of life at sea.

The duty to render assistance at sea requires positive action, so failure to provide assistance may be considered a breach of this rule.[278] In this sense, recognising a right to be rescued would allow victims of deficient or negligent management of search and rescue services to bring claims based on the right to life, in accordance with international human rights instruments applicable at sea, as will be discussed in the next section.[279]

However, this provision of Article 98 of UNCLOS underlines that the obligation to provide assistance is not absolute, as it will only be effective if such assistance can be provided

[272] *Ibid.* 230.
[273]1979 SAR Convention, Annex Chapter 2, para 2.1.10.
[274] Efthymios Papastavridis, 'Is there a right to be rescued? A skeptical view' (2014) QIL, Zoom-in 4, 21.
[275] Papastavridis (n 56) 295.
[276] Trevisanut (n 80) 154.
[277] Barnes (n 5) 134.
[278] Komp (n 226) 235.
[279] Trevisanut (n 80) 154.

without seriously endangering the ship, crew, or passengers.[280] Therefore, although it is an unconditional duty[281] —irrespective of the location of the emergency and the legal status or nationality of the person in distress— assistance is not mandatory if its provision would compromise the safety of human life.[282]

These two paragraphs of Article 98 of UNCLOS are, however, the only ones in the entire convention that refer to the duty to render assistance at sea, which makes this issue remarkably unregulated compared to other maritime issues, such as environmental protection. In contrast, regulations relating to search and rescue at sea are scarce and less developed.[283]

Furthermore, with regard to maritime migration, UNCLOS does not provide specific guidelines on issues such as human smuggling and irregular migration, nor does it include general human rights provisions. As a result, it has been necessary to rely on other instruments to address these issues, such as the Smuggling Protocol.[284]

In addition to the lack of specific regulation in UNCLOS on these issues, another significant problem has been the practical difficulty in modifying or adding amendments to the convention text.[285]

This is mainly because the adoption of UNCLOS involved a complex negotiation process in which states ceded rights in some areas in exchange for concessions in others. In this context, introducing a specific regulation on migration under the law of the sea would be complicated, as it would be necessary to balance the interests previously negotiated in the convention.

[280] Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein and Brien Opeskin, 'Securitization of Search and Rescue at Sea: the response to boat migration in the Mediterranean and offshore Australia' (2018) International & Comparative Law Quarterly, Cambridge University Press, 320.
[281] Barnes (n 5) 136.
[282] Komp (n 226) 236.
[283] Barnes (n 5) 136.
[284] Smuggling Protocol (n 37).
[285] Barnes (n 5) 109.

Such is the situation that UNCLOS establishes specific restrictions in its articles, such as the prohibition of reservations[286] and the restriction of agreements between states that are incompatible with the provisions of the convention.[287]

For this reason, the inclusion of new provisions to further regulate the commitments of SAR operations, especially in the face of the significant increase in maritime emergencies related to irregular migration, has depended on the updating of other legislative instruments, such as the Conventions adopted in the framework of the IMO. This has also allowed for a broadening of humanitarian considerations in this area.

3.2. International Maritime Organization (IMO) Conventions

3.2.1. International Convention for the Safety of Life at Sea (SOLAS Convention)

The origin of the current International Convention for the Safety of Life at Sea (SOLAS Convention) can be traced back to the sinking of the RMS Titanic in 1912. This tragic incident, which resulted in the loss of approximately 1500 lives, questioned the effectiveness of the maritime safety regulations in place at the time. In response, the 1913 Conference on the Safety of Life at Sea concluded with the adoption of the first version of the Convention, the most recent version of which has been in force since 1974.[288]

The SOLAS Convention stands as the most relevant international convention on the safety of maritime navigation, covering stringent standards of construction, devices, and lifesaving means essential for navigation and communications. Additionally, the Convention explicitly establishes the obligation to assist any person in distress at sea.

The main reference to this duty to render assistance at sea is found in Regulation 33(1) of Chapter V on Safety of Navigation of the Annex to the Convention, which states that:

> 1. 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

[286] 1982 United Nations Convention on the Law of the Sea, art. 309.
[287] 1982 United Nations Convention on the Law of the Sea, art. 311.
[288] Attard (n 267) 71.

> at sea, is bound to proceed with all speed to their assistance, if possible, informing them or the SAR service that the ship is doing so. […][289]

As the main novelty concerning what is already regulated in Article 98(1) of UNCLOS, the SOLAS Convention includes an additional requirement for the ship's master. The master must enter in the logbook the reason why assistance has not been rendered to the person in distress, either because the ship is not in a position to render assistance or because the master considers it unreasonable or unnecessary to assist the person in distress.[290] This provision is useful for monitoring and evaluating decision-making in emergencies at sea.[291]

In relation to the obligations of coastal States under Article 98(2) of UNCLOS, SOLAS also requires coordination and cooperation between States to ensure the prompt release of masters of ships from the obligation to assist persons in distress at sea.[292] This provision places the primary responsibility for ensuring such coordination and cooperation on the State responsible for the SAR region in which the assistance is provided, ensuring both the assistance and the disembarkation to a place of safety of the survivors.

Although the SOLAS Convention has significantly complemented UNCLOS by extending the regulation on the safety of life at sea, its age has necessitated some reforms to update its provisions and adapt them to the current maritime context.

In this respect, the SOLAS Convention is subject to the IMO's tacit amendment procedure, which makes it a more suitable and flexible mechanism for introducing regulatory changes related to maritime safety. The updating of its provisions and obligations has thus been greatly facilitated.[293]

Under this tacit amendment procedure, changes to the instruments are agreed upon through the various IMO committees and then submitted as formal amendments. These amendments enter into force automatically after a certain period of time, unless a certain number of states object to the changes.[294]

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[289] 1974 SOLAS Convention, Annex Chapter 5, regulation 33(1)
[290] *Ibid.*
[291] Barnes (n 5) 138
[292] 1974 SOLAS Convention, Annex Chapter 5, regulation 33(1-1)
[293] Barnes (n 5) 138
[294] *Ibid.* 139.

A significant number of amendments to the SOLAS Convention have been adopted using this process, including the 2004 amendments discussed below.

3.2.2. International Convention on Maritime Search and Rescue (SAR Convention)

The International Convention on Maritime Search and Rescue, commonly known as the SAR Convention, was adopted in 1979 with the aim of establishing an international system for the conduct of search and rescue operations at sea. This system ensures that such operations are effective and safe, regardless of where and when the accident occurs.[295]

Prior to the adoption of the SAR Convention, there was no comprehensive international regime governing maritime search and rescue needs. The coordination of these operations depended to a large extent on each State's individual performance, resources, and readiness to intervene. As a result, while some maritime areas had well-established and operational search and rescue services, there were many other regions where such assistance was not guaranteed.[296] This situation highlighted the need to standardize and strengthen the effectiveness of these services in all maritime areas of the world.

The adoption of the SAR Convention thus contributed to establishing a more uniform and comprehensive legal approach to the duty to assist at sea.[297] In particular, the Convention provided the necessary legislative framework for the effective implementation of rescue services as well as cooperation between States in the conduct of search and rescue operations, as provided for in Article 98(2) of UNCLOS.

The duty to render assistance at sea is present in several provisions of the Convention, particularly relevant being Article 2(1)(10) of Chapter II, on Organisation and Coordination, of the Annex to the Convention. This article states that 'Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless

[295] Koka and Veshi (n 77) 41.
[296] Attard (n 267) 77.
[297] *Ibid.* 77.

of the nationality or status of such a person or the circumstances in which that person is found.'[298]

Perhaps the highlight of this Convention is the detailed guidance it provides to States Parties for the establishment of adequate SAR services to respond to maritime emergencies. In this context, the Convention underlines the obligation of States to establish an effective search and rescue system, including the designation of rescue units and the provision of the necessary means and equipment to carry out these operations.[299]

The SAR Convention also provides for the creation of so-called Rescue Coordination Centres (RCCs). These centres are responsible for organising search and rescue operations and must operate 24 hours a day. They are equipped with the necessary resources to manage communications within their assigned area of responsibility.[300]

Notably, while the duty of assistance at sea under Article 98 of UNCLOS is not geographically limited, the obligation to provide effective search and rescue services is restricted by the SAR regions assigned to each State, as detailed in the previous section. In this context, the SAR Convention also regulates the adoption of these regions, stating that:

> 2.1.3 To help ensure the provision of adequate shore-based communication infrastructure, efficient distress alert routeing, and proper operational coordination to effectively support search and rescue services, Parties shall, individually or in co-operation with other States, ensure that sufficient search and rescue regions are established within each sea area […].

Concerning SAR regions, the Convention stipulates that their delimitation should be carried out by agreement between the parties concerned.[301]

In its Chapter III on cooperation between States, the SAR Convention encourages States, in fulfilling the obligations established in the treaty, to reach cooperation agreements with neighbouring countries. These agreements should define joint action procedures and contemplate aspects such as the creation of a common legal framework, the

[298] 1979 SAR Convention, Annex Chapter 2, para 2.1.10.
[299] 1979 SAR Convention, Annex Chapter 2, para 2.1.2.
[300] 1979 SAR Convention, Annex Chapter 2, para 2.3.
[301] 1979 SAR Convention, Annex Chapter 2, para 2.1.4.

efficient organisation of available resources and the implementation of training programs to optimize the service. In addition, coordinated planning of search and rescue operations is recommended to ensure an effective response in emergency situations.[302]

It is relevant to note that, in the same chapter, the SAR Convention advises States to allow the immediate entry of rescue units of the neighbouring State into their territorial waters, provided that it is exclusively a search and rescue operation. This operation must be coordinated between both countries, guaranteeing an effective and efficient response in maritime emergency situations.[303]

In this sense, the cooperation promoted by the SAR Convention aims to reduce the risk of inactivity in the event of incidents or emergencies at sea, ensuring a faster and more coordinated response that optimizes efficiency in search and rescue operations.[304]

3.2.3. 2004 amendment to SOLAS and SAR Conventions

Both Conventions discussed in this section were adopted in a context in which mass migration by sea had not reached the magnitude it is today. Therefore, these conventions did not address, nor were they designed to address, the specific challenges related to today's migration phenomenon.[305] This omission highlights that both SOLAS and SAR were drafted before maritime migration became a significant global issue.[306]

In recent years, the increase in irregular sea crossings has resulted in numerous human tragedies and has seriously compromised the safety of navigation. The increasing presence of people at sea linked to these irregular migration situations has highlighted serious challenges in the management and coordination of search and rescue operations, as well as in the protection of human life at sea.

As a result, masters of ships have frequently been obliged to participate in maritime rescue operations in an attempt to rescue persons in distress at sea. The inadequacy of

[302] 1979 SAR Convention, Annex Chapter 3, para 3.1.1.
[303] 1979 SAR Convention, Annex Chapter 3, para 3.1.2.
[304] Trevisanut (n 80) 142.
[305] Campàs Velasco (n 10) 89.
[306] Marcelo Di Filippo, 'Irregular Migration across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea', (2013) 1 Peace and Security – Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations) 55.

the distribution of responsibilities established by these instruments has placed masters in a difficult position, as they must balance their assistance obligations with the duty to protect the safety of their own ship, crew, and passengers.[307]

In this context, the need for the international community to review and strengthen the duty to render assistance at sea, especially in the context of large-scale rescue operations involving irregular migrants, became apparent. In response to this need, a number of reforms and amendments to the relevant legal instruments have been undertaken, with the aim of addressing and correcting existing gaps in regulation.

The amendments adopted in 2004 to the SOLAS and SAR Conventions are particularly relevant to this study. The main objective of these amendments was to address and correct the gaps affecting the existing legal framework for maritime rescue.

In particular, the case of the *MV Tampa* in 2001 sharply highlighted the need to review the loopholes concerning the regulation of the last phase of rescue operations, that is, the disembarkation of rescued persons in a place of safety.[308]

During this incident, the Norwegian-flagged vessel *MV Tampa*, which had rescued more than 400 migrants in distress in the Indian Ocean, became embroiled in a series of diplomatic disputes between Australia, Norway, and Indonesia. The Australian authorities, despite the serious medical needs of the passengers on board, refused disembarkation at Christmas Island, causing the vessel to be stuck at sea for several days. Finally, disembarkation was allowed in New Zealand.[309]

Following the *MV Tampa* incident, on 20 May 2004, the MSC of the IMO adopted two resolutions to amend the SOLAS[310] and SAR[311] Conventions. These amendments entered into force on 1 July 2006.

The amendment to the SAR Convention first introduces a new definition of the concept of person in distress, which now also includes those 'persons in need of assistance who

[307] Attard (n 267) 81.
[308] *Ibid.* 82.
[309] Ghezelbash, Moreno-Lax, Klein and Opeskin (n 280) 316.
[310] IMO Maritime Safety Committee, 'Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended ', Resolution MSC.153 (78) (20 May 2004).
[311] IMO Maritime Safety Committee, 'Adoption to the International Convention on Maritime Search and Rescue, 1979, as amended', Resolution MSC.155 (78) (20 May 2004).

have found refuge on a coast in a remote location within an ocean area inaccessible to any rescue facility other than as provided for in the annex.'[312]

Furthermore, in view of the recent incident mentioned above, the 2004 amendments strengthened the regulatory development of the obligation to provide assistance at sea to minimise the burden faced by masters of vessels during large-scale maritime rescue operations. This approach became particularly relevant given the high volume of migration in recent decades. In this context, Article 3.1.9 of Chapter 3 of the Annex to the SAR Convention states:

> 3.1.9 Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the shipś intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. […]

This provision also places primary responsibility on the State Party in charge of the SAR region in which the assistance takes place. Under this responsibility, this State must not only ensure coordination and cooperation during the rescue operation, but also ensure that the survivors are disembarked and delivered to a place of safety as soon as reasonably possible. As set out in the text of the Convention:

> 3.1.9 […] The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.

This provision is particularly relevant, as the determination of the place of safety remains one of the most complex aspects of current maritime search and rescue regulation.

As discussed in the previous section, the interpretation of place of safety involves considering various factors in the disembarkation of persons rescued at sea. On many occasions, this has led to political disagreements between the states involved in a SAR operation.

[312] 1979 SAR Convention, Annex Chapter 2, para 2.1.

Through this amendment, progress was made in regulating the duty to render assistance at sea by assigning to the State responsible for the SAR region where the emergency occurs the primary responsibility for coordinating and ensuring the identification of a place of safety for disembarkation. However, this obligation to identify a place of safety for disembarkation does not imply a right of entry into the territory of the State concerned for rescued persons.[313]

The main objective of the provision is to complete the rescue operation as quickly and efficiently as possible, avoiding situations similar to the *MV Tampa* incident, where rescued persons were forced to remain at sea for hours and days before being able to disembark.

To achieve this objective, the amendment to the SAR Convention also incorporates a new provision in its Chapter IV, concerning the coordination of rescues between RCCs. This provision establishes the obligation to identify the most appropriate places for the disembarkation of persons in distress at sea.[314]

However, alongside the primary responsibility of the SAR State, another principle set out in one of the resolutions adopted by the MSC in 2004 also stands out.

In particular, this refers to the Guidelines for the treatment of persons rescued at sea, already mentioned in this study, designed to provide a detailed interpretation of the obligations set out in the SOLAS and SAR Conventions.

In their Principle 2.5, included in the section on amendments to these conventions, the guidelines state that 'the responsibility to provide a place of safety, or to ensure that a place of safety is provided, fails on the Government responsible for the SAR region in which the survivors were recovered.'[315]

While not binding in nature, they suggest that the SAR State assumes a 'residual responsibility' to allow disembarkation on its own territory in the event that it is not possible to do so safely elsewhere. [316]

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[313] Trevisanut (n 80) 143.
[314] 1979 SAR Convention, Annex Chapter 4, para 4.8.5 Capitulo 4 .
[315] 'IMO Guidelines' (n 69) para 2.5.
[316] Trevisanut (n 80) 144.

This provision seeks to address problems related to the obligation to accept disembarkation of rescued persons, a responsibility that is not explicitly provided for in international instruments, but which has led to significant difficulties in concluding rescue operations in the context of high irregular migration flows.

According to Barnes, this arrangement avoids a simple search for the closest port to the emergency, thus allowing for a greater degree of accountability in the response. In this way, the specific circumstances of each incident and the passengers involved are properly considered and evaluated, rather than being limited to criteria of geographic proximity.[317]

However, this flexible approach creates uncertainties in the allocation of responsibilities, which neither facilitates nor encourages ship masters and coastal states to provide assistance to migrants in distress at sea.[318] Instead of solving the problem, it continues to allow politicized interpretations and decisions.

An illustrative example is the case of Malta, a country with an extensive SAR zone that, under this provision, would be forced to accept the disembarkation of hundreds of irregular migrants rescued in the central Mediterranean. Because of this, Malta has chosen not to ratify the amendments, arguing that it is not in a position to accept such obligations and maintaining that disembarkation should take place at the nearest safe place to the site of the emergency.[319]

Considering the 2004 amendments, authors such as Papastavridis and Barnes have noted an evolution in the nature of the duty to render assistance at sea, transforming it from an obligation of conduct to an obligation of result.[320]

Now, the primary responsibility assigned to the SAR State is to identify a safe place for the disembarkation of rescued persons, which implies that SAR States must ensure this specific result.[321] The obligation now focuses on ensuring that a safe place for disembarkation is found and on minimizing the time rescued persons remain on board

[317] Barnes (n 5) 140.
[318] Attard (n 267) 82.
[319] Jiménez García-Carriazo (n 149) 306.
[320] Barnes (n 5) 142.
[321] Papastavridis (n 56) 297.

the vessel by ensuring that all necessary measures are taken to effect disembarkation in a timely manner.

4. Human Rights obligations in Search and Rescue operations

The increased presence of human life at sea, whether linked to the irregular migratory movements analyzed in this study, to increased maritime labour activity, or to illicit activities, means that a growing number of people are potentially exposed to violations of fundamental rights. Furthermore, it is crucial to consider that the marine environment presents great difficulties in tracking and punishing abuses or violations of rights, which has led to the perception of 'sea blindness.'[322] For this reason, this study has decided to pay particular attention to the interrelationship between the Law of the Sea and International Human Rights Law, underlining the fundamental role that the human element must play in this legislative framework.

It is assumed that the Law of the Sea is an area of international law where the main focus is not on individuals. On the contrary, the provisions of this legislative framework focus on assigning obligations and rights to States, in accordance with the different maritime zones established in this regulation.[323] However, in the face of increasing human presence at sea, it is pertinent to question what improvements need to be implemented to protect the human rights of all people living, working, and travelling in this environment.

Therefore, this section is devoted to the study of the application of human rights and related obligations in the maritime domain, with a particular focus on their implementation through the duty of assistance at sea and search and rescue operations.

[322] Human Rights at Sea, 'Geneva Declaration on Human Rights at Sea' (2022) available at <https://www.humanrightsatsea.org/GDHRAS> accessed 25 July 2024.
[323] Trevisanut (n 80) 145.

4.1. The applications of Human Rights at sea: Protection of Human Rights in SAR operations at Sea

The increased use of the sea for a wide variety of activities, ranging from migration to the transport of goods and people, as well as the gathering of food and natural resources, has made the continued presence of people in the marine environment inevitable. This increased use of the sea, driven by technological advances and humanity's social adaptation to life at sea, has diversified the reasons, motives and needs that lead people to inhabit this environment.[324]

However, the dangers of the sea are always present. Moreover, the difficulty of monitoring and patrolling the sea means that damage cannot always be mitigated, while working and living conditions at sea are considerably harsher. Conditions at sea differ profoundly from conditions on land, creating an environment of impunity for abuses and violations that occur in the maritime domain. It is therefore essential that people at sea are protected from these threats, ensuring their safety and security. Hence the importance of strengthening the application of human rights at sea.

Focusing on migration, the sea has traditionally been a route for the movement of people. However, in recent years, these migratory flows have become a central issue in the political debate, due to the alarming increase in irregular immigration by sea.[325]

Nowadays, maritime irregular migration often involves people fleeing violence in their countries of origin and seeking asylum, refuge or protection in places where living conditions are more favourable.

In addition to the personal reasons that drive their migration, the clandestine nature of their journeys and the dependence on smuggling networks, which exploit them for financial gain, expose them to coercion, exploitation and various forms of abuse and violence, both before and during their journeys, significantly increasing their vulnerability.[326]

[324] Papanicolopulu (n 2) 15.
[325] *Ibid.* 17-22.
[326] Campàs Velasco (n 10) 89.

The dangers and threats that these people face at sea are intensified by the adverse conditions in which they make these journeys. They must endure long periods of insecurity, caused by the use of weak and unseaworthy vessels, overcrowded with too many passengers, and suffering from lack of food, water and health products.[327]

In addition, other external factors, such as the absence of controls and surveillance by coastal states, further increase the danger at sea. In this sense, vulnerability can also arise from situations caused by human error, such as in the case of a failed rescue or a state's reluctance to initiate a rescue operation, situations that are unfortunately common.[328]

As mentioned above, these dangers have resulted in more than 30,000 deaths and disappearances in the Mediterranean Sea since 2014.[329] In search of a solution to this problem, it is necessary to harmonise the regulatory framework for rescue operations, using it as a tool to prevent these tragic outcomes, with the protection of the human rights of these people during their migratory journeys.

However, the interrelationship between the Law of the Sea and Human Rights Law is less clear. While the main instruments for the protection of human rights, such as the International Covenants on Civil and Political Rights (ICCPR)[330] and the European Convention on Human Rights (ECHR),[331] do not explicitly mention maritime space, there are also Law of the Sea instruments that do not address human rights, such as UNCLOS.[332]

Even so, there are a variety of legal instruments that, while not providing specific rights for individuals at sea, have been adopted to protect them while in this environment. This is the case of instruments dedicated to ensuring the safety of ships and safety at sea, such as SOLAS Convention.[333]

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[327] Papanicolopulu (n 2) 24.
[328] Koka and Veshi (n 77) 49.
[329] See <https://missingmigrants.iom.int/region/mediterranean> accessed on 15 August 2024.
[330] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[331] European Convention for the Protection of Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR)
[332] Papanicolopulu (n 2) 6.
[333] *Ibid.* 48.

In other more specific areas, but also related to the vulnerability of people in the maritime environment, additional instruments have been developed to ensure their safety and humane treatment. An example of this is the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol), which establishes a general framework for cooperation to address the smuggling of migrants, while requiring the protection of the fundamental rights of smuggled migrants.[334]

In this sense, ensuring that certain human rights are protected is particularly relevant when people are at sea, as the dangerousness of this environment significantly facilitates the violation of fundamental rights, such as the right to life[335] and the prohibition of torture, as well as cruel, inhuman or degrading treatment.[336]

In this context, we can identify a special relationship between the right to life and the duty to render assistance at sea.

As previously stated, the duty to render assistance at sea is based on the safety of life at sea.[337] In this sense, the duty to assist can be considered a specific consequence of the right to life in the maritime domain,[338] with the conduct of SAR operations being the operational form of fulfilling this obligation.[339]

Although both duties share a common objective —to safeguard human life at sea— their scope of application differs significantly in two respects relevant to this study.

First, it is important to note that the duty to render assistance to any person in distress at sea applies anywhere at sea where a vessel encounters another vessel in distress. In contrast, obligations arising from the right to life apply exclusively within the jurisdiction of the State.[340]

Specifically, this limitation derives from the application of international instruments protecting the right to life, such as the aforementioned ICCPR (Art. 6 ICCPR) and the

[334] Smuggling Protocol (n 37) art. 2.
[335] ECHR (n 107) art. 2.
[336] *Ibid.* art. 3.
[337] Trevisanut (n 80) 139.
[338] Komp (n 226) 236.
[339] Koka and Veshi (n 77) 49.
[340] Komp (n 226) 237.

ECHR (Art. 2 ECHR), which attribute this protection only to persons within the jurisdiction of States Parties.

On the other hand, this question is less clear in the field of the Law of the Sea, where it is still debated whether a SAR operation involves the exercise of jurisdiction. In this context, there are doubts as to whether persons rescued in such operations fall under the jurisdiction of the rescuing state, be it the flag state of the rescue vessel or the coastal state.[341]

Human rights bodies tend to understand jurisdiction as a fundamentally factual matter, relating to the effective authority and control that a State exercises over a territory and the people within it.[342]

Moreover, the ECtHR ruled that the specificity of the maritime environment cannot justify the existence of an area outside the law where individuals are not protected by a legal system capable of guaranteeing them the enjoyment of their fundamental rights.[343]

However, in the context of a rescue operation, uncertainty remains as to whether or not the coastal State, which receives a distress call and knows the location of the persons in distress, exercises effective control over those persons, implying that they are under its jurisdiction.

According to authors such as Papastavridis, accepting this control would imply in principle that every vessel and person in a SAR region would automatically be under the jurisdiction of the responsible coastal State, even without having made a distress call.

This would contradict the nature of SAR regions, which, as mentioned above do not constitute a maritime area where the State exercises sovereignty, but a functional zone in which States have an obligation to provide effective SAR services. Therefore, it cannot be understood that vessels entering these zones are automatically under the jurisdiction of the coastal state. [344]

[341] Trevisanut (n 80) 139.
[342] Papastavridis (n 274) 26.
[343] Medvedyev and Others v. France [Grand Chamber] App no 3394/03 (ECtHR. 29 March 2010).
[344] Papastavridis (n 274) 28.

However, the ruling of the European Court of Human Rights suggests that coastal States may exercise de facto control over vessels and persons in their SAR regions. For this, a certain factual control is required in order to consider that the persons concerned are subject to the jurisdiction of the States in this matter. This control could manifest itself, for example, through knowledge of a distress situation at sea. With this interpretation, the possibility arises that the subjects who have requested assistance may be jurisdictionally bound to the States that have responded to the distress call and know their situation and location. This would allow the application of the right to life in this context, establishing a legal relationship between the coastal authorities and the persons in distress.[345]

Only one case of human rights violations in SAR operations has been brought before international tribunals to date, that of *Hirsi Jamaa et al. v. Italy*. In this case, a group of approximately 200 people were intercepted by Italian authorities while attempting to reach Italy from Libya. The occupants were transferred to Italian military vessels and returned to Tripoli, based on a 2008 bilateral agreement between Italy and Libya. The applicants alleged violations of the prohibition of torture (Article 3 of the ECHR), of the principle of collective expulsion (Article 4 of Protocol No. 4) and of the right to an effective remedy (Article 13).[346]

The Court concluded that, during the transfer, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities.[347]

By this interpretation, the SAR operation is considered to fall under the competence of the flag State when the persons in distress are embarked on the rescue vessel, implying that the ECHR applies to actions carried out on board these vessels. According to Trevisanut, this is consistent with Article 92 of UNCLOS, which establishes the exclusive jurisdiction of the flag state on the high seas. However, determining jurisdiction may be more complex if rescued persons are not transferred to the rescue unit or if SAR services are not provided.[348]

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[345] *Ibid.* 28.
[346] Hirsi Jamaa and Others vs Italy, App no 27765/09 (ECtHR, 23 February 2012).
[347] Trevisanut (n 80) 139.
[348] *Ibid.* 149.

In this context, the case of *S.A. et al. v. Italy*[349], discussed in the previous chapter, marked a milestone as the first cases in which the United Nations Human Rights Committee accepted the relationship of dependency between persons in distress at sea and States receiving distress calls as a sufficient criterion for recognizing the extraterritorial application of jurisdiction. This relationship of dependency also arises when coastal State authorities take persons on board and/or tow the vessel in distress to a specific destination.[350]

Meanwhile, in *S.A. et al. v. Malta*,[351] the Committee argued, based on the international legal framework on rescue at sea, that the presence of the vessel in the Maltese SAR zone and Malta's assumption of responsibility for coordinating the rescue made it possible to consider that Malta exercised effective control over the rescue operation.[352]

Accordingly, the Committee recognized the applicability of the ICCPR and therefore concluded that the decisions taken by the Italian and Maltese authorities directly affected persons in distress at sea and the outcome of the operation.

Secondly, another difference identified between the right to life and the duty of assist at sea lies in the subject responsible for ensuring its fulfillment. In this sense, the right to life is a human right whose protection corresponds exclusively to States; consequently, the obligation does not fall on private individuals. The right to life imposes a positive obligation on States to take appropriate measures within their legal and administrative framework to ensure that the lives of persons under their jurisdiction are protected.[353]

This implies that States are not only under an obligation to refrain from attempts on life but must also take appropriate measures to safeguard the lives of persons under their jurisdiction.[354]

On the contrary, under the duty to assist persons in distress at sea, the responsibility for providing assistance rests with the masters of ships.[355] However, it may be inferred that

[349] UN Human Rights Committee, 27 January 2021, Communication Nº 3042, S.A et al V. Italy.
[350] Koka and Veshi (n 77) 49.
[351] UN Human Rights Committee, 27 January 2021, Communication Nº 3043, S.A et al V. Malta.
[352] Calvo Mariscal (n 166) 196.
[353] Koka and Veshi (n 77) 49.
[354] Trevisanut (n 80) 146.
[355] UNCLOS, art. 98.

States have an obligation to require masters navigating under their flag to provide assistance where possible. So, ultimately, the responsibility for ensuring the effective discharge of this duty rests with States.

In this sense, although UNCLOS does not confer rights directly on individuals, it does impose in several instances a duty on States to protect and respect specific rights of individuals. Thus, the duty of assistance in Article 98, as discussed in the previous section, is a clear example of a positive obligation on the State to safeguard the right to life of individuals.[356] This positive dimension requires States to take proactive measures to prevent loss of life at sea, including the establishment of adequate units, equipment and personnel to ensure the provision of effective and appropriate SAR services.[357]

Also, in the field of rescue operations at sea, of particular relevance is the positive obligation established by Article 2 of the ECHR, which requires the State to conduct an official, independent and adequate public inquiry into any death that may have been caused by agents of the State or by other individuals.[358] In this regard, States have a positive duty under the ECHR to initiate investigations to identify those who die at sea and to hold those responsible for such deaths accountable.[359] To this end, the failure to initiate investigations concerning failed rescue practices constitutes a breach of international human rights law, particularly with respect to the right to life and the duty to provide assistance at sea.

4.2. The application of Refugee Law at sea: The principle of non-refoulement

The irregular migratory flows by sea analyzed in this study are characterized by a variety of factors that motivate people to undertake these journeys. In this sense, this migration is mixed, ranging from economic migrants, who seek better working and economic conditions in a new country, to asylum seekers or refugees.[360]

[356] Papastavridis (n 274) 43.
[357] Komp (n 226) 237.
[358] Papastavridis (n 274) 25.
[359] Koka and Veshi (n 77) 49.
[360] Papastavridis (n 274) 22.

Although all individuals should enjoy human rights protection, there is a particular group that is entitled to additional protection of their fundamental rights. This is the case for those who are under the protection of Refugee Law or the right to seek asylum enshrined in Article 14 of the Universal Declaration of Human Rights (UDHR).[361]

Turning to the legal definition of refugee, Art. 1A(2) of the 1951 Refugee Convention[362] states that:

> The term "refugee" shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Under this instrument, protected persons are entitled to a series of fundamental rights. One of the most relevant principles in the context of maritime migration and rescue operations is the prohibition of expulsion or return, better known as, the principle of *non-refoulement* codified in Article 33.[363] The Convention establishes a prohibition for Contracting States 'to expel or return a refugee to the frontiers of territories where his life or freedom would be threatened, by race, religion, nationality, membership of a particular social group, or political opinion.'[364]

According to this provision, a State may not return refugees to a territory where they fear persecution, nor may it transfer them to a place from which they may subsequently be sent to a territory where their life or freedom would be endangered.[365]

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[361] Patricia Mallia and Felicity Attard, 'Migrant and Refugee Law as Relates to the Maritime Regime' (2016) Med Agenda – Special Issue [Perspectives in a Changing Mediterranean] MEDAC Publications in Mediterranean IR and Diplomacy, 125.
[362] Convention relating to the Status of Refugees (Geneva, adopted 28 July 1951, entered into force 22 April 1954) (Refugee Convention) and Refugee Protocol (Geneva, adopted 31 January 1967, entered into force 4 October 1967) (Refugee Protocol).
[363] Barnes (n 5) 115.
[364] Refugee Convention (n 362) art. 33.
[365] Komp (n 226) 227.

As for the geographical scope, the Protocol Relating to Refugee Status accompanying the Convention explicitly explains in Art. 1(3) that the principle of non-refoulement does not contain any geographical limitation.[366]

While there is no doubt that the determination of refugee status is declaratory —that is, such status does not depend on a constitutive act on the part of the State processing the claim, but rather a person must simply meet the requirements established in the Convention to be considered a refugee— rejection of the opportunity to apply for protection does constitute a breach of the Refugee Convention.[367] Therefore, both rejection and measures intended to prevent a person from being able to submit an asylum claim can be considered a violation of this duty.[368]

Although the Refugee Convention does not grant an automatic right to asylum nor does it oblige States to process all claims that may arise, it does impose an obligation not to return applicants to a place where their life or freedom would be at risk without properly assessing the claims made.[369]

According to Barnes, there is no doubt that a person must be outside the State of his or her nationality in order to be able to invoke international protection as a refugee. However, the question of whether the State is obliged to comply with this duty in international zones, such as on the high seas, has been the subject of considerable debate.[370]

Clarification of the application of the principle of non-refoulement was achieved with the case law of the European Court of Human Rights in the aforementioned Hirsi Jamaa case. The ECtHR judgment established that the protection of human rights is triggered whenever a State exercises control, both territorially and extraterritorially.[371]

[366] Refugee Protocol (n 362) art. 1(3).
[367] Isabella Trombetta, 'Maritime Borders in the Central Mediterranean: Search and Rescue and access to asylum' (2023) Anales de Derecho, Universidad de Murcia, 149.
[368] Barnes (n 5) 115.
[369] Patricia Vella de Fremeaux (Mallia) and Felicity Attard, 'Dehumanising the human element of maritime migrant smuggling: a discussion on the application of human rights in the maritime sphere' (2019) 17(1) Benedict's Maritime Bulletin, 19.
[370] Barnes (n 5) 115.
[371] Mallia and Attard (n 361) 126.

Consequently, this would allow for the application of this principle on the high seas whenever a State exercises effective control over a vessel.[372]

Furthermore, the judgment specified that the principle of non-refoulement is not limited to asylum seekers or refugees only but protects all migrants. This is due to its application in the context of Article 3 of the ECHR, which extends to any person who may be exposed to a real risk of torture, inhuman or degrading treatment or punishment if returned to a particular country.[373]

Therefore, in order to properly assess the situation of each person, it is imperative to ensure a status determination procedure before the return of these individuals is allowed.[374]

Unfortunately, in practice, there have been frequent violations of the principle of non-refoulement. These violations have occurred both in situations where rescued persons have been disembarked on the territory of a third country, where compliance with this principle is doubtful, as is the case of disembarkation on Libyan territory, and when rescued persons have been returned to the high seas after being refused disembarkation in a port of a coastal State, leaving them in a situation of uncertainty and danger at sea.[375]

Finally, the principle of non-refoulement, as mentioned in previous sections, has been key to the interpretation of the concept of 'place of safety' for the disembarkation of rescued persons. In this context, even the Guidelines for the Treatment of Persons Rescued at Sea adopted by the IMO stress the importance of this place ensuring protection against threats to the lives and liberties of those who have a well-founded fear of persecution, in particular in the case of refugees and asylum seekers rescued from distress at sea.[376] This therefore implies that a 'place of safety' must be interpreted in accordance with refugee law and human rights provisions.[377]

[372] Vella de Fremeaux (Mallia) and Attard (n 369) 19.
[373] Mallia and Attard (n 361) 129.
[374] *Ibid.* 128.
[375] Komp (n 226) 228.
[376] Campàs Velasco (n 10) 91.
[377] Jiménez García-Carriazo (n 149) 308.

5. State cooperation under SAR obligations

Finally, this section will analyze the role of States cooperation in SAR operations. To this end, it will begin with a review of the international legal framework that specifically regulates cooperation between States. This will be followed by a discussion of the main challenges and problems in implementing such cooperation. It will conclude with a series of proposals for improvement.

5.1. Legal framework

As mentioned in previous sections, the provision of Article 98.2 of UNCLOS promotes cooperation among States to ensure the protection of human life at sea by stating that:

> 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

This is the first consideration concerning cooperation between States in carrying out rescue operations. However, this provision is limited to encouraging the adoption of common regional agreements and does not go into further detail.

For a more detailed regulation of cooperation between States, it is necessary to refer to other instruments, such as the SAR Convention. One of the innovations of this convention was to involve coastal States as main actors in the organization, coordination and implementation of SAR operations. Chapter 3 of the Annex to the SAR Convention is specifically dedicated to cooperation between States by establishing that 'Parties shall coordinate their search and rescue organizations and should, whenever necessary, coordinate search and rescue operations with those of neighbouring States.'[378]

To this end, the SAR Convention stipulates that neighbouring States, through their RCCs, must, among other measures, request the necessary assistance from other RCCs, including requests for ships, aircraft, personnel or equipment. In addition, they must grant the necessary permits for the entry of such vessels into their territorial sea or

[378] 1979 SAR Convention, Annex Chapter 3, para 3.1.1.

territory and collaborate with other RCCs to determine the most appropriate place to disembark persons in distress at sea.[379]

Other instruments, such as the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, have also contributed to the development of SAR cooperation between States by providing guidelines for a common aviation and maritime approach to organizing and providing SAR services.[380]

However, this legal framework has faced major challenges in terms of allocating SAR responsibilities among neighboring states, leaving many terms and obligations unspecified, as mentioned above.

Therefore, in a context of large-scale irregular immigration, the challenges that SAR cooperation must face to ensure that effective SAR services are provided and that the safeguarding of human life at sea is guaranteed have intensified.

5.2. Challenges

Throughout this study the dangers and risks faced by irregular migrants on their journeys by sea have been discussed. In this context of distress, cooperation between States becomes essential to ensure the safeguarding of human life at sea. However, this cooperation is hampered by a number of factors that compromise the effectiveness and outcome of rescue operations.

5.2.1. Unsuitability of commercial vessels for SAR operations

The obligation established in Article 98.1 of UNCLOS for shipmasters seems not to take into account the difficulties that private and commercial vessels may face when assisting persons in distress at sea, especially in contexts of mass rescues.

It is critical to consider that, on many occasions, the number of migrants may outnumber the crew on the vessels.[381] Since these commercial vessels may not be designed to carry

[379] 1979 SAR Convention, Annex Chapter 3, para 3.1.6
[380] International Aeronautical and Maritime Search and Rescue Manual Vol. I-III 2022 (IAMSAR)
[381] Felicity Attard, 'The duty of the shipmaster to render assistance at sea under international law' (2020) Brill Nijhoff, 11.

large numbers of people, this can pose a significant risk to the safety of all on board and difficulties in ensuring safe rescues.

It is likely that these vessels do not have adequate SAR equipment, such as lifeboats, life jackets, among others. In addition, the crew on board may not be trained to carry out rescue operations, and both crew members and rescued persons may face psychological or post-traumatic sequels due to the high responsibility and stress involved in these situations.[382]

Another difficulty that can arise in rescues carried out by commercial vessels is the lack of adequate medical care for rescued persons. Additionally, rescue may put the safety and health of the crew at risk by exposing them to possible infectious diseases. This could result in quarantines or prohibitions for the vessel to disembark in nearby ports, further complicating the situation.[383]

Another challenge associated with the participation of commercial vessels in rescue operations should also not be overlooked, such as the operational cost of responding to an emergency at sea. These vessels often have very strict commercial objectives, schedules and itineraries. Therefore, any deviation from these plans can cause delays in meeting their deadlines and result in a high financial cost to the shipmaster.[384]

In light of these considerations, the frequent refusal of certain States to allow rescued migrants to disembark at their ports has led to significant delays for private and commercial vessels, increasing the risk to both rescued persons and crew. For this reason, it is not surprising that many commercial vessels have begun to avoid routes where migrant vessels are more likely to be encountered or are reluctant to report their position to avoid being assigned by the SAR State to conduct rescues.[385]

[382] Kosmas, Acciaro and Besiou (n 17) 1878.
[383] Attard (n 381) 12.
[384] *Ibid.* 14.
[385] *Ibid*. 17.

5.2.2. Complexity in the allocation of responsibilities in overlapping SAR regions

The overlapping of SAR regions can generate a number of difficulties when establishing the responsibilities of coastal States in the coordination and execution of SAR operations. As indicated above, the SAR Convention recommends that SAR regions should be contiguous and, as far as possible, should not overlap. However, in the Mediterranean Sea there are numerous cases that contravene this recommendation.

Where the convergence of two States to ensure effective SAR services might seem beneficial for the comprehensive fulfillment of the duty of assist at sea, considerable challenges have been detected, on the contrary, that hinder cooperation in this area.

It is a fact that States are often reluctant to participate in SAR operations involving migrants because of the international protection responsibilities that may arise once these rescued persons are disembarked.[386] This situation has led to cooperation being perceived as a zero-sum game, with some States seeking to minimize their obligations at the expense of others assuming a greater burden.[387]

To address this problem, exacerbated by the absence of clear provisions on the sharing of responsibilities during the conduct of SAR operations, the 2004 amendments to the SAR and SOLAS Conventions introduced the concept of 'primary responsibility.' This principle states that the State responsible for the SAR region where the emergency occurs has the obligation to ensure that rescued persons are disembarked in a place of safety.[388]

The problem arises when, from the interpretation of this concept, some authors such as Trevisanut argue that a residual obligation can be derived for the SAR State to carry out the disembarkation in its own territory when it is not possible to do so elsewhere.[389]

In practice, the tendency to focus decisions on disembarkation and rescue responsibility on SAR regions, and thus on the relevant RCC, has led to a reluctance on behalf of coastal States to become involved in rescue operations.[390]

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[386] Ghezelbash, Moreno-Lax, Klein and Opeskin (n 280) 342.
[387] *Ibid.* 343.
[388] *Ibid.* 322.
[389] Trevisanut (n 253) 530.
[390] Barnes (n 5) 144.

In a hypothetical emergency at sea, the coastal State that first becomes aware of the situation —either through a distress call or through detection of the vessel by its surveillance or patrol systems— has the obligation to inform the RCC of the State whose SAR region covers the area of the emergency. Until the competent RCC assumes responsibility for the operation, the State that initially detected the emergency has the obligation to provide rescue services, provided it has the capability to do so.[391]

A clear example of this procedure was the already analyzed shipwreck off the Canary Islands coast in June 2023. On that occasion, Spain initially detected the dangerous situation thanks to a pilot from its air rescue services. Subsequently, Morocco was asked to assume responsibility for the operation, as the emergency was also within its SAR region.

Another significant problem related to SAR cooperation arises here, which is the interpretation of the concept of distress. The absence of a precise definition, as discussed above, has led to situations where States, claiming the lack of imminent risk, have evaded their responsibility to act and intervene in emergencies.[392] This practice is clearly exemplified in the aforementioned case, when Morocco, although assuming responsibility for the rescue, did not mobilize its units until ten hours later.

Meanwhile, once the SAR State in the area where the emergency occurs has accepted responsibility, this does not prevent the neighbouring State from participating in the rescue operation if the corresponding RCC requests its cooperation.[393]

In the case of S.A. et al. v. Italy, also analyzed in this study, a situation arises where Malta, the SAR State responsible for the emergency, requested assistance from Italy due to its proximity to the vessel in distress and the presence of the Italian vessel Libra, which was better prepared to handle the situation, even though the incident was not occurring in Italy's SAR region. According to this interpretation, Italy should have responded to Malta's request for assistance more promptly, given its role in supporting the SAR operation and contributing to the effective resolution of the incident.

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[391] Komp (n 226) 244.
[392] Patricia Mallia, 'The legal regime surrounding irregular migration and Europe's response: a crisis in solidarity' (2015) 13-4 Benedict's Maritime Bulletin, 191.
[393] 1979 SAR Convention, Annex Chapter 3, para 3.1.7.

In this context, the SAR State has the primary responsibility for coordinating the rescue and ensuring disembarkation in a safe place. In S.A. et al. v. Italy, a discrepancy in the interpretation of "primary responsibility" arose between Malta and Italy. Malta, which had not adopted the 2004 amendments to the SAR Convention, considered Italian territory to be the nearest place of safety for disembarkation. Italy, on the other hand, argued that the disembarkation should take place on Maltese territory, since the emergency occurred in its SAR zone. This difference in interpretation resulted in a significant delay in the disembarkation of the persons in distress, complicating the response to the emergency situation at sea.

Likewise, the existence of overlapping SAR regions has led to situations in which coastal States try to evade responsibility by pointing the finger at the other SAR State with which they share the region. A clear example of this problem can be seen in the relationship between Spain and Morocco. In practice, Spain has been accused of evading its rescue responsibilities by shifting the burden to Morocco under the argument that the latter should be in charge of operations in areas where the two countries have overlapping SAR responsibilities. This dynamic not only complicates the coordination of SAR operations, but may also jeopardize the efficiency and speed of response to emergencies at sea.

In this context of massive irregular immigration, coastal states face considerable pressure to address and manage migration problems individually. However, instead of a more equitable sharing of responsibilities, the response adopted has been, in many cases, the extraterritorialization of certain aspects of border control, as well as of SAR obligations. This strategy involves delegating the management of migration situations to third countries or external entities, often resulting in a decrease in the consistency, transparency and accountability of migration controls, not to mention the difficulties in ensuring the protection of migrants' rights during these procedures.[394]

[394] Barnes (n 5) 148.

5.2.3. Cooperation with third States as migration deterrence strategies

In recent practice, there has been a significant increase in cooperation between EU Member States and third countries, mainly in North Africa, in order to deal with irregular maritime immigration to Europe and to reduce the pressure on European states. In this context, these third countries have assumed an increasingly relevant role in the management of migration control and in the coordination of SAR operations.

A particularly significant example in the Central Mediterranean has been the cooperation between Southern European States and Libya. This cooperation was consolidated with the signing of Memoranda of Understanding, the first with Italy in 2017[395] and more recently with Malta in 2020.[396] These agreements have had as their main objective to combat illegal immigration in the central Mediterranean, delegating to Libya a considerable part of the responsibility in the management and control of migratory flows, as well as in the coordination of rescue operations.

These individual cooperation initiatives with Libya are characterized by a notable lack of transparency. Often, agreements are selectively or partially published by the authorities involved, making full access to information difficult. In many cases, full disclosure of these agreements depends on non-governmental organizations that, after receiving leaked information, bring to light details that would otherwise remain hidden.[397]

Cooperation with Libya, however, is not a recent trend. Since the beginning of the refugee crisis, and within the framework of Operation Sophia, the European Union Naval Force Mediterranean (EUNAVFOR MED) mission launched in 2016, increased support to the Libyan authorities began. This operation included the provision of resources and equipment, as well as training and capacity building of Libyan forces. The objective was

[395] Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, signed on 2 February 2017, available on < https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 27 June 2024.

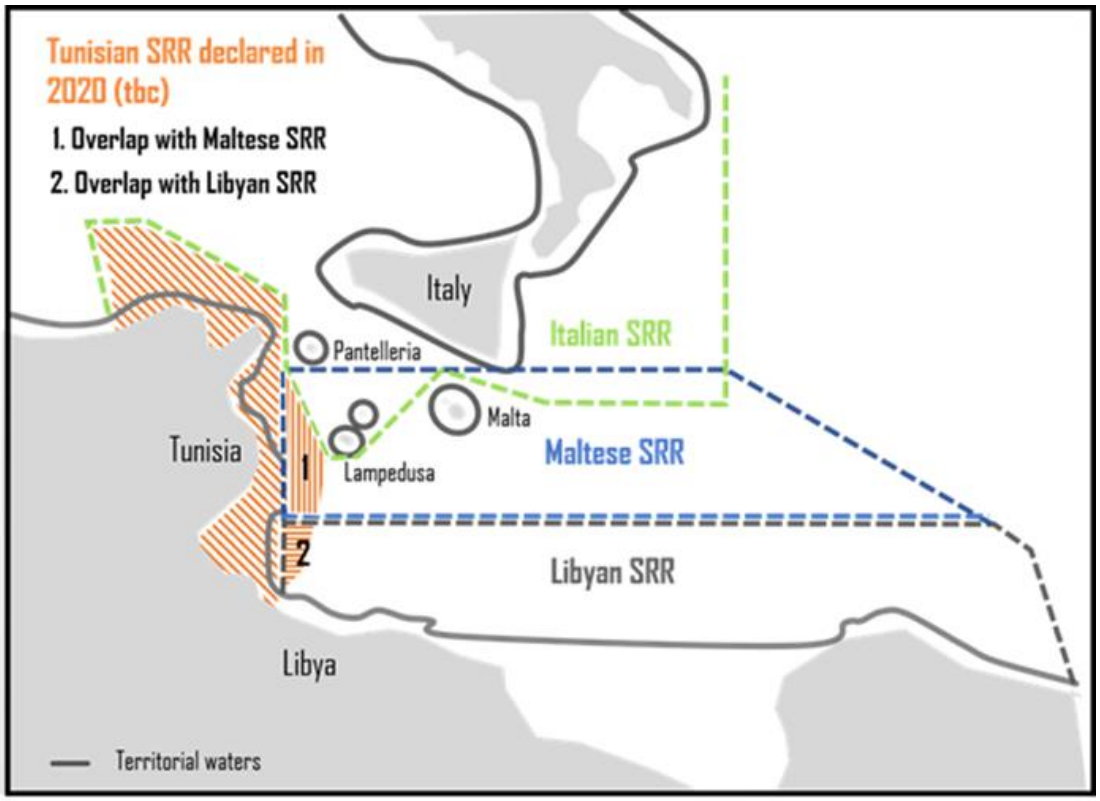
[396] Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combating Illegal Immigration, signed on 28 May 2020, available on <https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf> accessed 27 June 2024.

[397] Calvo Mariscal (n 166) 155.

to strengthen the Libyan National Coast Guard's capabilities to enable it to conduct rescue operations.[398]

In this regard, the financial support provided to Libya by EU Member States to improve its capabilities in SAR operations has been significant. This support has enabled Libya to establish a Maritime Rescue Coordination Center (MRCC), initially assisted by the Italian authorities until Libya reached the capacity to manage this function independently. In addition, this support facilitated the official declaration of its SAR regions, enabling the country to conduct rescue operations in those areas. In particular, in June 2018, Libya's SAR area was officially recognized by the IMO.[399]

Figure: Libya SAR region[400]



[398] *Ibid.* 159.
[399] *Ibid.* 171.
[400] The Civil Maritime Rescue Coordination Centre (CMRCC), 'From Libya to Tunisia: How the EU is extending the push-back regime by proxy in the central mediterranean' (2024) January, available on <https://civilmrcc.eu/from-libya-to-tunisia-how-the-eu-is-extending-the-push-back-regime-by-proxy-in-the-central-mediterranean/ accessed on 25 July 2024.

The problem intensifies when people rescued by the Libyan coast guard are disembarked in Libya, where systematic human rights violations have been documented. Migrants fear being captured by Libyan authorities, as this entails the risk of being returned to a territory where they are exposed to serious abuses and lack legal protection.[401]

Despite being part of several international human rights instruments, such as the 1986 African Charter on Human and Peoples' Rights[402] and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[403] Libya has been the subject of numerous complaints by international institutions and organizations. These complaints point out that, in practice, Libya does not guarantee the protection of the fundamental rights of rescued persons. Consequently, it is argued that Libya cannot be considered a safe place for the disembarkation of migrants, who, in many cases, could be asylum seekers or refugees in need of international protection.[404]

In the western Mediterranean, there is also a growing trend towards cooperation with third countries, as exemplified by the collaboration between Spain and Morocco.

In recent years, Spain has exemplified a trend towards the militarization of maritime rescue at its maritime external borders. According to Vives, this militarization is manifested through three main strategies, namely, the growing precarity of rescue services, the transfer of SAR decision-making power to militarized corps, and the externalization of SAR responsibilities to Morocco.[405]

In this context, the high migratory pressure experienced in recent years led the Spanish government to reconfigure its migration control system at the southern external border. In 2018, this restructuring was formalized with an Agreement of the Council of Ministers, which established the centralization of the coordination and monitoring of all operations related to irregular immigration in the area of the Strait of Gibraltar, the Alboran Sea and

[401] Campàs Velasco (n 10) 88.
[402] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter).
[403] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT).
[404] Campàs Velasco (n 228) 290.
[405] Vives (n 52) 653.

adjacent waters. To carry out this task, a new Coordination Authority was created, which was headed by a General Officer of the Spanish Civil Guard.[406]

As a consequence of the visible shortcomings in the management and control of irregular arrivals that this crisis situation revealed, the Coordination Authority assumed the role of centralizing the reception of all information concerning irregular immigration in the region. It also took responsibility for optimizing the coordination of all available resources for the control of maritime borders, the management of migratory flows and the assistance of migrants, as well as the cooperation and action of other organizations and institutions involved in the region.[407] Therefore, a system of collaboration is established under the centralization of the Coordination Authority.

In practice, the significant changes in the current scheme of action at Spain's southern border are especially evident in the management and organization of resources for migration control, including SAR operations. Although the rescue units involved in these operations remain essentially unchanged, there has been a centralization in the coordination of rescue operations in the region, which seeks to consolidate the supervision and management of SAR operations in a more unified and centralized structure.

This implies that, in order to proceed with rescue operations, it is necessary to obtain authorization from the Coordination Authority. This centralization has been criticized by the operators of SASEMAR, the Spanish maritime rescue service, who have pointed out that this new structure has reduced the autonomy previously available to the entity. Consequently, this change has increased response times, which may compromise the effectiveness of SAR operations and potentially put migrants at sea at greater risk.[408]

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[406] Orden PCI/842/2018, de 3 de agosto, por la que se publica el Acuerdo del Consejo de Ministros de 3 de agosto de 2018, por el que se dispone la creación de la Autoridad de Coordinación de las actuaciones para hacer frente a la inmigración irregular en la zona del Estrecho de Gibraltar, mar de Alborán y aguas adyacentes y se establecen normas para su actuación. «BOE» núm.188, de 4 de agosto de 2018.

[407] Orden PCI/121/2019, de 11 de febrero, por la que se publica el Acuerdo del Consejo de Ministros de 1 de febrero de 2019, por el que se adoptan medidas adicionales para reforzar las capacidades operativas y garantizar la adaptación permanente de la Autoridad de Coordinación de las actuaciones para hacer frente a la inmigración irregular en la zona del Estrecho de Gibraltar, mar de Alborán y aguas adyacentes, para el cumplimiento de las funciones que le fueron encomendadas por el Acuerdo del Consejo de Ministros de 3 de agosto de 2018. «BOE» núm.37, de 12 de febrero de 2019.

[408] Javier Galán et al. 'Salvamento Marítimo reduce drásticamente el rescate de pateras en aguas de responsabilidad marroquí' (2022) El País, available on <https://elpais.com/espana/2022-08-

These changes have been accompanied by a recent decrease in the performance of Spanish rescue services in the overlapping SAR regions. The choice has been made to give greater prominence and presence to Moroccan rescue services, despite the fact that their performance remains uncertain, late and, on some occasions, ineffective.

This change in operational approach, which prioritizes the coordination of Morocco in its area of responsibility, as well as in overlapping regions, has resulted in SASEMAR ceasing to conduct SAR tracking in the neighbouring country's SAR area, resulting in reduced opportunities to anticipate an emergency in advance, as well as the inability to track vessels and persons rescued by Morocco.

In this sense, there are several critical voices that link this increased intervention of Morocco in migration control in the region, with an increase in abuses and violations of fundamental rights perpetrated by Moroccan security forces towards migrants rescued at sea.[409]

In this context, the support provided to these third countries exemplifies how cooperation between States in the framework of the SAR Convention has become a mechanism to promote the externalization of responsibilities and foster the implementation of more restrictive migration policies. In this sense, instead of prioritizing the safeguarding of human life at sea, this cooperation contributes to the deterrence of migration, acting as a tool to limit the entry of migrants to Europe, to the detriment of the rights of those seeking protection.[410]

5.3. Proposal for enhancing SAR cooperation

To conclude this chapter, this study set out to provide a series of proposals to improve SAR cooperation. Having analyzed the main shortcomings and challenges facing the international regulations governing SAR obligations at sea, the following proposals for improvement have been identified.

21/salvamento-maritimo-reduce-drasticamente-el-rescate-de-pateras-en-aguas-de-responsabilidad-marroqui.html> accessed 4 August 2024.

[409] Statewatch (n 222) 1.

[410] Campàs Velasco (n 228) 291.

a. Consistency and stability in normative interpretations

Having verified that there are certain concepts in the SAR regulations that have not allowed a common and consensual interpretation to be reached, thus greatly affecting the effectiveness of SAR operations, it is understood that there is a need to create consistency and stability in such interpretations.

In particular, the need to agree on a definition of "distress at sea" and "place of safety" should be emphasized, to ensure the provision of effective SAR services, as well as the safety of people's lives at sea.

Currently, discretionary interpretation by States as to whether a situation requires assistance has led to significant delays in the provision of SAR services. These delays, in some cases, have resulted in late actions that have had tragic consequences.

Given the preventive nature of SAR operations, it is imperative that the definition of distress at sea prioritizes proactive action. When faced with knowledge of an emergency at sea, early intervention that seeks to anticipate the danger should take precedence over an exhaustive examination of the situation.

Regarding the interpretation of "place of safety", the lack of a common agreement has allowed States to decide at their discretion where to disembark rescued persons. This has led to significant delays, with migrants stranded at sea for hours or even days.

In the context of irregular mass migration by sea, the concept of a safe place must include access to international legal protection for those rescued, whether they are seeking asylum or have refugee status.

To this end, it is particularly important to assess the human rights protection situation in the States that may be possible candidates for disembarkation, ensuring that the fundamental rights of rescued migrants are protected and are not at risk of being violated. Reports from international organizations and NGOs on the ground are valuable tools to ensure that the disembarkation site is indeed safe and that there is no risk of human rights violations.

b. Adopting a holistic approach to the protection of human life at sea

The large-scale irregular migration context we are currently facing makes it clear that the safety of human life at sea is no longer an issue confined to the Law of the Sea, but that other areas of law are also involved, such as International Human Rights Law, Immigration and Refugee Law.[411]

This reality underscores the need to adopt a holistic approach to ensure the regulation of safety of life at sea from all these perspectives.

This approach implies that not only must the protection of the human rights of rescued persons be ensured once they have been disembarked in a place of safety, but that such protection must begin from the moment an emergency at sea becomes known. It is crucial to reduce the vulnerability of migrants, who are already in extremely precarious conditions due to the marine environment and the difficult circumstances of their migration.

In this regard, it would be a significant step forward if the Law of the Sea were to make express mention of the protection of persons at sea, ranging from guaranteeing the safeguarding of human life at sea to protection against possible violations of rights. This includes the prevention of inhuman or degrading treatment, slavery, forced labor, and the trafficking of migrants, situations that unfortunately occur with great incidence at sea.

c. State accountability in SAR Operations

The alarming increase in shipwrecks and deaths at sea, a consequence of the precarious conditions in which migrants make their journeys to Europe, underlines the need to hold States accountable for failing to meet their SAR obligations. This accountability must include a perspective of protecting the human rights of migrants.

[411] Francesco Munari, 'Search and Rescue at Sea: Do new challenges require new rules?' (2020) Springer Nature, 74.

To this end, it is essential that traditional forms of maritime jurisdiction be complemented by human rights approaches.[412] This means that, in emergency situations at sea where delayed action or inaction by States results in loss of life or violation of rights, international human rights bodies should be allowed to be called upon to determine responsibility for failed rescues.

This requires going beyond the traditional measure of State jurisdiction at sea, which was limited to certain maritime spaces, as well as to vessels flying its flag, and extending also to protect persons who are under effective control of the State or with whom it has created a relationship of special dependence, such as may arise from the provision of SAR services.

By establishing mechanisms to trace responsibility in cases of failed rescues, the aim is to strengthen accountability and encourage States to comply with their SAR obligations diligently and in accordance with human rights considerations.

d. Cooperation with countries of origin and transit to mitigate the migration phenomenon

The migration phenomenon has reached significant dimensions in recent years. The difficult situations faced by migrants in their countries of origin, often devastated by famine, poverty, lack of employment opportunities, as well as totalitarian regimes, wars and political tensions, have led thousands of people to risk their lives in complex and dangerous migratory journeys that do not guarantee a safe outcome.

These harsh conditions are compounded by the existence of criminal networks that exploit the desperation of these people for financial gain by selling them the possibility of traveling to Europe by sea, further complicating the situation.

For a response that addresses both the underlying causes and the immediate consequences, it is necessary to engage countries of origin and transit not only to cooperate in preventing boats from leaving their shores —a securitized approach adopted by southern European countries in recent years— but also to improve

[412] Vella de Fremeaux (Mallia) and Attard (n 369) 24.

conditions in those countries. This could reduce the need for desperate cross-border crossings, in addition to dismantling the organized crime networks that manage most of these migratory flows.

e. Regional agreements for cooperation and coordination in overlapping SAR regions

Finally, a crucial improvement in SAR regulation is the need to conclude regional agreements between States in overlapping SAR regions. The SAR Convention encourages this initiative with the objective that the contracting parties establish a coordination system that facilitates the exchange of information between the RCCs involved. In addition, such agreements would allow the sharing of SAR units and facilities, as well as, to the extent possible, the sharing of costs associated with the organization and management of SAR resources.[413]

Regional cooperation in areas with overlapping SAR regions would facilitate the organization of joint patrols, which would increase opportunities to detect and prevent emergency situations at sea. This type of coordination is especially relevant in regions such as the Mediterranean Sea, where the geographical configuration and the high density of migratory traffic require an efficient and coordinated response.

In the context of the case studies analyzed in this paper, the need for neighbouring coastal States to enter into specific agreements to improve coordination in rescue situations has become evident. The lack of formal agreements has led to incidents involving delayed actions or inaction by States, due to the absence of a clear understanding of which RCC is responsible for organizing and executing a rescue operation.

Therefore, the formalization of regional agreements serves not only to optimize the management of overlapping SAR regions and ensure efficient SAR operations, but also reduces the risks associated with lack of coordination. Among other measures, these agreements should clarify the establishment of protocols for decision-making and the

[413] Trevisanut (n 253) 528.

allocation of responsibilities, thus ensuring a faster and more effective response to emergencies at sea.

CHAPTER VI: CONCLUSIONS

The conclusions of this research seek to synthesize the most relevant findings obtained from the analysis of the legal framework of SAR operations in a context of large-scale irregular immigration, as well as from the comparative analysis of two case studies on SAR cooperation in the Mediterranean.

Throughout the study, different areas of interest related to the subject have been examined, such as the application of human rights or the role of cooperation between States in the development of rescue operations, in order to identify the main shortcomings and challenges faced by this legal framework when it comes to protecting the rights of people rescued at sea.

Final reflections on each of these aspects are presented below, highlighting both the progress made and the challenges that remain in the protection of human life at sea.

1. Cooperation between States in the conduct of SAR operations at sea remains an area scarcely addressed in the academic literature, despite its importance in the management of maritime migration.

Consistently, the literature focuses on analyzing the tension between State sovereignty and the protection of individuals at sea. While numerous studies contextualize the fight against maritime security threats, traditionally focused on strict border control, *a trend is beginning to emerge that advocates a more balanced approach, seeking a humanitarian perspective that defends an international legal commitment to safeguard the lives and human rights of people at sea.*

Regarding the legal framework for maritime rescue, studies agree that *the current legal regime is insufficient to provide an effective operational response to the current complex migration scenario.* SAR regulations, adopted without adequate consideration of the situation of applicants for international protection at sea, together with the fragmentation and isolation of legal areas such as the Law of the Sea, are identified as the main obstacles to developing more effective rules in the face of irregular migration at sea.

Although the Law of the Sea shows clear shortcomings in addressing the humanitarian aspects of maritime migration, *interest in the interaction between this legal framework and International Human Rights Law seems to be growing. More and more authors highlight the essential role played by the human element in this context,* especially at a time when the visibility of migrants risking their lives at sea in search of better opportunities is increasing.

In conclusion, academic doctrine, which has traditionally focused its attention on the operational aspects of SAR operations, seems to show a growing interest in the benefits that the study of the interconnection between the Law of the Sea and Human Rights can offer for the management of irregular migration by sea.

2. *The comparative legal research method, although it has received limited development in the existing literature, is currently emerging as one of the most valuable research approaches in the legal field.* This research method offers an in-depth understanding of how international law operates and impacts on different national legal systems, as well as their respective political and socioeconomic contexts. Through this approach, the present study makes it possible to analyze the interaction between various national and international legal systems under the principles of two key fields of law: the Law of the Sea and International Human Rights Law.

This study opts for a mixed method of research, combining the comparative legal research with the doctrinal research or '*black-letter'* law. *This combination facilitates a comprehensive analysis of cooperation in SAR operations between States from both a theoretical and practical perspective*.

In conclusion, the choice of this mixed method not only makes it possible to examine what the law establishes, but also to evaluate the practical reality in each legal system, identifying the challenges that prevent the expected results from being achieved and highlighting areas for improvement, either, for example, by drafting new legislation or suggesting further legal reforms.

3. The comparative analysis provides an insight into the cooperation mechanisms between pairs of States —Italy and Malta, and Spain and Morocco— in two regions of the Mediterranean Sea which, although affected differently by the migration phenomenon, share similar challenges. While the central Mediterranean migration route reached its peak at the onset of the refugee crisis, the western routes, especially to Spain, experienced a significant increase from 2018 onwards. This shift occurred when southern European States, such as Italy and Malta, intensified their cooperation with third countries such as Libya, resulting in increased control in the central region and a diversion of migration flows to the west.

In migratory terms, *Malta is not typically considered a destination country for migrants, as they mainly seek to reach Spain or Italy.* However, its central location in the Mediterranean makes it an unintended destination for numerous irregular arrivals. On the other hand, *North African countries, such as Morocco, Libya and Tunisia, have shifted from being traditional African immigration destinations to become key transit points for migrants from sub-Saharan African regions.*

Cooperation in the central Mediterranean has been more formally developed, with agreements aimed at empowering and strengthening Libya's SAR performance through funding and training. Similarly, in the western route, Morocco has also been sought to be capacitated as a key ally through financial support, although there is a scarcity of legal instruments formally regulating this cooperation, in line with the opacity that usually characterizes Spanish-Moroccan relations.

In this context, *the delimitation of the SAR regions of the States analyzed present significant challenges for cooperation between neighbouring countries*. In the central Mediterranean, the overlap of the SAR regions of Italy and Malta, exacerbated by the extensive expansion of the Maltese SAR region, has led to significant delays in emergency operations at sea, due to disagreements over the distribution of responsibilities, particularly as to which State should assume the disembarkation of rescued persons. The Maltese interpretation that disembarkation should take place in the nearest port contrasts with the Italian position, which holds that the State of the SAR region where the vessel in distress is located should be responsible for disembarkation, resulting in delays that increase the vulnerability of those rescued.

On the other hand, the overlap of the Spanish and Moroccan SAR regions in the western Mediterranean and the Atlantic route has complicated SAR cooperation in the region. The disparity in rescue capabilities between the Spanish and Moroccan services had traditionally led to Spain assuming the majority of rescue operations both in its SAR regions and in the overlapping areas. However, the recent increase in the migratory influx has led Spain to delegate responsibility in the overlapping areas to Morocco, with the aim of reducing the number of arrivals on Spanish territory, although this may aggravate the vulnerability of those rescued. In parallel, there is a trend towards the militarization of rescue services in Spain, under the direction of a Coordination Authority overseen by the Spanish Civil Guard. This evolution seems to alter the landscape of SAR operations in the western Mediterranean, although not without facing criticisms related to the increase in response times to emergencies at sea.

The comparative study allows for the analysis of two case studies of actual shipwrecks involving these pairs of States and highlights the challenges affecting their cooperation in the respective overlapping SAR regions. The shipwreck of 11 October 2013 in the central Mediterranean has resulted in a pronouncement by the UN Human Rights Committee, which concluded Italy's responsibility for failing to comply with its obligation of due diligence, by recognizing the existence of a relationship of special dependence between persons in distress at sea and Italian services. On the other hand, the shipwreck of 21 June 2023 off the Canary coasts, due to its recent occurrence, does not yet have a definitive pronouncement, although two investigations have been initiated by the Public Prosecutor's Office of the Canary Islands and the Ombudsman to determine the responsibility of the Spanish rescue services, which delegated their action to the Moroccan services, despite being in an area of overlapping responsibility and having vessels close to the place of the emergency.

Both cases exemplify current strategies for preventing the arrival of migrants on their shores, causing an essential delay in the response provided by the States involved to the emergency at sea. This is a key factor in understanding the tragic outcomes in both incidents and in assessing the fulfillment of their legal and humanitarian obligations.

In both cases, the decision to delegate responsibilities to other parties led to significant delay, a determining factor in the failure of the rescue and the tragic loss of life. This

clearly illustrates how an earlier response could have mitigated the risk and possibly prevented the fatal outcome.

4. The need to create consistency and stability in the interpretation of key terms in SAR regulations, such as 'distress at sea' or 'place of safety', is fundamental to guarantee the provision of SAR services that ensure the safeguarding of human life at sea.

The legal framework of maritime rescue contains a number of essential concepts that, despite their importance, lack a precise and universally accepted definition. In this context, it is crucial to avoid the interpretation of these concepts falling under the discretion of the rescue services involved. Subjectivity in interpretation could allow particular interests to corrupt the effectiveness of SAR operations or lead to a manipulation of definitions in order to avoid responsibilities derived from the rescue of persons at sea.

5. The duty to render assistance at sea is at the core of the legal framework regulating maritime rescue, based mainly on the UNCLOS and the conventions adopted within the framework of the IMO, such as the SOLAS Convention and the SAR Convention.

However, *the evolution of the maritime environment and the increasing human presence at sea highlight the limitations of regulations that were not designed to deal with the complexities arising from the growing migratory phenomenon.*

In response to these shortcomings, the legal framework for maritime rescue has been expanded through soft law instruments, aimed at addressing and correcting existing regulatory gaps.

A central challenge in this context is the regulation of the disembarkation of rescued persons in a place of safety, an aspect that became more relevant after the 2004 amendments to the SOLAS and SAR Conventions, as well as the adoption of the Guidelines for the Treatment of Rescued Persons by the IMO Maritime Safety Committee.

However, *the lack of international consensus among States on the interpretation and application of these regulations hinders a more effective and coordinated SAR response.* An illustrative example is Malta's refusal to adopt the 2004 amendments, which has allowed it to avoid the interpretation of the 'primary responsibility' of the SAR State where the emergency takes place to disembark rescued persons in its safe port.

Although these instruments represent significant progress in the regulation of the duty to assist at sea, particularly in the coordination of disembarkation to a place of safety, challenges remain, such as the allocation of responsibilities among States in SAR regions, which remain to be adequately resolved.

6. The maritime environment presents unique challenges that make it difficult to track down and punish human rights abuses or violations that occur at sea. To address these difficulties, it is essential to establish a strong connection between the Law of the Sea and International Human Rights Law.

However, *the Law of the Sea has traditionally been a field of law relatively isolated from other areas, with no explicit reference to human rights in its instruments, and vice versa*. To avoid this dissociation, some instruments such as the SOLAS Convention or the Smuggling Protocol have incorporated references to the vulnerability of people in the maritime environment as a means of ensuring their safety and proper humane treatment.

Moreover, *there is a clear interrelation between the duty to render assistance at sea and the right to life*, the duty to assist being a concrete manifestation of the protection of the right to life in the maritime domain. SAR operations are thus configured as an operational form of fulfilling this fundamental obligation.

However, the scope of application of both rights differs significantly in two aspects: the exercise of jurisdiction and the subject responsible for ensuring its fulfillment. Regarding the exercise of jurisdiction, the ECtHR states that the maritime environment cannot justify the existence of an area outside the law where individuals are not protected by a legal system that guarantees them the enjoyment of their fundamental rights. With respect to liability, Article 98 of UNCLOS, while interposing an obligation to render

assistance to the master of the ship, is interpreted as a clear example of a positive obligation for States to require masters navigating under their flag to provide such assistance whenever possible. This positive dimension of the obligation to render assistance requires the State to take all active measures to prevent loss of life at sea.

This relationship between the Law of the Sea and Human Rights also takes on special relevance in the disembarkation of rescued persons in a place of safety, where *the principle of non-refoulement plays a crucial role in protecting those who have been rescued from distress at sea,* ensuring that they are not returned to places where their lives or liberties could be at risk.

7. This study underscores the crucial importance of cooperation between States in the development and execution of SAR operations. The legal framework that regulates them places special emphasis on the organization, coordination and joint implementation among coastal States, highlighting the importance of fluid and effective communications between RCCs to ensure a rapid and efficient response to emergency situations.

However, significant challenges remain that compromise the effectiveness and positive outcomes of these rescue operations.

In particular, it highlights the role of commercial vessels in SAR operations and the technical, economic and psychological difficulties they face after a rescue.

The study also highlights the complexity in the allocation of responsibilities in SAR overlap zones, where overlapping responsibilities between two States have sometimes led to delegation to the other party to avoid international protection responsibilities that might arise when disembarking rescued persons in their ports.

Finally, it highlights the growing trend towards cooperation with third countries, particularly in North Africa, as a strategy to reduce migratory pressure towards Europe. This cooperation, however, is criticized for delegating SAR responsibilities to States that do not guarantee the safety and protection of migrants' fundamental rights, thus contravening the international protection obligations that should guide these operations.

In conclusion, this study has made it possible to examine the shortcomings that have characterized the legal framework for SAR operations and to evaluate the reforms adopted with the aim of improving the effectiveness of the SAR system, as well as adapting it to emerging changes in the maritime environment.

In the context of large-scale irregular migration, the analysis of the case studies has identified the main trends and strategies that hinder effective SAR cooperation between States. These trends highlight the need to prioritize the protection of human life at sea over traditional state sovereignty and security interests.

The recent initiative to investigate the responsibilities of SAR States involved in failed rescues offers a new perspective for assigning responsibilities and increasing the monitoring and prosecution of those responsible for recurrent tragedies at sea in recent years.

Meanwhile, enforcement and integration of humanitarian considerations into the SAR regime have been identified as one of the main challenges. However, recent developments, such as legislative amendments and increased pronouncements by human rights bodies, reflect a growing interest in the interconnection between the Law of the Sea and International Human Rights Law. In this regard, these developments can serve as a guide to achieve greater assurance in the protection of human life at sea.

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