

SPECIAL ISSUE ARTICLE

Vulnerability and marginalisation at sea: maritime search and rescue, and the meaning of ‘place of safety’

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Abstract

This paper proposes an integrating interpretation of the term ‘place of safety’ in the International Convention on Maritime Search and Rescue, 1979, grounded in international human rights and refugee law. It argues that the exposure to harm as a consequence of the conditions under which sea migrants endure irregular journeys raises vulnerability concerns and the need to search for mechanisms of redress. It further claims that sea migrants are marginalised by states’ refusal to allow their disembarkation on land. It also argues that a narrow interpretation of the term ‘place of safety’ risks perpetuating, if not exacerbating, situations of vulnerability and marginalisation among sea migrants. Key themes addressed in this contribution are vulnerability and marginalisation of sea migrants, vulnerability reasoning in the interpretation process and the scope for a more integrating reading of the term ‘place of safety’ that is responsive to the specific needs among sea migrants.

Keywords: maritime law; vulnerability; marginalisation; sea migrants; systemic integration

1 Introduction

Maritime search and rescue (SAR) of sea migrants raises complex and multi-faceted considerations that exceed the maritime SAR operative system of co-operation among states parties to the International Convention on Maritime Search and Rescue, 1979, as amended (SAR Convention). The SAR Convention, designed to respond to situations of distress with a ‘maritime search and rescue plan responsible to the needs of maritime traffic’, according to paragraph 3 of its preamble, ‘was neither foreseen, nor intended’ to respond to mass mixed migration by sea (International Maritime Organization (IMO), 2015). The term ‘sea migrants’ is used to refer to migrants embarking on irregular crossings by sea and includes refugees, asylum seekers and economic migrants in what has been named ‘mixed migration movements’ (United Nations High Commissioner for Refugees (UNHCR), 2011).

The last phase of a rescue operation, defined in paragraph 1.3.2 of the Annex to the SAR Convention as ‘[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety’, meets with the absence of a state international obligation to accept disembarkation of survivors on land. This is the prerogative of the state, grounded in its sovereignty, to regulate the admission of non-citizens into its own territory (Goodwin-Gill and McAdam, 1983/2007, pp. 270–272). It is determined by the reception and processing efforts that the particular state is willing to make, based on its border-control and migration policies. Reluctance and refusal to disembark rescued sea migrants on land are common responses among coastal states. These responses underscore underlying tensions and favour discrepancies among states

parties' interpretation of the term 'place of safety' and as to the level of protection a place of safety should provide.¹

In this context, marginalisation and vulnerability are experienced among sea migrants through the very clandestine nature of their journeys, devoid of protection of their fundamental human rights, exposed to ill-treatment and life-threatening crossing conditions. Marginalisation is marked by the unauthorised and unwanted crossings and presence in countries of arrival. States' resistance to allow disembarkation of sea migrants on land only reinforces the risk of exclusion from access to a safe place and international protection.

Against this backdrop, this paper proposes an interpretation of the notion of place of safety in the context of the SAR Convention, motivated by a pressing need to advance considerations of humanity. It highlights the particular needs among sea migrants and draws on what is referred to as 'vulnerability reasoning' (Peroni and Timmer, 2013; Timmer, 2013; Al Tamimi, 2016) to propose an interpretation of the SAR Convention that is more responsive to those needs. The risks and the suffering involved in irregular crossings, it is argued here, need to be taken into account in the interpretation of the maritime SAR legal framework. In particular, they have to be considered when assessing a situation of distress at sea and the operative procedures that follow, including the delivery of survivors to a place of safety.

A normative approach appears essential in an interpretative and qualitative analysis of the SAR Convention, in order to understand its potential to allow an integrating reading to respond to the challenges and the needs that result from irregular crossings. It allows us to establish, at the interpretative stage, legal grounds to advance human rights and refugee law considerations and thereby to advance the debate on the role of maritime SAR. This paper therefore assesses the extent to which the SAR Convention can foster an integrating reading of the notion of place of safety grounded in human rights and refugee law.

To this end, the paper first considers aspects of marginalisation and vulnerability among sea migrants. These highlight the importance of bringing their specific needs to the forefront of the interpretation process, and of protecting them within the maritime SAR legal framework. The paper subsequently proposes an interpretation that addresses those specific needs and proposes mechanisms of redress at the interpretative stage. The third section of the paper undertakes the interpretative process in accordance with the Vienna Convention on the Law of Treaties, 1969 (VCLT) with special emphasis on the principle of systemic integration. This interpretative guiding mechanism is scrutinised to assess the extent to which the wording of the SAR Convention admits to human rights and refugee law considerations.

The analysis contributes to existing literature advancing considerations of humanity in the reading of the SAR Convention (Klein, 2014; Moreno-Lax, 2014; 2017a, Chapter 7; Komp, 2016; Ratcovich, 2016; Trevisanut, 2017; Ghezelbash *et al.*, 2018). The interpretation proposed is centred on the notion of safety in the context of maritime SAR duties and considers specific protection needs among sea migrants in the realms of international human rights and refugee law. Incorporating vulnerability reasoning brings an innovative approach to reading the SAR Convention and related instruments. Grounded in Article 31(3)(c) of the VCLT, this analysis takes a broader approach to the applicability of the norms invoked in the relations between the parties to the SAR Convention (Ratcovich, 2016). This reasoning further differs from the harmonisation approach (Klein, 2014), the cumulative approach (Moreno-Lax, 2014) and the integrative interpretation approach (Moreno-Lax, 2017a, Chapter 7) where the actual application of the instruments invoked plays a more prominent role.

This paper finally suggests a test for the identification of locations that do not provide the protection a place of safety ought to offer in accordance with the interpretation proposed.

¹E.g. see Parliamentary Assembly of the Council of Europe Resolution 1821 (2011) on 'The interception and rescue at sea of asylum seekers, refugees and irregular migrants', 21 June 2011, para. 5.2, available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18006&lang=en> (accessed 21 January 2022).

2 Marginalisation and vulnerability among sea migrants

2.1 Marginalisation and states' deterrence practices at sea

A lack of legal and safe avenues to seek international protection or better life conditions results in staggering numbers of irregular crossings where sea migrants turn in great numbers to smuggling networks. As a result, the majority of sea migrants embark on life-threatening journeys on board unseaworthy boats, exposed to navigational risks and to ill-treatment.

Tensions and resistance subsist among coastal states with regard to allowing the disembarkation of rescued sea migrants ashore. One illustrative incident was the prolonged stand-off involving the rescue vessel *Open Arms*, operated by the NGO Proactiva Open Arms, in August 2019, after the refusal of Italy and Malta to allow the disembarkation of survivors without EU Member States' agreement on their relocation (Jones and Melander, 2019).

States' refusals to allow disembarkation on land are expressions of stringent migration policies driven, inter alia, by concerns about security, economic well-being and management of limited resources in a context of social under-provision. These have translated into non-arrival strategies and deterrent practices at sea (Gammeltoft-Hansen, 2014; Gammeltoft-Hansen and Hathaway, 2015; Gammeltoft-Hansen and Wallenberg, 2017) with increasing contactless control practices referred to as 'consensual containment' schemes (Moreno-Lax and Giuffr , 2019). These practices aggravate the difficulties that sea migrants face in having their needs, including international protection, considered when attempting to reach safe shores. With these practices, coastal states disregard situations of distress at sea and fail to ensure that assistance is provided. They deprive sea migrants of voice and opportunities, and put their lives at further risk.

The concentration of unsafe sea migration flows in specific geographical routes creates a much heavier burden on coastal states with search-and-rescue regions (SRRs)² adjacent to sea migration routes and areas of conflict. The numbers of unsafe sea crossings and arrivals to the shores of front-line states results in an enormous strain on these countries, in terms of both rescue capacity at sea and reception capacity on land (Coppens, 2013, p. 98). In the absence of responsibility-sharing mechanisms, this, undoubtedly, exacerbates states' unwillingness to become countries of disembarkation (van Berckel Smit, 2020) and has devastating effects on maritime SAR.

Survivors' accounts reveal that sea migrants aboard precarious and even drifting boats are often simply given food and water as well as some indications of how to reach the shores of another country. Alternatively, they are towed outside the SRR that they are located in, in order to avoid disembarkation duties (Human Rights Watch, 2009). These help-on practices usually rely on a narrow interpretation of the concept of distress and too often they have led to the deaths of sea migrants (Klepp, 2011). Interdiction strategies at sea, informal forced returns also known as pushback practices, include blocking the passage to sea migrants to prevent them from reaching the shores of a coastal state, or towing them outside a specific SRR to abandon them at sea. Commentators have scrutinised these practices, for instance involving Thailand, Indonesia and Malaysia in the Bay of Bengal and the Andaman Sea (N  Ghr inne, 2015), Australia and European countries (Moreno-Lax, 2017b; Ghezlbash *et al.*, 2018; Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, 2019). On some occasions, these deterrent practices involve violence against sea migrants on board their craft. Recent images of Greek coastguards firing warning shots and pushing an overcrowded inflatable boat with migrants trying to reach Greek shores illustrate these practices (ITV News, 2020).

Reluctance and refusal to disembark on land are hence common responses that hinder a global SAR system heavily reliant on the co-operation between states parties to the SAR Convention, with devastating consequences for sea migrants (Watch the Med, 2013; Mallia, 2014; Bagnoli, 2018).

Recent restrictive approaches to disembarkation on land have sought justification in the COVID-19 pandemic. Malaysia and Bangladesh, for instance, rejected the disembarkation of sea migrants, mainly Rohingya refugees in April 2020, leaving them stranded at sea in life-threatening conditions (Ratwate,

²SRR is defined in the Annex to the SAR Convention, para. 1.3.4 as: '[a]n area of defined dimensions associated with a rescue co-ordination centre within which search and rescue services are provided.'

2020; UNHCR *et al.*, 2020). The declaration of certain ports as ‘not safe’, notably by Italy and Malta, have been met with a decrease in maritime SAR capacity. This has resulted in delays and a lack of response to distress calls on grounds of risks of infections (Ellis, 2020; UN News, 2020; IOM, 2020).

Deterrence strategies by states have led to passing migration control on to third states, and to collaborative schemes such as EU Member States supporting Libya to increase capacity for SAR operations at sea. This has allowed Libya to officially declare responsibility over its SRR and to undertake SAR operations. Interventions by Libyan coastguards in SAR operations alarmingly underline how the SAR Convention and ultimately the maritime SAR system may be used as an instrument of extra-territorial border control, serving restrictive migration policies. These can be regarded as ‘cooperative *non-entrées* practices’ (Gammeltoft-Hansen and Hathaway, 2015). The term ‘non-entrée’ describes policies adopted by states to block refugees from accessing their territories (Hathaway, 1992, p. 41; 2005, p. 291). An illustrative example is the incident involving a co-ordinated SAR operation between the Italian warship *Andrea Doria* and the Libyan coastguard in 2017, when it was reported that Libyan coastguard officials retrieved migrants from the sea within Libyan SRR and returned nearly 300 to Libya where they reportedly endured detention and torture (Biondi, 2017). Another example is an incident regarding the SAR operation off the coast of Libya on 6 November 2017, where the Libyan coast guard interfered in a rescue operation already initiated by a number of rescue vessels, including the NGO SAR vessel *Sea Watch 3*, an Italian navy helicopter and a French warship, and took over the co-ordination of the operation. At least twenty people were reported dead in the operation. Libyan coast guards returned forty-seven sea migrants to Libya, where they were subjected violations of human rights. Two of the survivors were reportedly sold and tortured with electrocution (Sea-Watch, 2017; Forensic Architecture, 2018). Disembarkations in Libya, where systemic human rights violations are reported, remain a well-known practice (United Nations Support Mission in Libya (UNSMIL), 2016; UN Secretary-General, 2021, paras 106–107).

Such deterrence practices effectively render migrants invisible, deprive them of legal protection and contribute to their dehumanisation. These marginalising effects need to be contrasted with the formal equality with regard to SAR in paragraph 2.1.10 of the Annex to the SAR Convention: ‘parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which they are found.’

Formal equality or sameness of treatment does not guarantee sameness of result if equivalent conditions and opportunities are presupposed, and inequalities and specific needs are not recognised or addressed (Andorno, 2016, p. 258). This leads us to the urgent question of the specific needs and vulnerabilities of sea migrants in the context of irregular migration.

2.2 Situations of vulnerability among sea migrants

The concept of vulnerability has been shaped in political and legal arenas as a tool to promote, reinforce and ensure legal protections that are responsive and tailored to particular needs, and that redress substantive inequalities. The present analysis draws on institutional approaches that give prominence to situations of vulnerability migrants face during irregular transits. This is the position of the United Nations Human Rights Office of the High Commissioner and Global Migration Group (UN OHCHR and GMG, 2018, pp. 5–7) and the UN General Assembly (UNGA Resolution 2016). The emphasis on situations of vulnerability contrasts with Fineman’s (2008) narrative of inherent vulnerability as a universal notion, and with the notion that vulnerability characterises a particular population group. The European Court of Human Rights (ECtHR) takes the latter approach, discernible in its reasoning in the cases of *MSS v. Belgium and Greece*³ and *Khlaifia and Others v. Italy*,⁴ in the context of EU immigration and the asylum normative system. However, a normative approach that combines a collective notion of vulnerability with a circumstantial approach, in which factors of vulnerability may

³*MSS v. Belgium and Greece* (GC) (Application no. 30696/09), ECtHR, 21 January 2011, paras. 232, 251.

⁴*Khlaifia and Others v. Italy* (GC) (Application no. 16483/12), ECtHR, 15 December 2016, para. 194.

compound, as Ippolito proposes, appears more amenable to a dynamic and individualised understanding of vulnerability (Ippolito, 2019). The central aim of the context-based vulnerability proposed in this paper is to steer away from the stigmatisation generally attached to vulnerable groups (Fineman, 2008, pp. 8, 13; Truscan, 2013, p. 70). It aims instead to bring attention to institutional responses to situations of vulnerability among sea migrants (UN OHCHR and GMG, 2018, p. 9).

Situations of vulnerability in this context are linked to external problems that sea migrants experience, such as the unsafe crossing conditions on board overcrowded and unseaworthy wooden boats, rubber dinghies or other flimsy craft, and the conditions and treatment they encounter upon arrival (UN OHCHR and GMG, 2018, pp. 2, 5; UNGA Resolution 2016, paras 23, 27–28). The exposure of sea migrants to these hardships and the risks to their integrity and their lives during the crossings are not only related to navigational hazards. The clandestine nature of their journeys and wide reliance on smuggling networks or other types of facilitators expose sea migrants to coercion, exploitation or other forms of abuse, including trafficking and violence both prior to and during crossings (Goodwin-Gill, 2016, pp. 23–24; UNGA Resolution 2016, paras 26–29, 35; Leghtas, 2017; UNICEF and IOM, 2017; UN OHCHR and GMG, 2018, pp. 6–7).

The vulnerability of sea migrants derives from their exposure to violations of human rights such as the right to life and the prohibition of torture, or cruel, inhuman or degrading treatment. ‘Inherent’ vulnerability remains relevant in vulnerability reasoning, where the recognition of identifying personal characteristics, such as age, gender identity, disability or health condition (UN OHCHR and GMG, 2018, p. 1; UNGA Resolution 2016, paras 29–32), underscore overlapping layers or multiple grounds of vulnerability. These are often recognised as ‘extreme vulnerability’, ‘particular vulnerability’ or ‘compounded vulnerability’ (Timmer, 2013, pp. 161–162; Moreno-Lax and Papastavridis, 2016, pp. 5–6; Goodwin-Gill, 2016, p. 18).

3 Vulnerability reasoning in the interpretative process

Vulnerability reasoning calls for a substantive approach to equality that adopts levels of protection and response efforts that are tailored to the particular needs of sea migrants. This asymmetry that, according to Peroni and Timmer (2013) in their analysis of the ECtHR case-law, characterises substantive equality (pp. 1075–1076) informs the Court’s vulnerability reasoning (Timmer, 2013).⁵ It focuses on the result rather than on equal treatment, and seeks to correct inequalities through substantively adequate levels of response (Andorno, 2016, p. 258).

The text of the SAR Convention does not expressly refer to vulnerability. Yet it offers a system of protection for the safeguard of lives at sea consistent with vulnerability reasoning, where situations of difficulty and exposure to harm are graded and translate into levels of emergency situations that activate different levels of response. Among these, the ‘distress phase’ constitutes the highest degree of risk and triggers a SAR operation.⁶

A place of safety is to be determined, as paragraph 3.1.9 of the Annex to the SAR Convention provides, ‘taking into account the particular circumstances of the case and guidelines developed by the Organization’.⁷ These are the Guidelines on the Treatment of Persons Rescued at Sea (hereafter, ‘the Guidelines’) – a soft legal instrument that provides guidance for states parties to the SAR Convention and shipmasters on humanitarian obligations concerning the treatment of persons rescued at sea.⁸ A place of safety should be determined, according to paragraph 3 of the Appendix to

⁵See as an example of the ECtHR articulation of vulnerability reasoning *Chapman v. United Kingdom* case (GC) (Application no. 27238/95), ECtHR, 18 January 2001, para. 96.

⁶Annex to the SAR Convention, para. 1.3.13 defines ‘distress phase’ as ‘[a] situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance’.

⁷IMO Resolution MSC.155(78) adopted on 20 May 2004, available at: [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MSCResolutions/MSC.155\(78\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MSCResolutions/MSC.155(78).pdf) (accessed 21 January 2022). Malta formally objected to these amendments and they do not bind it.

⁸Resolution IMO MSC.167(78), available at: [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MSCResolutions/MSC.167\(78\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MSCResolutions/MSC.167(78).pdf) (accessed 21 January 2022).

the Guidelines, ‘by reference to its characteristics and by what it can provide for the survivors’. The Guidelines arguably draw on vulnerability reasoning when they expressly address in paragraph 6.17 the specific protection needs among asylum seekers and refugees recovered at sea by considering the need to avoid ‘disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened’. The Guidelines offer a non-exhaustive list of circumstances that should be taken into account, including medical needs among survivors, contained in paragraphs 6.15, 6.17 and 6.19. Undoubtedly, this open-ended list allows consideration of other factors determined by specific needs and circumstances. Vulnerability reasoning therefore appears key to the interpretation of ‘place of safety’, since the selection of a location for disembarkation and further reception arrangements ought to depend on the protection needs of survivors. The same consideration of vulnerability reasoning would also need to apply to the processes described in the SAR Convention for determining a place of safety, per paragraphs 3.1.6.4, 3.1.9 and 4.8.5 of its Annex.

The proposed approach to interpreting ‘place of safety’ relies on the principle of systemic integration for invoking international human rights law and international refugee law considerations. This would allow the SAR system to be more effective in responding to the needs of sea migrants when determining a place of safety for their disembarkation.

4 Construction of the term ‘place of safety’ and the principle of systemic integration

4.1 Initial interpretation considerations

Interpreting ‘place of safety’ calls for considerations outside the confines of the SAR Convention. As seen earlier, the Guidelines take into account basic protection needs among refugees and asylum seekers recovered at sea.

In brief terms, treaty interpretation seeks to reveal the meaning of the text, as ‘the text must be presumed to be an authentic expression of the intention of the parties’ (UN Conference on the Law of Treaties, 1968–1969, p. 40, para. 11). Articles 31–33 of the VCLT provide rules of interpretation to ascertain the intentions of the parties to the treaty. They do not, however, provide complete and exhaustive guidance, nor do they resolve all issues that may arise in the process of interpretation (Gardiner, 2008/2015, Chapter 1). This allows some margin of appreciation in the interpretation process.

The term ‘safety’ in the context of the SAR Convention (including its preamble and its Annex) is an integral part of the Convention according to Article I (Gardiner, 2008/2015, pp. 197–210; Linderfalk, 2015, p. 177). ‘Safety’ is construed in the light of the object and purpose of the SAR Convention, namely the rescue of persons in distress at sea, and according to its preamble (Gardiner, 2008/2015, pp. 211–222; Linderfalk, 2015, p. 178). The interpretation process is informed by the principle of good faith (Gardiner, 2008/2015, pp. 167–181). This examination of the notion safety also considers the Guidelines as a subsequent agreement between the parties for the interpretation of the SAR Convention, in accordance with Article 31(3)(a) of the VCLT. In this process, the components of Article 31 are read as a unity, with no hierarchy among the elements therein (Gardiner, 2008/2015, p. 162). Therefore, the mechanism of systemic integration formulated in Article 31(3)(c) stands on an equal footing with the previous ones and is considered cumulatively in the interpretative reasoning (Gardiner, 2008/2015, pp. 164, 172; McLachlan, 2005, p. 285).

This analysis considers the semantic content of the term and its construction, or legal effect to a diversity of facts. The distinction is particularly important in linking the interpretative reasoning to the dynamic nature of the SAR Convention and its continuous relevance in changing circumstances. This is also especially significant in the construction of a generic term such as ‘safety’, which, in the context of a treaty of continuing duration, such as the SAR Convention, is amenable to dynamic interpretation (Solum, 2010, p. 118).

This analysis resorts to definitions in various dictionaries as an initial method to ascertain the linguistic meaning of the term ‘safety’, following widespread practice among international courts (Gardiner, 2008/2015, pp. 164, 186–189; Merkouris, 2015, pp. 18–22). ‘Safety’ is defined as ‘[t]he

condition of being protected from or unlikely to cause danger, risk, or injury’ (Oxford Dictionaries online) and as ‘the condition of being safe from undergoing or causing hurt, injury or loss’ (Merriam Webster dictionary online). The term ‘safe’ is defined as ‘secure from threat of danger, harm, or loss’ (Merriam Webster dictionary online).

The Guidelines refer to a place where ‘the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met’ (para. 6.13). The concept of safety is also inevitably linked to considerations of protection needs among sea migrants, at the core of international human rights law and international refugee law, the latter also reflected in paragraph 6.17 of the Guidelines. The open-textured nature of the notion of ‘place of safety’ calls for reference to extraneous rules of international law by means of the principle of systemic integration to ‘assist giving content to the rule’ (UN International Law Commission (ILC), 2006, para. 467; French, 2006, p. 304). This makes space for exploring further considerations of humanity. These include specific protection needs that fall outside the realm of maritime concerns in order to identify, or discard, locations as prospective places of safety for the disembarkation of survivors (cf. Billing, 2019).

In this interregime dialogue, the physical and mental integrity of sea migrants during SAR operations is central and remains so upon their delivery to a place of safety.

4.2 The notion of safety: considering protection in the realm of international refugee law

In guiding the interpretation of ‘place of safety’, the Guidelines include the consideration of protection against threats to the lives and freedoms of those alleging a well-founded fear of persecution regarding refugees and asylum seekers retrieved from a situation of distress at sea. This consideration is grounded in the 1951 Refugee Convention and the Protocol relating to the Status of Refugees, 1967 (hereafter, ‘1967 Protocol’). This includes the principle of non-*refoulement* contained in Article 33.1 of the 1951 Refugee Convention, providing that states are prohibited from returning, expelling or extraditing refugees to territories where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.

Further protections available to refugees and asylum seekers can arguably be invoked. The protections referred to in the 1951 Refugee Convention and the 1967 Protocol rely on access for asylum seekers to fair and efficient procedures for determining refugee status, establishing their needs (UNHCR, 2017b, paras 4, 6) and availing international protection rights even pending formal determination of refugee status (UNHCR, 2017a, pp. 154–158). Therefore, when it comes to the rescue of sea migrants, an integrating reading of ‘place of safety’ appears incompatible with a location at sea, whether on board a rescue unit or an assisting vessel, even if treated as provisional safety according to paragraphs 6.13 and 6.14 of the Guidelines, given the need to process international protection claims in accordance with international standards (UNHCR, 2017b, para. 7). This interpretation is consistent with paragraph 3.1.9 of the Annex to the SAR Convention, by virtue of which a place of safety is to be determined taking into account the circumstances of the case and the Guidelines.⁹ Vulnerability reasoning underpins this interpretative reasoning and calls for the accommodation of the specific needs in the selection process of a place of safety.

An additional consideration when construing ‘place of safety’ is the protection from penalties imposed by a state purely on account of an irregular entry, in accordance with Article 31.1 of the 1951 Refugee Convention, where a broad construction of the term ‘penalties’ is preferred (Goodwin-Gill and McAdam, 1983/2007, pp. 264–267, 384–385, 520–522; Hathaway, 2005, pp. 405–412; Feller *et al.*, 2003, pp. 253–258). This protection can impact the assurance of access to fair and efficient refugee status determination procedures, where the penalty consists of the denial of the procedural rights (Hathaway, 2005, pp. 408–409).

A further aspect of protection relevant to the construction of ‘place of safety’ draws on the exercise of states’ prerogative to restrict freedom of movement, its maximum expression being the detention of

⁹See in particular the Guidelines, preambular para. 7 and para. 6.19, coupled with Annex to the SAR Convention, para. 2.1.10.

refugees, on grounds of irregular entry. The notion of safety is to consider, based on the principle of systemic integration, safeguards regarding the exercise and the duration of such restrictions of movement, in accordance with Article 31 of the 1951 Refugee Convention and the UNHCR Detention Guidelines (UNHCR, 2012).

Detention constitutes a limitation to the fundamental rights to liberty and freedom of movement in international and regional human rights legal instruments.¹⁰ It is therefore to be understood as a measure of last resort and strictly in conformity with national and international law, bearing in mind the ‘underlying purpose of preventing persons being deprived of their liberty arbitrarily’ (UNHCR, 2012, paras 2, 14, 15). Considerations of unlawfulness, as well as inappropriateness, injustice and lack of predictability constitute aspects of arbitrary detention, construed broadly by the UNHCR (2012, guideline 4, para. 18). Accordingly, detention is to be assessed in each individual case and meet criteria of necessity, reasonableness and proportionality, in line with a legitimate purpose. This will typically be related to public order, including the purpose of identification while establishing the grounds for asylum claims and the assessment of circumstances of arrivals, public health or national security (Hathaway, 2005, pp. 419, 421, 427; UNHCR, 2012, guideline 4.1, paras 22–27; guidelines 4.1.1–4.1.3, paras 21–30; guideline 4.2, para. 34). The criterion of legitimate purpose excludes any detention sought as ‘a penalty for illegal entry and/or as a deterrent to seeking asylum’ (UNHCR, 2012, paras 31–33; Hathaway, 2005, pp. 414, 422). Vulnerability reasoning underpins considerations of reasonableness regarding detention and alternatives to detention, whereby special circumstances and needs of particular asylum seekers and refugees are to be taken into account (UNHCR, 2012, guideline 4.2, para. 34; guideline 4.3, para. 39; guideline 9).

4.3 The notion of safety: considering protection in the realm of international human rights law

Human rights considerations proposed in this subsection for interpretation purposes do not constitute a closed list, but rather a starting point that could lead to further exploration of other protection concerns under the principle of systemic integration.

International human rights law informs detention regimes. In particular, it seeks to guarantee the lawfulness of detentions and minimum standards of detention conditions and treatment therein.¹¹ The latter is particularly acute in recurrent scenarios of mass influx where states resort to detention centres, facilities or camps that restrict movement (Goodwin-Gill and McAdam, 1983/2007, p. 465; Rodier, 2018). The protection against arbitrary detention is encapsulated in the broader ‘protection of liberty and security of person’.¹² It strengthens the protection provided in Article 31.2 of the 1951 Refugee Convention, in the context of migration control, and offers a wider scope of application to include as beneficiaries individuals who are not refugees (UN HRC, 2014; Hathaway, 2005, pp. 424–425). The term ‘arbitrary’ is construed in a wide manner. It includes not only unlawful deprivation of liberty, but also unjust arrest and detention ‘under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person’ (UN Department of Economic and Social Affairs, 1964, paras 23(b), 23–30).¹³

Detention itself raises human rights law considerations. Migrants deprived of their liberty are to be treated with humanity and dignity, and their fundamental rights are to be protected. Generalised

¹⁰See e.g. International Covenant on Civil and Political Rights, 1966 (ICCPR), Art. 12; the African (Banjul) Charter on Human and People’s Rights (ACHPR), 1981, Art. 12; the OAS American Convention on Human Rights, ‘Pact of San Jose’ (ACHR), 1969, Art. 22; the European Convention on Human Rights, 1950, as amended by Protocols Nos 11 and 14, 1950 (ECHR), Art. 2; and Protocol No 4 to the ECHR, Art. 2.

¹¹E.g. ICCPR, Arts 7, 10; and ECHR, Art. 3.

¹²E.g. ICCPR, Art. 9; ECHR, Art. 5 and Art. 2 of Protocol 4 to ECHR; ACHR, Art. 7; and ACHPR, Art. 6.

¹³See also regarding the consideration of detention arbitrary on account of its duration the views of the HRC (2003) in the case of *A Bakhtiyari and R Bakhtiyari v. Australia*, Communication No 1069/2002, UN Doc. CCPR/C/790/D/1069/2002, available at: http://www.worldcourts.com/hrc/eng/decisions/2003.10.29_Bakhtiyari_v_Australia.htm (accessed 21 January 2022).

practices of deprivation of liberty by states remind us of the need to consider the protection of fundamental rights in detention conditions where situations of vulnerability arise or compound. These very considerations also apply to states' strategies, such as Australia's, involving disembarkations or transfers of undocumented migrants, including refugees and asylum seekers, to offshore processing centres. These are effectively open-ended detention centres, where there are substantial grounds for believing that they will be exposed to torture or to cruel, inhuman or degrading treatment or punishment (UN News, 2018; Human Rights Watch, 2019).

Fundamental to detention are the actual conditions in which people are detained and the standards set by international human rights law to safeguard humanity and dignity (UNHCR, 2012, guideline 8, para. 48, particularly para. 48(ii)). Among these international standards of protection, Article 10 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides a standard of care in confinement circumstances higher than the treatment prohibited by Article 7 of ICCPR (UN HRC, 1992, paras 2–4; 1986, para. 7). The protection against torture or cruel, inhuman or degrading treatment or punishment, proscribed in Article 7 of ICCPR, Article 3 of the European Convention on Human Rights, 1950 (ECHR) and equivalent provisions in other international and regional legal instruments, evidences a global and cohesive consensus on the prohibition of these forms of ill-treatment,¹⁴ and they are invoked in this integrating interpretation of 'place of safety' and its central considerations of protection. These considerations are also to be included within the principle of non-*refoulement* on human rights law grounds, prohibiting the return, expulsion or extradition of persons, directly or indirectly, to a territory where they could face a real risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment (Lauterpacht and Bethlehem, 2003).

The principle of systemic integration is therefore proposed in the construction of 'place of safety' to take into account the exposure to all forms of ill-treatment as a key consideration of protection upon disembarkation, particularly while in reception or detention facilities. It further considers the prospects of protection afforded under international refugee law. It calls for a close examination of states' practices at disembarkation where violations of international human rights systematically occur (as in the case of Libya, described above).

4.4 Relevance of the rules invoked and their applicability in the relations between the parties

This guiding mechanism of interpretation, formulated in Article 31(3)(c) of the VCLT, requires that the international rules invoked are relevant for the purpose of construing 'place of safety' in the SAR Convention. It further requires that the international rules invoked are applicable in the relations between the parties.

The relevance of the rules invoked, in the realms of both human rights law and refugee law, is grounded in the subject matter at stake, rather than an identity or a proximity between the treaties themselves (cf. Merkouris, 2015, pp. 84–95). The relevance lies in the protection of the integrity, both physical and mental, of sea migrants retrieved from a situation of distress at sea and disembarked to a location where safety takes into account sea migrants' protection requirements. The integrity of sea migrants is at the intersection of the legal regimes involved, namely international law of the sea and maritime law relating to maritime SAR, and international human rights law and international refugee law, where considerations of humanity converge.

The requirement of applicability of the norms invoked in the relations between the parties to the SAR Convention, where there is no identity of parties, relies on the partial solution, or mitigation, proposed in the Report of the Study Group of the ILC (UN ILC, 2006, para. 470) to avoid a restrictive approach to systemic integration. This is the possibility of invoking a norm that is not in force between all parties to the treaty under interpretation, when that norm is 'treated as customary international law', namely a norm that arises from the general and consistent practice of states, deriving from a

¹⁴E.g. ACHR, Art 5; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Arts 1, 16.

sense of legal obligation and binding upon the international community (McLachlan, 2005, para. 15; UN ILC, 2006, para. 471).

In this analysis, the applicability in the relation between the parties to the SAR Convention of the international human rights rules regarding the prohibition of torture, cruel, inhuman or degrading treatment or punishment rests upon their status of customary international law (Rodley, 2010/2018, pp. 167–168). Equally, the applicability of the prohibition of arbitrary detention among these states relies on its status of customary international law, as defined and determined by the Working Group on Arbitrary Detention, established by the former Commission on Human Rights and the Human Rights Council (Malick Sow, 2012, paras 43, 51, 75, 79). It further relies on the prevailing, albeit contested, view that the prohibition of *refoulement*, in the realms of human rights and refugee law, holds the status of customary international law (Lauterpacht and Bethlehem, 2003, paras 193–253; cf. Hathaway, 2010, pp. 507–527).

Determining the status of a particular norm as customary international law is a complex process and, as the ILC points out, ‘not always susceptible to exact formulations’ (UN ILC, 2018, p. 123, para. 4). For instance, the ILC considers that the constituent element of general practice means that ‘it must be sufficiently widespread and representative, as well as consistent’ (UN ILC, 2018, conclusion 8, para. 1). It further clarifies that universal participation is not required. In other words, ‘it is not necessary to show that all States have participated in the practice in question’ (UN ILC, 2018, conclusion 8, para. 3).

Against this backdrop, this analysis argues in favour of a broader approach to the principle of systemic integration whereby not only recognised customary international rules can be invoked as applicable in the relations between the parties, but also provisions in international treaties that are widely accepted in the international community. This contrasts with Ratcovich’s approach that relies solely on rules of international law that hold the status of customary international law (Radcovich, 2016, pp. 16, 33). The present position draws on McLachlan’s proposal of ‘an intermediate test which does not require complete identity of treaty parties, but demands that the other rule relied upon can be said to be implicitly accepted or tolerated by all parties to the treaty under interpretation’ (McLachlan, 2005, pp. 314–315). Although not the strict formulation of Article 31(3)(c) of the VCLT, as Boyle (2005, p. 571) points out, reference can be made to norms as interpretative guiding mechanisms where they evidence a common understanding among the parties to the treaty under interpretation to the meaning of the term concerned. The ILC supports this view when referring to multilateral treaty notions or concepts not found in treaties with identical membership and not reflecting formal customary law, but adopted widely enough ‘so as to give a good sense of “common understanding”’ (UN ILC, 2006, para. 472). With this reasoning in mind, attention is next drawn to the applicability of the norms invoked under international refugee law.

The 1951 Refugee Convention and the 1967 Protocol constitute the core of the international framework for the international refugee-protection system. The former has been ratified by 146 states¹⁵ and the latter by 147 states.¹⁶ These instruments, however, hold a wider consensus reflected in the wording of complementary regional instruments, such as the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (OAU Refugee Convention) Recital 9 or the non-binding agreement adopted as Cartagena Declaration on Refugees, 1984. At present, among the parties to the SAR Convention, eighteen are not parties to the 1951 Refugee Convention or the 1967 Protocol.¹⁷ However two of them are parties to the OAU Convention.¹⁸ More importantly, protection considerations on refugee law grounds contained in

¹⁵Ratification status as at 1 July 2021, available at: https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&msgid=V-2&chapter=5&Temp=msgid2&clang=_en (accessed 21 January 2022).

¹⁶Ratification status as at 1 July 2021, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=V-5&chapter=5&clang=_en (accessed 21 January 2022).

¹⁷These are Bahrain, Bangladesh, Barbados, Cabo Verde, Cuba, India, Indonesia, Jordan, Libya, Mauritius, Niue, Oman, Qatar, St Lucia, Samoa, Saudi Arabia, Singapore and United Arab Emirates.

¹⁸Libya and Cabo Verde.

paragraph 6.17 of the Guidelines evidence the existence of a common understanding of this fundamental safeguard amongst states parties to the SAR Convention. This is regardless of whether they are parties to the 1951 Refugee Convention, the 1967 Protocol or related instruments. The safeguard of access to fair and efficient refugee status determination procedures and the safeguard against penalisation on grounds of irregular entry also invoked are directly linked to the effective protection against exposure to persecution on refugee law grounds. It is therefore argued that these considerations can be assimilated in that common understanding of refugee law protection as reflected in the Guidelines. Consequently, these norms convey a common understanding among states parties to the SAR Convention as to the scope of protection sought and inform the reading of ‘place of safety’.

An integrating construction of ‘place of safety’, grounded in international human rights law and refugee law considerations, is therefore viable, based on the operability of Article 31(3)(c) of the VCLT, at any rate to the extent of the specific safeguards considered here. These are primarily linked to the integrity of sea migrants retrieved from distress at sea, taking into account their protection needs.

4.5 Effective protection test to determine delivery at a place of safety

In this integrating reading, a test is suggested for the determination of locations that do not constitute places of safety for the purpose of disembarkation in maritime SAR operations. It draws on the principle of the non-*refoulement* test applied by the ECtHR and the HRC in cases of transfers, returns or disembarkations of migrants to countries that do not offer effective protection on grounds of refugee or human rights law.¹⁹ Accordingly, delivery at a place of safety would necessarily exclude locations where there are substantial grounds for believing that there is a real risk that the rescued may be subjected to ill-treatment in the forms described above. It would also exclude locations where there are substantial grounds to believe that there is a real risk for those alleging a well-founded fear of persecution on refugee law grounds to have their lives and freedoms threatened. The same threshold would apply to the risks involving penalisation on irregular entry grounds and arbitrary detention.

5 Conclusion

In the present political tide of increasing migration-restrictive policies and securitisation at sea, the SAR Convention appears vulnerable to deterrence strategies and a dehumanisation of the maritime SAR system. In this context, it becomes urgent to uphold and advance considerations of humanity in the reading of the SAR Convention.

The SAR Convention and the term ‘place of safety’ allow a dynamic interpretation in which vulnerability reasoning plays an instrumental role. It brings to the forefront of the interpretation process the risks and the protection needs among sea migrants for the purpose of disembarkation on land. Vulnerability reasoning underpins the interpretative reasoning proposed, grounded in the principle of systemic integration, to invoke protection considerations in the realms of human rights and refugee law, as a mechanism of redress.

An integrating reading of ‘place of safety’ through the doctrinal formula of systemic integration contained in Article 31(3)(c) of the VCLT is viable, at any rate to the extent of the protection needs considered in this paper. These do not constitute an exhaustive list. Instead, they are the starting point for reinvigorating the ongoing discussions on the interpretative approach to SAR duties.

The determination of a place of safety relies on the mechanisms of co-operation in the SAR Convention. These need to resort to exchanges of up-to-date information and reports that evidence

¹⁹*MSS v. Belgium and Greece*, (GC) (Application no. 30696/09), ECtHR, 21 January 2011, paras 158–203, 342, 347–349, 365; *Hirsi Jamaa and Others v. Italy* (GC) (Application no. 27765/09), ECtHR, 23 February 2012, paras 114–117; see also HRC views on the case of *X v. Sweden*, Communication No. 1833/2008, CCPR/C/103/D/1833/2008, 17 January 2012, para. 5.18, available at: <https://juris.ohchr.org/Search/Details/1390> (accessed 21 January 2022); and HRC views on the case of *H Said Hashi v. Denmark*, Communication No. 2470/2014, CCPR/C/120/D/2470/2014, 9 October 2017, para. 9.3, available at: <https://juris.ohchr.org/Search/Details/2320> (accessed 21 January 2022); see further UN HRC, 2004, para. 12.

a state's systematic failures on human rights and/or refugee law that meet the test proposed. This would allow discarding specific locations and ensure the identification of suitable places of disembarkation for the safety of sea migrants rescued, as construed here. Notwithstanding the above, further co-operation among states is undoubtedly needed to better enable tenable distribution of efforts both at sea and on land that guarantees the protection and safeguards the integrity of sea migrants.

The normative approach proposed here reinforces the humanitarian role of maritime SAR and enhances a *pro homine* approach in which specific needs among sea migrants stand at the centre of the interregime dialogue. However, expectations regarding the potential of this integrating interpretative mechanism to solve underlying policy tensions need to be curbed. Having said that, this analysis underscores the potential of the SAR Convention to address and respond to challenges and needs arising in the context of irregular crossings. It further underlines its relevance and its potential to redress situations of vulnerability among sea migrants and to offer the visibility and due consideration to their protection needs that the clandestine nature of these journeys deprive them of.

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