



Citation: ANDINO, A. , “SAR regions in the Mediterranean context: old acquaintances and perspectives on the New Pact on Migration and Asylum”, *Peace & Security – Paix et Sécurité Internationales*, No 14, 2026.

Received: 15 April 2026.

Accepted: 23 June 2026.

SAR REGIONS IN THE MEDITERRANEAN CONTEXT: OLD ACQUAINTANCES AND PERSPECTIVES ON THE NEW PACT ON MIGRATION AND ASYLUM

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I. INTRODUCTION — II. MIGRANTS’ AND REFUGEES’ RIGHTS: ANALYSING THE ROOTS OF THE RIGHTS AT STAKE — III. CONTEXTUALIZING THE MIGRANT RESCUE PHENOMENON IN THE MEDITERRANEAN — IV. THE NEW MIGRATION AND ASYLUM PACKAGE: TACKLING THE ROOTS OF POTENTIAL RESPONSIBILITIES AND SETTling A ‘B’ PLAN? — V. CONCLUSIONS — VI. BIBLIOGRAPHY

ABSTRACT: The Mediterranean Sea has long served as an actual border for Africa-EU irregular migration flows. In this context, the Search and Rescue (SAR) regime and its implications in terms of human rights accountability have repeatedly been in the spotlight. The latest decisions and judgments from different instances regarding the concepts of *effective control* and responsibility, coupled with the lack of evaluation mechanisms for rescued individuals before an eventual disembarkation make it necessary to revise its suitability as a tool for border management. This paper argues that these new trends, comprehensively understood with the New Pact on Migration and Asylum and the creation of Tunisian and Libyan SAR regions, really call into question its current capacity to give a humanitarian response in terms of human rights in the Central Mediterranean.

KEYWORDS: Search and rescue, migrants, human rights, borders, Mediterranean.

REGIONES SAR EN EL CONTEXTO MEDITERRÁNEO: VIEJOS CONOCIDOS Y PERSPECTIVAS SOBRE EL NUEVO PACTO SOBRE MIGRACIÓN Y ASILO

RESUMEN: El mar Mediterráneo ha servido durante mucho tiempo como una frontera real para los flujos migratorios irregulares entre África y la Unión Europea. En este contexto, el régimen de búsqueda y rescate (SAR) y sus implicaciones en términos de responsabilidad en materia de derechos humanos han estado repetidamente en el centro de atención. Las decisiones y sentencias más recientes de distintas instancias sobre los conceptos de control efectivo y responsabilidad, junto con

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la falta de mecanismos de evaluación de las personas rescatadas previos a un eventual desembarco, hacen necesario revisar su idoneidad como herramienta para la gestión fronteriza. Este artículo sostiene que estas nuevas tendencias, entendidas de manera integral junto con el Nuevo Pacto sobre Migración y Asilo y la creación de regiones SAR tunecinas y libias, cuestionan seriamente su capacidad actual para ofrecer una respuesta humanitaria en consonancia con los Derechos Humanos en el Mediterráneo central.

PALABRAS CLAVE: Búsqueda y rescate, migrantes, derechos humanos, fronteras, Mediterráneo.

**LES RÉGIONS SAR DANS LE CONTEXTE MÉDITERRANÉEN : DES VIEILLES CON-
NAISSANCES ET DES PERSPECTIVES SUR LE NOUVEAU PACTE SUR LA MIGRA-
TION ET L'ASILE**

RÉSUMÉ: La mer Méditerranée sert depuis longtemps de véritable frontière pour les flux migra-
toires irréguliers entre l'Afrique et l'Union européenne. Dans ce contexte, le régime de recherche
et de sauvetage (SAR) et ses implications en matière de responsabilité des droits de l'homme ont
été à plusieurs reprises au centre de l'attention. Les décisions et jugements récents de différentes
instances concernant les notions de contrôle effectif et de responsabilité, associés à l'absence de
mécanismes d'évaluation des personnes secourues avant un éventuel débarquement, rendent néces-
saire une révision de son adéquation en tant qu'outil de gestion des frontières. Cet article soutient
que ces nouvelles tendances, comprises de manière globale avec le Nouveau Pacte sur la migration
et l'asile ainsi que la création de régions SAR tunisiennes et libyennes, remettent véritablement en
question sa capacité actuelle à fournir une réponse humanitaire en matière de droits de l'homme en
Méditerranée centrale.

MOT CLES: recherche et sauvetage, migrants, droits de l'homme, frontières, Méditerranée.

I. INTRODUCTION

The Mediterranean Sea has long served as a central route for migration between Africa and Europe. Since the war broke out in Syria in 2011, the arrival of irregular migrants to the European coasts along the Eastern Mediterranean Route (EMR) and the Central Mediterranean Route (CMR) has increased significantly. That was when some scholars, media outlets and politicians started referring to the refugee *crisis*² in Europe³. Official data state that since 2014, more than 25,546 migrants have lost their lives trying to reach Europe through CMR⁴. Moreover, the irregular migration attempts through CMR

² We will address this issue and the legal difference between *refugee* and *migrant* in this work's second part.

³ HUTTER, S. and KRIESI, H., "Politicising immigration in times of crisis", *Journal of Ethnic and Migration Studies*, Vol. 2, No. 48, 2021, pp. 341-365.

⁴ International Organization for Migration (IOM), *Migrants travelling to Europe by land and by sea: Journeys, vulnerabilities and needs of migrants arriving in Greece, Italy, and Spain (Europe Region-*



in 2024 reached 127,600⁵. The time gap between the so-called *crisis* and the present, however, makes it clear we are talking not about a *crisis* but about a structural issue. These high figures and their political implications, combined with the regulatory ambiguity traditionally attributed to maritime spaces, have led the EU to distort the original function of certain legal instruments, such as Search and Rescue (SAR) areas⁶, initially conceived for the protection of human life at sea, in order to use them as a tool for border management. The main problem with this mechanism, and the aspect that enables such use, is the way in which it distributes responsibilities among the different agents involved in order to identify who is responsible for the rights of those migrants (both those in distress at sea, and those eventually rescued). This is particularly relevant with regard to the principles of *non-refoulement* and the right to apply for asylum.

Recent developments have heightened this tension. On the one hand, the evolving jurisprudential trends of the different international human rights bodies have gradually come to interpret the concept of *effective control* (based on functional jurisdiction) in a restrictive manner. While the UN Human Rights Committee (HRC) endorsed a functional approach linking SAR coordination with *effective control*, the European Court of Human Rights (ECtHR) has recently adopted a narrower understanding, most notably in *S.S. and Others v. Italy*, where mere coordination of rescue operations was considered insufficient to establish State functional jurisdiction. On the other hand, the establishment and consolidation of Libyan and Tunisian SAR regions have shifted responsibility away from EU Member States without providing any mechanisms for the protection of rights of migrants and refugees involved.

This article argues that, although SAR regions are not legal maritime borders under international law, current Mediterranean migration governance

al Report), IOM, Vienna, 2025, available at https://dtm.iom.int/sites/g/files/tmzbd11461/files/reports/DTM_Europe_Migrants_Travelling_To_Europe_Flow_Monitoring_Surveys_Greece%20Spain%20Italy%202023.pdf, accessed 24 May 2026.

⁵ International Organization for Migration & United Nations High Commissioner for Refugees, *Migrant and Refugee Movements through the Central Mediterranean Sea in 2024* (UNHCR-IOM Joint Annual Overview), UNHCR Operational Data Portal, 2025, available at <https://data.unhcr.org/en/documents/download/119012>, accessed 24 May 2026.

⁶ DE WITTE, F., “Here be Dragons: Legal geography and EU law”, *European Law Open*, Vol. 1, No. 1, 2021, p. 119.



increasingly operationalizes them as functional migration-control spaces. Combined with restrictive interpretations of functional jurisdiction and the implementation of the New Pact on Migration and Asylum in the context of *ex post* disembarkation, this transformation generates significant accountability gaps with regard to *non-refoulement*, asylum access and human rights protection⁷. Even if these issues have attracted considerable scholarly attention, the most recent case law precedents⁸ and the approval of the New Pact on Migration and Asylum make a renewed assessment of this legal framework necessary. The normative evolution of SAR areas, together with the ECtHR's interpretation of the key concept of *effective control* in this type of operations in the Mediterranean, seem insufficient to guarantee the rights of migrants and refugees eventually rescued. This statement is based on three main points: (1) the lack of clarity surrounding rescue, coordination and disembarkation obligations, (2) the overlapping "potential" *effective controls* between the different actors involved, and (3) the absence of material and procedural mechanisms to assess migrants' individual situations in order to prevent unlawful *refoulements* and collective expulsions during SAR cooperation operations. Finally, the article examines how the developments introduced by the EU New Migration and Asylum Pact reinforce these dynamics, particularly regarding disembarkation mechanisms and its *ex post* effects in the Euro-Mediterranean context.

Methodologically, this paper relies on a comprehensive bibliographical review in accordance with the classical doctrinal legal method, which is subsequently examined alongside the contemporary critical legal scholarship and the latest EU regulations. The analysis draws on legal instruments (mainly EU regulations, the international legal framework governing the law of the sea, and human rights jurisprudence), academic literature, institutional reports, policy documents, and both official and unofficial databases, thereby enabling a comprehensive and critical assessment of the issue.

⁷ ISLAM, M.S., FADASON, D.W. and ASHRAF, A., "State accountability in maritime SAR operations involving smuggled migrants: human rights challenges at sea", *Discover global society*, No. 85, 2025, p. 13.

⁸ *e.g.* European Court of Human Rights (ECtHR) (First Section), *S.S. and Others v. Italy*, no. 21660/18, Decision on inadmissibility, First Section, 12th June 2025.



II. MIGRANTS' AND REFUGEES' RIGHTS: ANALYSING THE ROOTS OF THE RIGHTS AT STAKE

Legally, we can infer two main categories of displaced individuals sailing in the Central Mediterranean: irregular migrants and refugees. This distinction has often been criticised, as it is presented as a binarism that leads to a gross oversimplification of migrant reality and is ill-suited to address modern migration flows⁹. The situation is aggravated as the legal protection gap derived from this duality proves to be considerable¹⁰ even though the situations and conditions faced by irregular migrants and refugees have been widely recognised as similar¹¹.

Irregular migrants, as human beings, are protected by the main human rights norms. Accordingly, they can submit complaints to the United Nations supervisory bodies (e.g., Human Rights Committee (HRC), Committee on the Elimination of Racial Discrimination (CERD), Committee on Economic, Social and Cultural Rights (CESCR), etc.), as these constitute a primary source of protection¹². Refugees, on the other hand, benefit from additional protection under other instruments, such as the 1951 Refugee Convention. Some of these rights, such as the right to life, are also specifically protected in the context of the sea¹³. When we talk about a protection gap between refu-

⁹ RAMJI NOGALES, J., "Moving Beyond the Refugee Law Paradigm", *AJIL Unbound*, Vol. 111, 2017, p. 11.

¹⁰ VAN HOUTE, M., KASLI, Z. and LEERKES, A., "Introduction: Irregularized Humanitarian Migrants - Policies, Rationales, and the Search for More Durable Solutions", *Journal of Refugee Studies*, Vol. 3, No. 36, 2023, p. 316.

¹¹ United Nations, *Global Compact for Safe, Orderly and Regular Migration*, adopted 19 December 2018, United Nations A/RES/73/195, mention that "The two Global Compacts, together, present complementary international cooperation frameworks that fulfil their respective mandates as laid out in the New York Declaration for Refugees and Migrants, which recognizes that migrants and refugees may face many common challenges and similar vulnerabilities". Final draft available at <https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf>, accessed 24 May 2026.

¹² CHETAIL, V., "The human rights of migrants in general international law: From minimum standards to fundamental rights", *Georgetown Immigration Law Journal*, Vol. 28, No. 1, 2013, p. 231.

¹³ PAPANICOLOPULU, I., "The Historical Origins of the Duty to Save Life at Sea in International Law", *Journal of the History of International Law / Revue d'histoire du droit international*, Vol. 24, No. 2, 2022, p. 150.



gees and irregular migrants, the analysis mainly focuses on two principles: the principle of *non-refoulement*^{14 15} and the right to apply for asylum¹⁶.

Nevertheless, international human rights law has evolved to confer individuals falling within its scope protection claims vis-à-vis the State where they are. Therefore, in addition to refugees within the meaning of the Geneva Convention, it is widely accepted that there are other categories of individuals that have a right to protection under international law^{17 18 19}. This protection gap is further narrowed in the European context, as the *non-refoulement* principle has also been developed under article 3 of the European Convention on Human Rights (ECHR)^{20 21} and more broadly through the application of the doctrine developed by the Human Rights Committee (HRC)^{22 23 24}. At this point, it is clear that since *non-refoulement* forms part of international human

¹⁴ ALLAIN, J., “The jus cogens nature of non-refoulement”, *International Journal of Refugee Law*, Vol. 4, No. 13, 2001, p. 557.

¹⁵ Convention Relating to the Status of Refugees, adopted on 28 July 1951, entered into force on 22 April 1954, 189 UNTS 137, art. 33.

¹⁶ EDWARDS, A., “Human Rights, Refugees, and The Right ‘To Enjoy’ Asylum”, *International Journal of Refugee Law*, Vol. 17, No. 2, 2005, p. 303.

¹⁷ GIL BAZO, M.T., *Refugee status, subsidiary protection, and the right to be granted asylum under EC law*, Refugee Studies Centre, University of Oxford, RSC Working Paper No. 136, 2006, p. 10.

¹⁸ MC ADAM, J., “The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime”, *International Journal of Refugee Law*, 2005, Vol. 3, No. 17, pp. 461-516.

¹⁹ GIL BAZO, *Refugee status, subsidiary protection, and the right to be granted asylum under EC (...)*, p. 11.

²⁰ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), adopted on 4 November 1950, entered into force 3 September 1953, ETS No. 5.

²¹ MAYROFHER, M. and HAMMER, M., “Climate mobility to Europe: The case of disaster displacement in Austrian asylum procedures”, *Front. Clim*, No. 4, 2022, p. 3.

²² MC ADAM, J., “Protecting people displaced by the impacts of climate change: The UN Human Rights Committee and the Principle of Non-Refoulement”, *American Journal of International Law*, No. 114, 2020, p. 709.

²³ *Vid.* Human Rights Committee. General Comment No. 36, Article 6 (Right to Life), CCPR/C/GC/36, adopted 3 September 2019, para. 31.

²⁴ LAMBERT, H., “Protection against refoulement from Europe: human rights law comes to the rescue”, *International and Comparative Law Quarterly*, Vol. 48, 1999, p. 544; VON STERNBERG, M., “Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection”, *Journal on Migration and Human Security*, Vol. 2, 2014, p. 344.



rights law, it must be respected in all contexts, and not only in the specific context of refugees, which necessarily applies to all migrants in the maritime context²⁵.

Regarding the right to apply for asylum, the issue gets more controversial. All the asylum applications in the EU must follow the applicable procedures²⁶, which require a personal assessment of every applicant in order to examine whether the relevant requirements are met. It is this phase of personal assessment that poses the main differences between maritime and land migration, even though they follow the same policy trends. As Aleinikoff and Zamore observe, even if it is not explicitly recognised in the Geneva Convention 1951, the *non-refoulement* principle, together with the right to apply for international protection necessarily entail a (limited) right to enter. Otherwise, they would have no meaningful effect in practice. In a world where all habitable territory falls under the jurisdiction of some State, it is States that must provide procedures to determine whether the protection applies, which should necessarily allow entry to lodge at least an asylum claim^{27 28}. In the EU, the responsibility for the assessment is determined under the principles of the Regulation 1351/2024 (before, the Dublin III Regulation)^{29 30}, the State

²⁵ JIMÉNEZ GARCIA-CARRIAZO, A., “Small Island, Big Issue: Malta and its Search and Rescue Region-SAR”, *Paix et Sécurité Internationales*, No. 7, 2019, p. 308.

²⁶ Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20 December 2011, pp. 9–26, recital 2

²⁷ ALEINIKOFF, T.A. and ZAMORE L., *The Arc of Protection: Toward a New International Refugee Regime*, Stanford University Press, Stanford, 2019, pp. 58–59.

²⁸ All these procedures are regulated in Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 on the establishment of a common framework for the management of asylum and migration, OJ L, 22 May 2024, arts. 42–45, together with the mechanisms developed in Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, OJ L, 22 May 2024.

²⁹ 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 (recast), OJ L 180/31, 29 June 2013 (binding until May 2026).

³⁰ From May 2026 onwards, these aspects will be ruled by Regulation (EU) 2024/1351.



of first entry usually being responsible for assessing the personal situation of the asylum seeker^{31 32 33}.

Even though the EU made an effort to specify the situation of those entering a State territory by sea, it has been shown these clarifications were not sufficient for the whole sea voyage³⁴. This lack of precision has been partially corrected by the jurisprudence (with respect to the first issue of *non-refoulement*), as it has been clarified that at sea, the State responsibility is based mostly on the exercise of *de facto* jurisdiction³⁵ (or *effective control* over specific persons), and not on the effective entry of the irregular migrants or refugees in their territories³⁶. This normative vagueness, together with developed States' avoidance of being confronted with the obligations arising from the duty of *non-refoulement* and the material aspects of asylum protections, has given

³¹ DI FILIPPO, M., "The allocation of competence in asylum procedures under EU law: The need to take the Dublin bull by the horns", *Revista de Derecho Comunitario Europeo*, No. 59, 2018, p. 64.

³² Regulation (EU) 604/2013, arts. 7, 8, 9, 10 and 11.

³³ Regulation (EU) 604/2013, art. 13.

³⁴ *Vid.* TREVISANUT, S., "The principle of non-refoulement and the de-territorialization of border control at sea", *Leiden Journal of International Law*, Vol. 3, No. 27, 2014, pp. 661-675.

³⁵ Some scholars have developed some theorisation on this *formal-material* jurisdiction tension. Especially talking about the maritime case, Papastravidis concluded that "On the contrary, the situation is different where rescue operations are conducted by private vessels. In such cases, there is no jurisdictional link between the rescued persons and the flag State. Nevertheless, such a link could, arguably, be established in the case that the master was given specific instructions from the competent authorities of the flag State as to how it should proceed with the persons concerned and acted accordingly". This way, a differentiation is established between *formal* jurisdiction (the one concerned between a private vessel and its flag State), and the *material* jurisdiction (the one involving a *public* State vessel and its flag State). PAPA-STRAVIDIS, E., "The European Convention of Human Rights and migration at sea: Reading the "jurisdictional threshold" of the convention under the law of the sea paradigm", *German Law Journal*, Vol. 21, 2020, p. 432.

³⁶ European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy*, Judgment, Grand Chamber, Appl. No. 27765/09, 23 February 2012, declared that the Italian State was responsible for the *refoulement* of several migrants to Libya, thereby violating arts. 3, 4, and 13 of the European Convention on Human Rights. The basis for this decision was that the rescue operation had been carried out by the Italian Navy; the Court therefore found it clear that it was the Italian authorities who were responsible for the *refoulement* and even for addressing the corresponding asylum procedures



rise to politics of contactless control and non-entrée³⁷, which are reflected in European policies of external border management and the *externalization* of border controls in the Central Mediterranean³⁸.

It is at this point that the SAR regulation acquires its instrumental relevance, as it establishes a series of responsibilities regarding the rescue and disembarkation of these persons that have been proven to be applicable to displace potential humanitarian responsibilities. In this sense, while international and European law formally aim to provide protection to all migrants at sea, their legal framework is based on territorial and functional settings that SAR operations do not clearly establish. In addition, the approval of the EU New Migration and Asylum Pact has generated some controversy, especially in the maritime field, concerning the concepts of first country of asylum, safe third country and the simplified return procedures in *ex post* disembarkation contexts. These developments must be assessed together with the recent SAR updates, such as the creation of Libyan and Tunisian SAR areas that could lead to a significant denaturalisation of the SAR regime in the Mediterranean and humanitarian obligations.

III. CONTEXTUALIZING THE MIGRANT RESCUE PHENOMENON IN THE MEDITERRANEAN

1. Unpacking rescue operations within displacement contexts

When referring to *rendering assistance*, it can be divided into two main parts: *rescue* and *disembarkation*³⁹. Although they can sometimes be assessed as a whole in certain contexts (e.g. cruise ship accident involving tourists), their impact and potential repercussions in the migrant context make it necessary to analyse them separately.

³⁷ GAMMILETOFT-HANSEN and HATHAWAY, J.C., “Non-refoulement in a world of cooperative deterrence”, *Columbia Journal of Transnational Law*, Vol. 2, No. 53, 2015, p. 241.

³⁸ MÜELLER, P. and SLOMINSKI, P., “Shrinking the space for civil society: (De)Politicizing the obstruction of humanitarian NGOs in EU border management”, *Journal of Ethnic and Migration Studies*, Vol. 19, No. 48, 2022, p. 807.

³⁹ CARRERA, S. and CORTINOVIS, R., “Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing away from responsibility?”, *CEPS Paper in Liberty and Security in Europe*, No. 10, 2019, p. 2

With regard to the duty to *rescue*, there is relative consensus that it is a rule with solid bases in customary law⁴⁰, which has been codified in several legal instruments. These different instruments, apart from consecrating this principle, have established the main outline of what a rescue entails. On this basis, the article 98 of UNCLOS⁴¹ develops the main characteristics of the duty to rescue people at sea: (1) shipmasters are required to render assistance to any person found in distress at sea (as far as it can be done without serious danger to the ship or the passengers), and (2) they must proceed with all possible speed to assist persons in distress. The SOLAS Convention⁴² and the SAR Convention⁴³ further establish some additional obligations: (3) it is mandatory to communicate to the coastal State's SAR services the distress situation, (4) the rescue must be done regardless of the legal status of the person in distress (5) the shipmaster is allowed to deviate to the minimum extent necessary from its planned trip, and (6) the coastal States must coordinate rescue and disembarkation to ensure a safe place for rescued persons as soon as possible⁴⁴. The key question here is that we can infer the existence of several kinds and levels of *effective control* over the rescued migrants.

The *disembarkation*, instead, is regulated in rather soft terms. Both SAR and SOLAS Conventions establish that disembarkation should be carried out “as soon as reasonably practicable” in a “safe place” without further precision about what can be considered a place of safety. Apart from that, even if it is clearly stated that the SAR State is responsible to find a place to disembark the rescued people, no explicit obligation requires SAR States ultimately to

⁴⁰ PAPANICOLOPULU, I., “The Historical Origins of the Duty to Save Life at Sea in International Law”, p. 150.

⁴¹ United Nations, United Nations Convention on the Law of the Sea (UNCLOS), adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.

⁴² International Maritime Organization. International Convention for the Safety of Life at Sea (SOLAS), adopted 1 November 1974, entered into force 25 May 1980, as amended, 1184 UNTS 278.

⁴³ International Maritime Organization. International Convention on Maritime Search and Rescue (SAR), adopted 27 April 1979, entered into force 22 June 1985, 1405 UNTS 97.

⁴⁴ SOLAS Convention, Chapter V, Regulation 33.1 and 1-1 (as amended).



allow disembarkation in their own territory^{45 46 47}, even if some scholars have argued that such a duty is implied by the latest amendments and commentaries adopted by the Maritime Safety Committee (MSC)⁴⁸. The implications for the responsibility of the State where these migrants would be disembarked is undeniable, as a *disembarkation* would constitute the migrants' effective entry into that country.

Understanding the importance of disembarking is critical, as this phenomenon may lead to two possible consequences. On the one hand, a disembarkation in a third country could eventually result in the irremediable *refoulement* of migrants and refugees to places where they could suffer inhuman or degrading treatments, in breach of Article 3 of the ECHR. On the other hand, the disembarkation may trigger the application of accountability mechanisms in asylum matters according to EU law⁴⁹. On this basis, determining the place of disembarkation appears to be of crucial legal relevance. However, the international regulations are too lax, allowing states to regulate the institution of disembarkation on a national level, or even to reach informal agreements regarding this topic from both *ex ante* and *ex post* perspectives.

Considering these *rescue* and *disembarkation* obligations with *migrant* and refugee realities, UNHCR issued a set of principles and good practices for migrants and refugees rescued at sea⁵⁰ that partially serves to, at least, clarify

⁴⁵ VAN BERCKEL SMIT, J., "Taking Onboard the Issue of Disembarkation", *European Journal of Migration and Law*, Vol. 4, No. 22, 2020, p. 507.

⁴⁶ SAR Convention, para. 3.1.9 (as amended).

⁴⁷ European Parliament and Council of the European Union. Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex, OJ L 189, 27 June 2014, 93-107, establishes this obligation but it is just mandatory for border surveillance operations carried out by Member States at their external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, as it is established in its art. 1.

⁴⁸ International Maritime Organization, Resolution MSC.167(78): Guidelines on the Treatment of Persons Rescued at Sea, adopted 20 May 2004, IMO Doc. MSC 78/26/Add.2, Annex 34, para. 6.11.

⁴⁹ Regulation (EU) 2024/1351, article 33.2.

⁵⁰ Office of the United Nations High Commissioner for Refugees (UNHCR), "Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees", Geneva: UN-



how these terms can be interpreted. In this way, it is posed that *disembarkation* of rescued (presumed) asylum-seekers and refugees cannot be carried out in territories where their lives or freedoms would be threatened⁵¹. In these terms, there appears to be a link between the duty to *disembark* and the principle of *non-refoulement*. It is also stated that final decision regarding the place of disembarkation must be taken by the shipmaster from among the options provided from the Responsible Rescue Coordination Centre (RCC). In addition, a *place of safety* is defined as *a location where rescue operations are considered to terminate, and where the rescued persons' safety of life is no longer threatened; basic human needs (such as food, shelter and medical needs) can be met; and transportation arrangements can be made for the rescued persons' next or final destination*⁵². One of the main problems this instrument poses is that, as is often the case in global migration governance, it is a non-binding guideline of soft law⁵³.

From the presentation of the rescuing main obligations that has been made, we can identify three main actors: the *flag State*, the *coastal State* (or the *SAR State*, depending on the instrument we are applying), and the *shipmaster*. From the objective obligations developed (*to render assistance, to coordinate the rescue, and to disembark in a safe place*) we can infer that certain forms of *effective control* are exercised by these responsible actors. In addition, we can conclude that these obligations are not properly developed with sufficient precision. It is through this regulatory vagueness and overlapping control and responsibilities that the EU saw the SAR regime as the perfect instrument to carry out deterrent border policies of policies characterised by limited accountability. The reason seems clear, as it shifts (virtually) the border crossing moment and eventual responsibilities on human rights back to the maritime context, where those responsibilities are not clearly established⁵⁴.

HCR, 2013, p. 13, <https://www.unhcr.org/media/rescue-sea-guide-principles-and-practice-applied-migrants-and-refugees>, accessed 24 May 2026.

⁵¹ UNCHR's, "Rescue at sea: A guide to principles and practice as applied to migrants and refugees", p. 13.

⁵² *Ibid.*, p. 14.

⁵³ *Vid.* CHETAIL, V., "The politics of soft law: progress and pitfall of the global compact for safe, orderly, and regular migration", *Front. Hum. Dyn.*, 2023, pp. 1-8, regarding the use of *soft law* in migration global governance.

⁵⁴ AALBERTS, T. E. and GAMMELTOFT-HANSEN, T., "Sovereignty at sea: The law and politics of saving lives in mare liberum", *Journal of International Relations and Development*, Vol. 17, 2014,



2. From rescue places to genuine (?) borders: the issue of maritime jurisdiction

Historically, the concept of legal bindingness has been linked to a territorial space. Without going any further, the Vienna Convention on the Law of Treaties establishes in its article 29 that “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”. In the field of human rights protection in Europe, accountability has been developed around the concept of jurisdiction⁵⁵ and not territory⁵⁶. However, even if we can infer extraterritorial exercises of jurisdiction, the notion itself is still closely linked to the concept of territory and border, as the territorial configuration of the law of the sea and SAR regions directly affects any assessments concerning the exercise of functional jurisdiction. For the purposes of this analysis, we will approach the issue of jurisdiction from the perspective of ECHR, as nowadays it is the Convention that best protects migrants’ rights, allowing them to request interim measures and lodge individual complaints. Even if the international accountability does not end in the ECHR, its direct application on migrants makes it adequate to analyse these concepts properly. It is convenient to first analyse the territorial development of the different obligations and formal forms of jurisdiction, and then subsequently specify the functional interpretation given by the ECtHR taking into account the SAR legal framework.

The concept of *borders* can be assessed from several points of view, but in this paragraph, we will address it mainly from its legal conception. Even though there is no precise legal definition for *borders*, the current historical model (*Westphalian border model*) generally conceives *borders* as a permanent

p. 451.

⁵⁵ In this regard, it is necessary to distinguish between the concepts of *jurisdiction* and *responsibility*, which are not synonymous, even though in some instances they have been treated interchangeably. On the one hand, *jurisdiction* in terms of Article 1 ECHR, is a concept which raises two distinct questions, mostly linked to the exercise of control over an area or the exercise of authority and control over individuals. On the other hand, *responsibility* refers to the legal relationship between an attributable act and a breach of an international obligation, as established in the ARSIWA. Their interrelationship at the level of the ECHR causes them to be used incorrectly as equivalents. *vid.* MILANKOVICH, M., “Jurisdiction, Attribution and Responsibility in Jaloud”, *EJIL: Talk!*, 11 December 2014, https://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/?utm_, accessed 25 May 2026.

⁵⁶ ECHR, article 2.



line that establishes the limit of the territorial jurisdiction of the States. Therefore, the definition is based on three main ideas: line (the objective fact), limit (the main purpose), and State (the author and receiver of both fact and purpose)⁵⁷.

In accordance with this, the EU asserts border policy as its own policy area (shared with Member States), operating through an integrated management system of external borders, but making it clear borders belong to States and not to the EU^{58 59 60}. From the very beginning, this concept of common external borders created a tension with Europe's aspiration to eliminate internal borders under the Schengen Convention in the development of the European Area of Freedom, Security and Justice⁶¹. This external border regime is applied not only to land borders but also to maritime borders⁶². The main difference between maritime *borders* and land *borders* is that maritime borders are not only regulated by domestic law and legal traditions, but also by many other instruments that must be taken into account. In the context of the Central Mediterranean, apart from the common instruments related to the *acquis Communautaire*, consideration must also be given to others such as UNCLOS and SAR Conventions (noting that the latter just regulates spaces of cooperation).

⁵⁷ DEL VALLE GÁLVEZ, A., "Las fronteras de la Unión: el modelo europeo de fronteras", *Revista de Derecho Comunitario Europeo*, Vol. 12, No. 6, 2002 pp. 303-304.

⁵⁸ MANGAS MARTÍN, A., "Territorio, integridad territorial y fronteras del Estado en la Unión Europea: Conferencia pronunciada por la Madrina de la Promoción Anual de la Facultad de Derecho el día de la festividad de San Raimundo de Peñafort", *Revista Jurídica de La Universidad de León*, No. 2, 2015, p. 230.

⁵⁹ European Union, Treaty on the Functioning of the European Union (TFEU), consolidated version, OJ C 202, 7 June 2016, pp. 47-390, arts. 77.1 and 2.

⁶⁰ Regulation (EU) 2019/1896 on the European Border and Coast Guard States that Member States retain primary responsibility for the management of their external borders, while the Agency supports and coordinates their actions at Union level, recital 12.

⁶¹ KASPAREK, B., "Complementing Schengen: The Dublin System and the European Border and Migration Regime" in BAUDER, H. and MATHEIS, C. (eds.), *Migration Policy and Practice*, Palgrave Macmillan, 2016, p. 61.

⁶² MARIN, L., "Policing the EU's external borders: A challenge for the rule of law and fundamental rights in the area of freedom, security and justice? An analysis of FRONTEX joint operations at the Southern Maritime border", *Journal of Contemporary European Research*, Vol. 4, No. 7, 2011, pp. 468-487.



In this regard, UNCLOS defines several maritime zones (the territorial sea, the contiguous zone, and the exclusive economic zone (EEZ)) in which the coastal State exercises certain sovereign rights or forms of jurisdiction⁶³. In addition, articles 92-94 establish the legal fiction of the *flag State*. Under this regime, every vessel must be subject to exclusive authority of a single *flag State*, which it is required to effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag⁶⁵. The link between the territorial sea and its nature as a genuine border is beyond doubt, but the specific case of the *flag State* and its jurisdiction exercise has been the subject of ongoing debate. In this respect, we can identify two different views: (1) the view according to which flag States constitute factual State outposts at sea; and (2) the view that the link with the flag State merely allocates extraterritorial jurisdiction over the vessel to that State⁶⁶. In the context of rendering assistance to persons in distress at sea, it has been underlined the duty of every State to require a master of a ship flying its flag to render assistance to any person found at sea in danger with all possible speed⁶⁷.

Apart from that, in order to enforce and guarantee the duty to render assistance to people in distress at sea, the SAR Convention was adopted to establish areas of responsibility to coordinate the different rescue operations that could occur within a given area⁶⁸. Related to the obligations defined, as we stated before, it is the responsibility of the SAR State to receive the notifications of people in distress at sea, ensure and coordinate their rescue, and identify a safe place of disembarkation as soon as possible⁶⁹. Apparently, the

⁶³ ARROYO MARTÍNEZ, I., *Compendio de derecho marítimo* (7th ed.), Tecnos, Madrid, 2020, pp. 61-63.

⁶⁴ According to the UNCLOS, arts. 2 and 33, the States can exercise sovereign rights and jurisdiction on migration issues in their *territorial sea* and *contiguous zone* (12 and 24 miles away from their coastline).

⁶⁵ UNCLOS, art. 94.1.

⁶⁶ CAVALCANTIL DE MELLO FILHO, E., “From ‘Flags of Convenience’ to ‘Flags of Deceit’: The Future of the Law Governing the Nationality of Ships”, *International and Comparative Law Quarterly*, No. 74, 2025, p. 129.

⁶⁷ UNCLOS, arts. 98.1.a) and 2.

⁶⁸ PAPA-STRAVIDIS, E., “The European Convention of Human Rights and Migration at sea: Reading the “jurisdictional threshold”, p. 433.

⁶⁹ The lack of precision on developing *disembarkation* duty has been severely criticised, as it



SAR Convention only establishes a series of obligations and responsibilities, without granting any jurisdiction over the area of responsibility. These spaces are established by State parties, after approval by the MSC, which supervises whether proper requirements are met⁷⁰.

Several issues have been identified when attempting to apply these two legal instruments (SAR Convention and UNCLOS) to the migration context. First, the SAR Convention merely imposes a duty to coordinate a potential rescue operation, extended to disembarkation. In contrast, UNCLOS clearly establishes that ships are subject to the exclusive jurisdiction of their *flag States*⁷¹. As we can see, different kinds of jurisdictional powers can coincide in certain cases. In this context, it is necessary to analyze how the ECtHR has been interpreting the notion of functional jurisdiction in order to determine responsibilities regarding human rights.

As noted earlier, in the context of forced migration, responsibility for certain rights, duties, and principles has been developed under the exercise of *effective control* over an individual or a group of people, which also applies extraterritorially to people sailing on boats at sea.⁷² Addressing this issue, when no rescue ship is involved, the responsibility for failing to initiate rescue operations has been attributed to the relevant SAR State⁷³. On this basis,

does not clarify if the *disembarkation* must be allowed in the SAR State territory or not. On this topic, Resolution MSC.167(78) stated that “responsible State authorities should make every effort to expedite arrangements to disembark survivors from the ship; however, the master should understand that in some cases necessary co-ordination may result in unavoidable delays”, para 6.9. On this basis, some kind of *disembarkation duty on SAR State* can be barely defined.

⁷⁰ International Maritime Organization and International Civil Aviation Organization, Manual IAMSAR, Volume I: Organización y gestión (International Aeronautical and Maritime Search and Rescue Manual, Volume I). Edition 2010. London: International Maritime Organization, 2010., para. 2.3.7). These requirements imply that no State can just declare itself responsible without any control.

⁷¹ UNCLOS, art. 92.

⁷² GHEZELBASH, D., MORENO-LAX, V., KLEIN, N. and OPESKIN, B., “Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia”, *International and Comparative Law Quarterly*, Vol. 2, No. 67, 2018, p. 331.

⁷³ *Vid.* UN Human Rights Committee (HRC). *A.S., D.I., O.I. and G.D. v. Italy and Malta*, Communications N. 3042/2017 and 3043/2017, Views adopted 13 March 2020 (Malta) and 4 November 2020 (Italy), UN Doc. .CCPR/C/128/D/3043/2017 and CCPR/C/130/D/3042/2017 (27 January 2021), para. 7.8, available in <https://docs.un.org/en/>



it seems legitimate to wonder what happens when a ship flying the flag of a third State acts under the instructions of or in cooperation with the coastal or SAR-responsible State.

In these debates, a tension between the concepts of *de facto* and *de iure* (legally legitimised) jurisdiction has been developed on the Mediterranean. Several ECtHR judgments have expanded the interpretation on these two concepts in relation to human rights law in maritime contexts. As an example, in *Medvedyev and others v. France*⁷⁴, in which France coordinated an operation involving a ship flying a third State flag, the ECHR affirmed

that having exercised full and exclusive control over the “Winner” and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France’s jurisdiction for the purposes of Article 1 of the Convention⁷⁵.

Something similar occurred in *Hirsi Jamaa and others v. Italy*⁷⁶ a case in which the Italian armed forces rescued some migrants in distress at sea, and subsequently handed them over to Libyan authorities. When examining this case, the ECtHR stated that “in the instant case the events took place entirely on-board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel (...) the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities”⁷⁷.

The link between *effective control* and the carrying out of SAR tasks by State-owned vessels seems to be clear by now. In relation to cases of rescues performed by private vessels (under the jurisdiction of their flag State)⁷⁸ in SAR

CCPR/C/130/D/3042/2017, accessed 24 May 2026.

⁷⁴ European Court of Human Rights (ECtHR) (Grand Chamber), *Medvedyev and Others v. France*, no. 3394/03, Judgment, Grand Chamber. 29th March 2010.

⁷⁵ *Ibid.* para. 81.

⁷⁶ European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy*, no. 27765/09, Judgment, Grand Chamber. 23rd February 2012.

⁷⁷ *Ibid.*, para. 81.

⁷⁸ Which at certain times have supposed even a half of the total rescues in the CMR, *vid.* <https://www.senato.it/service/PDF/PDFServer/BGT/1023441.pdf>, accessed 24 May



regions of third parties, the question was not so clear from the beginning. Some scholars, regarding the development of contactless control migration systems by the EU in the CMR (particularly through informal arrangements with Libya and Tunisia) defended that the existence of jurisdiction and responsibility could be attributed to the fact that these controls and coordinations in Libyan SAR waters were being performed under the direct influence of the EU since it was its main financial supporter⁷⁹. On the contrary, the ECtHR in its last decision on this issue, *SS and others v. Italy*⁸⁰ determined that

The procedure for their rescue was initiated in accordance with the provisions of international maritime law relating to the search for and rescue of persons in distress at sea. As the recipient of the distress signal, the Rome MRCC had an obligation to initiate the rescue operations, by raising the alert, and to coordinate them with the RCCs of the other coastal States (...) Such a procedure cannot be compared to the proceedings which created a jurisdictional link between the applicants and the respondent State (...) the mere fact that the search and rescue procedure was initiated by the Rome MRCC cannot have resulted in bringing the applicants under the jurisdiction of the Italian State⁸¹.

In this case, the ECtHR concluded that Italian authorities were not responsible for a *pushback* to Libya, as the rescue operations had been coordinated and made effective by the Libyan coastguard with no *effective control* of Italian authorities⁸². Therefore, it seems the ECtHR partially departs from the existing doctrine of other pseudo jurisdictional judgments such as *A.S*

2026.

⁷⁹ MORENO-LAX v. & GIUFRE, M., “The Rise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Forced Migration Flows,” in *Research Handbook on International Refugee Law*, ed. S. Juss (Cheltenham: Edward Elgar, 2019), retrieved from <https://www.unhcr.org/media/raise-consensual-containment-contactless-control-contactless-responsibility-forced-migration>, p. 17

⁸⁰ European Court of Human Rights (ECtHR) (First Section), *S.S. and Others v. Italy*, no. 21660/18. Decision on inadmissibility. First Section. 12th June 2025.

⁸¹ *Ibid.*, para. 104-106.

⁸² For a first hand complete analysis on this case, *vid.* MORENO-LAX, V., “The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the “Operational Model””, *German Law Journal*, No. 21, 2020, pp. 385-416.



and others v. Italy and Malta from HRC, which appear to offer stronger functional protection by applying a broader interpretation of the *effective control* concept concerning coordination obligations. At this point, some scholars have pointed out the potential nature of coordination means as actual control mechanisms⁸³. The interpretation given by ECtHR, moreover in the current context, has been shown to be too brief as it does not analyse extensively the possible existence of indirect control or decisive influence resulting from cooperation between Italy and Libya⁸⁴, as it did in other cases such as *Catan* and *Ilascu*⁸⁵ which could lead to effective responsibility attributions⁸⁶ even interpreting the existence of direct *effective control* from Italian authorities. Thus, the decision merely overlooks the existing legal and political framework between Italy and Libya, as well as the funding and equipment given to Libya by the Italian government and the existing operational involvement.⁸⁷

A main conclusion could be drawn from this analysis. It stems from the difficulty of reconciling the classic conception of the *border* with the current ideas of maritime spaces, jurisdiction, and responsibility systems, as these clearly overlap. As we can see, the common Westphalian border scheme (line, limit and State) does not align with some of the paradigms described above. In the maritime case, there is sometimes not a line itself, creating the fiction of a jurisdictional space (*flag States*), and sometimes lines are established that do not correspond with spaces of jurisdiction, but just responsibilities (SAR areas). This lack of cohesion between maritime spaces and common conception of borders, together with the usual vagueness and abuse of soft law in the law of the sea, has resulted in recurrent legal gaps in several issues inclu-

⁸³ ISLAM, M.S., FADASON, D.W. and ASHRAF, A., “State accountability in maritime SAR operations involving smuggled migrants: human rights challenges at sea”, *Discover global society*, No. 85, 2025, p. 8.

⁸⁴ About this, the Decision just mentions that the Court finds no evidence to suggest that, as a result of the bilateral agreements entered into between the two countries, Italy can be said to have taken over Libya’s public powers in immigration matters by virtue of a form of consent, invitation or acquiescence on the part of the Libyan Government”, para. 97.

⁸⁵ MORENO-LAX and GIUFFRÉ, “The Rise of Consensual Containment: From ‘Contactless Control...’”, p. 24.

⁸⁶ ILC Articles on the Responsibility of States for Internationally Wrongful Acts (‘ASR’), [2001] YILC Vol. II (Part 2), Annex to UNGA Res. 56/83, 12 Dec. 2001 (A/56/49(Vol. I)/Corr.4).

⁸⁷ MORENO-LAX, “The Architecture of Functional Jurisdiction...”, pp. 390-396.



ding human rights⁸⁸. These gaps (potentially salvageable under ECHR as it is grounded in jurisdiction) together with the current ECtHR interpretations on *effective control*, have led to the reality that participating States may successfully evade and deconstruct responsibilities by reference to traditional norms of sovereignty and international law, thus transforming the sea into a perfect place for disclaimers of sovereignty⁸⁹.

In any case, the answers remain unclear. On this issue, some scholars have even questioned not only the flag State–SAR State allocation of responsibility, but also the shipmaster’s responsibility, and even the link between the shipmaster’s decisions as the operational authority on board and the eventual responsibility of the flag State in accordance with those decisions⁹⁰. This is further complicated by the fact that these international regulations have been interpreted differently by national authorities in several occasions⁹¹, which contributes negatively to the application of similar criteria. In this context, it may be concluded that currently the legal regime governing the duty to render assistance, SAR and disembarkation leaves many uncertainties exacerbated by the fact that we are not dealing with “regular” citizens, but *irregular migrants* and *refugees*. These uncertainties, as we will discuss later when talking about the New Migration and Asylum pact, have not been addressed from a

⁸⁸ *Vid.* MARTIN, J., “A Transnational Law of the Sea”, *Chicago Journal of International Law*, Vol. 21, No. 2, 2021, pp. 419-475.

⁸⁹ AALBERTS and GAMMELTOFT-HANSEN, “Sovereignty at sea: The law and politics of saving lives in mare liberum”, p. 458.

⁹⁰ DE VITTOR F. and STARITA, M., “Distributing responsibility between shipmasters and the different States involved in SAR disasters”, *Italian Yearbook of International Law*, No. 28, 2019, p. 86.

⁹¹ *E.g.* Tribunale di Palermo (Criminal Division), Judgment of 18 June 2025 (deposited 25 June 2025), R.G. No. 4308/21 (Salvini — Open Arms), Palermo; pp. 1--270. In this case the Judge affirmed that, as the NGO ship *Open Arms* was involved, Spain should have been considered the State responsible for assisting the rescued migrants, as it was the flag State and was “somehow” involved in the rescue mission. The judgment is available at <https://www.giurisprudenzapenale.com/wp-content/uploads/2025/06/Sentenza-Salvini-Rgt-4308-21.pdf>, pp. 205-206.



humanitarian perspective, but through security-oriented measures^{92 93}.

3. Matching migrants' and refugees' situations with international responsibilities: the SAR-asylum connection failure

The SAR regime does not align with usual border conception; in fact, it remains clear we are not dealing with genuine (legal) borders⁹⁴. On the other hand, it is clear that the EU has been developing actual migration border policies in the Mediterranean Sea⁹⁵. What emerges here is that there is a lag between social reality (an actual border) and the applied legal frame. The numbers posed above (127,600 migration attempts through CMR in 2024), together with the geographical position of the Mediterranean and the tough realities migrants are facing in most of the countries of origin and transit suggest that there is an actual border reality in the Mediterranean. In contrast, SAR areas are not legally designed for that⁹⁶. The misuse and denaturalisation of some legal instruments for border management purposes is, in any case,

⁹² Even if it is not the *quid* of the present work to analyse the concept of *securitization*, it seems appropriate to at least mention that we consider it from the point of view of the Paris School, as a current that seeks to justify and perpetuate the idea that the issue in question (in this case, migration) is a security matter and is no longer questioned. The main aim of this paper is to analyse the SAR system as a legal instrument taking into account the migrant and refugee situation, but we think it must be noted that it has been used as a key part of security policies carried out by EU and Frontex. For more about this topic, see KINACIOGLU, M., “Militarized governance of migration in the Mediterranean”, *International Affairs*, Vol. 99, 2023, p. 2428.

⁹³ VAN BERCKEL SMIT, J., “Taking Onboard the Issue of Disembarkation”, p. 512.

⁹⁴ SAR Convention, art. 2.I.

⁹⁵ WOLFF, S., “Border management in the Mediterranean: Internal, external and ethical challenges”, *Cambridge Review of International Affairs*, Vol. 2, No. 21, 2008, pp. 257-260.

⁹⁶ Taking a look at the SAR Convention's previous considerations and recitals, we can infer that SAR areas were not designed to act as genuine borders. In addition, we can see how the migrant and rescue management issue was discussed years after by the MSC, due to the emerging migrant reality at its already mentioned *Guidelines on the Treatment of Persons Rescued at Sea*, MSC 78/26/Add.2, Annex 34. It should be noted that, furthermore, the SAR Convention is not designed to address structural humanitarian situations such as migration flows in the Mediterranean. *Vid.* JIMÉNEZ-GARCÍA CARRIAZO, A., “The Human Dimension: The Great Forgotten Factor in Migration Along the Central Mediterranean Sea”, *Spanish Yearbook of International Law*, No. 28, 2024, p. 102.



not new⁹⁷ in European migration context⁹⁸, but is this legal system sustainable from the perspective of human rights in the Central Mediterranean Sea?⁹⁹

Human rights must be assessed from a protection perspective. In this context, it is clear that the right to life is firmly protected, at least formally, by every regulation applied¹⁰⁰. The main problem arises when we consider other rights inherent to the persons in distress at sea together with the uncertainty about their legal status as refugees or migrants. We are referring mainly to their right to seek asylum and the principle of *non-refoulement* (understood together with the prohibition of torture or inhuman or degrading treatment or punishment)¹⁰¹. At this point, the problem that may be identified (in addition to defining which authority is responsible for ensuring compliance with regard of migrants' human rights)¹⁰² is the need to pre-assess *migrants'* legal status when they are found in distress at sea, in order to ensure their right to seek asylum; and to understand migrants' context before they are disembarked to ensure they are not being refouled. This idea is not new, as it is even underlined in the UNHCR Guidelines for rescued migrants¹⁰³. This means that when we are considering a rescue operation and its implications in the Central Mediterranean, we cannot study a specific case abstractly, since, in most of the cases, we are not dealing with ordinary citizens, but *refugees* and *irregular migrants*. In this context, we can conclude that there is a need to understand those *migrants'* realities, to pre-assess their transit or origin conditions, to

⁹⁷ DE WITTE, "Here be Dragons: Legal geography and EU law", p. 119.

⁹⁸ SHACHAR, A., "The shifting border: legal cartographies of migration and mobility", *The shifting border: Legal cartographies of migration and mobility: Ayelet Shachar in dialogue*, 2021, p. 6.

⁹⁹ Regarding this topic, Solanes Corella states that "It must be admitted that states now fulfill a surveillance function that multiplies the categories of borders; a single external border delimiting the territory over which the nation-state exercises its sovereignty is no longer enough". *Vid.* SOLANES CORELLA, A., "Una reflexión iusfilosófica y política sobre las fronteras", *Anuario de Filosofía Del Derecho*, No. 32, 2016, p. 178.

¹⁰⁰ ICCPR, art. 6; ECHR art.2; UNCLOS art. 98; SAR Convention para. 3.1.9.

¹⁰¹ Established in ICCPR, art. 7 and ECHR art. 3.

¹⁰² Understood in terms of which one is exercising *effective control* over them, in accordance with ECtHR doctrine

¹⁰³ "If rescued persons appear to indicate that they are asylum-seekers or refugees or that they fear persecution or ill-treatment if disembarked at a particular place, the Master should inform he rescued persons concerned that the Master has no authority to hear, consider or determine an asylum request", p. 10.



eventually ensure they have access to an international protection application procedure. As it has been stated, this assessment normally happens in border procedures: processes in which an applicant for international protection is allowed (or not) to enter the national territory while authorities examine his or her asylum application. These procedures typically take place at border locations such as border islands, airports, transit zones, or land border areas¹⁰⁴.

The rationale appears clear, as a disembarkation in a third State could lead to liability and violations of the principle of *non-refoulement*, as well as an eventual distortion of the principles of responsibility developed in EU asylum law^{105 106}. On this basis, it appears reasonable to argue that Italy and the ECtHR should have taken into account the migrant status of the persons who were in distress in accordance with Italy's positive obligations on human rights¹⁰⁷. Taking this into account, it would have been possible to assess whether there was a link in the causal chain that could give rise to possible violations in another jurisdiction in *S.S. and others v. Italy*¹⁰⁸. In any event, this comprehensive approach was not adopted in this sense, which led the case to inadmissibility on the basis that there was not a sufficiently strong jurisdictional link between Italy and the rescued migrants. The question here is that even if jurisdiction existed¹⁰⁹, the SAR legal system does not provide sufficient elements to determine potential risks related to migrants' rights, which could lead to potential disclaimers of liability based on ignorance. This

¹⁰⁴ APATZIDOU, V., "Bordering Asylum: Examining the EU's Border Procedures under the Asylum Procedures Regulation (EU) 2024/1348", *International Journal of Refugee Law*, No. 47, 2025, p. 203.

¹⁰⁵ MSC 78/26/Add.2, Annex 34, principle 6.17

¹⁰⁶ TREVISANUT, S., "The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection", *Max Planck Yearbook of United Nations Law*, No. 12, 2008, p. 239.

¹⁰⁷ *A.S., D.I., O.I. and G.D. v. Italy and Malta*, para. 8.3.

¹⁰⁸ MSC 78/26/Add.2, Annex 34, principle 6.7 states that "The first RCC, however, is responsible for co-ordinating the case until the responsible RCC or other competent authority assumes responsibility". On this basis, some kind of "control" could be determined.

¹⁰⁹ Mancini posed this same issue defending that "it is doubtful whether coordination of search and rescue activities relating to migrant boats in distress on the high seas off the Libyan coast by the Maritime Rescue Coordination Centre Rome (MRCC Rome), under the SAR Convention regime is sufficient to trigger Italy's jurisdiction over rescued migrants)", *vid.* MANCINI, M., "Italy's new migration control policy: stemming the flow of migrants from Libya without regard for their Human Rights", *Italian Yearbook of International Law*, 2018, p. 279.

worsens if we take into account controversial judgments from different national authorities regarding responsibility for potential asylum obligations¹¹⁰.

As a conclusion, it may be stated that even if SAR responsibilities could be properly established applying a proper wider interpretation of functional jurisdiction, the lack of standardised procedures to guarantee a basic first assessment proves that the SAR system is not suited to address structural migration issues. The failure to create *ad hoc* systems of personal assessment of these individuals and the lack of clearly defined duties and responsibilities in this regard, delegating all these procedures entirely to post-disembarkation situations, necessarily lead to potential violations of the principle of *non-refoulement* as well as the right to apply for asylum in a process with a minimum procedural guarantee.

IV. THE NEW MIGRATION AND ASYLUM PACKAGE: TACKLING THE ROOTS OF POTENTIAL RESPONSIBILITIES AND SETTLING A 'B' PLAN?

1. The New Pact on a general context

Instrumentalising SAR areas as de facto borders is not an isolated phenomenon, in fact it is part of a bigger phenomenon that is being described as *detritorialising borders*. This phenomenon includes all the migration control practices carried out by EU and its Member States directly or indirectly out of their territories either *externalising* or *extra territorialising* those practices (what is commonly labelled as “external EU migration policy”)¹¹¹. Although they may seem similar, there are some differences that must be underlined.

Externalization refers to the current practices that allow States to circumvent sovereignty concerns, where direct intervention in a foreign territory is not possible but the relevant local government accepts to cooperate in *controlling migration*¹¹². *Extraterritorialization*, by contrast, refers to a form of

¹¹⁰ *Ibid.* Judgment of Palermo Criminal Court of 25th June 2025, pp. 205-206.

¹¹¹ DEL VALLE GÁLVEZ, A., “Inmigración, derechos humanos y modelo europeo de fronteras: Propuestas conceptuales sobre “extraterritorialidad”, “desterritorialidad” y “externalización” de controles y flujos migratorios”, *Revista de Estudios Jurídicos y Criminológicos*, No. 2, 2020, p. 168.

¹¹² CUTTITTA, P., “Bridgeheads of EU border externalisation? NGOs/CSOs and migration in Libya”, *Environment and Planning C: Politics and Space*, Vol. 4, No. 41, 2023, p. 753.



governance and an extension of politics beyond borders, between at least two countries. In light of the analysis developed in this paper, we can currently determine that the SAR regime and its implications can be understood as extraterritorial forms of governance. From the perspective of refugees and migrants, even if both forms of governance are used politically to create spaces of ambiguous responsibility, it is the *externalization* which could leave them in a more precarious situation¹¹³. This is because externalization results in reduced traceability of control mechanisms, which in turn facilitates “irresponsibilisation” regarding human and refugees’ rights.

We can see that the New Pact on Migration and Asylum introduces several new forms of financial support for third countries¹¹⁴ aimed at containing irregular arrivals and preventing migratory pressure on the EU¹¹⁵. This practice is not new, as the outsourcing of migration controls in Libya or Tunisia¹¹⁶ has already been developed under the European Union Emergency Trust Fund¹¹⁷ for stability and addressing the root causes of irregular migration

¹¹³ As we have addressed previously, extra territorialization, in fact, supposes the exercise of *effective control* or *de facto* jurisdiction over a group of individuals, which may result in liabilities in matters of Human Rights.

¹¹⁴ ARNOUX, M. and RIPOLL SERVENT, A., “The New Pact on Migration and Asylum in a shifting political context: Depoliticization and repoliticization in EU external migration policy”, *Mediterranean Politics*, 2025, p. 3.

¹¹⁵ Regulation (EU) 2025/1351 art. 5 states that “the Union and the Member States shall, within their respective competences, promote and build (...) close cooperation with relevant third countries at bilateral, regional, multilateral and international levels, including to: (...) (b) support partners hosting large numbers of migrants and refugees in need of protection and build their operational capacities in migration, asylum and border management in full respect of human rights, (c) prevent irregular migration and combat migrant smuggling and trafficking in human beings, including reducing the vulnerabilities caused by them, while ensuring the right to apply for international protection”. This is probably the clearest example from the New Pact on Migration and Asylum.

¹¹⁶ There is also a working Memorandum between UE and Tunisia related to some migration matters.

¹¹⁷ Libya and Tunisia EUTF factsheets published by EUTF, https://trust-fund-for-africa.europa.eu/document/download/bfec9818-0b3d-4d79-ae75-f16ce08ab8a5_en?file-name=the%20EUTF%20Libya%20factsheet, 24 May 2026. It must be noted that more than 65% of the funds are dedicated to issues related to migration control and protection management.



and displaced persons in Africa¹¹⁸. Apart from that, in the case of Libya this externalisation process has been even more evident due to the approval of EUBAM Libya,¹¹⁹ whose main aims are to support the Libyan authorities to develop capacity for enhancing the security of Libya's land, sea and air borders in the short term and to develop a broader integrated border management strategy in the longer term^{120 121}. This externalisation process is further aggravated by the EU's proposal to consider some transit third countries as *safe third countries*¹²², potentially qualifying them as first countries of asylum¹²³, thereby facilitating repatriation or readmission procedures¹²⁴ (or, in the SAR context, disembarkation) to those third States¹²⁵.

From an academic point of view, we cannot analyse the influence of the New Pact in the SAR context in abstract terms, as this could lead to the discursive fallacy of depoliticization of migration policies¹²⁶. As reflec-

¹¹⁸ PACCIARDI, A. and BERNDSTONN, J., "EU border externalisation and security outsourcing: exploring the migration industry in Libya", *Journal of Ethnic and Migration Studies*, Vol. 17, No. 48, 2022, p. 4011.

¹¹⁹ Council of the European Union. Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), OJ L 138, 24 May 2013, pp. 15-18.

¹²⁰ Council Decision 2013/233/CFSP, art. 2.

¹²¹ Council of the European Union. Council Decision (CFSP) 2025/1281 of 26 June 2025 amending Decision 2013/233/CFSP on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), OJ L 1281, 27 June 2025, supposed the renovation of this alliance.

¹²² Regulation (EU) 2024/1348, art. 59.

¹²³ Regulation (EU) 2024/1348, art. 58.

¹²⁴ In accordance with the Proposal for a Regulation amending Regulation (EU) 2024/1348 as regards the establishment of a list of safe countries of origin at Union level these countries would be: Bangladesh, Colombia, Egypt, India, Kosovo (when recognised), Morocco, and Tunisia.

¹²⁵ Regulation (EU) 2024/1348, art. 38.1.b)

¹²⁶ Understood from Cuttitta's point of view (2018) as "the marketization of policy-making processes and "the rise of technocratic forms of governance", but it also refers, more specifically, to the tendency of political actors to obscure the political character of politics and to present policymaking as a neutral, necessary and indisputable process, in which the possibility to choose between different political (not merely technical) alternatives, as well as that for disagreement and contestation, is limited or denied. *Vid.* CUTTITA, P., "Repoliticization through Search and Rescue? Humanitarian NGOs and Migration Management in the Central



ted in the figures above, we can see that in 2024, 127,600 crossing attempts were made through CMR, of which at least 40% are estimated to involve persons fleeing war and violence, who may therefore be potential applicants for asylum or international protection. In addition, with regard to asylum procedures initiated in Italy in 2024 (the main destination country of those traveling through CMR), we can see that out of 158,605 applications, 55,426 were initiated by applicants from Bangladesh, Egypt, and Tunisia, who probably entered via the CMR^{127 128}. Accepting the proposed legal framework could legitimise protection denials and *refoulements* to unsafe origin or transit countries of individuals that should in fact be candidates to apply for asylum, or other forms of international protection in the EU, consequently breaking the link, but not the law¹²⁹.

2. The potential influence of the New Migration and Asylum Pact in SAR contexts

As SAR matters remain primarily governed by Member States' international obligations, the Pact mainly addresses the asylum-related consequences arising from disembarkation¹³⁰. Procedurally, one of its main contributions is the establishment of a common two-phase framework linking disembarkation following SAR operations to: (1) a mandatory pre-screening procedure, and (2) a subsequent asylum procedure (which is commonly a simplified one). Consequently, SAR operations increasingly lead to the same procedural outcome regarding asylum in the EU. As a result, while the exact place of disembarkation remains unknown until determined, the legal and procedural consequences following disembarkation are progressively standardised across EU Member States, thereby integrating the post-disembarkation phase into a Mediterranean", *Geopolitics*, Vol. 23, No. 3, 2018, p. 634.

¹²⁷ As there is no specific date published, we have to infer it from the aggregated data available.

¹²⁸ Data taken from and available at https://asylumineurope.org/wp-content/uploads/2025/07/AIDA_IT_2024update.pdf, 24 May 2026.

¹²⁹ MÜELLER and SLOMINSKI, "Breaking the Legal Link but Not the Law? The Externalization of EU Migration Control through Orchestration in the Central Mediterranean", *Journal of European Public Policy*, Vol. 6, No. 28, 2021, pp. 801-820.

¹³⁰ The clearest example could be the inclusion of specific SAR aspects in the European Annual Asylum and Migration Report, as it is established in Regulation 1351/2024, article 9.3.a).xii)



common EU migration governance framework.

In substantive terms, we should examine together several aspects mentioned in the Pact concerning, in particular, disembarkations and their potential collateral effects on asylum claims. To analyse these issues comprehensively, we will address three main questions: (1) the grounds for inadmissibility¹³¹, (2) the border and simplified procedures¹³², and (3) the concepts of “safe third country” and “first asylum country”¹³³.

The Regulation (EU) 1351/2024 firmly establishes that in the SAR context, the country where the rescued persons are disembarked is the country responsible for analysing their eventual asylum claims in common cases¹³⁴. This must be taken into account with the precision that first these migrants must go through the pre-screening procedure, an initial procedure under the legal fiction of *non-entry* which may lead to a border asylum procedure¹³⁵. It is during this initial pre-screening procedure that health, vulnerability, identity and security checks are first conducted¹³⁶. As stated in the recitals of the Regulation, the main objectives of this procedure are to strengthen the control of third-country nationals crossing the EU’s external borders and to ensure the identification or verification of their identity, particularly in order to assess whether they may pose a threat to internal security¹³⁷. The Regulation (EU) 2024/1356 directly links this pre-screening procedure with the subsequent asylum application, explicitly mentioning the case of disembarked people¹³⁸.

Once migrants have submitted their asylum applications, the provisions of Regulation 1348/2024 come into play. One of the main aims of this New Pact on Migration and Asylum is to harmonise the different criteria established by the previous framework¹³⁹. Unlike the previous Regulations, com-

¹³¹ Regulation 2024/1348, articles 36-38

¹³² Regulation 2024/1348, articles 41-43

¹³³ Regulation 2024/1348, articles 58-64

¹³⁴ Regulation 2024/1351, article 33.2

¹³⁵ Regulation 2024/1356, article 6, in relation with Regulation 2024/1348, article 43.1.c)

¹³⁶ Regulation 2024/1356, article 8.5

¹³⁷ Regulation 2024/1356, recital 59

¹³⁸ Regulation 2024/1356, article 18.2 in relation with article 5.1.b)

¹³⁹ HÄKLI, J., KUDZMAITÉ, G. and KALLIO, K.P., “Devaluing personhood: The framing of migrants in the EU’s New Pact on migration and asylum”, *Transactions of the Institute of British*



mon grounds have been established for the inadmissibility of petitions. The article 38 Regulation 1348/2024 establishes several inadmissibility and rejection criteria, among which the following stand out: (1) a country which is not a Member State is considered to be a first country of asylum for the applicant pursuant to Article 58, and (2) a country which is not a Member State is considered to be a safe third country for the applicant pursuant to Article 59. A review of the list of safe countries proposed by the Commission and the common countries of origin and transit of rescued people, we can conclude that it can be assumed that most of the rescued people would fit these criteria¹⁴⁰. Although it would be very bold to claim a systematic violation of rights, from a moderate point of view, it seems possible that more than one potential refugee may have their rights curtailed. This may be exacerbated as the New Pact appears to result in the application of the border procedure for most maritime arrivals, which may lead to a reduction in guarantees, potential detentions, and eventual *refoulements*¹⁴¹, as it reduces the capacity to adequately and effectively assess protection claims¹⁴².

Thus, the Pact provides for two main procedural possibilities for disembarked people: (1) the application of a border procedure¹⁴³; or (2) the application of an accelerated examination procedure¹⁴⁴. Both procedures have aspects in common, as both suppose an expedited processing of the asylum applications. Anyway, the border procedure (which appears specially relevant in post-disembarkation contexts) develops some other noteworthy aspects. Specifically, the border procedure is formally linked to these applicants that have a higher prospect of being returned¹⁴⁵, which it makes clear it is biased

Geography, No. 49, 2024, p. 12.

¹⁴⁰ Taking a comprehensive look at AIDA reports on asylum applicants origin countries (*vid. note 123*) and UNCHR and IOM reports (*vid. notes 3 and 4*) on Mediterranean migration flows, we can see that there is a considerable similarity between the most origin and transit countries and the list of safe third countries proposed by the European Commission (*vid. note 118*).

¹⁴¹ Regulation 2024/1348, article 43.1.c)

¹⁴² APATZIDOU, “Bordering Asylum: Examining the EU’s Border Procedures under the Asylum Procedures Regulation (EU) 2024/1348”, p. 214.

¹⁴³ Regulation 2024/1348, article 43.

¹⁴⁴ Regulation 2024/1348, art. 42.

¹⁴⁵ Regulation 2024/1348, art. 44.2.a)

towards cases that are likely to end in a return procedure. In light of this framework, several scholars have argued that these new asylum procedures in SAR and disembarkation contexts appear primarily designed to facilitate and accelerate return mechanisms¹⁴⁶ rather than to ensure effective protection of migrants rights. In particular, it has been noted that border procedures result in (1) faster resolution (with a consequent loss of guarantees of access to legal assistance); (2) a significantly restricted right to an effective remedy; and (3) eventual de facto detentions¹⁴⁷.

A simulation of a potential case of rescue and disembarkation helps to illustrate this situation. Let's imagine a small boat with migrants on board from Bangladesh, Libya, and Syria sailing from the port of Zuwarah, Libya. The situation in the countries of origin and transit readily suggests the possibility of such persons applying for asylum or other forms of international protection in EU Member States after disembarkation. In the current context, we can see that these migrants could find themselves without protection even if they are able to contact the Italian, Maltese, or Greek SAR authorities outside Libyan territorial waters but within its SAR area of responsibility. This could be due to the ECtHR's current interpretation of *effective control*. Now let us assume that these migrants finally reach European shores or SAR waters. In this case, the first consequence would be that there would be no clear determination of the place of disembarkation. Secondly, after agreeing on a landing site, in accordance with the provisions of the New Pact, a pre-screening¹⁴⁸ and a border procedure¹⁴⁹ would be conducted in order to determine whether international protection should be granted. Considering the current trends regarding migration flows in the Mediterranean together with the proposed list of *safe third countries* (both of origin and asylum) we can conclude that it is reasonable to assume that inadmissibility decisions may eventually be adopted without a genuine substantive analysis. Accordingly, the EU appears to have adopted a mechanism that could lead to unfair return

¹⁴⁶ VELLA DE FREMEAUX, P. and ATTARD, F. G., "Human rights implications of the European Union Migration and Asylum Pact in search and rescue operations", *Peace & Security – Paix et Sécurité Internationales*, No. 13, 2025, p. 4

¹⁴⁷ APATZIDOU, "Bordering Asylum: Examining the EU's Border Procedures under the Asylum Procedures Regulation (EU) 2024/1348", pp. 215-216.

¹⁴⁸ Regulation 2024/1356, art. 5.1.b)

¹⁴⁹ Regulation 2024/1348, art. 43.1c)



decisions. In this regard, the Pact contributes to transforming post-SAR disembarkation from a primarily humanitarian mechanism into an increasingly securitised system of migration filtering and return management.

V. CONCLUSIONS

Following the structure of the analysis, we can divide our conclusions in three main parts. The first one concerns the SAR regime as an ill-suited system for managing migrant rescue operations in the Mediterranean. Although this argument has been made repeatedly, recent case law developments necessitate a review of this assertion. This review is based on two main points. The first relates to the legal conception of SAR operations. On this basis, the overlapping duties and responsibilities that arise from SAR, UNCLOS, and SOLAS Conventions, together with the lack of jurisdiction establishment, render the system prone to sovereignty disclaimers, which directly affect fundamental principles of human rights and legal certainty. Linked to this, the novelty lies in the second aspect, referring to the current jurisprudential development of the *effective control* concept in SAR operations. While acknowledging the differences and recognizing that there is some margin in the events described, while HRC seems to endorse simple coordination as a potential *effective control*, the ECtHR seems to interpret it more restrictively, holding that mere coordination or cooperation may not suffice to trigger State responsibility. The second conclusion, on the other hand, highlights the lack of precision of SAR regulations in fundamental aspects such as the prior assessments of rescued migrants (which are provided for neither in the Conventions nor in the relevant guidelines) before taking actions affecting them (as disembarkation) that could result in *refoulements* or deficient information on their right to seek asylum.

The third conclusion, as a consequence of the first and second ones, is based on the combined effect of the absence of legal clarity and the current geographical situation of the SAR regions. In this sense, the ECtHR's current reluctance to recognise *effective control* arising from coordination responsibilities, together with the establishment of Libyan and Tunisian SAR regions (when understood together with the New Pact) will leave many migrants unprotected, and legally pushed back to (or directly trapped in) their

transit and origin countries where they fear torture, inhuman, or degrading treatment. As is often the case, the lack of regulatory clarity puts the focus on the political will. Under the current regulatory framework, the solution could involve establishing standardized migration assessment systems for shipmasters. As a result, by sharing their analysis with the involved SAR coordination authorities, these authorities could then make informed decisions regarding disembarkations or pushbacks of the migrants involved. This would make it much clearer (1) that rescue coordination authorities were aware of migrants' nature and situation and (2) that they may effectively be held responsible for their rights. As a result, this could lead to fewer potential *refoulements*, and greater accountability establishments. Regarding the New Pact on Migration and Asylum (pending evaluation once it enters into force), its developments in the field of disembarkation provide assurance regarding asylum obligations. However, applying all of its rules could lead to returns without a substantive assessment, which may result in returns incompatible with human rights obligations.

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