

REVISITING THE LEGAL OBLIGATIONS IMPOSED ON COMMERCIAL VESSELS IN RESCUE OF INDIVIDUAL AT SEA UNDER THE NIGERIAN MERCHANT AND SHIPPING ACT OF 2007

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Abstract

*The obligation of rescuing individuals at sea, most especially those in peril or lost at sea, is one of the oldest and most deep-rooted maritime traditions. For centuries, seafarers have considered it their duty to assist individuals in peril on the high seas. Today, it is not just a moral obligation, it has now been codified in international treaty law and is considered part and parcel of the customary international law. Statistics have shown that between 1861 and 1870, 5,826 ships were wrecked off the British coast with the loss of 8,105 lives. It was against this background that the legal obligation of rendering assistance to people at sea was recognized in 1880 in the popular case of **Scaramanga v. Stamp**.*

This basic rule of British common law as pronounced in the case cited above thus:

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To all who have to trust themselves to the sea it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered by the prudential considerations which may result to a ship or cargo from the rendering of the needed aid was subsequently codified in a number of international Conventions. The first to acknowledge the principle of rendering assistance at sea was the 1910 *Brussels Convention on Salvage*.

Research has also shown that every year, between 100,000 to 120,000 migrants attempt to illegitimately cross the Mediterranean Sea to reach European shores in hope of a better life. In 2008, more than 30,000 arrived the Italian island of Lampedusa alone. Illegal migrants from Nigeria account for 21 percent of the total 171,299 immigrants that braved the Mediterranean odds to arrive Italy in 2016. Many others never made it that far. Between 2006 and 2008, 4,677 migrants have been confirmed dead in an attempt to cross either the Mediterranean or the waters between West Africa and the Canary islands.

Because state resources dedicated to this issue have reduced, the burden of rescuing individuals has shifted to commercial vessels on the high sea. This situation puts all concerned in danger, as ships' masters and crews are ill-equipped even though they have a well-established obligation to intervene in such situations

The *Tampa* incident in 2001 is one of the major incidents that involved the rescue of individuals at sea. The *Tampa* a Norwegian Vessel responded to a call to conduct a rescue operation. However the vessel faced a number of challenges while engaging in the rescue operation most especially the challenge of disembarking the individuals.

This article aims to revisit the Legal obligation of rescuing individuals at sea as provided in various international instruments,. It investigates how the rescue operation is to be conducted with minimal risk to the rescuer and how the individuals are to be managed and taken care of on board the vessel. The paper also discussed the challenges faced in the rescue operation. The paper thereafter concludes by making some far reaching recommendations on how the challenges identified could be addressed.

1.0 INTRODUCTION

Under the International Law there is an obligation to render assistance to those in distress at sea without regard to their nationality, status or the circumstances in which they are found (SOLAS Convention 5:33) The customary obligation to rescue is codified through a number of international convention, among which are:

- United Nations Convention on the Law of the Sea 1982.
- International Convention for the Safety of Life at Sea 1974
- International convention on maritime search and rescue 1979.
- International Convention on salvage 1989.

These conventions are regarded by most experts in the International law of the sea as an “Expression to the general tradition and practice of all seafarers and of maritime law regarding the rendering of assistance to persons or ships in distress at sea, and the elementary conditions of humanity”(Nordquist, 1985:193)

It is therefore firmly established in all the conventions above that shipmasters are bound “to render assistance to any person found at sea in danger of being lost; to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.” (Article 98 UNCLOS)

The question of whether persons are in danger at sea is phrased in a manner that leaves masters to make their own inference about whether persons are really in danger at sea.

THE LEGAL FRAMEWORK FOR THE RESCUING OF INDIVIDUALS AT SEA

The 1979 convention on the international search and rescue also states that there must be a reasonable certainty that people/persons to be rescued are threatened by grave and imminent danger (Human Right at Sea, Volunteer Maritime Rescuers’ awareness report 2016)This obligation was also reiterated by the **International Maritime Rescue Federation**

(IMRF). The IMRF provides that assistance must be rendered irrespective of the territorial or international waters or the status of the persons involved (IMRF report, 2016).

The duty is imposed on the master who receives information that persons are in distress at sea and who is able to provide assistance, ‘to proceed with all speed to their assistance’. This therefore requires the ship to proceed to the location of the distressed vessel, changing course if necessary in order to do so. The duty is a qualified duty in that it applies to the master of a ship at sea ‘*which is in a position to be able to provide assistance*’ (Goddard 2016:253). When ships are not in a position to render such assistance or it will be unreasonable to render such assistance, the master must make an entry in the log book explaining the reasons.

The International Convention for the safety of Life at sea (SOLAS convention 4:31) distinctively provides that the discretion to render assistance is on the master of the ship. It also states that the owner charterer or any company in control of the ship or any other person shall not restrict the duty of the master to render assistance at sea, (SOLAS Convention 4 :32)

Article 10 of the Salvage convention goes further to provide that the owner of the vessel will not incur any liability for breach of duty of the master during the rescue operation.

As seen from the various conventions above, the duty is a duty whereby the master is ‘bound ... to render assistance to any person in danger of being lost at sea’. This applies to refugees, migrants, asylum seekers and other persons who may be in such danger.

It is the opinion of the writers that the Search and Rescue Convention is reactionary in nature. This is because it is designed to encourage cooperation between State Parties with the aim of optimizing search and rescue operations at sea. This is to ensure a speedy response after a maritime incident. SOLAS Convention on the other hand has a preventive approach with which it establishes minimum standards for the construction, equipment and operation of ships (so-called CDEM measures) (Bateman

2009). These international treaties create a number of rights and obligations, which are variously aimed at flag States, transit States and coastal States. In the following, three duties contained in these treaties are identified, namely the duty to provide assistance, to bring to a place of safety and to provide for disembarkation.

1.1 DUTY TO PROVIDE ASSISTANCE

From the Provision of **Article 98(1) of the UNCLOS** it is clear that this duty rests not on the individual mariner. Rather it requires the flag State of that mariner to ensure that an adequate law is enacted which imposes this obligation on the master of the ship. Thus, it is not a self-executing norm. (Proelss 2008) Nor can the duty to assist contained in the SOLAS Convention be said to be self-executing. This duty requires all ships at sea to attempt to rescue people in distress if it is reasonably safe for them to do so. They are not to discriminate due to legal status of the persons in distress and are only limited to the extent that offering assistance would be unreasonable.

The scope of the duty *ratione personae* is broadly formulated to the benefit of "any person" in UNCLOS and "regardless of [...] the circumstances in which that person is found" an important factor bearing in mind that many of the persons in need of assistance are so-called "economic refugees. (O'Brien 2011)" For there to be a duty to provide assistance at sea, there must be a reasonable certainty that a vessel or persons is threatened by a grave or imminent danger and requires immediate assistance (SAR Convention, 1:13)." Despite the apparent clarity of the preceding provisions, the full extent of the duty to render assistance or, more precisely, the existence and scope of related duties such as bringing the rescued persons to a place of safety etc. remains unclear. (O'Brien 2011)

1.2 DUTY TO BRING TO A PLACE OF SAFETY

The vessel providing assistance has a duty to bring rescued individuals to a place of safety. A place of safety (as referred to in the Annex to the 1979 SAR Convention, paragraph 1.3.2) is a location where rescue operations are expected to terminate. It is also a place where the safety of 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. It also includes a place where transportation arrangements can be made for the survivors' next or final destination.

An issue for determination is whether an assisting ship should be considered as a place of safety. An assisting ship should not be considered as a place of safety just because the survivors are no longer in immediate danger. This is because the ship may not have the appropriate facilities and equipment to cater for the survivors. Also, the assisting ship may be unseaworthy. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements are made.

The Search and Rescue Conventions, as amended, indicate that in deciding a place of safety, the particular circumstances of the case should be taken into consideration, such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units (O'Brien 2011)

The assisting ship or another ship may be able to transport the survivors to a place of safety as soon as possible for attention. However, if performing this function would be a hardship for the ship, it is the duty of the RCCs to arrange other reasonable alternatives for this purpose.

1.3 DUTY OF DISEMBARKATION

It is the duty of rescuing vessels to disembark rescued persons. However, this is not legally binding as it does not exist in the law of the sea. As a result, these persons can spend weeks on a ship at sea before a State allows them to go ashore (Coppens 2010:379).

The question of whether an obligation exists to allow for the disembarkation of rescued persons at a place of safety centres on the balancing act which must be effected between the interests of flag states on the one hand and coastal states on the other. However, given that disembarkation will involve entering the territorial or perhaps even internal waters of a state, there may be an issue of territorial sovereignty

Proelss correctly pointed out that:

Any obligation of a flag State to disembark shipwrecked persons at the next port of call would turn out to be useless, were it not logically linked with a corresponding duty of the coastal State of the next port of call to temporarily accept the rescued persons on its Territory (Proelss A, 2008: 10).

One must first ascertain whether the flag State is under a duty to disembark rescued individuals. Sadly none of the relevant international Conventions contain such a duty.

Various arguments have however been made in support of this duty to disembark.

In the first place, given that there is a duty to provide assistance at sea, an absolute refusal to accept disembarkation limits the likelihood of a rescue taking place. Thus, it could be seen as undermining the execution of the rescue in the first place. Consequently, a right to the disembarkation of individuals must exist along with the corresponding duty on the flag state to carry out disembarkation and coastal state to accept disembarkation as well.

Secondly, it serves the humanitarian purpose and intention of Art. 98(1) UNCLOS, as well as the provisions of the SAR and SOLAS Conventions which is based on the understanding of the “place of safety” criterion. For this place of safety criterion to be met, the rescued persons cannot be maintained on board the vessel indefinitely. In other words, they need to be disembarked.

2.0 THE RESCUE OPERATION AND ROLE OF THE DISTRESSED SHIP IN THE RESCUE OPERATION

Commercial vessels engage in rescue operations either on their own or in conjunction with a specialized search and rescue unit. In the latter case commercial vessels may receive information additional to that obtainable from distress traffic or specific requests from land-based SAR authorities. However, in view of the general practice of co-operation by commercial

vessels, it must be emphasized that no order or advice received from these authorities can set aside the obligation or the rights of any master as set out in regulation V/10 of SOLAS 1974. In rescue of individuals at sea, both the distressed ship and the assisting ship have roles and obligations to play.

A ship in distress should transmit the distress call and message on any one or more of the following international maritime distress frequencies as may be available

- 500 kHz (radiotelegraphy);
- 2,182 kHz (radiotelephony); and
- 156.8 MHz (VHF channel 16) (radiotelephony).

When a ship is in distress there are some important component of the distress message to be sent. These messages include but are not limited to the identity of the ship, position and nature of the distress and kind of assistance needed for the rescue operation as well as any other information which might facilitate the rescue (e.g. course and speed if under way; the master's intention, including the number of persons, if any, leaving the ship; type of cargo, that is whether the cargo is a dangerous kind or not. It will also be important to give relevant information such as: whether in immediate vicinity, direction and force of wind, sea and swell, visibility, presence of navigational dangers (e.g. icebergs); time of abandoning ship; number of crew remaining on board; number of seriously injured persons; number and type of survival craft launched, emergency location aids in survival craft or in the sea.

It will normally be impracticable to include all information in the initial distress message. The timing of subsequent transmissions will be governed by circumstances. In general, if time allows, a series of short messages will be preferable to one or two long ones. Distress messages should always be cancelled as soon as saving of life is no longer required or search is terminated.

2.1 ROLE OF THE ASSISTING SHIP

It is the obligation of the assisting ship to acknowledge receipt of the distress message and, if appropriate, retransmit the distress message; and gather the following information from the ship in distress: identity of the distressed ship, position of the distress ship, speed and expected time of arrival (ETA). Also, when available, true bearing of the ship in distress, number of victims, type of vessel and the cargo carried as well as any other important information that may facilitate the rescue should be provided. It is also the duty of the assisting vessel to maintain a continuous watch on the international frequencies if equipped to do so in such a standard and appropriate manner (500 kHz), (2,182 kHz) or (156.8 MHz) (VHF channel 16).

2.2 PROCEEDING TO THE AREA OF DISTRESS

Ships proceeding to the area of distress are to plot the position, course, speed and estimated time of arrival of other assisting ships. Should the ship in distress fail to transmit this information, it is the duty of a ship proceeding to assist to request what information is needed. The assisting ship should maintain active radar plots on vessels in the general vicinity, estimate the ETA's to the distress site of other assisting vessels; assess the distress situation to prepare for operations on-scene as well as prepare adequate on-board preparation. Importantly the vessel en route to assist a distressed ship should have the following minimum equipment ready for possible rescue operation:

- Lifeboat
- Inflatable life raft • Lifejackets
- Survival suits for the crew
- Lifebuoys
- Breeches buoys

- Portable VHF radios for communication with the ship and boats deployed
- Line-throwing apparatus
- Buoyant lifelines
- Hauling lines
- Non-sparking boat hooks or grappling hooks
- Hatchets
- Rescue baskets
- Litters
- Pilot ladders
- Scrambling nets
- Supplies and survival equipment, as required
- Fire-fighting equipment
- Portable ejector pumps
- Binoculars
- Cameras
- Bailers and oars

Signalling equipment

- Signalling lamps • Searchlights • Torches
- Flare pistol with color-coded signal flares
- Buoyant VHF/UHF marker beacons
- Floating lights

- Smoke generators
- Flame and smoke floats
- Dye markers;
- Loud hailers

Equipment for medical assistance

- Stretchers • Blankets
- Medical supplies and medicines
- Clothing • Food • Shelter.

2.3 EMBARKATION OF RESCUED INDIVIDUALS

Embarkation is often the most challenging phase of a rescue operation. Masters should use ship specific plans and procedures, adapted for the circumstances, to safely embark rescued people. Before the master decides to embark rescued individuals, he has to make an assessment of, the danger posed to the ship by the distressed craft; the type of ship and its freeboard; the presence of people in the water; weather set and drift conditions; availability of pilot and/or accommodation ladders; and the ability of the crew to manage an orderly embarkation. Also each person being rescued ought to be searched in order to know the type of items being brought on board the vessel such as smoking materials, phones and other sources of ignition. If any offensive material is found, such material should be confiscated and handed over to the authorities at the port of disembarkation.

Furthermore, the number of those embarked should be recorded; their gender should also be identified. Those who require immediate medical attention should also be identified. The individuals should also be divided into size and groups based on their medical condition, family or gender.

One may want to question why so much protocol should be involved in rescuing those that are in distress at sea considering the fact that they need

to be saved as soon as possible. The answer to this is simple. As stated earlier, when a rescue operation is going on, what is of paramount importance is the safety of the rescuing ship and the safety of its crewmembers. However a shipmaster is not allowed to engage in a rescue operation that will endanger his ship and crewmembers (Adeniran,,2016:22).

2.4 MANAGEMENT OF RESCUED INDIVIDUALS

It is the duty of the shipmaster to treat those rescued as humanely as the design and limitations of the ship and the capability of the crew allow. If they require medical treatment they should be given such treatment while taking into cognisance the past medical history of the victims. They should also be provided with suitable quantities of drinking water and food as they may be dehydrated and hungry. If the food is not sufficient or it finishes, the master of the vessel should request for more food and water from the Rescue Coordination centre (RCC). Survivors are to be questioned about the distressed vessel as soon as possible . This will enable further assistance in the search and rescue operation. However, care must be taken during the questioning to avoid worsening the survivors' condition by excessive interrogation. The main essence of the questioning is to attend to the physical welfare of the survivors and the information required is for the success of the SAR operation, which will likely be of great value for future SAR operation.

2.5 DISEMBARKATION OF RESCUED INDIVIDUALS

Disembarkation of the rescued individuals is another important aspect of the rescue operation as it is necessary to make the rescue operation effective. (Bailliet C. 2003:5) The shipmasters are obliged to bring rescued persons to a place of safety. Personal belongings and dangerous weapons, that have been confiscated for safety reasons should, be passed to the appropriate authority for onward returns to the owners during disembarkation. The ship is to be searched for stowaways immediately after the disembarkation; and be cleaned effectively.

2.6 LIABILITY FOR FAILURE TO RESCUE

Under International law there seems to be no clear provision as to how the obligations are to be operationalized. That is; whether states are required to enact and enforce legislation criminalizing shipmasters that fail to assist. However, a number of states have enacted laws imposing criminal liability on shipmasters for failing to render assistance to those who are in distress at sea. For instance, **Section 323c of the German Criminal Code** provides on omission to effect an easy rescue thus:

Whosoever does not render assistance during accidents or a common danger or emergency although it is necessary and can be expected of him under the circumstances, particularly if it is possible without substantial danger to him and without violation of other important duties shall be liable to imprisonment not exceeding one year or a fine.

Similarly, **article 1158 of the Italian Code of navigation** Provides for the imprisonment of the master of a national or foreign ship who does not assist other ship or persons in distress.

Again in Nigeria, **Section 274 of the merchant shipping Act 2007**, provides that the master of a Nigerian ship on receiving the signal of distress is obliged to respond. Failure to respond without any cogent reason means he has committed an offence and on conviction liable to a fine not less than five hundred thousand naira or to imprisonment for a term not exceeding two years or both.

It could be argued that such provision will help in ensuring an effective implementation of the obligation. However, despite the existence of these provisions, the likelihood of prosecution may be quite remote. This is so because witnesses who are willing and able to report the crime may be unavailable (Pugash 1977:18). Also, if a captain ignores the plea of those in distress, the victims may not survive to report the captain's offence. If they do survive, the expense involved and inconvenience will discourage them from prosecuting. Members of the ship's crew, too, are not likely to report the shipmaster's crime. Even if they do, they might not be able to

secure a conviction. The prosecution would have to prove the individual were actually ignored and that if they had rescued them, such rescue would not have endangered the ship or its crew.

3.0 PERILS AND CHALLENGES OF RESCUING INDIVIDUALS AT SEA

Despite the moral and legal obligations on shipowners to rescue individuals at sea, the rescue operation comes with its own perils and challenges. Rescuing those in distress at sea can have repercussions not only for the seafarers but also for the contracts of affreightment under which the vessel is sailing (Park, 2015). This part of the paper discusses some of the major challenges that commercial vessels face in rescuing individuals at sea. Some of these challenges are discussed below.

3.1 DEVIATION ON THE CHARTER PARTIES AGREEMENT

In English law, the doctrine of deviation is an important one in relation to contracts for the carriage of goods by sea. In the absence of a contractual provision giving liberty to deviate, the ship-owner gives an implied undertaking that the vessel will not deviate from the contractual voyage (Park, 2015:16). In other words, the master is to proceed on the agreed route, or if there is no agreed route, the direct geographical route or the customary route used in the trade. An unjustified deviation has traditionally been regarded as a fundamental breach of contract which carries serious consequences for the ship-owner.

When engaged in a rescue operation, a vessel will often have to deviate from its planned route. The charter party agreement or the international convention adopted into national law or voluntarily incorporated into the contract may define the limits of the ability of the vessel to deviate. Thus, for instance, the “Deviation Clause” (clause 3) of the GENCON 94 charter is widely drafted, giving the vessel *“liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property.”* If a vessel is required to rescue distressed persons, it may need to make more than one deviation: first to

save them, then to take them to a port which may not be on the vessel's scheduled route. Then, in the worst case scenario, to a second port if the first one will not allow the rescued persons in, as has sometimes happened.

The time lost in deviating may lead to the deterioration of cargo or missing the cargo's intended market. And which is breaching the sale agreement of duty to deliver at a specific date. If the vessel spends more time deviating, there is a high risk that at least one of the deviations will not be covered by the requirement that deviation should be for the purpose of "saving life" per se.

3.2 DELAYS ON THE CHARTER PARTIES AGREEMENT

Another problem for commercial ships which rescue individuals is delay to the vessels. Delay inevitably causes financial loss to ship owners and charterers who have to bear the cost of the delays. When a ship picks up rescued individuals at sea it will have to divert to an unscheduled port of call. This will amount to delay and it will also require that the ship pays extra port charges. Secondly, and more significantly in commercial terms, there is the implicit cost of the lost time itself. The old cliché is very true in relation to ships: time is money (Davies 2003).

The daily time charter hire for a large container ship such as the *Tampa* is about USD 20,000 per day, depending on market conditions. Someone must bear the loss for every day the ship is delayed. Most commercial ships are operated under time charter parties. In accordance with the commercial laws, consequences of delay are borne either by the ship-owner or charterer depending the terms of the charter party. Time charter parties contain a clause, known as the "off-hire clause," which identifies the circumstances in which the charterer's obligation to pay hire for use of the ship shall be suspended. If the ship goes off hire by operation of this clause, the commercial cost of the delay is borne by the ship-owner, who ceases to receive hire payments from the charterer. If the ship remains on hire, the cost of the delay is borne by the charterer, who must continue to pay hire despite the fact that the ship has been delayed.

3.3 SEAWORTHINESS OF THE VESSEL

If there is a lack of equipment or a failure to have the necessary documentation on board, this could give rise to issues concerning the seaworthiness of the ship. An untrained crew that puts the ship in danger when assisting in the rescue could make that the ship was unseaworthy. This is not to say that the lack of relevant documentation in itself may make the ship unseaworthy. However, if search and rescue procedures are not documented, then an owner could have difficulty in proving that he exercised due diligence in relation to training of the crew. (Miller 2015)

3.4 LACK OF REMUNERATION

Another challenge faced by Commercial ships in rescue activities is the fact that there is currently no mechanism in place to ensure rescuers are compensated. The shipowners are left to foot the cost of rescue operations. This has made commercial vessels to be reluctant in rescue operation.

3.5 RISK OF BEING IN BREACH OF SAFETY CERTIFICATES

Ships are also at risk of being in breach of their safety certificates by taking on board more passengers than have been legally agreed upon. According to Andrew Linington, a spokesman for Nautilus, a maritime trade union, was of the opinion that “ a merchant ship operates with an average crew of 20.” Sometimes, the number of people to be rescued may be as many as hundreds of them, “*So if you go to the rescue of sometimes several hundred people, it can compromise the safety of the entire ship. There may be no accommodation for them, the ships are sailing with a minimum amount of food and there are not enough life-saving appliances.*” (Hughes 2015: 101)

3.6 LACK OF LEGAL FRAMEWORK FOR DISEMBARKATION

When the rescue duty was codified into various international treaties, corresponding duty of disembarkation was not codified in any instrument. (Sein and Cooper ,2006) According to UNHCR Report, the problem stems in part from the fact that disembarkation was “until recently” con-

sidered so obvious that it was not found necessary in any of the instruments pertaining to rescue at sea. (Miltner, 2006) The rescuing ship is not under any obligation to conduct them to their preferred destination but must offload them safely somewhere on dry land (Miller, 2015). Under international law, no state is obliged to allow ships carrying refugees or other passengers to disembark on its territory. There have been well-known historical cases in which such ships have been forced to sail for thousands of miles in order to find a port willing to allow them to anchor and offload their occupants. The SS St Louis, a German ship which in 1939 carried over 900 refugees from Nazi-occupied Europe, only to be refused entry by Cuba, the United States and Canada in succession. Returning to Europe, it was finally able to dock at Antwerp, and the passengers were distributed between the UK and (less safely) France, Belgium and the Netherlands.

This places the captain of a rescuing ship in dilemma, as Pugash explains:

“If he refuses to take the refugee on board, he will be violating a law that is rarely, if ever enforced; but he will also be neglecting a duty owed by all mankind to those in need. On the other hand, if he rescues the refugee, he may not be able to find a country willing to grant asylum and the country of origin may be unwilling to take the refugee back” (Miller, 2015).

3.7 LACK OF COOPERATION

Lack of cooperation amongst the states is also one of the challenges of rescue at sea. Australian authorities refused to permit the Norwegian freighter, the MV Tampa, to enter Australian waters. The Australian government contacted some other countries like Norway, New Zealand and Papua New Guinea which agreed to receive a number of migrants. This took weeks for all the countries to resolve. Thereby demonstrating the insufficiency of the International legal framework (Derrington & White, 2002). The episode sparked a political controversy in Australia and a diplomatic spat between Australia and Norway (Thomas 2011).

3.8 RELUCTANCE OF INDIVIDUALS TO BE ASSISTED

Migrants sometimes are reluctant to be assisted unless they were to be taken to a particular port where they anticipated favourable treatment. For example the story of the bulk carrier *CS Caprice* which rescued 500 people who were drifting north of Libya without a skipper. The individuals refused to be assisted unless the rescuing vessel takes them to Italy even though Malta was considered a place of safety.

3.9 CRIMINALIZATION OF RESCUERS

Commercial vessels fear being criminalized by states for carrying or disembarking irregular migrants (Gallagher & David, 2014). A number of rescuers have faced such criminalisation. The crews of two Tunisian fishing boats who rescued 44 drowning asylum seekers in the Mediterranean Sea in August 2007 were subsequently charged with supporting illegal migration by Italian authorities. Even though they were eventually acquitted, they were not compensated for the losses resulting from the lengthy trial. In addition, penalties imposed on ship masters add to their burden and can discourage them from fulfilling their humanitarian duty. There have been incidents of captains who did not respond to distress calls or who threw people overboard. In June 2005, a group of 27 people rescued by another Maersk ship, the *Clementine Maersk*, after a failed engine left them drifting helplessly in the Mediterranean for about a week, said that several other boats either ignored them altogether or promised to summon help which never materialized.

The challenges above clearly demonstrate the practical challenges masters and owners can face, despite the existence of a comprehensive international legal framework setting out the duties of both the rescuing ship and the RCCs.

4.0 CONCLUSION AND RECOMMENDATION

From the foregoing, it has been seen that the duty of commercial vessels to rescue individuals in perils at sea has been a long standing humanitarian, legal and moral obligation. However the challenges and perils enumerated

earlier have been the major problems hindering masters of commercial vessels from rescue operation. The following recommendations are hereby suggested.

In one or more of the maritime instruments, a duty can be imposed on rescuing vessels to disembark at the next port of call in conjunction with a duty on the coastal states to allow disembarkation. (Barnes, 2000:52) The disembarkation of rescued persons at the next port of call has been consistently advocated by the UNHCR Executive Committee. Although such advocacy is not formally binding, it is a sound indication of how such policy is likely to develop and may be regarded as soft law. Such an approach has the advantage of setting out clear obligations that are readily recognisable and practicable. It would also appear favourable to the flag state in that they can relinquish responsibility as soon as possible.

Regimes of offering temporary protection for migrant should be improved and possibly formalized. Temporary protection regimes are increasingly used as a means of dealing with the mass influxes of refugees, especially during conflict situations. (Fitzpatrick 2000) It involves the temporary admission of a person into a state and the provision of food and shelter in accordance with basic human rights provisions for an indeterminate but limited period of time. It is not a full and permanent asylum. It offers migrants immediate protection from danger to life and liberty and it is less burdensome on the host state.

Masters that engage in rescue operation should be compensated in order for more commercial vessels to be willing to engage in the rescue operation. They should not be penalized in any manner whatsoever for disembarking or attempting to disembark the persons.⁹² They should not be seen as part of the problem; rather, their actions in saving lives should be appreciated and supported by states.

When disembarkation proves difficult or when rescue persons claim international protection, shipping and/or insurance companies should promptly inform the International Maritime Organization (IMO), UNHCR and other relevant actors. This helps in finding an appropriate disembarkation solution.

Lastly, cases of refusal of disembarkation should be documented by shipping companies and statistics on incidents of stowaways and persons rescued should be reported to the IMO. This information can then be used by relevant intergovernmental organizations to better quantify the problem and devise solutions with the concerned States.

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book10. In Germany, for example, §2 of the Regulation concerning the Safety of Seafaring in conjunction with §323c of the Criminal Code, which foresees criminal sanctions for a failure to assist, are the relevant provisions transposing Art. 98 (1) UNCLOS.

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