

Legal Considerations for the Protection of Maritime Refugees

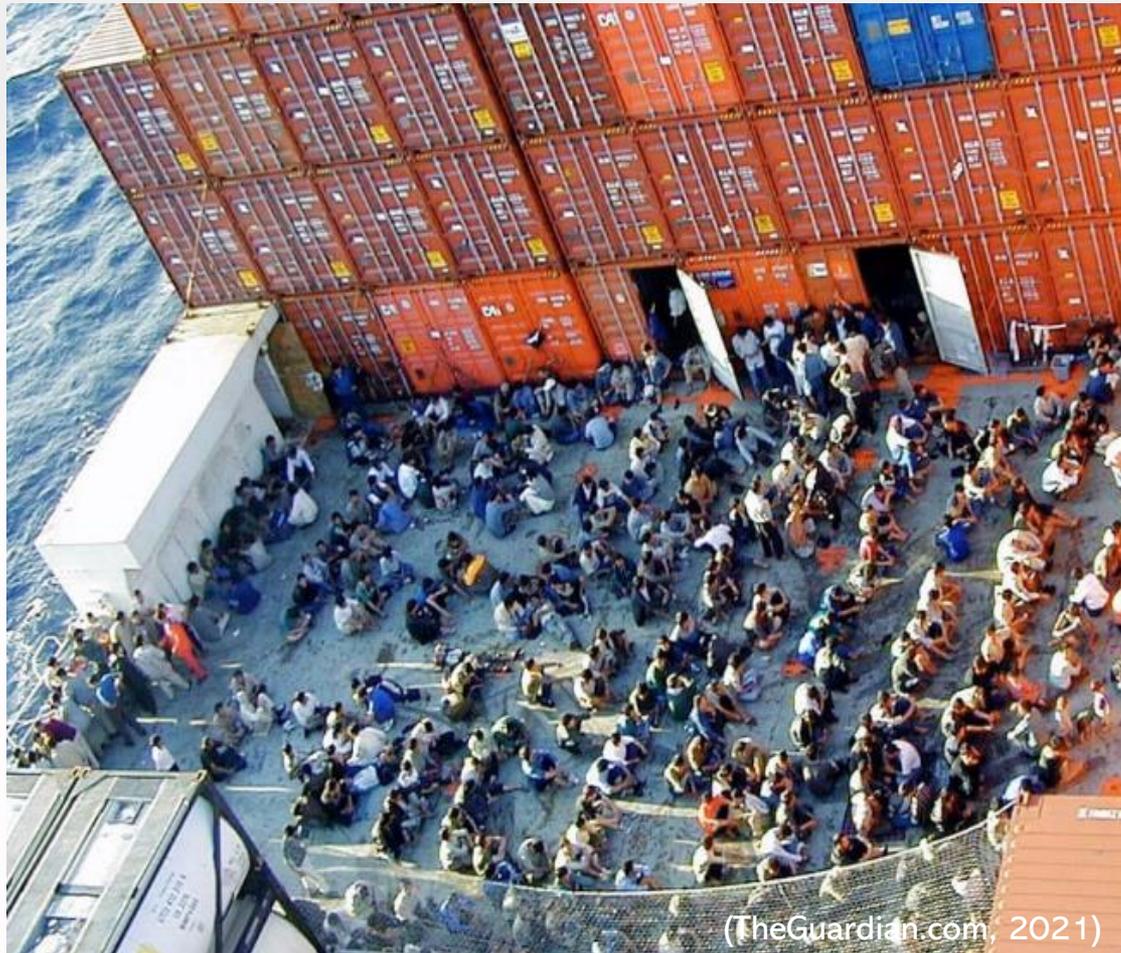
Team "Lifeguard"



Tampa Affair (2001)



Urgent need for readjustment of international laws & guidelines



(TheGuardian.com, 2021)

Rescued 400↑ asylum seekers

BUT denied entry into Australian waters, endangering both the crew and the rescued persons

Maersk Etienne Incident (2001)



Urgent need for readjustment of international laws & guidelines

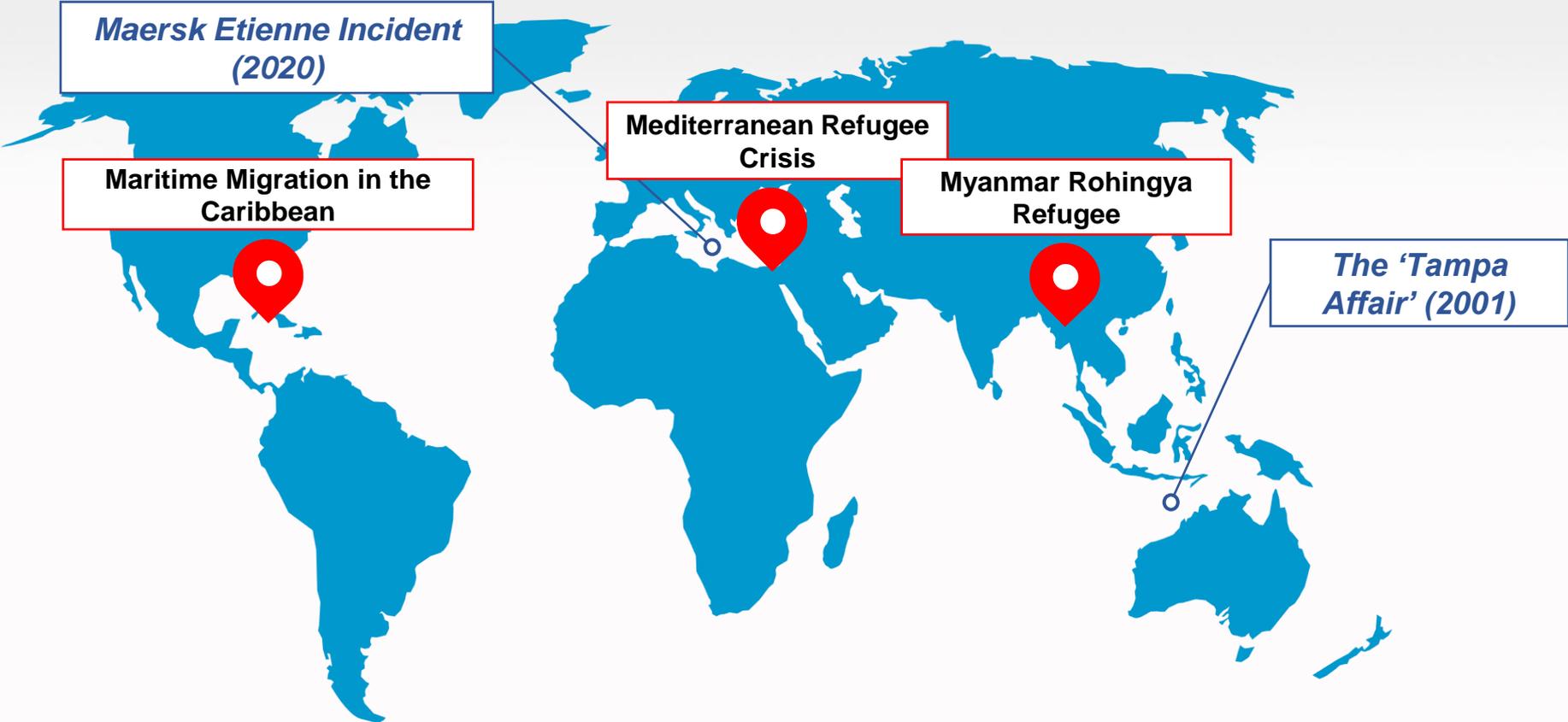


Denied entry to Italian,
Maltese, Libyan, and
Tunisian waters

&

Suffered \$1.7 million
in loss

Maritime Refugee Status Quo





Convention on the International Maritime Organization

PART I

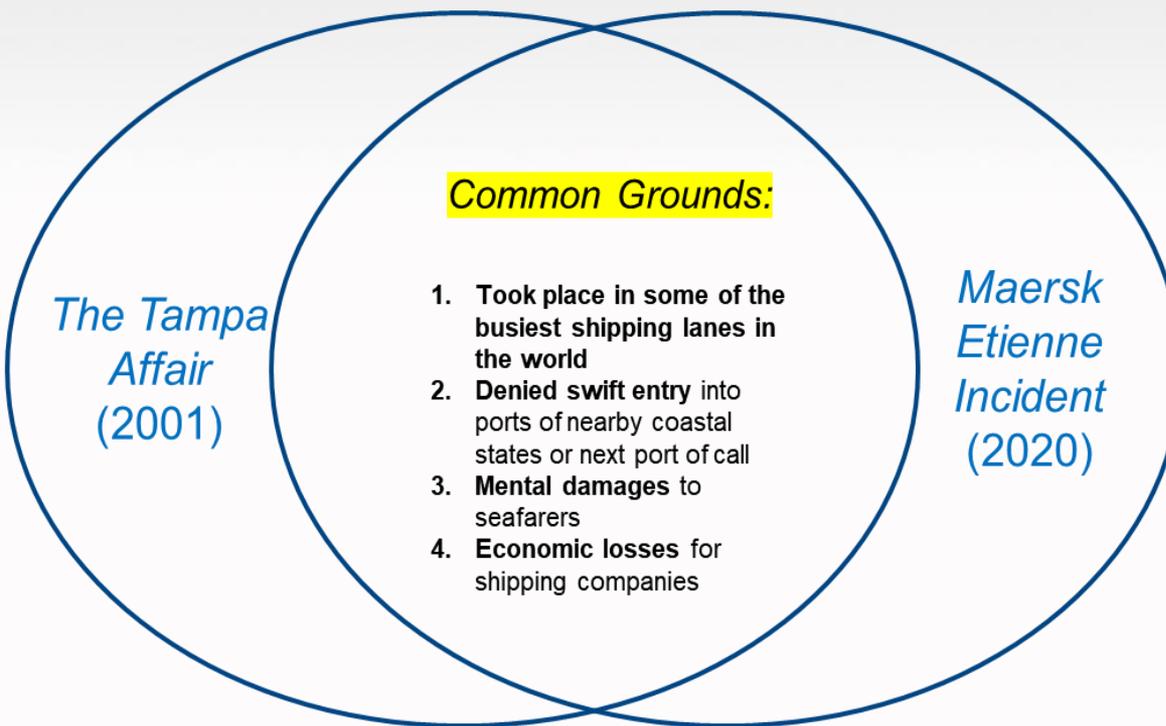
Article 1

The purposes of the organization are:

(a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from ships; and to deal with legal matters related to the purposes set out in this article.

(b) To encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;

(d) To provide for the consideration by the Organization of any matters concerning shipping that may be referred to it by any organ or specialized agency of the United Nations



Global Impact

1. **Commercial ships may hesitate to render assistance to persons** in distress, which is against the spirit of SOLAS and SAR
2. **Possible violations of International Human Rights Law** by coastal states
3. **Loss of lives** as a result of 1&2



SUMMARY:

the issue of maritime refugees affect **BOTH** the shipping industry and migrating individuals

IMO and the Protection of Maritime Refugees – Role of IMO



IMO's efforts on the issue of Maritime Refugees

•IMO Resolution A.920(22)

[Review of Safety Measures and Procedures for the Treatment of Persons rescued at sea]

•MSC.1/Circ.896/Rev.2

[Interim Measures for Combating Unsafe Practices Associated with the Trafficking, Smuggling or Transport of Migrants by Sea]

•MSC. 167(78)

[Guidelines on the Treatment of Persons Rescued At Sea]

•Global SAR Plan

•SAR & SOLAS

Inter-Agency Efforts within the UN

•2017 meetings hosted by the IMO concerning unsafe mixed migration by sea

•UNHCR-IMO Inter-Agency Group on Safety of Life at sea (see MSC/104/17 para 9.4)



Protection of Maritime Refugees – Impetus within the IMO Now



MSC 104/18

para 9.11 Consequently, while having noted **the support in principle for the draft resolution**, the Committee, taking into account the various views and suggestions (see paragraph 9.8), agreed to postpone further consideration of the matter to MSC 105 and invited Member States to submit comments to that session, with a view to finalizing the resolution then.

MSC 105/10 [Update on developments regarding mixed migration by sea: UNHCR led Inter-Agency Group on Safety of Life at Sea]

MSC 105/10/1 [Impacts on shipping (submitted by Denmark and Italy) : NOTE Annex (Draft Resolution)]

MSC 106/8 [Update on developments regarding unsafe mixed migration by sea: UNHCR led Inter-Agency Group on Safety of Life at Sea]

MSC 107/9 [Update on developments regarding mixed migration by sea: UNHCR led Inter-Agency Group on the protection of refugees and migrants moving by sea]

MSC 108/1 [Provisional Agenda] : Agenda 9 (Unsafe Mixed Migration by Sea)

MSC 105/10/1 :

Draft Resolution submitted by Denmark and Italy

MSC 105/10/1
Annex, page 2

1 CALLS ON Member States, acting in their respective capacities as flag States, coastal States responsible for the search and rescue region, port States, shipowners, captains of ships, seafarers, other relevant organizations, and other relevant stakeholders, to ensure safety at sea:

- .1 by acknowledging the need for **quick and effective cooperation** in all phases of a search and rescue operation, especially through the signing of search and rescue cooperation agreements respecting the SAR Convention.
- .2 by **minimizing the time survivors remain aboard the assisting ship,**
- .3 by acknowledging further that a **search and rescue operation has not been concluded before the rescued persons are disembarked in a place of safety,** according to the annex to the SAR Convention, chapter 1, paragraph 1.3.2 and/or chapter 3, paragraph 3.1.9, and
- .4 by promoting the cooperation between coastal Member States and their Rescue Coordination Centres (RCC) which are responsible over the Search and Rescue Regions (SRRs) and flag States of the ships involved in search and rescue operations in accordance with the obligations of the SOLAS and SAR Conventions.

Limitations of Discussions within the MSC



1. Need of Clarification

the focus was mainly on the emphasis of the duty of states to provide a 'place of safety' without further attempts to clarify what such duty specifically entails by international law

2. Need of Relevant Considerations

the scope of the discussion was within the context of SOLAS and SAR, which may not necessarily include all relevant considerations of international law

3. Need of Amendments of "the Scope"

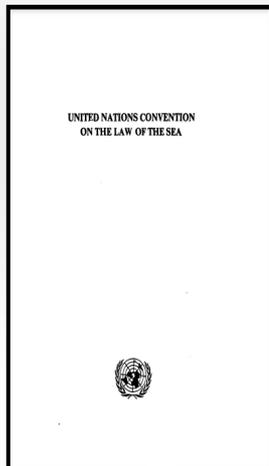
the scope of the discussion was concerning SAR operations in general, and does not encompass all aspects necessary to ensure the safety of maritime refugees



Calls for a
**HOLISTIC
APPROACH**

practical implementation based on thorough legal assessment of SOLAS and SAR, in light of UNCLOS and international law, is necessary to ensure the enforceability of said conventions, and the protection of maritime refugees by law

The Legal Provisions for the duty to render assistance at sea - 'Rescue'



UNCLOS

Art. 98 (Duty to render assistance)

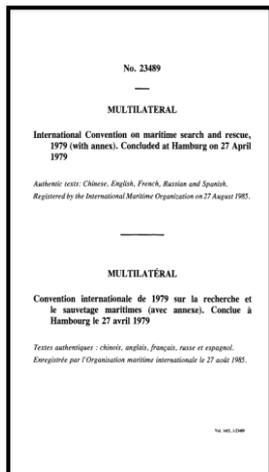
[1] Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) **to render assistance to any person found at sea in danger of being lost;**

SOLAS

Regulation V/33 (as amended Res.MSC.153(78))

[1] The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, **is bound to proceed with all speed to their assistance...**

[1-1] Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking onboard persons in distress at sea **are released from their obligations with minimum further deviation** from the ships' intended voyage...



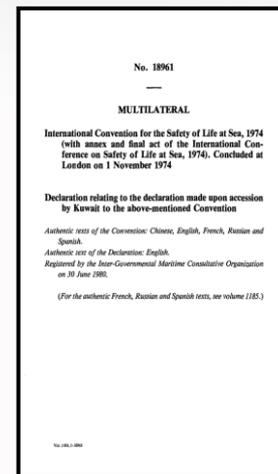
SAR

Chapter 2.1.10

'... ensure that **assistance [is] provided to any person in distress at sea** ... regardless of the nationality or status of such a person or the circumstances in which that person is found'

Chapter 1.3.2

'... provide for their initial medical or other needs, and deliver them to a **place of safety**'.



The Legal Provisions for the duty to render assistance at sea - 'Rescue'



Guidelines on the Treatment of Persons Rescued at Sea (MSC.167(78)) - Paragraph 6.12

Place of safety

6.12 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 considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination.

The Legal Provisions for the duty to render assistance at sea - 'Rescue'



'Place of Safety'

• Problems

- ✓ the mentioned Guideline fails to legally bind states;
- ✓ the term 'place of safety', by legal definition as it stands, is heavily dependent on the support and coordination of coastal states and the associated RCCs;
- ✓ the 'place of safety', as noted in paragraph 6.14 of the Guideline, may not be on land.

6.14 A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination.

Guidelines on the Treatment of Persons Rescued at Sea (MSC.167(78))
- Paragraph 6.14

• Effects

- ✓ Hesitation by ships to rescue
- ✓ Resultant potential for loss of lives at sea

The Legal Provisions for the practice of 'Interception'



UNHCR EXCOM (EC/50/SC/CPR.17), 9 June 2000

10. **An internationally accepted definition of interception does not exist**... For the purpose of this paper, interception is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.

UNHCR, "Conclusion adopted by the Executive Committee on international Protection of Refugees" (2003)

... **interception** is one of the measures employed by States to:

- i. **prevent embarkation of persons** on an international journey;
- ii. **prevent further onward international travel** by persons who have commenced their journey; or
- iii. **assert control of vessels** where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;

Currently observed examples of interception



US – bilateral treaties with neighbouring states to extend US maritime operations beyond US maritime zones

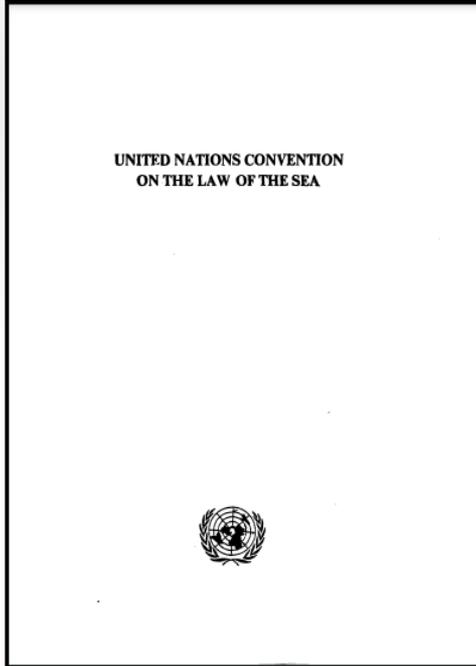


Australia – regional cooperation arrangements not based on bilateral treaties, 'tow-back' tactics



EU – Frontex (European Agency for the Management of External Bordes) operations and bilateral agreements

The Legal Provisions for the practice of 'Interception'



UNCLOS

Article 19 (Meaning of Innocent Passage)

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

Article 110 (Right of Visit)

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in the slave trade;
- (b) the ship is without nationality; or

Problems

- The term 'interception' is entirely open for interpretation, allowing for an extenuating scope of state practice.
- Not all state practices may guarantee the due process of law or other processes and rights as provided for by International Human Rights Law and Refugee Law.



VCLT

Vienna Convention
on the Law of Treaties (1969)
Article 31
(General Rule of Interpretation)

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.



Problem

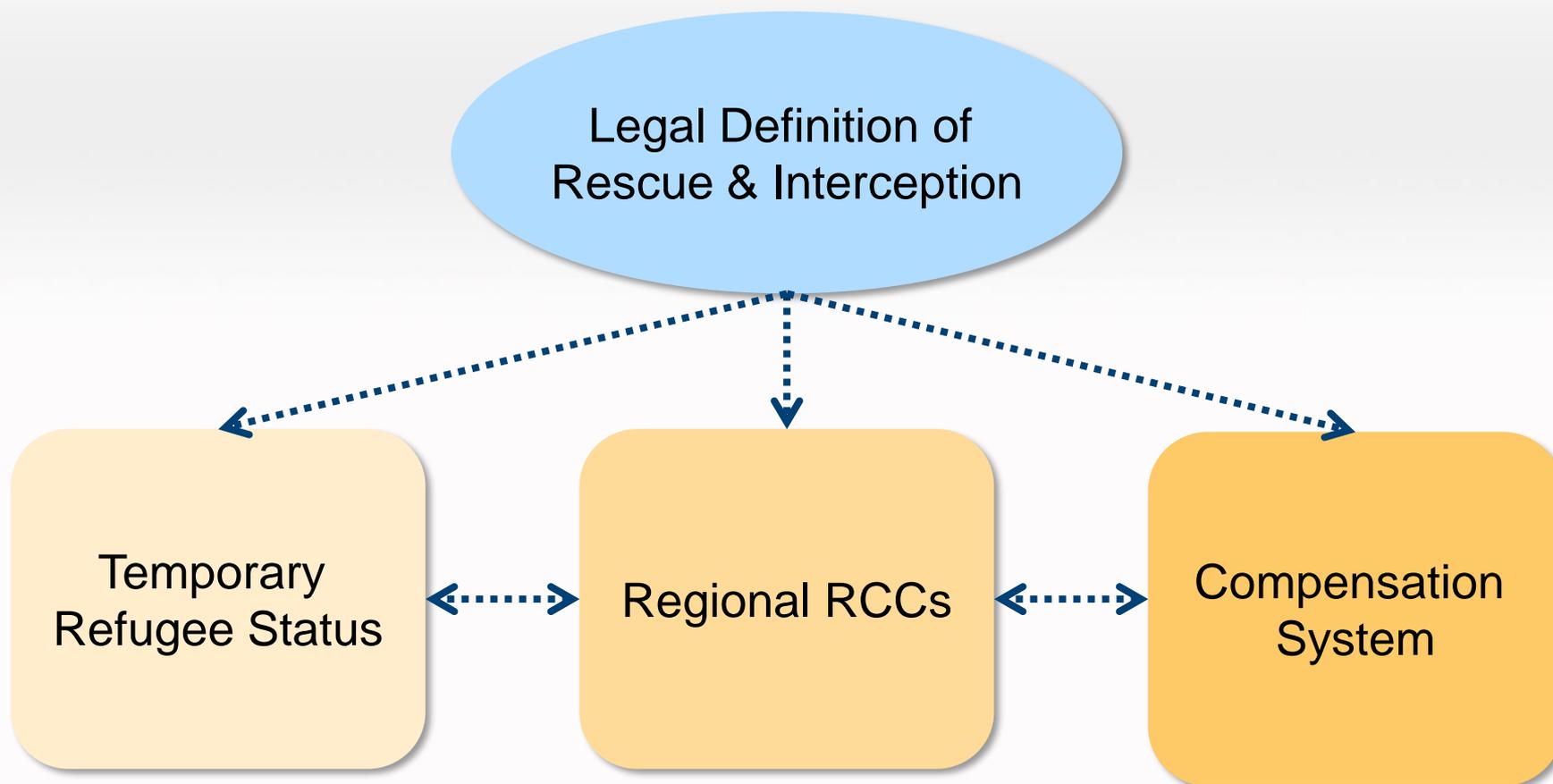
Interpretive guidelines, sufficient?

- UNHCR EXCOM Documents
 - IMO Guidelines on the Treatment of Rescued Persons at sea
- Unbinding in nature – state practice is so diverse that it is unlikely to see international customary law has formed



Solution

1. ~~New Treaty~~
2. **Amendments**



PROTECTION OF HUMAN RIGHTS

→ Amendments to SAR and SOLAS



3-Step Approach

3	LEG-MSC Joint Working Group		Drafting of Resolution for Amendments to the SOLAS and SAR Convention
2	LEG-MSC Joint Working Group	IMO-UNHCR Inter-Agency Group	Drafting of Interpretative Guidelines - 'place of safety', 'interception'
1	LEG		Examination of the possible interpretations of the terms 'rescue' and 'interception'



Overview	Review of SOLAS & SAR, Considerations of other branches of international law
SD / OW	SD 7.1 Unified interpretation of provisions of IMO safety, security, environment, facilitation, liability and compensation-related conventions (Continuous, MSC/MEPC/FAL/LEG) OW 5 Provide advice and guidance on issues brought to the Committee in connection with implementation of IMO instruments (Annual, LEG) <i>A.1149(32)</i>
Discussion	<ul style="list-style-type: none">• MSC 105/101 agenda on unsafe mixed migration by sea• Annex of MSC 106/8 the need for provisions of SOLAS and SAR to be interpreted in light of international law• Provisional Agenda for MSC 108/1 agenda of unsafe mixed migration by sea

Approach - Step 1



1. REQUESTS Member States and non-governmental organizations to submit their current state practice and governmental guidelines concerning the matter of maritime refugees.
2. REQUESTS Member States to send a report on the implementation status of SOLAS and SAR conventions.
3. CALLS UPON Member States to participate in identifying legal problems that may hinder the sound implementation of SOLAS and SAR conventions and the protection of persons at sea in light of UNCLOS and other branches of international law.
4. AGREES to review SOLAS and SAR conventions for matters related to the issue of maritime refugees, with special considerations of other branches of international law under which many Member States are bound.

- Annex 1

Approach - Step 2



THE MARITIME SAFETY COMMITTEE OF THE INTERNATIONAL MARITIME ORGANIZATION
AND THE LEGAL COMMITTEE OF THE INTERNATIONAL MARITIME ORGANIZATION

Overview	<ul style="list-style-type: none">- drafting of Additional Guidelines by MSC-LEG Joint Working Group with regards to the matters of SAR operations and state practice of interception- considering the reports of the UNHCR led Inter-Agency Group on the Safety of life at sea
SD / OW	<p>SD 7.1 Unified interpretation of provisions of IMO safety, security, environment, facilitation, liability and compensation-related conventions (Continuous, MSC/MEPC/FAL/LEG)</p> <p>OW 5 Provide advice and guidance on issues brought to the Committee in connection with implementation of IMO instruments (Annual, LEG) A.1149(32)</p>
Discussion	<ul style="list-style-type: none">• MSC 167/78 Guidelines on the Treatment of Persons Rescued at Sea



'Place of Safety'

- **Definition**

'Place of safety' is to be interpreted, dependent on the circumstances aboard the assisting ship, as any of the following:

- 2.1 the next port of call;
- 2.2 the closest coastal state port;
- 2.3 other land territory designated and coordinated by the RCC of the SAR region.

- **Not to be considered**

- 3.1 the endangering of the survivor's safety of life and the failure to meet basic human needs;
- 3.2 the endangering of the lives and freedoms of those alleging well-founded fear of persecution, in accordance with the principle of non-refoulement;
- 3.3 the inability of rescued persons to access means of making transportation arrangements for the persons' next or final location.

(Annex 2-1)



'Interception'

• Definition

'Interception' is to be interpreted as all measures applied by a State in their territorial waters or contiguous zones, **in order to prevent, interrupt or stop the movement of persons** without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination, provided that these measures:

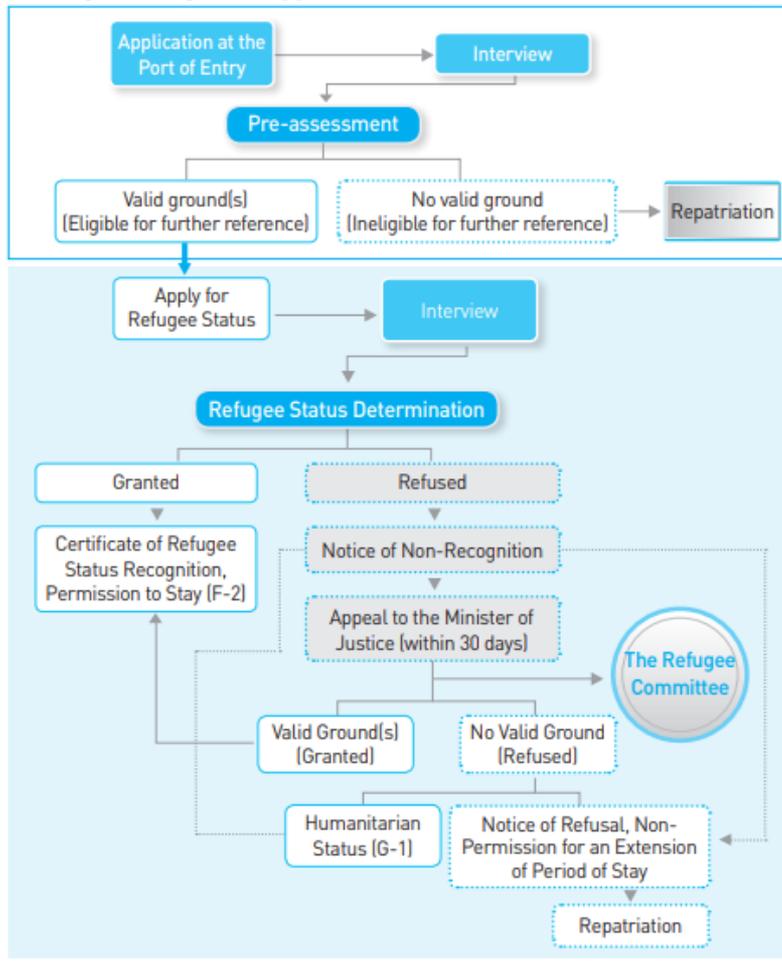
- 6.1 are conducted by military vessels or other vessels empowered by the state to perform the practice of interception;
- 6.2 have, as its constituent part, a **screening process** by an official who shall assess the situation for any illegal activities;
- 6.3 have, as its constituent part, a process whereby an official may assign **temporary refugee status** to asylum-seekers, and ensure their referral to assessment at the intercepting state;
- 6.4 do not occur against vessels performing or is subject to rescue operations as coordinated by RCCs, without prejudice to provisions under UNCLOS.

(Annex 2-1)

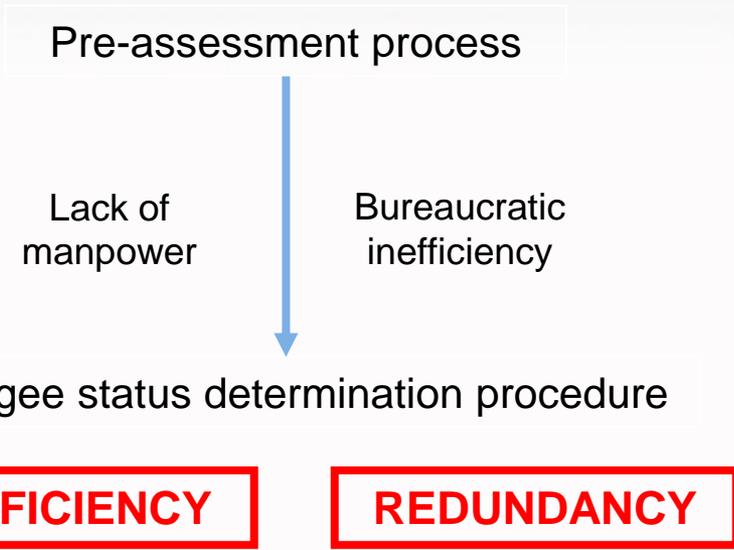
Approach - Step 2



<Refugee Recognition Application and Procedures at a Port of Entry>



<CURRENT SCREENING PROCESS >



Approach - Step 3



THE MARITIME SAFETY COMMITTEE OF THE INTERNATIONAL MARITIME ORGANIZATION
AND THE LEGAL COMMITTEE OF THE INTERNATIONAL MARITIME ORGANIZATION

Overview	<ul style="list-style-type: none">- the drafting of amendments to SOLAS and SAR conventions for the consolidation of works resulting from step one and step two.
SD / OW	<p>SD 5.13 IMO's contribution to addressing unsafe mixed migration by sea (2022, FAL/LEG/MSC) A.1149(32)</p> <p>OW 9 Cooperate with other international bodies on matters of mutual interest, as well as provide relevant input/guidance (2023, Assembly) A.1149(32)</p>
Discussion	<ul style="list-style-type: none">- Annex of the SAR Convention, chapter 2, paragraph 2.3.1- SOLAS Convention regulation 15, chapter 3, paragraph 3.1.6.

Approach - Step 3



Necessity of “temporary refugee status”

BEARING IN MIND that maritime refugees are especially vulnerable to unforeseen risks, as they are not provided with sufficient protection under conventions of SOLAS and SAR,

BEARING ALSO IN MIND the necessity of an integrated control rescue system operated by the IMO, respecting the difficulty to accommodate the growing numbers of maritime refugees,

Necessity of “Regional RCCs”

BEARING FURTHER IN MIND the necessity of providing reparation to shipowners and shipping companies in light of the challenges faced by shipmasters when rescuing maritime refugees, which often result in significant expenses and potential profit loss for shipowners and shipping companies due to the requirements of seeking a place of safety and shipping delays,

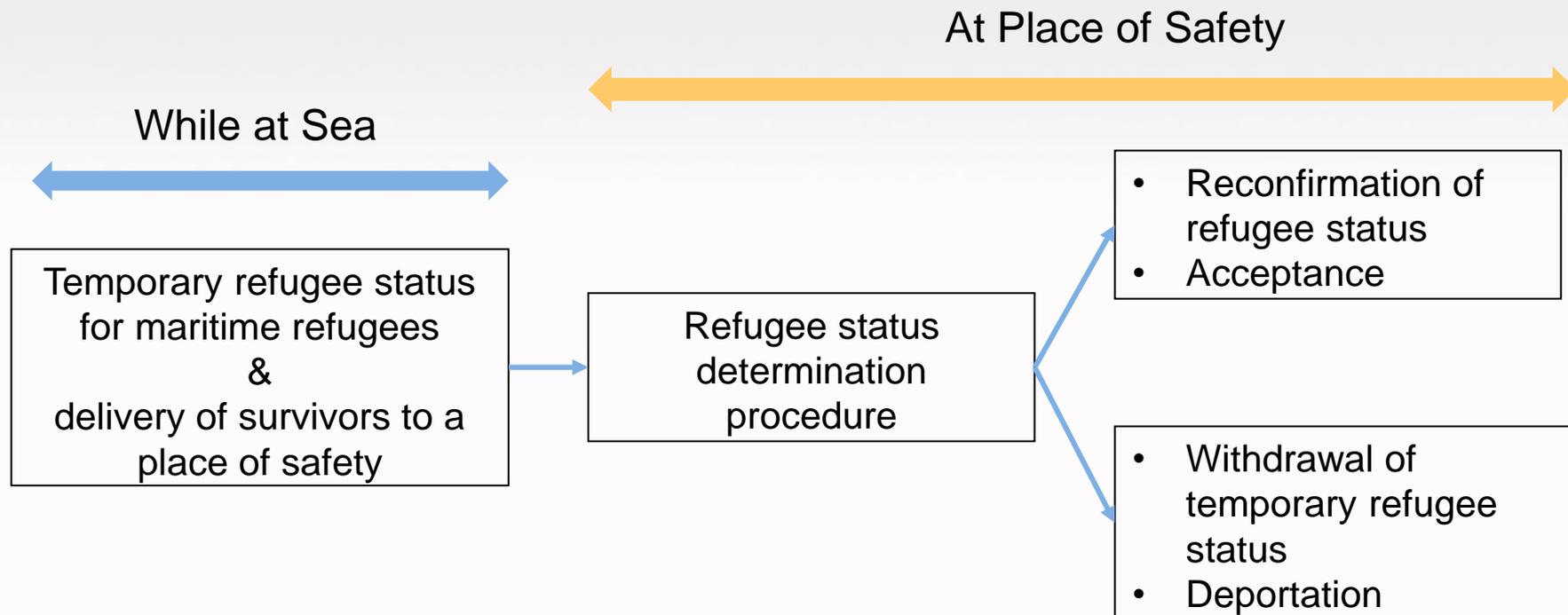
Necessity of “Reparation System”

- Annex 3

Approach - Step 3



Suggestion – “Temporary Refugee Status”

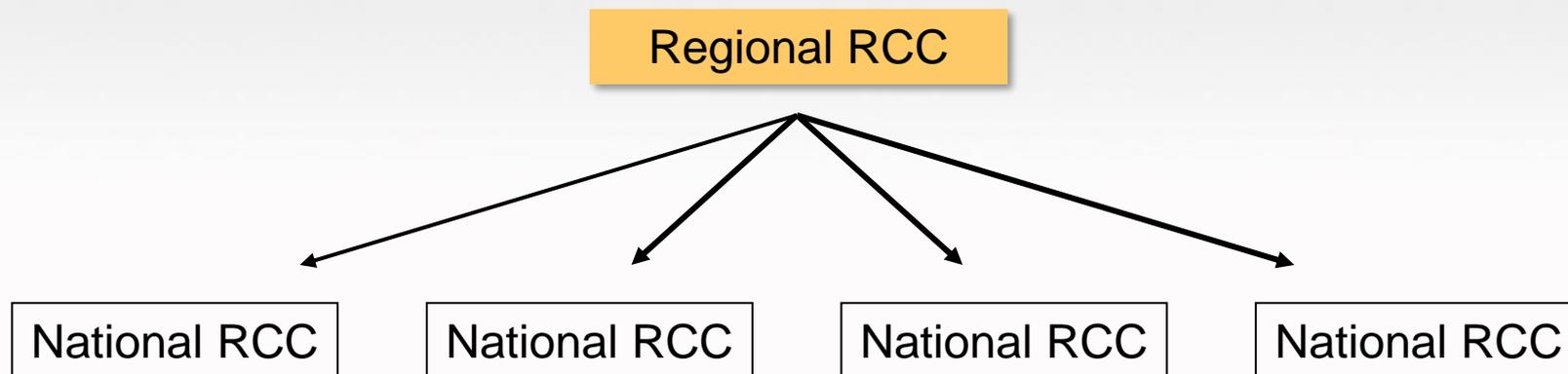


Expectation

- Confer maritime refugees with due process rights on the high seas.
- Open doors to various entitlements reserved for formally recognized refugees.



Suggestion – “Regional Rescue Coordination Centers (RCCs)”



Roles of Regional RCCs

- Receive reports from RCCs in each country
- Assess region’s capacity for refugee acceptance
- Designate host country to receive refugees
- Report IMO on the status of maritime refugee acceptance

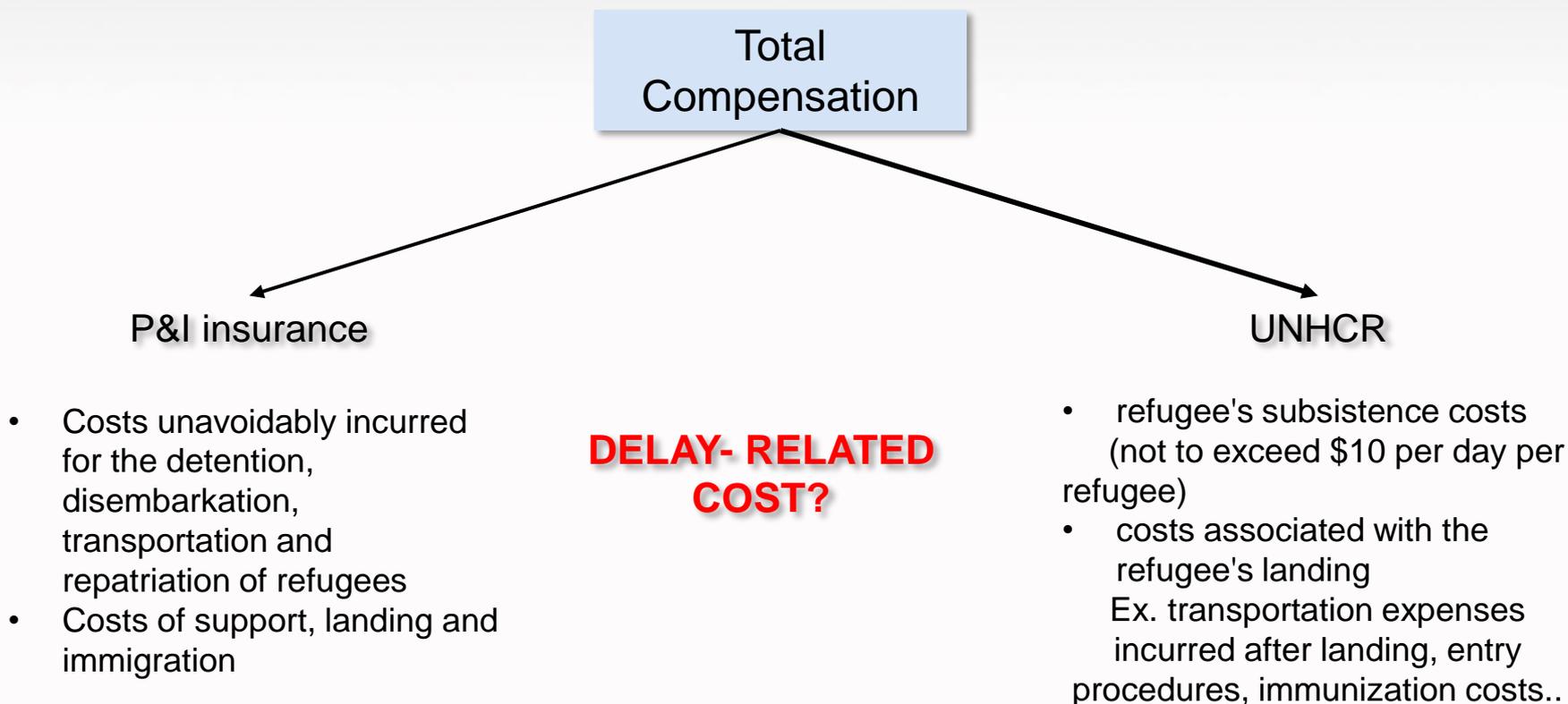


- 3 REQUESTS Member States to consider the establishment of **Regional RCCs**, to perform the function of:
 - 3.1 collecting data on maritime refugees in distress;
 - 3.2 monitoring national refugee acceptance rates;
 - 3.3 facilitating the coordination and assignment of the duty to disembark;
 - 3.4 promoting the unwavering fulfillment of the duty to disembark through collaborative efforts among local RCCs.

- Annex 3



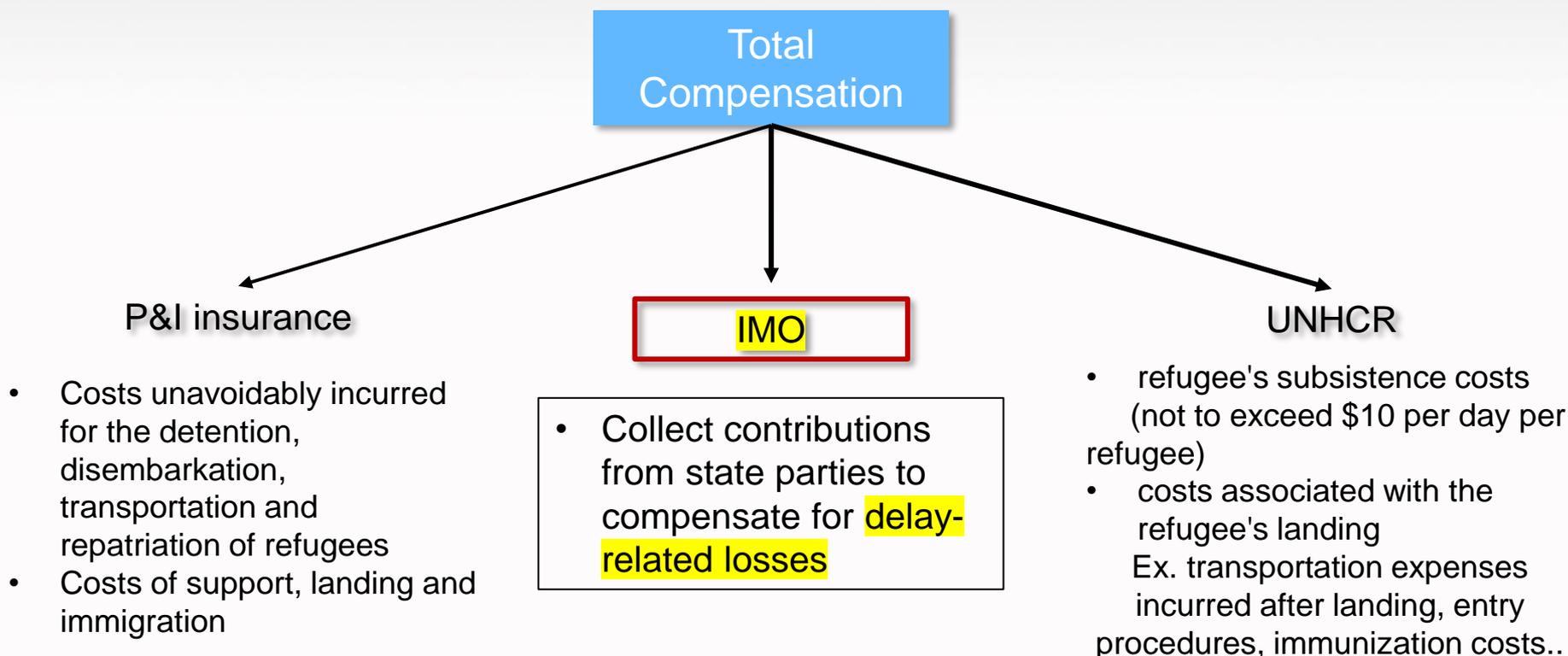
Status Quo – “Reparation System”



Approach - Step 3



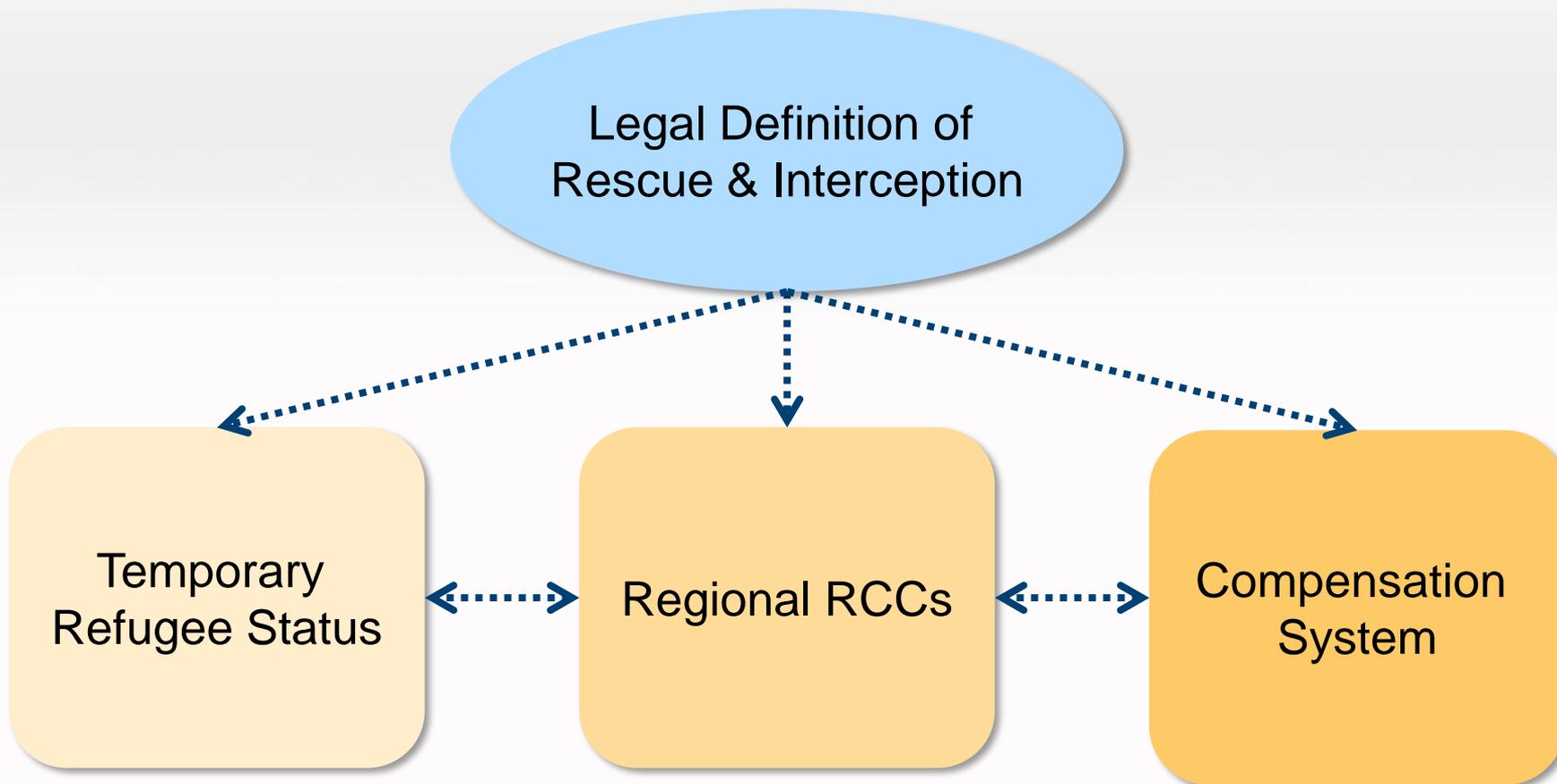
Suggestion – “Reparation System”





- 4 INVITES Member States to acknowledge the **necessity for a compensation instrument** for ships which are involved in SAR operations and suffer tremendous economic losses due to delays and depreciations despite their good intentions.

- Annex 3



PROTECTION OF HUMAN RIGHTS

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Do You Have Any Questions?

THANK YOU VERY MUCH!