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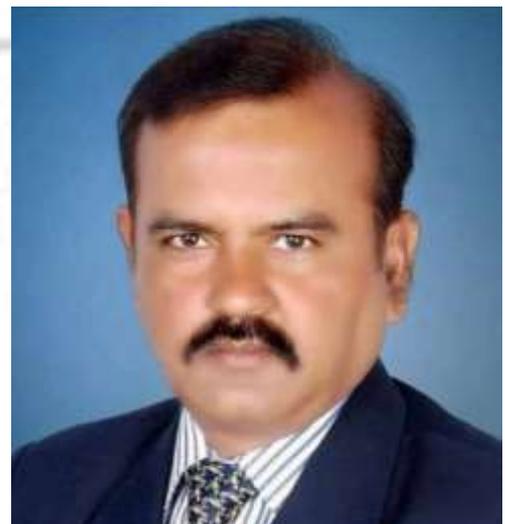
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Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

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Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.



Dr. Rinu Saraswat

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E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CONFLUENCE OF RIGHT TO BE RESCUED AT HIGH SEAS AND CRITICAL MARITIME INFRASTRUCTURE OF INDIA

AUTHORED BY - DIYA MARY JO

ABSTRACT:

International law regime is never out of its dependence on the terms of relations between states. A system of fluctuating power dynamics demands an extensive categorisation of the stakeholders, which is often hunched to the first-world and third world denominations. The right to be rescued from distress at sea is the focal point of this article as it denotes the beginning of the intrusion of human right into maritime law. The article proposes to move out of the uniform standards placed by the international organisations on nations and puts forth a need to identify the varied abilities and the added difficulties posed by the neighbourhood conditions of each country. However, is not standing in defiance to the practical applications and utility of the long-standing norms and standards. The article identifies the need for the provisions of international conventions to be exhaustive and to reduce the subjective discretion in complying with the correlative of the right which is the duty to render assistance. The same has been earned through a doctrinal method of research, navigating mainly with the help of scholarly articles as the scope of primary data collection deviates the sole aim of the article. The critical approach taken by the article is mainly dealing with the issue in the pursuit of duty rather than on rights perspective as the effect of the enforcement of the right is more profound on the nation states whose state sovereignty cannot be compromised. An overhaul of the legal framework is governing the arena is not the only recommendatory remark by the article rather it points to a reconsideration right from the state-to-state interactions. The two-level recommendations drifting out from the paper commands a complete review of the current exiting legal framework which in turn is seen as the point of confusion in the enforcement of the right to be rescued.

Keywords: Right to be Rescued, Marine Security, Duty to render assistance, UNCLOS, SAR, Maritime Infrastructure

INTRODUCTION:

Convenience in regulating the world affairs is the much-anticipated grail for international law regime. However, just a world map can portray the ocean of mitigating factors to construct a system of convenience coupled with the legitimacy. The word convenience roars throughout this article over the usual features of law regimes and the reason for the same is melted down to the everlasting cry for recognition of third world countries and an overhaul of the powerplay. An extensive critical approach is employed in the article, to account more for the social and political reasons for the current state of affairs in the global front with the legal framework as the master to hold the global actions accountable. A biased convenience is indispensable to be researched on, when dealing with the most ancient and convenient method of globalisation which was the sea, where routes of international trade and commerce first navigated. Therefore, any system working to regulate and reform the same, calls for the determination of jurisprudence behind the rights enumerated therein and then the same convenience of some selected world powers or to be specific states, should surpass meticulous tests of under-inclusiveness and over-inclusiveness. With this line of thought, the article in its essence is an attempt to define the frontiers of the right to be rescued at high seas for India, with the critical maritime infrastructure of the country as the compass for the same and to answer what hurdles the first-world convenience has posed on to it to immunise itself from claims of human rights violation and state responsibility. Again, a mere statutory analysis is not the sole area of work in this regard rather it is largely addressing the political questions and the global power structure that aims a single arrow to all states but which later ruptures into a bunch of knives to cut off each state in a different modus operandi.

Right to be rescued through the lens of Hohfeldian and O'Neills theory of Rights:

The recognition of a right to be rescued at the high seas is well backed by international conventions and statutes which are widely recognised by the states. Therefore, the focus is now tilted to the difficulties in expanding on the elements of the right which are crucial in imposing the duty of enforcement and the benefit to be availed by the rights holder. The correlative of a right in the Hohfeldian analysis is the duty to rescue, which adds on to the complexity of an equitable distribution of such duty when duty holders are many and with different facilities and economic conditions in the background. The scholarly attention to the right to be rescued is usually hooked to the notion that there exists a general obligation on the states to render assistance to the persons distressed at the sea and this same analogy is formulated into Article

98 of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS)¹, this widespread notion was first recognised by Oxman². A *sui generis theory* is yielded from Hohfeldian analysis which is a stratum for analysing international legal relations.³ A logical correlative relation is crucial in the analysis of the quantum in which differently abled duty holders should be held obliged. A simple common logic can bring out the point as the fact that someone is in distress at the sea itself implies that without some kind of assistance, one cannot get out of the distress, at the same time the vessels which are employed or entrusted with national security and commercial interests cannot be tagged as the watch dogs to look and help those at distress. This further complicates the need for defining the limits as to enumerate an exhaustive definition for the cases in which a customary obligation binds each vessel in the seas. Keeping the same in a global perspective, the convenience of the still first world countries stained the global standards of the duty holder. In such a paradigm this article tends to demand a further split of the Hohfeldian notion of duty holder to achieve a perfect inclusion which is in a generic sense dealt by the most notable objection to Hohfeldian analysis put forth by Onora O'Neill. Specification of duty holders was submerged in the redefining their relation between right holder and duty bearer, thus O'Neill's theory demands and articulates the identification of specific duty bearers. When bringing a right to be rescued in a global framework such a specification can even turn into anecdotes of powerplay where the already struggling countries are granted with additional burden. The article however also takes a deviation from her theory as it bases the existence of a right on the condition of specification of duty bearers being fulfilled, which directly points to the requirement that rights should be claimable. Such a formulation hampers the growing influence of international human rights in the field of maritime law. The nuanced understanding of a right beyond a formalistic concept and turning it into one of a wide scope wherein the assumption that a human right is important, legislating into an enforceable legal right as argued by Amartya Sen is a parallel which this article seeks to incorporate into the maritime law regime. Therefore, a broader understanding of the duty bearers and their assessment in terms of their position in the developed and developing categorisation is the claim put forth by the article.⁴

¹ United Nations Convention on the Law of the Sea, Dec.10, 1982, 1833 U.N.T.S 397.

² B.H. Oxman, 'Human Rights and the United Nations convention on the Law of the Sea', 36 Columbia Journal of Transnational Law 399,414 (1997).

³ Aphrodite Papa Christodoulou, 'The Recognition of a Right to be Rescued at Sea in International Law', 35 (2) Leiden Journal of International Law 337, at 342 (2022).

⁴ A.Sen, 'Elements of a Theory of Human Rights', 32(4), Philosophy and Public Affairs 345.

Right to be Rescued: Scope and Enforcement:

Traditional norms of seafaring are now almost past the time of getting incorporated into statutory frameworks and therefore provisions of the various international treaties define the boundaries of the duty imposed on states to render assistance to persons at distress in the sea. The International Convention on Maritime Search and Rescue 1979 (SAR), International Convention for the Safety of Life at Sea, 1974 (SOLAS) and International Convention on Salvage, 1989 deal with the right to be rescued in the pursuit of Duty to render assistance. These conventions with states themselves both being the parties and duty bearers hold a significant position in deciding what to be applied and what not.

Article 98(1) UNCLOS is the primary provision and the one which is the widely accepted by the states. It begins as: (1) Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

- (a) to render assistance to any person found at sea in danger of being lost;
- (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; ...⁵

The provision straight away is a definition of the right in terms of duty and includes both public and private vessels. However, it is not exhaustive as to what type of distress and what level of serious danger to the ship is recognised by it which further makes it a discretionary power of the master of the ship. Chapter V Regulation 33 is also the same description in a different statute⁶. The convenience aspect earlier mentioned technically plays here a role as the master of the ship is nothing more than a representative of the flag state where the interests of the state will be marking his professional margins. This aspect is crucial when the provision addresses the sea as general and not as demarcated marine regions where state interests float over, especially when a developing country and developed country collides with their personal interests. Difficulties in maritime governance often conveniently place it a vacuum of national jurisdictions but this is blind to the notion that the duty bearers in the case of right is literally is treated as territories of the flag state, where crew is the nationals of a state and not stateless nomads.

The promotion of SAR services is added to the UNCLOS provision which validates the notion

⁵ United Nations Convention on the Law of the Sea, Dec.10, 1982, 1833 U.N.T.S 397, Art.98(1).

⁶ International Convention for the Safety of Life at Sea, 1974, Chapter V Reg. 33(1).

that the duty to render assistance is a positive duty on the states as a non-action from the flag ship state is narrow when compared to the positive acts to be rendered to the person at distress. Article 3(9)(1) of the SAR Convention⁷ is more concentrated on the state rather than the vessel sailing in the waters, which obliges the state to assist in rescue operations and demarcated SAR regions for each country wherein the rescue operations are more or less to be a service, which the state is obliged to provide. This demarcation creates a uniform level of facilities and systems to be placed to deal with the claims of duty to render assistance, such a uniform level is a point of contention as the coastlines are not something which was acquired by those states which struggle with their national issues. Taking the State of Somalia into consideration, a country with coastline running over 3,330 kilometres⁸ with more than 55% of the population beyond poverty line⁹ is obliged to follow the same standards as the United States with a GDP of more than 20 trillion dollars¹⁰, where claims of duty to render assistance is dealt on the SAR framework where these factors are never raised. The position is not improved with respect to the countries struggling midway, such as India. Another significant point of contention is how the SAR convention also invites to conclude bilateral SAR agreements with neighbouring countries which in general sense is an effective step towards the actual enforcement of right to be rescued but when placed in the global framework it is nearly impossible for the countries with hostile neighbours such as in the case of India.

The analysis of the provisions yields that these are not flawed in its entirety as law is not the ultimate solution to the issue rather it is the requirement for a varied application of the limits, rights and liabilities which it places on the states. Hence, the choice of a nation like India in almost in the centre of the first-world and third-world countries with a hostile neighbourhood is apt as it is convenient to formulate systems and practices for entities at the two extreme ends but not for the ones which are in the journey of reaching wither of the ends. Such a perspective, demands an extensive categorisation of factors which contribute or mitigate the possible applications of right to be rescued and the article also is inclined to the need for the same.

Critical Maritime Infrastructure of India:

The maritime infrastructure of India is in the hands of the Indian Coast Guard, the maritime

⁷ International Convention on Maritime Search and Rescue, 1979, Art. 3 (9) (1).

⁸ Somalia, Interactive Country Fiches, <https://dicf.unepgrid.ch/somalia> (last visited Oct 1, 2024).

⁹ Overview, WORLD BANK, (Oct 2, 2024, 10:00 PM) <https://www.worldbank.org/en/country/somalia/overview>

¹⁰ World GDP Ranking 2024 List, (Oct 2, 2024, 10:05 PM) <https://cleartax.in/s/world-gdp-ranking-list> (last visited Oct 2, 2024).

law enforcement and search rescue agency of India and is governed by the Coast Guard act of 1978. The National Maritime and Research Manual details on the SAR and National agencies concerned with the obligations related to rescue and search operations. The National Search and Rescue Board was constituted with following composition vide Ministry of Shipping, GOI, resolution number SW- MIC/ 27/ 77/MD/AG dated 28 Jan 2002 with the Director General Coast Guard as the National Maritime Search and Rescue Coordinating Authority (NMSARCA)¹¹. The SAR board in association with other agencies such as the Indian Navy, Air force, Shipping Corporation carries out the SAR operations. Further, SRR areas within which the SAR services are provided are mainly controlled regulated by the three Maritime Rescue Coordination Centres located in Mumbai, Chennai and Port Blair. In addition to this, recently in August 2024, India and Sri Lanka launched a Maritime Rescue and Coordination centre which is to play a crucial role in the double interest Sri Lanka has with China and India at the same time.¹²

Together with the SAGAR initiative, the Maritime Vision 2030 is the latest iteration of the government's maritime development roadmap which outlines a 10-year blueprint for refurbishing the maritime sector and comprises over 150 initiatives across ports, shipping and waterways aimed at policy enhancements for augmenting efficiency¹³. The amount allotted to the Coast Guard in BE 2024–25 is Rs 7,651.8 crores, which is 6.3% more than that in BE 2023–24. Over 54% of the overall allocations are made up of revenue allocations. Since 2015, the Coast Guard's budget has grown at a cumulative annual growth rate (CAGR) of 9.6%, with average annual increase of 12.8%¹⁴.

Maritime Terrorism: a complex narrative in the Background of Duty to Render assistance

As per the latest information available 158 lives were saved in 70 missions conducted by the Indian coast guard. The Rescue Operation conducted in the month of August, 2022 wherein 32 Bangladeshi fisherman at sea were saved who was safely repatriated to Bangladesh. The factors of disembarkation and repatriation is not simple when it comes to India's other

¹¹ National Maritime Search and Rescue Board, National Maritime and Research Manual, 2010

¹² EAM Jaishankar, Sri Lankan President Wickremesinghe formally commission Maritime Rescue Coordination Centre | World News - Hindustan Times, (Oct 9, 2024, 10:30 pm). <https://www.hindustantimes.com/world-news/eam-jaishankar-sri-lanka-president-wickremesinghe-formally-commission-maritime-rescue-coordination-centre-101718873803658.html>

¹³ Maritime India: The Quest for a Steadfast Identity, ORFONLINE.ORG, (Oct 9, 2024) <https://www.orfonline.org/research/maritime-india-the-quest-for-a-steadfast-identity>.

¹⁴ Defence Budget 2024-25: Trend Analysis, Manohar Parrikar Institute for Defence Studies and Analyses, (Oct 9, 2024) <https://idsa.in/issuebrief/Defence-Budget-2024-25-SSC-Rajiv-ASingh-160224>.

neighbours as India was never insulated from the vices of maritime terrorism. The 26/11 attacks in Mumbai were one such incident of great national importance. The terrorists first landed on the Mumbai Sea shore and conducted coordinated attacks inflicting huge casualties¹⁵. This leads to the further analysis of the stage in rescue operations where relation among states play a huge role, which is the stage of disembarkation. Chapter 1.3.2 of the SAR Convention in fact adds this corollary to the term 'rescue' where the duty to take people to places of safety is inherently connected to it¹⁶. While the only exception to duty to rescue given to the flag states is of the necessity of not endangering their vessels, crew and passengers. Commercial considerations, in this regard might play a huge role as rescue operations involve financial expenditures and a diversion in the routes of the commercial vessel to disembark the rescued persons. These concerns are amplified in the wordings of the Regulation 33.1 of the SOLAS Convention¹⁷ as the terms 'unreasonable' and 'unnecessary' is a subjective metrics to the exception. The instances of vessels waving off the duty to render assistance to avoid the economic loss is not rare¹⁸. The effect of the possible economic and security losses of a country cannot be measured unless each duty bearer is analysed with a separate set of economic standards. The 3 billion container ship would be of great importance to a country like India when compared to other first world countries. This economic difference is bound to be addressed in the SAR guidelines, as the claims of state responsibility differ in their levels of impact on the state.

Further the counter terrorism framework in maritime law is blind to the duty to render assistance as it more concentrated on providing global safety and security standards and therefore it shows an obvious blindness to the highly varied abilities and capabilities of such duty bearers. Such a frameworks is bound to address the additional aspects of such as the drug smuggling and piracy, these are often sources of terrorist linkages and findings. The NIA investigations have revealed that the Bander-e-Abbad port in Iran is being used by the drug cartels comprising Afghan, Iranian and Indian nationals to smuggle drugs¹⁹ and the terrorist linkages of these cartels needs to be under serious observations as a potential fake enactment

¹⁵Shishir Gupta. "India on alert against possible Lashkar, Jaish attacks from sea." Hindustan Times. October 12, 2018. <https://www.hindustantimes.com/india-news/india-on-alert-for-terror-attacks-from-sea/story/Z3sbBaWORD4X6R0QZqymaN.html>.

¹⁶ SAR Convention, Ch. 1.3.2.

¹⁷ *Supra at.6*

¹⁸ Martin Davies, "Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea", Vol. 12, No. 1 Pacific Rim Law & Policy Journal, 2003.

¹⁹ K.V Thomas, '*India's Maritime Security Architecture-Challenges & Threats*', Centre for Public Policy and Research, Oct.2022.

of distress at sea can be staged by these to confuse the state with actual persons perishing in the sea. The huge possibilities of such concerns when coming to the developing countries with most porous coastlines are submerged in the convenience of the first world countries which is tamed by their high expenditure capabilities and military infrastructure. The recent seizure of contraband articles from Iranian/Pakistani boats in the strategically important Lakshadweep group of islands have been reported as part of the revival of the LTTE²⁰. A SAR guideline which is under inclusive of these factors can indeed turn the rescue operations into an operation to threaten the internal security of the nation. The international tribunal for the law of the sea often lack an opportunity to decide on the specific matters couples with right to be rescued as most casualties is dealt between the countries and is rarely taken to the international dispute resolution.

Right to be Rescued in a Specific sense of the refugee migrants:

The above discussed disembarkation principle is crucial when dealing with migrants not only for India but for states across the world. The principle governing it demands a consent from the state where the rescued people are to be given to and also the non-refoulment principle which is that persons should not be transported back to a state where their life or freedom is at danger. The states are usually apathetic to acquire the responsibilities of the refugees, especially when the internal conditions and the neighbourhood is hostile like in the case of India. The SAR Convention purports to cooperate between nation states, however is silent on which states can be termed as disembarking places rather it is presuming that relevant states will coordinate. The convention is also silent on the scenario when no agreement is reached between the flag state and port state and is further creating only an ancillary duty on the state responsible for the SAR to ensure that such rescue operation occurs and not a duty to receive the disembarked people in case of such absence of an agreement²¹.

India, while dealing with the large influx of Rohingya refugees is creating its ports vulnerable. Although it is not a signatory to the Refugee Convention 1951 India has always been the host of Rohingya refugees. The issue is of ever-growing importance in the light of the right to be rescued as 2022 was one of the deadliest years since 2014, with at least 348 people dying or going missing at sea, according to the most recent UNHCR data on the number of deaths

²⁰ *Ibid.*

²¹ Irini Papanicolopulu, 'The duty to rescue at sea, in peacetime and in war: A general overview', 98(2) International Review of the Red Cross, 491-514, (2016).

brought on by these risky travels²². Brenner's analysis, which is based on research conducted by an NGO in India, emphasises how smugglers are involved in the human trafficking networks that Rohingya refugees have also been victims of, specifically in the bonded labour and Rohingya women trafficking rings²³.

The most striking point of contention is on the decision of which of the neighbouring states should be providing assistance in the SAR operations. This is particular in the case of refugees as generally they reach the shores of the neighbouring first where if the relationship between the countries is strained, an additional level of the negotiation for the enforcement of the duty to render assistance is appointed to be addressed by the rescue conventions. The countries with hostile neighbours should be given an extra layer of guidelines without compromising their national security concerns. The famous *Tampa* case is a depiction of the same in which the asylum seekers of the Norwegian Cargo vessel was prevented by the Australian government²⁴. The nationalist tendencies spurred by the elections was seen as the political background to avoid the asylum seekers, where burden sharing mechanism in the sea was seriously violated. Despite repeated instances of high numbers of migrants perishing at the sea, the international conventions are more or less behind the crave for establishing a global standard rather than addressing the specific concerns posed by each maritime regions. Such a convenient method adopted by the international organisations have contributed to the global scenario in which the states with unfavourable conditions are held accountable and further straining their relationships with neighbouring countries.

Recommendations drifted from a global comparison:

The article proposes recommendations on two level, first on the international and the on then on the national level. The provisions of the UNCLOS, SOLAS and SAR conventions should break the barriers of presumed cooperation from states in respect of rescue operations as the current state of global affairs and evolving relation between states does not guarantee the same. The provisions in addition should also ideally demarcate between the countries with extensive marine infrastructures and the ones stifled with internal conflicts and issues as otherwise the

²² Steep increase in deadly boat journeys reflects Rohingyas' desperation: UNHCR | UN News, (2023), <https://news.un.org/en/story/2023/01/1132517> (last visited Oct 10, 2024).

²³ Brenner, Y. 2019. "Rohingya Migration to India: Patterns, Drivers and Experiences." Copenhagen: Mixed Migration Centre. https://mixedmigration.org/wp-content/uploads/2019/04/063_briefing-paper_Rohingya_India.pdf

²⁴ *Ruddock v. Vadarlis*, (2001) FCA 1329

lacuna in the enforceability of the right to be rescued will exist forever. The SAR guidelines should incorporate the security concerns of nation states in the form of counter terrorism strategies formulated as a part of the exceptions to render assistance. The conventions should also seek to reduce the subjective discretion of states especially when defining the refugee rights.

Although the article proposes for a specification of duty bearers it also expounds a comparison with first world countries to efficiently reform the maritime rescue systems for India. The maritime administration strategy of the US and the recently launched suborbital program DART (Dedicated Altitude Research and Testing) can be modelled in India to expand the research basis to incorporate air force facilities also in maritime security²⁵. The UK model of positioning SAR equipment right at the coastal forefront is also an adoptable model. A comprehensive coordination between the multiple resource agencies is crucial for the effective rescue operations. Further, the involvement of local coastal police should be improvised as their knowledge of the coastal lines and the local community can contribute largely to the coordination of the security forces. Rescue operations should in high span be in conjunction with the central and state governments, which can effectively share the burden of generating actionable intelligence. The logistical, technical and administrative guidelines while competing with global standards should take into account the specific national interest allied with it. Counter Terrorism strategy should effectively incorporate the right balance between the duty to render assistance and security breaches. An operational framework should indicate the right demarcation between the factors for providing rescue services. The Narcotics Control Bureau should be dedicated with a special wing to deal with the coastline smuggling and associated terrorist fundings, which can ultimately contribute to an overhaul of improvisation. Coastal Surveillance Network should also be dedicated with the function of SAR operations so that the information asymmetry between the rescue and search agencies are accounted for. Therefore, hand in hand go of the rescue and security operations can effectively contribute to the SAR obligations.

²⁵ Louise Weightman, *Maritime Launch Announces Suborbital Launch Program*, SPACE WATCH.GLOBAL (2023), <https://spacewatch.global/2023/09/maritime-launch-announces-suborbital-launch-program/> (last visited Oct 10, 2024).

CONCLUSION:

The time-honoured rule of international law, the duty to rescue and the right to be rescued from distress at the sea is struggling with the n number of mitigating factors. The establishment of a global standard is seriously impairing the expenditure and naval capacity of states like India. The formal recognition given to the right to be rescued is insulated from the possible misuses of the same in the guise of respect for human rights. The article identifies the factors which should be given a prima facie consideration in presuming that the states would coordinate in rescue operations. A number of non-compliance factors were identified which are usually shaped by the national security concerns of the states. However, although this should not lead to a dilution of the principles of right to life, an elaborated negotiation is the need of the hour to demand a global standard for rescue and search operations. The universal character of the duty is hampering the interests of the third world countries which is further expanded into a range of financial and national difficulties. A significant scholarly and legislative attention is to be given to the plight of the refugees who end up being extinguished from the purview of the right to be rescued. The practical difficulties of the countries combined with specified set of rules on implementation and international cooperation should evolve into a perfect balance between the right to be rescued and duty to render assistance. The national interest of the states should not be lost in the seafaring of standardisation of rescue operations which in effect is the under-inclusion of the ambit of the right to be rescued.