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POLICY BRIEF 4

The Interdiction of Asylum Seekers at Sea: Law and (mal)practice in Europe and Australia

Violeta Moreno-Lax
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Kaldor Centre for International Refugee Law

About the author

Dr Violeta Moreno-Lax is Lecturer in Law, founding Director of the Immigration Law programme, and inaugural Co-Director (2014–2016) and co-founder of the Centre for European and International Legal Affairs (CEILA) at Queen Mary University of London. She is also a Fellow of the Centre for European Law of King's College London, EU Asylum Law Coordinator at the Refugee Law Initiative of the University of London, Co-Chair of The Refugee Law Observatory, Convener of the Society of Legal Scholars (SLS) Migration Law Section, as well as member of the Steering Committee of the Migration Law Network. Since January 2016, she is part of the Editorial Board of the *European Journal of Migration and Law*. Before coming to Queen Mary, she was a Lecturer in Law at the Universities of Liverpool (2012–2013) and Oxford (2011–2012). She has held visiting positions at the Universities of Macquarie and New South Wales (Kaldor Centre for International Refugee Law) (2016–2017), Oxford (Refugee Studies Centre) (2010–2012), Nijmegen (Centre for Migration Law) (2009–2010), and The Hague Academy of International Law (Research Session 2010). She read Law in Murcia (LLB/LLM), European Studies in the College of Europe (MA), and EU Immigration and Asylum Law at the Free University of Brussels (PG Certificate), before obtaining her Doctorate in Law from the University of Louvain (PhD). She has published widely in the areas of international and European refugee and migration law and acts regularly as expert consultant for the EU institutions and other organisations in the field.

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Executive summary

The phenomenon of irregular migration by sea or 'boat migration' is not new,[1] but it has drawn significant attention since the Tampa affair in Australia in 2001 and during the so-called 'migration/refugee crisis' in the Mediterranean in 2015–2016. Both regions have replaced proactive search and rescue (SAR) efforts with militarised border security missions, which has had detrimental effects on those seeking asylum.

This policy brief explores this evolution and critically evaluates policies and practices of deterrence at sea against the standards set by international law. It considers:

- State **powers of interception**, as regulated by the law of the sea for the different maritime zones, in particular as they relate to flagless (migrant) vessels;

- The **duties of SAR** for flag and coastal States, clarifying notions of 'distress', 'rescue', 'disembarkation' and 'place of safety' as applied to asylum seekers;

- The **interaction** of State obligations under the law of the sea **with** their **obligations under human rights and refugee law**, especially with respect to the principle of *non-refoulement*, non-arbitrary detention and due process guarantees, as well as issues of extraterritoriality and 'effective control'.

The policy brief concludes that current strategies in Europe and Australia are not viable in the long term. It recommends that both regions abandon practices of containment without protection, engage in genuine SAR actions, and embrace a comprehensive approach to 'boat migration' that conforms with States' international legal obligations and the rights of refugees and migrants.

It specifically argues that States should:

- Conduct **genuine SAR missions**, instead of interdiction/deterrence operations, to comply with their obligations relating to the right to life and related responsibilities underpinning the SAR regime;

- Take account of the individual circumstances of each asylum seeker encountered at sea, **avoiding direct/automatic returns** before considering the conditions required for their safety and respect for their rights;

- **Allow disembarkation of those rescued and permit access to their territory for** the purposes of **refugee status determination**, as this is the only solution capable of guaranteeing that any subsequent removal to a third country is safe;

- Embrace a **comprehensive approach**, in which **law of the sea obligations** are **interpreted in accordance with international refugee law and human rights law, in particular the right to life, the prohibition on arbitrary detention and the principle of *non-refoulement*;**

- Open up **alternative pathways** to ensure **safe and legal access to Europe and Australia** in humane conditions, thus avoiding asylum seekers having to resort to smuggling/trafficking rings, reducing fatalities at sea, and allowing for more orderly arrivals.

1 Introduction

The phenomenon of 'boat migration' has a long history. Movements of refugees across the ocean include the Vietnamese 'boat people' in the 1970s and 1990s; Haitians and Cubans in the Caribbean since the early 1980s; Albanians escaping the Hoxhaist regime via the Adriatic Sea in the 1990s; and a range of movements in the 2000s, including Ethiopians and Somalis crossing the Gulf of Aden, Afghans and Sri Lankans crossing the Bay of Bengal, Sub-Saharan Africans crossing the Strait of Sicily, Iraqis crossing the Aegean Sea, and most recently Syrians traversing the Mediterranean.[2] What is new today is the scale and the danger of these movements, and the nature of responses by destination countries.[3]

The increasingly securitised and militarised measures to counter maritime flows adopted by European Union (EU) Member States and Australia, among others, appear misplaced when considering the type of movements that occur. Overreliance on interdiction powers, which go beyond what is permitted under the law of the sea (section 3), coupled with a selective approach towards rescue obligations and human rights and refugee law standards operating at sea (sections 4 and 5), compound rather than resolve the situation. These approaches arguably overstep the limits of State sovereignty to the detriment of international protection for refugees and other vulnerable migrants (section 6).

2 Background: State practice in Europe and Australia

Since 2000, 46,000 asylum seekers and migrants have drowned, mostly in the Mediterranean.[4] This is despite the fact that this stretch of water is the most heavily surveyed and among the most tranquil in the world.[5] The *Australian Border Deaths Database* has documented 1,992 deaths between 2000–2017 connected to Australia's migration control policies.[6] In both scenarios, the countries of origin of boat arrivals are typically war-ravaged, refugee-producing regimes. Consequently, although the flows are mixed (i.e. composed of different categories of migrants), 80–90% are asylum seekers and belong to the top-10 nationalities of the world's refugees.[7] In other words, the majority are likely to have international protection needs which remain unaddressed when turnback[8] and interdiction[9] policies are used.

2.1 Europe

Even though sea crossings are clearly linked to refugee movements, especially from Syria, Eritrea, Afghanistan and Iraq,[10] since the beginning of the so-called 'refugee/migration crisis' in 2015, EU Member States have deployed a securitarian, rather than humanitarian, response.[11]

Operations coordinated by the external frontiers agency (Frontex), renamed the European Border and Coast Guard in 2016 (EBCG),[12] have taken over national SAR initiatives, such as the Italian *Mare Nostrum* mission in the Strait of Sicily, which rescued more than 140,000 migrants in distress at sea between October 2013 and October 2014.[13] Frontex's subsequent substitute mission, Operation *Triton*, has only partially replaced *Mare Nostrum*, as its focus is on border security and migration control and does not include a proactive SAR component.[14]

Operation Triton has been supported by a military operation, the European Union Naval Force Mediterranean (EUNAVFOR Med) *Operation Sophia*,[15] whose objective is to combat smuggling and trafficking through the Central Mediterranean. Its role is not only to identify smuggling vessels, but also to capture and dispose of them pursuant to a United Nations (UN) Security Council Resolution covering use-of-force activities on the high seas.[16] The idea is to 'deter' irregular border crossings, without giving much attention to the 'push factors' underpinning such movements.[17]

On the Aegean Sea, Frontex-led *Operation Poseidon* has been buttressed by two additional measures.[18] First, the EU–Turkey Statement guarantees the readmission of all 'irregular migrants' who have left Turkey, including refugees, and ensures Turkey's cooperation with EU anti-smuggling efforts,[19] including through 'pullbacks' of migrant vessels headed to Greece. So far, Turkey has readmitted 1,487 people and blocked the exit of most migrants since March 2016. This has resulted in a huge drop of daily crossings from 2,500 to just 43,[20] notwithstanding human rights concerns.[21] Secondly, controls at sea have been reinforced by a NATO mission 'tasked to conduct reconnaissance, monitoring and surveillance of illegal crossings in the Aegean'.[22] As the mission lacks a specific SAR or border control mandate, when encountered with distress situations, it apparently rescues and (directly) returns to Turkey all survivors, irrespective of *non-refoulement* and related guarantees.[23]

2.2 Australia

In Australia, there have been far fewer boat arrivals than in Europe, with just over 60,000 landings since 2000, including a peak in 2013 of 20,719. Progressively, the number has been reduced to virtually zero.[24]

Boat deterrent initiatives started in late 2001 after the *Tampa* incident, through a policy known as the 'Pacific Solution'.[25] The *Tampa* was a Norwegian-registered container ship that rescued 438 asylum seekers within the SAR region of Indonesia, but closer to Christmas Island (part of Australia). When permission to disembark was requested, Australia considered it to be Indonesia's responsibility, entering into a diplomatic standoff, during which time the *Tampa* remained at sea. It was eventually boarded by Australian military officials, and following hasty agreements with Nauru and Papua New Guinea (PNG), the asylum seekers were taken there to 'offshore' detention centres.[26]

The incident led to the adoption of domestic legislation through which Australia has 'excised' its territory for immigration law purposes, such that no valid asylum claim can be made by irregular entrants (the fiction created is they have not entered Australia in a legal sense). Instead, they are directly taken to third countries declared safe, such as Nauru and PNG, where Australia has funded detention centres. Those found to be refugees are denied settlement in Australia, and must remain in Nauru or PNG or be resettled elsewhere (with very few viable options forthcoming).[27]

Maritime interdictions were initially carried out under *Operation Relex* (2001–2007), with *Operation Sovereign Borders* commencing in September 2013 when the policy of turning back boats was reintroduced after a hiatus between 2008–2012.[28] As a military-led border security operation, *Operation Sovereign Borders* focuses on deterrence, interception and forcible turnbacks of boats.[29] According to government figures, as at early April 2017, 30 boats carrying approximately 765 people had been turned back at sea or otherwise returned to their country of departure since *Operation Sovereign Borders* commenced.[30] The operations have been shrouded in secrecy, as the government's policy is not to provide information routinely about 'on-water' matters.[31] Reports from media and civil society organisations suggest that turnbacks by Australia have involved a range of risks to the safety of passengers and crew, both in the course of operations and upon return.[32]

3 Interdiction powers under the law of the sea

Both Australia and the EU have regulated interdiction at sea in domestic/regional law, vesting extensive powers on warships to counter infringements of immigration law. In the EU, the Maritime Surveillance Regulation (MSR) establishes the rules applicable to Frontex-coordinated operations,[33]

authorising Member States to stop, board, search and seize a vessel, to order it to alter its course or even to conduct it to a third country.[34] In Australia, the *Maritime Powers Act 2013* (Cth) (MPA) allows similar action.

Yet, under international law, the UN Convention on the Law of the Sea (UNCLOS)[35]—to which Australia, the EU, and all its Member States are bound[36]—imposes important limits on interdiction powers, as detailed below.

3.1 Territorial sea: Rights of innocent passage and refuge in port

Coastal States have sovereignty over the 12 nautical miles from their baselines, described as the 'territorial sea'.[37] They are permitted to exercise control there, but do not have unlimited powers. According to article 17 of the UNCLOS, vessels of all countries enjoy a right of innocent passage through the territorial sea, which includes stopping or anchoring when rendered necessary by distress or to render assistance, among other things.[38]

According to article 19 of the UNCLOS, passage is not innocent when it is prejudicial to the peace, good order or security of the coastal State. In particular, it may be rendered non-innocent if a vessel loads or unloads persons 'contrary to the … immigration … laws and regulations of the coastal State', which is what Australia and EU Member States tend to rely on to curtail traffic.[39] Determining exactly when passage becomes non-innocent is, therefore, crucial to establishing whether Australian and EU practice conforms with international law, as it is only in such cases that they are allowed to take 'the necessary steps … to prevent passage'.[40] What these 'necessary steps' entail is then limited by article 27 of the UNCLOS, which excludes the exercise of criminal jurisdiction *during passage*, except in the cases explicitly listed (which do not contemplate 'boat migration' as such).

Some authors suggest that '[t]he fact that a vessel may be carrying … asylum seekers who intend to request the protection of the coastal State arguably removes that vessel from the category of innocent passage'.[41] Others note that seeking asylum actually 'accords with international law', although recognise that, in some cases, 'passage with asylum seekers aboard may be non-innocent'.[42] Still others submit that unless there is actual 'loading' or 'unloading' of persons in breach of immigration regulations, article 19(1) of the UNCLOS should not apply.[43] The fact that article 31 of the Refugee Convention explicitly states that refugees must not be penalised for unauthorised entry, and that States are bound to interpret anti-smuggling/anti-trafficking provisions as subject to refugee law (see section 3.2), reinforces this interpretation. Thus, the mere fact that a person may request asylum does not render their passage non-innocent by default.

More generally, 'distress' provides an exception to coastal State control over territorial waters, independent of immigration/asylum considerations. Faced with a situation of danger, vessels transiting (or on the verge of) the territorial sea have a right to seek refuge in adjacent ports as a matter of customary law,[44] particularly when there is 'a well-grounded apprehension of the loss of the vessel … or of the lives of the crew'.[45] Refusing access to port in these circumstances would ignore 'elementary considerations of humanity'.[46] Therefore, practices of retention at, or ejection from, territorial waters in this situation infringe international law.

3.2 Contiguous zone: Rights of police as 'necessary'

In the contiguous zone, which extends an extra 12 nautical miles beyond the territorial sea, the coastal State enjoys 'a limited right of police'.[47] This area does not fall within its exclusive power and, for most purposes, counts as part of the high seas.[48] In fact, article 33(1) of the UNCLOS allows the coastal State to exercise only such control as is '*necessary* to prevent [the] infringement

of its … immigration … regulations within its territory or territorial sea', which requires proportionality in each individual case.[49]

Contrary to what Australia and EU Member States appear to assume, it is not obvious that powers of detention, escort to port or forcible return are encompassed within the meaning of this provision.[50] Rather, the 'necessary' power to control does not seem to include any of these, 'because at this stage (i.e. that of a ship coming into the contiguous zone) the ship cannot have committed an offence'.[51] In addition, it should be borne in mind that every exercise of jurisdiction in this zone remains subject to 'other rules of international law',[52] including refugee law and human rights law.

3.3 High seas: Flag State jurisdiction, the 'right of visit' and stateless ships

In the high seas, freedom of navigation reigns and, as a rule, vessels are only subject to the authority of their flag State.[53] Other States may exercise power in very limited cases only, as exhaustively listed in UNCLOS.[54]

In the case of stateless/flagless ships encountered on the high seas, which are those routinely used by asylum seekers, all States enjoy a 'right of visit'.[55] This entails a right to approach and board the vessel to verify its nationality. But whether or not additional powers of 'arrest' or 'interdiction' are included remains controversial. Most authors consider this is not the case, '[e]xcept where … [expressly] conferred by treaty'.[56] Also, the fact that visit and enforcement powers have been regulated in separate clauses in UNCLOS (e.g. with respect to piracy or unauthorised broadcasting[57]) suggests that the right of visit concerning flagless ships does not imply wider enforcement prerogatives.[58]

'Seizure', for instance, assumes that a crime has been committed on the high seas. Mere navigation by asylum seekers is not considered as such a crime under international law. However, where a vessel is engaged in the 'transport of slaves', in human trafficking, or in migrant smuggling, the approach adopted under the various international treaties is inconsistent.[59] Slave trade, under articles 99 and 110 of the UNCLOS, attracts only a right of visit. The slavery conventions do not provide for interdiction powers either.[60] The UN Trafficking Protocol provides for cooperation to prevent and combat trafficking and to protect the victims thereof.[61] It is only the UN Smuggling Protocol that allows for 'appropriate measures' to be taken where 'evidence confirming suspicion' of migrant smuggling is found,[62] but these must take account of 'the other rights, obligations and responsibilities of States and individuals under international law, including … international human rights law … the 1951 Convention … and the principle of *non-refoulement*'.[63]

Therefore, contrary to what European and Australian legislators appear to assume, actions such as seizing a vessel and apprehending those on board; ordering a vessel to modify its course; or conducting a vessel or those on board to a third country or handing them over to the authorities of a third State,[64] do not follow from the terms of the applicable treaties. The fact that asylum seeker boats may be flagless does not allow for unlimited enforcement powers.

4 Duties of search and rescue at sea

Rescue-at-sea has sometimes been used by destination countries as an excuse for boarding flagless vessels, enabling them to intervene beyond the limits of their interdiction powers under UNCLOS, with motives other than, or additional to, the preservation of human life.[65] However, the

duty to render assistance, as a core principle of the law of the sea, has a distinct purpose which is different from interception.

4.1 State obligations: Article 98 of the UNCLOS, SAR and SOLAS Conventions

A number of treaties specify several elements of the duty to rescue, including the UNCLOS, the 1974 Safety of Life at Sea Convention (SOLAS Convention),[66] and the 1979 Search and Rescue Convention (SAR Convention).[67] These impose obligations both on flag States and coastal States.

4.1.1 Flag State obligations: The duty to render assistance

Article 98(1) of the UNCLOS provides that '[e]very State shall require the master of a ship flying its flag … to render assistance to any person found at sea in danger of being lost' and 'to proceed with all possible speed to the rescue of persons in distress'. The obligation is not absolute and depends on whether the master 'can do so without serious danger to the ship, the crew, or the passengers'. The SOLAS Convention contains a similar duty, but it again depends on the master's 'position to be able to provide assistance'.[68]

Australian and European approaches do not foster compliance with this obligation. Rather than prosecuting shipmasters for failing to provide help, they instead tend to threaten them with (or press) charges for facilitating irregular entry of rescued asylum seekers.[69]

4.1.2 Coastal State obligations: The duty to rescue and set up SAR services

The obligations imposed on coastal States are more stringent and include a positive duty to ensure coast-watching and rescue around their shores.[70] 'These arrangements shall include the establishment, operation and maintenance of such [SAR] facilities as are deemed practicable and necessary' to proactively guarantee preparedness in cases of distress.[71] The SAR Convention additionally provides for inter-State coordination of SAR services and for the delimitation of SAR regions,[72] so as to cover all areas of the world.

This clarity in law is in contrast to the recurrent conflicts in practice where there are overlapping SAR regions (such as the Greek and Turkish regions in the Aegean) or where safe ports are closer to a non-SAR region coastal State (as in the *Tampa* case). The elimination of proactive SAR endeavours and their replacement with border security missions, as in the Mediterranean or through *Operation Sovereign Borders*, is also at odds with these positive obligations of coast-watching and proactive rescue.

4.2 Personal scope of application: 'Any person'

The personal scope of application of the SAR obligation is universal. It benefits 'any person' found in distress at sea, including 'everybody, *even though an enemy*',[73]regardless of nationality or legal (including immigration) status.[74] Discrimination on account of other circumstances is also prohibited.[75]

4.3 Territorial scope of application: '(Everywhere) at sea'

In regard to its territorial ambit, the SAR obligation applies 'throughout the ocean',[76] unlike powers of interdiction whose exercise is subordinated to limitations (depending on maritime jurisdictional areas). The use of the generic term 'at sea' in article 98 of the UNCLOS supports this interpretation.[77]

4.4 Content: Notions of 'distress' and 'rescue'

The content of the SAR obligation is the most controversial on account of the potential flexibility of the core notions of 'distress' and 'rescue', discussed below. This creates inconsistences in practice and has led to episodes of non-compliance, with boats 'left to die' on more than one occasion.[78]

The notion of 'rescue' relates to the 'operation to retrieve persons in distress, provide for their initial medical or other needs and to deliver them to a place of safety',[79] which, in turn, requires further specification (see section 4.5 below).

However, since rescue is contingent on 'distress', the definition of that term is central to the SAR response. 'Distress' is defined as 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.[80] Further nuance has been provided in case law, which characterises 'distress' as *not* requiring instant or overwhelming physical peril, like a vessel taking on water or being 'dashed against the rocks'.[81] The focus is on the *prospect* of danger, not on harm that has already occurred or is about to occur. As such, unseaworthiness could *per se* entail distress and trigger SAR obligations.[82]

The definition in the EU MSR warrants this conclusion. The text distinguishes between the 'phase of uncertainty', where a person/vessel is reported missing or overdue; the 'phase of alert', where attempts to establish contact have failed or the operating efficiency of the vessel is impaired; and the 'phase of distress', where the need for assistance is determined by a number of elements, including the seaworthiness of the vessel, so that 'the existence of a request for assistance … shall not be the sole factor'.[83]

By comparison, the Australian SAR Manual is less detailed.[84] A 'maritime SAR incident' is said to exist when any of the following conditions exist: a vessel has requested assistance, a vessel has sent a distress signal, or it is obvious that a vessel is in distress because it has gone missing, has been reported to be sinking/have sunk, has been/is about to be abandoned, has its operating efficiency seriously impaired, or the crew/passengers are in the water.[85] Like the EU MSR, the Manual also distinguishes the phases of 'uncertainty' and 'alert' in similar terms.[86] Yet, by contrast, 'distress' is considered to occur when a vessel requires 'immediate assistance' resulting from 'grave or imminent danger'.[87] So, unlike a 'reasonable certainty' of a threat, as per the SAR Convention, the Manual requires that a person be (already) 'threatened' for 'distress' to materialise, which has at times delayed, if not pre-empted, the SAR response.[88]

4.5 'Place of safety', disembarkation and termination of SAR operations

As a result of repeated episodes of non-compliance with SAR obligations and frequent disagreement over disembarkation, the SAR and SOLAS Conventions have been amended[89] and the content of the duty to rescue further clarified.[90]

Since July 2006, the State responsible for the SAR region in which assistance is rendered must exercise 'primary responsibility' to ensure the necessary cooperation for survivors to be 'delivered to a place of safety'.[91] Although the duty is limited to ensuring collaboration, the amendments nonetheless require a specific outcome to be achieved, namely that the survivors are 'effectively disembarked'. This means that, contrary to growing (mal)practice, SAR operations can only be considered to terminate upon disembarkation *on dry land* at a place that can be considered safe. As a result, Australia's practice of returning vessels to the edge of the territorial waters of the location from which they departed—be it on the original vessel, an orange lifeboat, or another vessel—does

not conform to this standard, whether or not the passengers have been provided with lifejackets, fuel or other supplies.[92]

Although neither the 'place of safety' nor the concept of 'safety' itself has been defined in SAR or SOLAS, the amendments clearly indicate that both 'the particular circumstances of the case and [the] guidelines developed by the [International Maritime] Organization' have to be taken into account.[93] According to the International Maritime Organization (IMO) Guidelines, a 'place of safety' is:

> a location where rescue operations are considered to terminate … [A] place where the survivors' safety of life is no longer threatened and where their basic human needs … can be met.[94]

This, however, does not amount to designating a default port of disembarkation – whether the next port of call,[95] the port geographically closest[96] or one within the SAR region country.[97] Instead, it is left to the States involved to come up with an appropriate solution in the circumstances.

This is a significant gap.[98] To (partially) fill it – and then only in the context of to Frontex-coordinated operations – the EU MSR stipulate that the operational plan of each Frontex-led mission must contain the 'modalities for the disembarkation of the persons intercepted or rescued', foreseeing three alternatives: disembarkation in the coastal Member State hosting the operation, when interdiction occurs in its territorial waters or contiguous zone; disembarkation at the place designated by the Rescue Coordination Centre (in cooperation with the host and participating Member States), in the case of SAR events; or disembarkation in 'the third country from which the vessel is *assumed* to have departed', if interdiction happens on the high seas.[99] This last option is the one preferred by the EU legislator – it is only 'if that is not possible' that disembarkation should be arranged 'in the host Member State'[100] – but poses compatibility problems with States' *non-refoulement* obligations. Its succinct formulation appears to imply that disembarkation can be arranged in a third country by default, contrary to the need to consider the individual circumstances of each asylum seeker concerned (and the general situation prevailing in the disembarkation country) (see section 5.1 below).

In terms of Australia, the SAR Manual only includes guidance on the conclusion of 'search' action, but not on 'rescue' itself [101] (which is defined reproducing the SAR Annex terms).[102] Otherwise, there is no further indication of what 'safety', 'place of safety' or 'disembarkation' mean.[103] Instead, practice reveals that asylum seekers are either turned back at sea, or taken to Nauru or PNG for processing.[104]

5 Intersection with human rights and refugee law obligations

The notion of 'safety' has no single meaning and the arrangements made for some asylum seekers may not be appropriate for others, given their individual circumstances and the general situation in the country of disembarkation. One advantage of the absence of a precise definition of 'place of safety' is that it allows for tailored responses, 'taking into account the *particular circumstances* of the case',[105] alongside 'other rules of international law' (in conformity with which the law of the sea is to be construed).[106]

Those 'particular circumstances', as spelt out in the IMO Guidelines, 'may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units'.[107] The reality is that '[e]ach case is unique, and selection of a

place of safety may need to account for a variety of important factors',[108] including, above all, individual rights.[109] As underlined in the IMO Guidelines, '[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea'.[110]

Therefore, 'States cannot circumvent refugee law and human rights requirements by declaring border control measures … to be rescue measures'.[111] Removal elsewhere without prior assessment of each individual's situation is not 'rescue'. Launching maritime operations with the objective of 'stopping the boats'[112] and/or '[preventing] migrants from leaving the shores [of a third country]'[113] constitutes a misconception of SAR duties. Equating interdiction to SAR and disconnecting it from attendant human rights implications does not have support in international law. In the same way, disembarkation in a pre-determined place—such as Turkey/Libya or Nauru/PNG—disregarding the particular conditions of the case at hand, may not only amount to a direct breach of a State's protection obligations, but may also entail a bad faith implementation of the law of the sea itself.

5.1 Interdiction/rescue and the principle of non-refoulement

Interdiction measures, such as those allowed under Frontex regulations and Australian law, need to comply with the principle of *non-refoulement* (among others) and protect survivors from *any* action that exposes them to a well-founded fear of persecution or a real risk of serious harm. This covers instances of 'chain' or 'indirect *refoulement*' via intermediary countries (such as returns via Turkey or Indonesia).[114]

The prohibition of *refoulement* is key to the international protection system and is considered part of customary international law (thus binding all States independently of explicit treaty commitments).[115] Consequently, provisions like section 22 of the MPA, according to which maritime enforcement powers can be exercised under Australian law without consideration of Australia's international protection obligations, are in direct defiance of this prohibition. Basic tenets of international law require States to honour their international commitments in good faith. They are specifically banned from invoking the provisions of their internal law as a justification for failure to do so.[116]

International human rights and refugee law protections apply within the territory of the State concerned, but they may also have extraterritorial application. So long as affected individuals come within a State's 'jurisdiction', that State will have an obligation to 'ensure' that the relevant rights are guaranteed.[117] As such, and notwithstanding the Refugee Convention's silence about its extraterritorial reach, there is general consensus that 'the ordinary meaning of *refouler* is to drive back, repel, or re-conduct, which does not presuppose a presence in-country',[118] thereby supporting the view that article 33(1) of the Refugee Convention includes rejection at the border, in transit (or 'excised') zones, as well as (anywhere) at sea. The same applies with respect to the *non-refoulement* obligation in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), article 7 of the International Covenant on Civil and Political Rights (ICCPR), and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), all of which prohibit exposure to a real risk of ill-treatment in whatever circumstances.[119]

As a result, whether interdiction takes the form of contact actions (such as seizing, towing, boarding and returning a vessel, or handing people over to third countries) or contactless measures (including warning, blockading, re-routing or ordering a change of course) is immaterial.[120] In so far as 'the effect' of the measure concerned—whatever its name or form—'is to prevent migrants from reaching the borders of the [would-be host] State', exposing them to serious harm, the prohibition will be engaged.[121] The establishment of 'effective control', whether through 'active' or 'passive'

steps, is what counts as an exercise of 'jurisdiction', giving rise to international responsibility under human rights law.[122] Thus, *direct* returns to Turkey by NATO units, or to Sri Lanka, Vietnam, or the edges of Indonesian waters under *Operation Sovereign Borders*, for instance, as well as *indirect* enforcement of migration/border controls through maritime blockades, as in *Operation Sophia*, are incompatible with the prohibition on *refoulement*.

The EU MSR provides specific coverage in this respect, with article 4 explicitly stating that:

> No person shall … be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where … there is a serious risk [of] … inhuman or degrading treatment or punishment, or where … life or freedom would be threatened on account of … race, religion, nationality, sexual orientation, membership of a particular social group or political opinion … or from which there is a serious risk of an expulsion…to another country in contravention of the principle of *non-refoulement*.

No particular territorial limitation is contemplated. Rather, the principle seems to apply to *any* Frontex-led mission, whether undertaken in territorial waters, the contiguous zone of the host Member State or on the high seas.

5.2 Interdiction/rescue and the prohibition of arbitrary detention

In addition to the requirement that interdiction (or rescue) actions must not to amount to *refoulement*, intermediary stages of interception/SAR operations may also raise other human rights/refugee law issues. If those rescued are arbitrarily held at sea or in offshore facilities under the 'effective control' of Australia or the EU Member States, a count of unlawful detention may ensue,[123] in violation of the right to liberty.[124]

As noted earlier, both EU and Australian rules allow for stateless vessels presumed to be engaged in migrant smuggling to be stopped and boarded, and for the persons on board to be apprehended.[125] This is intended to be, at least in the European case, 'in accordance with the Protocol against the Smuggling of Migrants'.[126] However, the Smuggling Protocol does not regulate the conditions under which smuggled migrants can be detained. It provides merely for the State concerned to take 'appropriate measures' if evidence is found confirming suspicions.[127]

In *Medvedyev*, the European Court of Human Rights held that a similar 'appropriate measures' clause in the Convention against Illicit Traffic in Narcotic Drugs was inadequate to serve as basis for detaining people on the high seas who were suspected of drug trafficking.[128] The provision did 'not afford sufficient protection against arbitrary violations of the right to liberty'.[129] Like article 8(7) of the UN Smuggling Protocol, article 17 of the Convention against Illicit Traffic in Narcotic Drugs merely allows the intervening State to 'take appropriate measures', without explicitly authorising detention and establishing the conditions under which it may occur. The provision also fails to indicate related guarantees of due process and judicial protection.[130] Following the principle of legal certainty,[131] the court therefore concluded that the clause was insufficient to justify deprivation of liberty.

With regard to asylum seekers apprehended at sea, an additional factor must be noted. Not only does the Smuggling Protocol fail to regulate detention, but it specifically requires that a general distinction be made between victims of smuggling and its perpetrators. Whereas the Protocol provides for 'the prevention, investigation and prosecution' of smuggling crimes,[132] the victims thereof must be the object of 'protection and assistance',[133] in line with States' 'obligations under international law'.[134] Thus, simply declaring that 'restraint is not arrest', as in the Australian case, will not suffice to exclude responsibility.[135]

5.3 Interdiction/rescue and procedural guarantees

Where individual rights are at stake, a series of related procedural guarantees are also applicable. Besides the need for judicial oversight of any deprivation of liberty, as indicated above, detention is only justifiable if, in the individual case, it is 'necessary in all the circumstances'—not merely 'reasonable' or 'convenient' to public policy or national security—and is open to challenge by the individual concerned.[136] This is so 'even if [attempted] entry [is] illegal'. The Australian approach to mandatory detention is therefore untenable as a matter of international law.[137]

The conditions of detention must also be adequate, otherwise they may amount to inhuman or degrading treatment.[138] This is implicit in article 3 of the ECHR and explicit in article 10 of the ICCPR, which requires that all detained persons 'be treated with humanity and with respect for the inherent dignity of the human person'. This entails a 'positive obligation' of care, with which compliance is obligatory irrespective of 'the material resources available'.[139] Detention that does not provide for a person's essential needs, the opportunity to contact family or counsel, and adequate medical attention is incompatible with this obligation.[140]

Regarding the principle of *non-refoulement* (including instances of indirect/chain *refoulement*), the only adequate manner in which to determine whether an individual can be safely sent elsewhere is to establish *first* that his or her life or freedom will not be threatened in the destination country, either due to lack of adequate protection there or because of insufficient procedural safeguards against onwards removal somewhere else.[141] The Refugee Convention thus requires States to assess whether people have protection needs through an individual examination of each case.[142] The same applies under international human rights law.[143] To preserve the effectiveness of the principle,[144] access to dedicated status determination procedures must be legally and practically feasible. Compliance with tight time limits and other such requirements must not frustrate this guarantee.[145]

Indirect *refoulement* (via agreements with third countries, such as in the *Hirsi* case, which provided for *automatic* removals to Libya[146]) is also forbidden. States are prohibited from sending individuals to any country from which removal to a real risk of persecution or other serious harm is reasonably foreseeable. The presumption that a particular country is safe must be subject to rebuttal and will not be justified when reliable information indicates that the country concerned fails to meet suitable standards of protection (including procedurally). In such circumstances, it will be presumed that 'those facts were known or ought to have been known to the [expelling] State at the time of removal'.[147] Hence, neither EU countries nor Australia can rely solely on international arrangements (such as those underpinning Frontex/EUNAVFOR/NATO operations or the 'Pacific Solution') to ensure that their *non-refoulement* obligations are met.[148]

Article 4 of the MSR recognises this to a certain extent, but fails to specify how exactly the principle is to be complied with in each individual case. The provision simply states that 'before' intercepted/rescued persons are disembarked, participating units 'shall' identify those concerned and 'assess their personal circumstances', giving them 'the opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *refoulement*'. However, it omits to concretise any follow-up action or to indicate which procedural guarantees apply. It also appears to assume that border officials are competent to carry out such (instant) evaluations on board ships—without providing legal counsel, translation or any facilities to prepare claims, which are basic elements for procedures to be fair.[149]

By contrast, Australian law contains no specific provisions to this effect. In fact, it explicitly authorises removal irrespective of whether this complies with Australia's *non-refoulement* obligations,[150] which is in direct opposition to the most basic understanding of good faith compliance with international (procedural) commitments, as mentioned above. Instances of 'enhanced

screening', as are apparently taking place during turnback operations,[151] are also insufficient to meet due process guarantees.[152]

Even if an 'independent and rigorous' evaluation leads to a finding that a person is not at risk of persecution or other serious harm, the individual concerned must still be given an opportunity to have that decision reviewed. Indeed, the principle of *non-refoulement* 'guarantees the availability at national level of a remedy to enforce … the [principle]'.[153] To be effective, remedies must be legally and practically accessible,[154] and must allow 'the competent national authority both to deal with the substance of the … complaint and to grant appropriate relief'[155] (including the opportunity for review on the merits). The adjudicating authority must either be a court or be vested with similar powers and guarantees of impartiality and independence (which disqualifies 'participating units' in interdiction/SAR operations).[156] In addition, appeals must have 'automatic suspensive effect'[157] so as to 'prevent the execution of measures … whose effects are potentially irreversible'. As a result, measures such as immediate returns to places like Indonesia or Turkey are incompatible with these requirements.[158]

6 Conclusion: The limitations of current approaches

The preceding sections have disclosed a picture of non-compliance by EU Member States and Australia with their SAR duties under the law of the sea, and with key obligations under refugee and human rights law:

- Deterrence and interdiction are pursued instead of operations focused on ensuring the safety and rights of refugees and asylum seekers at sea;
- Interdiction powers have been stretched beyond the limits allowed under the law of the sea to block asylum-seeker boats or to proactively deflect them to other destinations;
- Such interventions neglect human rights and jeopardise the principle of *non-refoulement*, which prohibits States from sending people to any country where they may face persecution, ill-treatment or other serious harm;
- Policies of *immediate* or *automatic* removal are fundamentally at odds with the principle of *non-refoulement*, which requires adequate, individualised procedures with a right of appeal and appropriate safeguards, including access to legal counsel, translation, and a rigorous merits review by a competent and impartial authority;
- Holding asylum seekers in purportedly extra-jurisdictional zones (such as excised territories, boats on the high seas or international areas of ports/airports) may unlawfully impede their access to such procedures and constitute arbitrary detention, and in some cases inhuman or degrading treatment.[159]

To observe its legal obligations in good faith, an intervening State must instead:

- Conduct **genuine SAR missions**, instead of interdiction/deterrence operations, to comply with its obligations relating to the right to life and related responsibilities underpinning the SAR regime.[160]
- Take account of the individual circumstances of each asylum seeker encountered at sea, **avoiding direct/automatic returns** before considering the conditions required for their safety and respect for their rights;

- To that effect, **allow disembarkation and access to its territory for the purposes of refugee status determination**, as this is the only solution capable of guaranteeing that any subsequent removal to a third country is, indeed, safe;[161]

- Instead of deflection and containment measures, which may channel asylum boats through ever more perilous routes and multiply fatalities,[162] a good faith application of SAR would embrace a **comprehensive approach**, in which **law of the sea obligations** are **interpreted in accordance with international refugee law and human rights law, in particular the right to life, the prohibition on arbitrary detention and the principle of *non-refoulement*;**

- In parallel, open up **alternative pathways** to ensure **safe and legal access to Europe and Australia** in humane conditions, thus avoiding asylum seekers having to resort to smuggling/trafficking rings. This would reduce the number of fatalities at sea and allow for more orderly arrivals. Pressure on the SAR system would decrease and smuggling/trafficking routes would be rendered obsolete for asylum seekers at sea.[163]

In conclusion, to ensure good faith compliance with international law, a comprehensive '**protection-centred vision**' must replace the current securitised approach that dominates EU and Australian policy on refugees and asylum seekers at sea.[164]

Endnotes

[1]For an overview, see UNHCR, *Danger on the Deep Blue Sea: 40 Years of Peril* <http://www.unhcr.org/seadialogue/>.

[2] Ibid.

[3] See, extensively, Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill, 2016).

[4] IOM, *Missing Migrants Project* <https://missingmigrants.iom.int/latest-global-figures>.

[5] On EUROSUR, see Frontex, *EUROSUR* <http://frontex.europa.eu/intelligence/eurosur/>.

[6] *Australian Border Deaths Database*, Monash University <http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/>.

[7] UNHCR, *Global Trends 2015* <http://www.unhcr.org/global-trends-2015.html>.

[8] The Australian government defines a 'turnback' as an operation whereby a vessel is removed from Australian waters and retuned to just outside the territorial seas of the location from which it departed. See Commonwealth of Australia, Senate, Legal and Constitutional Affairs Legislation Committee, *Estimates*, 23 February 2015, 137 (Lieutenant General Angus Campbell) <http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/726d2567-78be-48ef-a9df-f7302dbb884c/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2015_02_23_3235_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/726d2567-78be-48ef-a9df-f7302dbb884c/0000%22>.

[9] There is no legal definition of 'interdiction'. The term is commonly taken to encompass 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'. See UNHCR, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, EC/50/SC/CRP.17 (9 June 2000) 10.

[10] EUROSTAT, *Asylum Statistics* (13 March 2017) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics>.

[11] See, as summary, European Council, 'Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route' (Press Release 43/17, 3 February 2017) <http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/>. Numbers peaked with over one million sea arrivals in 2015: UNHCR, 'Over one million sea arrivals reach Europe in 2015' (30 December 2015) <http://www.unhcr.org/afr/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>.

[12] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251/1.

[13] ECRE, 'Mare Nostrum to end – New Frontex operation will not ensure rescue of migrants in international waters' (10 October 2014) <http://www.ecre.org/operation-mare-nostrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters/>.

[14] 'Frontex launches call for participation of the EU Member States in Joint Operation Triton' (Frontex, Press Room, 26 September 2014) <http://frontex.europa.eu/news/frontex-launches-call-for-participation-of-the-eu-member-states-in-joint-operation-triton-b9nupQ>.

[15] Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 122/31; and EUNAVFOR MED operation SOPHIA <https://eeas.europa.eu/csdp-missions-operations/eunavfor-med_en>.

[16] SC Res 2240, UN Doc S/RES/2240 (9 October 2015).

[17] See, eg, Human Rights Watch (HRW), *The Mediterranean Crisis: Why People Flee, What the EU Should Do* (19 June 2015) <https://www.hrw.org/report/2015/06/19/mediterranean-migration-crisis/why-people-flee-what-eu-should-do>.

[18] 'Joint Operation Poseidon (Greece)', (Frontex, Hot topics, 10 October 2016) <http://frontex.europa.eu/pressroom/hot-topics/joint-operation-poseidon-greece--3ImFxd>.

[19] 'EU-Turkey Statement, 18 March 2016' (International Summit, Press Release 144/16, 18 March 2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

[20] European Commission, 'Report from the Commission to the European Parliament, the European Council and the Council: Fifth report on the Progress made in the implementation of the EU-Turkey Statement' COM(2017) 204 final (2 March 2017) 2, 5.

[21] Amnesty International, *A blueprint for despair: Human rights impact of the EU-Turkey deal*, (2017) <https://www.amnesty.org/en/documents/eur25/5664/2017/en/>.

[22] 'NATO Defence Ministers Agree on NATO support to assist with the Refugee and Migrant Crisis' (North Atlantic Treaty Organization (NATO), News, 11 February 2016) <http://www.nato.int/cps/en/natohq/news_127981.htm>. See also 'Warsaw Summit Communiqué: Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8–9 July 2016' (Press Release 2016(100) 9 July 2016), <http://www.nato.int/cps/en/natohq/official_texts_133169.htm?mc_cid=f8343b1adb&mc_eid=bf01703a94>.

[23] Andrew Rettman, 'NATO to take migrants back to Turkey, if rescued' on *EUObserver* (23 February 2016) <https://euobserver.com/foreign/132418>.

[24] 'Table of Maritime Arrivals by Calendar Year (2007–14)', Operation Sovereign Borders (6 November 2014) <http://www.aph.gov.au/~/media/Committees/legcon_ctte/estimates/sup_1415/DIBP/CJATF1156ClarificationofEvidence.pdf>; and Janet Phillips, 'Boat arrivals and boat "turnbacks" in Australia since 1976: a quick guide to the statistics' (Parliamentary Library, Research Paper Series, 2016–17, 17 January 2017) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacks>.

[25] See, extensively, Madeline Gleeson, *Offshore: Behind the wire on Manus and Nauru* (NewSouth Publishing, 2016).

[26] For an account of the facts, see *Ruddock v Vadarlis* [2001] FCA 1329; 110 FCR 491.

[27] See, in detail, Claire Higgins, 'The (Un-)sustainability of Australia's Offshore Processing and Settlement Policy', in Moreno-Lax and Papastavridis, above n 3, 303, 307 ff.

[28] Janet Phillips, 'A comparison of Coalition and Labor government asylum policies in Australia since 2001' (Parliamentary Library, Research Paper Series, 2013–14 (28 February 2014) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/AsylumPolicies>.

[29] 'The Coalition's Policy for a Regional Deterrence Framework to Combat People Smuggling' (August 2013) <http://www.rowanramsey.com.au/Portals/0/PeopleSmuggling.pdf>.

[30] Peter Dutton, 'Press Conference with AVM Stephen Osborne, Commander JATF, Austal Ship Yard, Western Australia', 7 April 2017 <http://www.minister.border.gov.au/peterdutton/2017/Pages/press-conference-07042017.aspx>.

[31] Commonwealth of Australia, Senate, Legal and Constitutional Affairs Legislation Committee, *Estimates,* 24 March 2017, 38 (Roman Quaedvlieg and Michael Pezzullo) <http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/9c54e9d6-7341-41c1-8366-ac26ee0669bd/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2017_03_24_4909.pdf;fileType=application%2Fpdf#search=%22committees/estimate/9c54e9d6-7341-41c1-8366-ac26ee0669bd/0000%22>. See also Parliament of Australia, Senate, A Claim of Public Interest Immunity Raised over Documents <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Public_Interest_Immunity>.

[32] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats: Interim Report, May 2016 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Payments_for_turn_backs/Interim_Report>.

[33] Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L 189/93 (MSR).

[34] *MSR* arts 6–8.

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

[36] See the status of the Convention as at 10 October 2014: <http://www.un.org/depts/los/reference_files/status2010.pdf>; and *Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (98/392/EC)* [1998] OJ L 179/1.

[37] *UNCLOS* arts 2–3. On the measurement of the baselines, see *UNCLOS* arts 5–16.

[38] *UNCLOS* art 18(2).

[39] Eg, *Ruddock v Vadarlis* [2001] FCA 1329; 110 FCR 491; and *Hirsi v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012). See also *MSR* art 6.

[40] *UNCLOS* art 25.

[41] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 274.

[42] Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 *International Journal of Refugee Law* 329, 357.

[43] Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 *International Journal of Refugee Law* 174.

[44] *The Creole* [1853] Moore, International Arbitration 824. See also Alexander P Higgins and Constantine J Colombos, *Higgins and Colombos on the International Law of the Sea* (Longmans/Green, 2nd rev ed, 1951) 329; Aldo Chircop, 'The Customary Law of Refuge for Ships in Distress', in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom* (Nijhoff, 2006) 163. In this line, art 24(1)(a) of the UNCLOS provides that the coastal State 'shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage'.

[45] *Kate A Hoff v The United Mexican States* [1929] 4 RIAA 444.

[46] *Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 4 [22]. The principle has been reiterated, eg, in *Juno Trader* (*Saint Vincent and the Grenadines v Guinea-Bissau*), *Judgment* [2004] ITLOS Rep 17, 128 ILR 267 [77].

[47] D P O'Connell, *The International Law of the Sea*, Vol II (Oxford University Press, 1984) 1058.

[48] *UNCLOS* art 87.

[49] *Guyana v Suriname*, *Award*, ICGJ 370 (PCA 2007) [445].

[50] Cf Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) and Australian Maritime Powers Act 2013 (Cth) (MPA); and MSR art 8.

[51] O'Connell, above n 47.

[52] *UNCLOS* art 87(1).

[53] *UNCLOS* arts 92(1) and 87; *Convention on the High Seas*, adopted 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962) art 6.

[54] *UNCLOS* arts 99 (slave trade), 100 (piracy), 109 (unauthorised broadcasting), 110 (flaglessness) and 111 (hot pursuit). See further, Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart, 2013).

[55] *UNCLOS* arts 92(2) and 110.

[56] *UNCLOS* art 110(1); Robin Churchill and Vaughan Lowe, *The Law of the Sea* (Manchester University Press, 1983) 214.

[57] *Cf UNCLOS* arts 110(1)(a) and 105 (piracy); arts 110(1)(c) and 109(4) (unauthorised broadcasting).

[58] Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (Brill, 2010) 103, 133.

[59] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009) 181.

[60] Slavery Convention [1927] UKTS 16; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957).

[61] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) arts 2 and 14(1).

[62] Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004) (MSP) art 8(2)–(7).

[63] *MSP* art 19.

[64] *MSR* arts 6–8 and *MPA* s 69 ff.

[65] See, eg, Committee against Torture, *Decision: Communication No 323/2007,* 41st sess, UN Doc CAT/C/41/D/323/2007 (21 November 2008) ('*JHA v Spain*'); and *Hirsi v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012).

[66] *International Convention for the Safety of Life at Sea*, adopted 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980) (*SOLAS*). Australia and all EU Member States are party. See status of ratifications as at 6 February 17: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

[67] *International Convention on Maritime Search and Rescue*, adopted 27 April 1979, 1405 UNTS 97 (entered into force 22 June 1985) (*SAR*). Australia and all EU Member States are party, except landlocked Austria, Czech Republic and Slovakia. See status of ratifications as at 6 February 17: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

[68] *SOLAS* Ch V Reg 33(1).

[69] See, recently, Kylie J Brennan, 'Volunteer aid workers returned to Spain after nightmare in Greek jail' on *EuroWeekly* (20 January 2016) <https://www.euroweeklynews.com/3.0.15/news/on-euro-weekly-news/spain-news-in-english/136474-volunteer-aid-workers-returned-to-spain-after-nightmare-in-greek-jail>; Andreas Schloenhardt and Colin Craig, 'Prosecutions of People Smugglers in Australia 2011–14' (2016) 38 *Sydney Law Review* 49.

[70] *UNCLOS* art 98(2).

[71] *SOLAS* Ch V Reg 7(1).

[72] *SAR* Annex Ch 2 and 3.

[73] Convention for the Unification of Certain Rules respecting Assistance and Salvage at Sea [1913] UKTS 4 art 11 (emphasis added).

[74] *SAR* Annex [2.1.10].

[75] Ibid. Note also that this is general principle of the law of the sea, permeating several *UNCLOS* provisions in all jurisdictional zones. See, eg, *UNCLOS* arts 25(3), 26(2), 52(2), 141, 152, 227.

[76] Satya N Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol III (Martinus Nijhoff, 1995) 177.

[77] John King Gamble Jr (ed), *Law of the Sea: Neglected Issues* (University of Hawaii, 1979) 261.

[78] Parliamentary Assembly of the Council of Europe, 'The "Left-to-die Boat": actions and reactions', Resolution 1999 (2014) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21024&lang=en>. See also Mike Steketee, 'We can't afford to rescue refugees, but we can afford to send them away', *ABC News* (online), 4 June 2015 <http://www.abc.net.au/news/2015-06-04/steketee-languishing-at-sea/6522340>.

[79] *SAR* Annex [1.3.2].

[80] *SAR* Annex [1.3.13].

[81] *Kate A Hoff v The United Mexican States* [1929] 4 RIAA 444. See also English High Court of Admiralty, *The Eleanor* [1809] Edw, 135.

[82] In this line, see Commission of the European Communities, 'Commission Staff Working Document: Study on the international law instruments in relation to illegal immigration by sea' SEC(2007) 691 (15 May 2007) 9, 28.

[83] *MSR* art 9(c)–(f).

[84] Australian Maritime Safety Authority, *National Search and Rescue Manual* (revised February 2017) <https://natsar.amsa.gov.au/natsar-manual.asp>.

[85] Ibid [3.3.3].

[86] Ibid [3.4.1], [3.4.4], [3.4.5], [3.4.7].

[87] Ibid [3.4.12].

[88] Daniel Ghezelbash et al, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2017, forthcoming).

[89] Resolutions MSC.155(78) and MSC.153(78), 20 May 2004.

[90] Beside the formal amendments, see *Guidelines on the treatment of persons rescued at sea*, Resolution MSC.167(78), 20 May 2014 (*IMO Guidelines)*, and IMO/UNHCR 'Rescue at Sea: A guide to principles and practices as applied to migrants and refugees' (updated 2015) <http://www.refworld.org/docid/45b8d1e54.html>.

[91] *SAR* Annex [3.1.9], and *SOLAS* Ch V Reg 33 (1–1) (in identical terms).

[92] Australian Associated Press, 'Lifeboat reportedly used by Australia to return asylum seekers found in Java', *The Guardian* (online), 1 February 2014 <https://www.theguardian.com/world/2014/feb/01/lifeboat-australia-return-asylum-seekers-found-java>. On the definition of 'interdiction' see above n 9.

[93] *SAR* Annex [3.1.9], and *SOLAS* Ch V Reg 33 (1–1) (in identical terms).

[94] *IMO Guidelines* [6.12]. See also IMO/UNHCR, above n 90, 6.

[95] See discussions at the 29th Session of IMO Facilitation Committee, 7–11 January 2002.

[96] UNHCR, 'Problems Related to the Rescue of Asylum-Seekers in Distress at Sea', EC/SCP/18, 26 August 1981 [19]–[21]; and EXCOM, 'Problems related to the Rescue of Asylum Seekers in Distress at Sea' Conclusion No. 23 (XXXII), 21 October 1981, 3.

[97] IMO, Principles relating to administrative procedures for disembarking persons rescued at sea, FAL.35/Circ.194, January 2009.

[98] 'Commission Staff Working Document: Study on the international law instruments in relation to illegal immigration by sea' above n 82, 4, 6.

[99] *MSR* art 10(1).

[100] *MSR* art 10(1)(b).

[101] Australian SAR Manual [7.1]–[7.2].

[102] *SAR* Annex [1.3.2].

[103] It is s 74 of the *MPA* that establishes the obligation of disembarkation at a 'place of safety', but again without defining any of the terms.

[104] See, eg, Cindy Wockner, 'Asylum seekers who sailed near Christmas Island transferred to Indonesia by fishing boat', *News.com.au* (online), 27 November 2015 <http://www.news.com.au/national/politics/asylum-seekers-who-sailed-near-christmas-island-transferred-to-indonesia-by-fishing-boat/news-story/5182b90232a7b568a7bb1b367c25dc6a>.

[105] *SAR* Annex [3.1.9], and *SOLAS* Ch V Reg 33 (1–1) (emphasis added).

[106] *UNCLOS* arts 2(3), 87(1).

[107] *IMO Guidelines* [6.15].

[108] Ibid.

[109] W A O'Neil, IMO Secretary-General, Opening address to the 22nd regular session of the IMO Assembly, London, IMO Headquarters, 19 November 2001.

[110] IMO *Guidelines* [6.17]. Endorsed by UN General Assembly, GA Res 61/222, 61st sess, UN Doc A/RES/61/222, 16 March 2007.

[111] Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *International Journal of Refugee Law* 256, 291, reflecting: *Hirsi v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012).

[112] 'The Coalition's Operation Sovereign Borders Policy' (July 2013), 2, 8, 10, 14 <http://sievx.com/articles/OSB/201307xxTheCoalitionsOSBPolicy.pdf>.

[113] 'A sequel of operation HERA just starting' (Frontex, News, 15 February 2007) <http://frontex.europa.eu/news/a-sequel-of-operation-hera-just-starting-uy631h>.

[114] Convention relating to the Status of Refugees, adopted 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (Refugee Convention) art 33(1); Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocols No 11, ETS No 155 (entered into force 1 November 1998) and No 14, CETS No 194 (entered into force 1 June 2010) (ECHR) art 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 of 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT) art 3; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR) art 7.

[115] Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' (2015) 46 *Netherlands Yearbook of International Law* 273.

[116] *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 26–27.

[117] *ECHR* art 1. See also *ICCPR* art 2(1); *CAT* art 3.

[118] UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007) [24] <http://www.refworld.org/docid/45f17a1a4.html>.

[119] Violeta Moreno-Lax, *Accessing Asylum in Europe* (Oxford University Press, 2017 forthcoming) ch 8.

[120] Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows', in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Elgar, 2017 forthcoming).

[121] *Hirsi v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012) [180].

[122] Moreno-Lax, above n 119.

[123] On retention at sea, see *CPCF* [2015] HCA 1 and *Medvedyev v France* (European Court of Human Rights, Grand Chamber, Application No 3394/03, 29 March 2010). On extraterritorial detention, see *Al-Saadoon and Mufdhi v UK* (European Court of Human Rights, Fourth Section, Application No 61498/08, 2 March 2010), and *Namah v Pato* [2016] PNG SC 13.

[124] *ECHR* art 5; *ICCPR* art 9; *Refugee Convention* arts 26 and 31(2).

[125] *MSR* arts 6(2)(a) (territorial sea) and 7(2)(a) (high seas); *MPA* Div 7 (detaining vessels); Div 8 (placing and moving persons); Div 9 (arrest).

[126] *MSR* art 7(1).

[127] *MSP* art 8(2).

[128] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, concluded 20 December 1988,1582 UNTS 95 (entered into force 11 November 1990).

[129] *Medvedyev v France* (European Court of Human Rights, Grand Chamber, Application No 3394/03, 29 March 2010) [82]–[103].

[130] Ibid [61].

[131] Ibid [80], [102].

[132] *MSP* art 4.

[133] *MSP* art 16.

[134] Ibid.

[135] *MPA* s 75.

[136] Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.5] ('*A v Australia*'). See also, Human Rights Committee, *Views: Communication No. 900/1999*, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) ('*C v Australia*'); and Human Rights Committee, *Views: Communication No 1014/2001,*UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*'). For analysis and further references, see also *Kaldor Centre Factsheet – Immigration Detention* (7 October 2015) <http://www.kaldorcentre.unsw.edu.au/publication/immigration-detention>.

[137] Human Rights Committee, *Views: Communication No 560/1993,* 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.5] ('*A v Australia*') [9.2], [9.4].

[138] Human Rights Committee, *Views: Communication No. 900/1999*, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) ('*C v Australia*') [8.4].

[139] Human Rights Committee, General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), 44th sess, HRI/GEN/Rev.9 (Vol I) (10 April 1992) [3]–[4].

[140] Eg, Human Rights Committee, *Views: Communication No* 1011/2001, 81st sess, UN Doc CCPR/C/81/D/1011/2011 (26 August 2004) ('*Madafferi v Australia*') (detention against medical opinion); *MSS v Belgium and Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011) (overcrowding, poor hygiene, basic needs unmet, maltreatment by custodians).

[141] James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 279 and Goodwin-Gill and McAdam, above n 41, 215.

[142] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, (HCR/1P/4/ENG/REV.3) (re-issued Geneva, December 2011) [189].

[143] *ECHR* arts 2– 3; *ICCPR* arts 6–7; *CAT* art 3.

[144] The Convention aspires to guarantee rights that are 'practical and effective', not 'theoretical or illusory'. See, among many others, *Artico v Italy* (European Court of Human Rights, Application No 6694/74, 13 May 1980).

[145] See, eg, *Jabari v Turkey* (European Court of Human Rights, Fourth Section, Application No 40035/98, 11 July 2000) [39]; *Abdolkhani and Karimnia v Turkey* (European Court of Human Rights, Second Section, Application No 30471/08, 22 September 2009) [107]–[17].

[146] *Hirsi v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012) [115], [129].

[147] Ibid [121].

[148] *MSS v Belgium and Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).

[149] *Hirsi v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012) [113]–[138], [146]–[157], and [197]–[206].

[150] *Migration Act 1958* (Cth) s 197C. See also MPA s 22 and comment in section 5.1 above.

[151] Commonwealth of Australia, Senate, Legal and Constitutional Affairs Legislation Committee, *Estimates,* 23 February 2015, 138–9 (Lieutenant General Angus Campbell and Kruno Kukoc) <http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/726d2567-78be-48ef-a9df-f7302dbb884c/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2015_02_23_3235_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/726d2567-78be-48ef-a9df-f7302dbb884c/0000%22>.

[152] UNHCR, 'Returns to Sri Lanka of individuals intercepted at sea' (7 July 2014) <http://www.unhcr.org/afr/news/press/2014/7/53baa6ff6/returns-sri-lanka-individuals-intercepted-sea.html>; UNHCR, 'Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing' (November 2010) <http://www.refworld.org/docid/4cd12d3a2.html>.

[153] *Jabari v Turkey* (European Court of Human Rights, Fourth Section, Application No 40035/98, 11 July 2000) [48].

[154] *Salah Sheekh v The Netherlands* (European Court of Human Rights, Third Section, Application No 1948/04, 11 January 2007) [121].

[155] *Jabari v Turkey* (European Court of Human Rights, Fourth Section, Application No 40035/98, 11 July 2000) [48].

[156] *Čonka v Belgium* (European Court of Human Rights, Third Section, Application No 51564/99, 5 February 2002) [75].

[157] *Gebremedhin v France* (European Court of Human Rights, Second Section, Application No 25389/05, 26 April 2007) [66].

[158] *Čonka v Belgium* (European Court of Human Rights, Third Section, Application No 51564/99, 5 February 2002) [79] (emphasis added).

[159] *Amuur v France* (European Court of Human Rights, Application No 19776/92, 25 June 1996) [43]. Confirmed: *ZA v Russia* (European Court of Human Rights, Third Section, Application No 61411/15, 28 March 2017).

[160] *Xhavara and 15 others v Italy and Albania* (European Court of Human Rights, Fourth Section, Application No 39473/98, 11 January 2001) 1.

[161] *Hirsi v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012) and Separate Opinion of Judge Pinto de Alburquerque.

[162] EU Presidency, Council Doc. 8624/16 (3 May 2016) [1]; and UNHCR, 'Mediterranean death toll soars to all-time high' (25 October 2016) <http://www.unhcr.org/news/briefing/2016/10/580f1d044/mediterranean-death-toll-soars-all-time-high.html>.

[163] Violeta Moreno-Lax, Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward (EU Red Cross, February 2016) <https://redcross.eu/latest-news/ueope-in-crisis-facilitating-access-to-protection-discarding-offshore-processing-and-mapping-alternatives-for-the-way-forward>.

[164] Guy S Goodwin-Gill, 'Setting the Scene: Refugees, Asylum Seekers, and Migrants at Sea – The Need for a Long-Term, Protection-Centred Vision', in Moreno-Lax and Papastavridis, above n 3, ch 1.