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Protection at Sea and the Denial of Asylum

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1. INTRODUCTION

Maritime migration in search of refuge has a long history.[1] The exodus of Vietnamese 'boat people' in 1979 is a well-known example.[2] Since then, the oceans increasingly have become the theatre of forced movement, putting the fundamentals of State sovereignty and the international protection regime under strain, undoing 'classic' understandings of State jurisdiction and fundamental rights.[3] There is widespread recognition that the duty to rescue, in customary and treaty law,[4] is part of the most 'elementary considerations of humanity'.[5] Yet, in recent years, the overwhelming global trend has been for destination States (the ones asylum seekers try to reach) to engage in interdiction,[6] blocking 'boat migrants' *en route*.[7] Examples extend from the Mediterranean to the Asia-Pacific region, the Caribbean, the Gulf of Aden, and the Bay of Bengal and the Andaman Sea.[8] Although statistics show that the vast majority of people attempting these perilous voyages come from refugee-producing countries, sympathy has given way to indifference, resulting in mass drownings, pushbacks, and abandonment at sea.[9] Global cross-border deaths have reached nearly 40,000 since 2014, with almost half the total recorded in the Mediterranean.[10] The perception of 'boat migrants' as threats to national security has reinforced responses of prevention and deterrence.[11]

States' modalities of interdiction have evolved over time, at times justified on purported humanitarian grounds (such as the benevolent effect of 'stopping the boats' as a mechanism to 'save lives').[12] Presumably in a bid to circumvent legal responsibilities, while maintaining high levels of control,

[1] Irial Glynn, *Asylum Policy, Boat People and Political Discourse* (Palgrave Macmillan 2016).
[2] Itamar Mann, *Humanity at Sea* (CUP 2016) 56–101.
[3] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control' (2020) 21 German Law Journal 385; Thomas Gammeltoft-Hansen and Rebecca Adler-Nissen, 'An Introduction to Sovereignty Games' in Thomas Gammeltoft-Hansen and Rebecca Adler-Nissen (eds), *Sovereignty Games* (Springer 2008) 1.
[4] Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), art 98; International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention); International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 119 (SAR Convention).
[5] *The Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4, 22, para 215.
[6] See generally, Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009); Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart 2012).
[7] UNHCR, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach' UN doc EC/50/SC/CRP.17 (9 June 2000).
[8] Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea* (Brill 2016); Bríd Ní Ghráinne, 'Left to Die at Sea: State Responsibility for the May 2015 Thai, Indonesian, and Malaysian Pushback Operations' (2015) 10 Irish Yearbook of International Law 109.
[9] Tugba Basaran, 'The Saved and the Drowned: Governing Indifference in the Name of Security' (2015) 46 Security Dialogue 205.
[10] International Organization for Migration (IOM), 'Missing Migrants' (19 May 2020) <https://missingmigrants.iom.int/> accessed 25 May 2020.
[11] Natalie Klein, 'A Maritime Security Framework for the Legal Dimensions of Irregular Migration by Sea' in Moreno-Lax and Papastavridis (n 8) 35; Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 8–11.
[12] Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-through-Interdiction/Rescue-without-Protection" Paradigm' (2018) 56 Journal of Common Market Studies 119.

they have become ever more secretive and sophisticated.[13] There has been a shift from direct to indirect forms of interdiction, increasingly performed by third countries or private actors at the behest of destination States. These modalities of interdiction are based on expansive interpretations of State powers in the different jurisdictional areas in which the oceans have been divided, as explained in Part 2. They are also substantiated by self-serving notions of rescue obligations, addressed in Part 3, including by reference to intersecting norms of human rights and refugee law that do not cease to apply in the maritime context.

This chapter identifies two competing yet complementary dynamics. First, while destination States *inflate* their policing competence through reliance on rescue rhetoric and intervene beyond prerogatives explicitly recognized in the law of the sea, they tend to maintain minimalistic constructions of the associated concepts of 'distress' or 'place of safety' to reduce the scope of their legal responsibilities. Thus, secondly, they *deflate* their rescue duties and detach them from their international protection obligations,[14] either by deflecting them to third countries or neglecting them altogether. Part 4 explores this by examining the US Caribbean interdiction programme,[15] the 'Pacific Solution' in Australia,[16] and the *mare clausum* approach favoured in the Mediterranean.[17] The ultimate effect, as Part 5 concludes, is one that paradoxically converts rescue itself into an interdiction tool, impeding access to international protection for 'boat migrants'.

2. STATE INTERDICTION POWERS AT SEA

The maritime context is not 'an area outside the law'.[18] Precisely because it is a space of common interest and shared sovereignty, multiple norms operate to demarcate the precise contours of jurisdictional competence. The UN Convention on the Law of the Sea (UNCLOS) is considered to codify long-standing customary rules on the prerogatives of flag and coastal Sates in the different sea zones, including norms on interdiction—understood as 'any act of interference' with foreign vessels, 'even acts which do not involve physical [contact] or enforcement'.[19] States do not have absolute control, however, and disagreements regarding the specific reach of interdiction powers necessarily have implications for 'boat migrants'.

(a) Territorial waters: Quasi-plenary police powers

The territorial sea extends 12 nautical miles (NM) from the baselines of the coastal State.[20] This is an area of extensive yet limited sovereignty, which must be exercised in conformity with UNCLOS and 'other rules of international law'.[21] Within this area, the coastal State enjoys quasi-plenary policing jurisdiction, although the vessels of all countries have a right of innocent passage.[22] This allows them to navigate the territorial sea without entering internal waters or calling at a port, unless authorized

[13] To palliate the scarcity of data, see *SAROBMED: The Search and Rescue Observatory for the Mediterranean* <https://sarobmed.org/> accessed 25 May 2020; 'BOb: Border Crossing Observatory' (*Monash University*) <https://www.monash.edu/arts/border-crossing-observatory/home> accessed 25 May 2020.
[14] Mapping this trend in the Mediterranean, see Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 IJRL 174.
[15] Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (CUP 2015).
[16] Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2019) 74–99.
[17] Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein, and Brian Opeskin, 'Securitization of Search and Rescue at Sea: The Response to "Boat Migration" in the Mediterranean and Offshore Australia' (2018) 67 ICLQ 315.
[18] *Medvedyev v France* (2010) 51 EHHR 39, para 81.
[19] *The MV Norstar (Panama v. Italy)* [2019] ITLOS, paras 222–23 (not yet reported).
[20] UNCLOS (n 4) arts 2(2), 3.
[21] ibid art 2(3).
[22] ibid art 17.

by the coastal State. Passage must be continuous and expeditious, except for stopping or anchoring incidental to ordinary navigation or rendered necessary by *force majeure* or distress or for the purpose of rendering assistance.[23]

Article 19 of UNCLOS specifies that passage is not innocent when it is prejudicial to the peace, good order, or security of the coastal State. In particular, passage is rendered non-innocent if a vessel engages in the 'loading or unloading' of persons 'contrary to the immigration rules of the coastal State'.[24] In such situations, if the coastal State has adopted domestic legislation to regulate the matter, it may enforce it, including through interdiction.[25] Article 25 of UNCLOS explicitly authorizes coastal States to adopt 'the necessary steps … to prevent passage', which has been interpreted as entailing a power to eject vessels from the territorial sea.[26]

Goodwin-Gill and McAdam have suggested that '[t]he fact that a vessel may be carrying refugees or asylum seekers who intend to request the protection of the coastal State arguably removes that vessel from the category of innocent passage'.[27] But there is no consensus. Pallis rejects this approach, noting that asylum seeking actually 'accords with international law', and thus the passage of migrant boats cannot automatically be assumed as non-innocent.[28] In fact, interdiction powers must comply with UNCLOS and 'other rules of international law',[29] including human rights and refugee law, regardless of how passage is characterized.[30] This includes the principle of *non-refoulement*,[31] the prohibition on penalizing refugees for irregular entry,[32] and the right of any person to seek asylum.[33] Moreover, 'passage' does not strictly correspond to the 'loading' or 'unloading' of persons, which arguably excludes migrant boats merely transiting the territorial sea from the scope of interdiction powers. There is also the possibility that migrant boats become or are in distress, in which case the general customary right of ships in distress to seek refuge in foreign ports[34] would 'neutralize' the non-innocence of their passage.[35] Contrary State practice should, therefore, be seen as a violation of the relevant norms.[36]

(b) Contiguous Zone: Limited Constabulary Functions

[23] ibid art 18(2).
[24] ibid art 19(2)(g).
[25] ibid art 21(1)(h).
[26] Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 87, 95–100; Jasmine Coppens, 'Interdiction of Migrant Boats at Sea' in Moreno-Lax and Papastavridis (n 8) 199, 201.
[27] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 274.
[28] Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes' (2002) 14 IJRL 329, 357.
[29] UNCLOS (n 4) art 21(1).
[30] UNHCR Executive Committee Conclusion 97 (LIV), 'Protection Safeguards in Interception Measures' (2003).
[31] See Mathew ch X; Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017) ch 8.
[32] On Refugee Convention, art 31, see Costello ch X.
[33] See ch X [asylum]; Moreno-Lax (n 31) ch 9.
[34] Aldo Chircop, 'Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an Ancien Regime?' (2002) 33 Ocean Development and International Law 207; Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Brill 2006).
[35] UNCLOS (n 4) art 18(2), final sentence.
[36] cf *Ruddock v Vadarlis* (2001) 110 FCR 491, concerning the Tampa affair.

The contiguous zone (CZ) is a 'functional' area,[37] extending 24 NM from the baselines,[38] within which the coastal State enjoys 'a limited right of police'.[39] This area preserves the navigational freedoms associated with the high seas. But article 33 of UNCLOS allows the coastal State to exercise 'the control necessary to prevent [the] infringement of its … immigration … laws and regulations within its territory or territorial sea',[40] subject to proportionality.[41]

It is not obvious that powers of detention are encompassed by this provision. While the coastal State is permitted to issue warnings and to board and inspect foreign vessels suspected of engagement in illicit activity,[42] it is 'arguable that the necessary power to control does not include the right to arrest and forcible redirection into port, because at this stage [namely, that of a ship coming into the CZ from outside territorial waters] the ship cannot have committed an offence'.[43] Yet, it has been argued that in situations of 'constructive presence', whereby mother-ships on the high seas transfer illicit cargoes to smaller boats that complete smuggling offences within the territorial jurisdiction of the coastal State, there is a right to interfere and seize the delinquent vessels to prevent the crime.[44]

A different matter is the right of 'hot pursuit', which may be undertaken when the coastal State has good reason to believe that a foreign ship has violated its domestic regulations.[45] But there are conditions to its exercise. Such pursuit must commence when the foreign ship is within the territorial sea or the CZ of the pursuing State and may only be continued outside that area if the pursuit has not been interrupted. If the foreign ship is within the CZ, it may only be pursued if there has been an infringement 'of the rights for the protection of which the zone was established',[46] which includes the prevention of violations of immigration laws.[47] Based on the doctrine of 'objective territorial jurisdiction',[48] some authors conclude that this allows for the prosecution of ships for acts committed in the CZ that produce effects in the territorial waters of the coastal State.[49]

In both scenarios, interdiction powers translate into a right of the coastal State to apprehend delinquent vessels and escort them to a port within territorial waters for further legal enforcement. This may explain why few coastal States engage in this course *vis-à-vis* 'boat migrants', for fear of becoming responsible for any related asylum claims.[50] There is no right per se to push vessels away from the CZ to elsewhere in the high seas. And every exercise of jurisdiction in this zone remains subject to 'other rules of international law',[51] including human rights and refugee law.

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[37] Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Nijhoff 2007).
[38] UNCLOS (n 4) art 33(2).
[39] Daniel O'Connell, *The International Law of the Sea*, vol II (OUP 1984) 1058.
[40] UNCLOS (n 4) art 33(1).
[41] Permanent Arbitral Tribunal, *Guyana v Suriname* [2007] 30 RIAA 128, para 445.
[42] Ivan Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' (1986) 35 ICLQ 320, 330.
[43] O'Connell (n 39) 1058. Considering the two practices (in the first part of the sentence) equivalent, see *Camouco (Panama v France)* [2000] ITLOS Rep 10, para 71; *Monte Confurco (Seychelles v France)* [2000] ITLOS Rep 86, para 90; *Hoshimaru (Japan v Russia)* [2007] ITLOS Rep 18, para 12.
[44] *The MV Saiga (St. Vincent and the Grenadines v Guinea)* [1999] ITLOS Rep 10, Separate Opinion of Judge Laing, para 16.
[45] UNCLOS (n 4) art 111.
[46] ibid art 111(1).
[47] ibid art 33(1)(a).
[48] Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 301.
[49] Douglas Guilfoyle, 'Maritime Interdiction of Weapons of Mass Destruction' (2007) 12 Journal of Conflict and Security Law 1, 7.
[50] cf Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (Brill, 2010) 103, 126–27.
[51] UNCLOS (n 4) arts 2(3), 87(1). See O'Connell (n 39) 1058.

(c) High Seas: Near-Absent Interdiction Prerogatives

On the high seas, freedom of navigation reigns and, as a rule, ships are subject to the exclusive jurisdiction of their flag State.[52] Other States may exercise jurisdiction in very limited circumstances, as '*expressly* provided for in international treaties or in [UNCLOS]'.[53] This includes situations of slave transport, piracy, unauthorized broadcasting, flaglessness, and hot pursuit,[54] where a 'right of visit' obtains.[55] Such a right, '[e]xcept where acts of interference derive from powers conferred by treaty', entitles States to approach and board foreign ships to effect a *vérification du pavillon*. Whether it grants further powers of arrest and detention is controversial.[56] Opinion is divided and limited jurisprudence is available on this point.[57]

Regarding flagless ships and vessels without nationality,[58] which are typically the vessels used by 'boat migrants', some consider that the use of force would not be justified without 'some jurisdictional nexus in order that a State may extend its laws to those on board … and enforce the laws against [them]'.[59] Others suggest that 'extraordinary deprivational measures are permitted with respect to stateless ships', since they do not enjoy the protection of any State.[60] The first view appears more aligned with UNCLOS. The fact that visit and enforcement powers are regulated separately—as in relation to pirate vessels, where the right of visit is enshrined in article 110, while seizure is allowed under article 105—suggests that a right of visit does not generally imply wider enforcement prerogatives without express provision to that effect. According to article 110, when a ship is without nationality, the warship of the State concerned may proceed to verify its identity. 'If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration'. Nowhere does UNCLOS provide for any additional powers with regard to these vessels or the persons on board.[61]

Seizure would assume that a crime has been committed on the high seas, but merely navigating on a flagless ship is not illegal. If the ship is used to transport slaves, articles 99 and 110 of UNCLOS only grant a right of visit.[62] In cases of human trafficking, the relevant UN Protocol calls for cooperation to prevent and combat the crime, while protecting and assisting the victims thereof,[63] reminding States parties that 'the[ir] rights, obligations and responsibilities … under international law' remain

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[52] UNCLOS (n 4) arts 92(1), 87.
[53] UNCLOS (n 4) art 92(1) (emphasis added).
[54] ibid arts 99, 100, 109, 110(1)(d), 111.
[55] ibid art 110.
[56] For an overview, see Efthymios Papastavridis, 'The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited' (2011) 24 Leiden Journal of International Law 45.
[57] cf *Norstar* (n 19).
[58] UNCLOS (n 4) arts 91, 92. See further, Herman Meijers, *The Nationality of Ships* (Nijhoff 1967).
[59] Churchill and Lowe (n 26) 214.
[60] Myres McDougal and William Burke, *The Public Order of the Oceans* (Yale University Press 1962) 1084.
[61] Myron Nordquist (ed), *United Nations Convention on the Law of the Sea*, vol III (Nijhoff 1985) 127; cf Irini Papanicolopoulou, 'A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea' in Clive Schofield, Seokwoo Lee, and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Nijhoff 2014) 387, 402–03.
[62] cf Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under Interational Law' (2009) 36 Syracuse Journal of International Law and Commerce 145; Samuel Menefee, 'The Smuggling of Refugees by Sea: A Modern Day Maritime Slave Trade' (2003) 2 Regent Journal of International Law 1.
[63] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Trafficking Protocol), art 2.

unaltered.[64] The same applies in smuggling scenarios, where the related UN Protocol aims to 'prevent and combat the smuggling of migrants … while protecting the rights of smuggled migrants'.[65] Regarding interdiction, article 8 of the Smuggling Protocol allows parties to 'board and search' flagless vessels used for the crime and to 'take appropriate measures'. But the measures must comply with 'relevant domestic and international law',[66] taking account of 'other rights, obligations and responsibilities of States and individuals under international law'.[67] Therefore, such actions as ordering the ship to modify its course; escorting it on such course; conducting the ship to a third country; or handing its passengers over to foreign authorities, in so far as they may be exposed to a risk of *refoulement*, are not permitted. As discussed in Part 4, these are, however, some of the actions that destination States have adopted *vis-à-vis* 'boat migrants' to evade their rescue and related obligations, which are examined in Part 3.

3. SEARCH AND RESCUE OBLIGATIONS (AND THEIR INTERSECTION WITH HUMAN RIGHTS AND REFUGEE LAW)

Like the interdiction powers explored above, search and rescue (SAR) obligations under UNCLOS must also be carried out in conformity with 'other rules of international law'.[68] States' selective and minimalistic understanding of their SAR duties, detaching them from related commitments under human rights and refugee law, contradicts this imperative. Rather, an integrated reading of the maritime treaties is called for which takes account of all relevant rules applicable in the specific situation.[69] This is true for both flag and coastal States.

(a) Search and Rescue Duties of Flag States

Article 98(1) of UNCLOS obliges 'every State' to require ships flying its flag 'to render assistance to any person found at sea in danger of being lost' and 'to proceed to the rescue of persons in distress'. The only limitation foreseen is that the captain intervene 'in so far as he can do so without serious danger to the ship, the crew, or the passengers'. The SOLAS Convention reiterates the obligation in similar terms. The trigger is the receipt of 'a signal *from any source* that persons are in distress'.[70]

The personal scope of application of the obligation is universal. It benefits 'any person' irrespective of nationality or legal status, which includes 'boat migrants'.[71] Discrimination on other grounds is also prohibited. The territorial ambit extends 'throughout the ocean'.[72] The use of the generic 'at sea' in the relevant provisions does not allow for geographical restrictions. This means that, regardless of where a vessel encounters a ship in distress, it is duty-bound to assist it.

As regards the material object of the obligation, the notions of 'distress' and 'rescue' are key. 'Distress' is defined as 'a situation wherein there is reasonable certainty that a person, a vessel or

[64] ibid art 14(1). On trafficking, see further ch X.
[65] Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime (15 November 2000, entered into force 28 January 2004) 2241 UNTS 480 (Smuggling Protocol), art 2.
[66] ibid art 8(7).
[67] ibid art 19.
[68] UNCLOS (n 4) arts 2(3), 87(1).
[69] Moreno-Lax (n 14).
[70] SOLAS Convention (n 4) ch V, reg 33(1) (emphasis added).
[71] SAR Convention (n 4) annex, para. 2.1.10.
[72] Satya Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982— A Commentary*, vol III (Nijhoff 1995), 177.

other craft is threatened by grave and imminent danger', which is the reason for it requiring 'immediate assistance'.[73] Yet, the term has been interpreted in two different ways. The most stringent requires that safety of life be a factor, entailing 'something of a grave [and impending] necessity'.[74] The other focuses on the likelihood of the danger materializing in the foreseeable future, without there being 'an actual physical necessity existing at the moment'.[75] This interpretation better accommodates the object and purpose of the maritime conventions,[76] and takes account of the positive obligations ensuing from the right to life, which favour an expansive reading.[77] In this light, unseaworthiness per se may entail distress, which would make boat migrants' vessels—typically overcrowded, ill-equipped, and vulnerable to many hazards—in need of assistance *by definition*.

Whether 'boat migrants' put themselves in peril by 'voluntarily' undertaking a voyage does not release shipmasters from their duty to assist. There is no indication to this effect in the relevant texts. This would require a subjective assessment on dubious moral premises, away from the objective appraisal of the situation at hand. Such a stance would contravene 'elementary considerations of humanity',[78] and amount to indirect discrimination regarding the enjoyment of the right to life.[79]

Like 'distress', 'rescue' is not defined in UNCLOS. The 2004 amendments to the SAR and SOLAS Conventions have clarified the term.[80] It is now accepted to entail an operation in three steps: 'to retrieve persons in distress', to 'provide for their initial medical or other needs', and 'to deliver them to a place of safety', where rescue is considered to terminate.[81] Since survivors are to be 'disembarked from the assisting ship and delivered to a place of safety',[82] this implies that the 'place of safety' is on dry land,[83] requiring cooperation from the coastal States.

(b) Search and Rescue Duties of Coastal States

Coastal States have a duty to ensure that necessary arrangements are made for coast watching and for both the searching *and* rescuing of persons in distress around their coasts. These arrangements include the operation and maintenance of SAR facilities.[84] The SAR Convention provides, in addition, for inter-State coordination of SAR services and for the delimitation of SAR regions (SRR) in

[73] SAR Convention (n 4) annex, para 1.3.13.
[74] John Noyes, 'Ships in Distress' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2007) para 1; George Walker, *Definitions of the Law of the Sea* (Nijhoff 2012) 169.
[75] English High Court of Admiralty, *The Eleanor* (1809) Edwards Rep 135, 161.
[76] SOLAS Convention (n 4) annex, ch V, reg 7(1); SAR Convention (n 4) preamble, paras 1, 3, annex, para 2.1.1.
[77] See further, Lisa-Marie Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas' in Moreno-Lax and Papastavridis (n 8) 222.
[78] *Corfu Channel* (n 5) para 215.
[79] Human Right Committee, 'General Comment No 36, Article 6: Right to Life' UN doc CCPR/C/GC/36 (3 September 2018).
[80] IMO, 'Amendment to the International Convention on Maritime Search and Rescue, 1979, as Amended', Res MSC.155(78) (20 May 2004); IMO, 'Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended', Res MSC.153(78) (20 May 2004). See also IMO, 'Guidelines on the Treatment of Persons Rescued at Sea', Res MSC.167(78) (20 May 2004) (IMO Guidelines). Although IMO Guidelines are not strictly binding, they must 'be taken into account' by SAR and SOLAS Conventions Parties accepting of the 2004 amendments to both instruments. See SAR Convention (n 4) annex, para. 3.1.9.
[81] SAR Convention (n 4) annex, para 1.3.2.
[82] ibid annex, ch 3, para 3.1.9; SOLAS Convention (n 4) annex, ch V, reg 33(1–1).
[83] See further Martin Ratcovich, 'The Concept of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever Controversial Question of Where to Disembark Migrants Rescued at Sea?' (2015) 33 Australian Yearbook of International Law 81.
[84] SOLAS Convention (n 4) ch V, reg 7(1); UNCLOS (n 4) 98(2).

cooperation between the parties.[85] The objective is to develop a SAR system that can effectively respond to emergencies at sea. This requires the establishment of adequate communication and operational infrastructure, including a Rescue Coordination Centre responsible for recording distress signals and coordinating the assistance response.[86] Rescue units attached to them must, in turn, be suitably equipped, staffed, and managed.[87]

Awareness of a distress situation through whatever means—including satellite imagery or radar detection—triggers the obligation to assist.[88] The objective is to ensure the preservation of human life at sea. The State responsible for the SRR in which assistance is rendered retains 'primary responsibility' to ensure the cooperation necessary for the survivors to be 'delivered to a place of safety'.[89] Although the duty on the coastal State is limited to ensuring collaboration, rather than disembarkation in its own territory, the 2004 amendments nonetheless establish an obligation of result, in that survivors must be taken to landfall.[90] The SAR operation will not be considered accomplished unless survivors are effectively disembarked.

Neither the 'place of safety' nor the concept of 'safety' itself have been defined. Yet, the amendments do indicate that in determining such a location, both the individual circumstances of the case as well as the International Maritime Organization (IMO) Guidelines have to be taken into account.[91] According to the Guidelines, this must be 'a place where the survivors' safety of life is no longer threatened and where their basic human needs … can be met'.[92] Because '[e]ach case is unique', the selection of a place of safety 'may need to account for a variety of important factors',[93] in particular any risk of *refoulement*, which 'is a consideration in the case of asylum-seekers and refugees recovered at sea'.[94] States cannot circumvent international protection obligations by declaring interdiction measures to be rescue operations.[95] Equating the two and disconnecting them from their human rights and refugee law implications has no support in international law.[96]

The identification of a precise port of disembarkation has been most problematic,[97] with divergent views clashing as a result. It can be the next port of call, the geographically closest to the emergency, one within the SRR where survivors are retrieved, or one provided by the flag State of the rescuing vessel. In case of conflict, there is no residual rule in the maritime conventions. An IMO circular recommended that '[i]f disembarkation … cannot be arranged swiftly elsewhere', the State responsible for the relevant SRR '*should* accept the disembarkation of the persons rescued … into a

[85] SAR Convention (n 4) annex, chs 2, 3.
[86] ibid annex, paras 2.1.3, 2.3, 2.1.8, 3.1.
[87] ibid annex, paras 2.4.1.1, 2.5.
[88] ibid annex, paras 4.2.1, 4.3; Efthymios Papastavridis, 'The ECHR and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 German Law Journal 417.
[89] SAR Convention (n 4) annex, para 3.1.9; SOLAS Convention (n 4) ch V, reg 33 (1–1).
[90] Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 International Journal of Marine and Coastal Law 523, 524.
[91] SAR Convention (n 4) annex, para 3.1.9; SOLAS Convention (n 4) ch V, reg 33 (1–1).
[92] IMO Guidelines (n 80) para 6.12.
[93] ibid para 6.15.
[94] ibid para 6.17. See also IMO and UNHCR, 'Rescue at Sea: A Guide to Principles and Practices as Applied to Migrants and Refugees' (2015) <http://www.unhcr.org/450037d34.pdf> accessed 25 May 2020.
[95] Andreas Fischer-Lescano, Tillmann Lohr, and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 IJRL 256, 291.
[96] *Hirsi Jamaa v Italy* (2012) 55 EHRR 21; Human Rights Committee (n 79).
[97] UNHCR, 'Problems related to the Rescue of Asylum-Seekers in Distress at Sea', UN doc EC/SCP/18 (26 August 1981) paras 19–21.

place of safety under its control',[98] but this has not become hard law. This leaves ample space for negotiations, delays, and disputes between the countries concerned, which powerful States have exploited to their advantage, as Part 4 elaborates.

4. CREATING SPACES OF NON-PROTECTION THROUGH INTERDICTION

The maritime conventions delineate functional areas of responsibility that States must oversee in good faith. Yet, perceived gaps and ambiguities have been interpreted in self-serving ways by destination States. As discussed below, rescue has been (mis)construed to inflate interdiction powers and to deflect protection responsibilities to other States, if not to neglect them altogether. The three strategies of inflation, deflection, and negation result in a denial of opportunities for 'boat migrants' to access international protection. Interdiction in these different configurations is undertaken directly, indirectly, or by omission, as examples from the US, Australia, and the Mediterranean demonstrate.

(a) Direct Interdiction: Co-opting Rescue within the US Caribbean Programme

The first and most rudimentary type of interdiction emerged and was systematized as part of the US Caribbean interdiction programme in the 1980s, to prevent an influx of Haitian refugees by sea.[99] It was extended to Cubans, Ecuadorians, Dominican Republic nationals, and Chinese citizens in later periods.[100] The technique is 'direct' and consists in contact-based measures of detention, seizure, boarding, and apprehension of the persons concerned for their repatriation or forcible transfer to areas within government control. The technique draws on an understanding that neither *non-refoulement* nor international protection obligations at large apply in these circumstances. Rhetorically, interdiction is justified on compassionate grounds, co-opting the meaning of rescue and exploiting provisions in the maritime conventions to ramp up policing strategies of 'sovereign capture'.[101] This entails the instrumentalization of succour to legitimize interception, diversion, and rejection of responsibility for those concerned, (re)presenting interdiction as a humanitarian measure that saves lives, albeit negating related rights.

In the first iteration of the programme, the US accepted it had a *non-refoulement* obligation *vis-à-vis* potential refugees, maintaining a rudimentary screening process on board interdicting ships. 'Screened-in' Haitians were taken to the US military base in Guantánamo for offshore processing, while those 'screened-out' were held at sea. When the number of shipboard detainees became too large, the US started repatriations. The fear was that taking screened-out Haitians to US soil would create a 'pull factor' and 'bring a massive outflow [from Haiti] resulting in large numbers of deaths on the high seas',[102] so the measure was obliquely justified as a sort of pre-emptive rescue.

The approach changed in 1992, when the US disclaimed *non-refoulement* responsibilities and extended the repatriation policy to all Haitians intercepted at sea, regardless of international

[98] IMO, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea', IMO doc FAL.35/Circ.194 (2009) (emphasis added).
[99] For a comprehensive overview, see Dastyari (n 15) 13–52.
[100] Niels Frenzen, 'Responses to "Boat Migration": A Global Perspective—US Practices' in Moreno-Lax and Papastavridis (n 8) 279, 283.
[101] Polly Pallister-Wilkins, 'Humanitarian Rescue/Sovereign Capture and the Policing of Possible Responses to Violent Borders' (2017) 8 Global Policy 19.
[102] Howard French, 'US Starts to Return Haitians who Fled Nation after Coup', *New York Times* (19 November 1991) <https://www.nytimes.com/1991/11/19/world/us-starts-to-return-haitians-who-fled-nation-after-coup.html> accessed 25 May 2020.

protection considerations.[103] The approach was validated by the US Supreme Court in *Sale*, based on the interpretation that neither domestic US immigration law or constitutional protections, nor the Refugee Convention, had extraterritorial application.[104] Interdiction and forced repatriation were, once more, portrayed as 'tantamount to a life-saving policy, preventing death at sea'.[105]

Over the years, the shipboard pre-screening policy has been re-introduced, interrupted, and re-introduced again. But this has been done without reversing the *Sale* paradigm: namely, as an act of goodwill, rather than as a matter of legal obligation,[106] following Haiti's threat to otherwise suspend the readmission agreement.[107] Instead of providing access to its territory, the US has concluded additional agreements with several Caribbean island States for the processing and resettlement of 'screened-in' claimants elsewhere.[108]

Although the US has since recognized the extraterritorial scope of the Convention against Torture and has accepted its application to Guantánamo in the context of the 'war on terror',[109] there has been no substantial change to the Caribbean interdiction programme. The Obama and Trump Administrations have continued the policy, which is used as a deterrent of unauthorised maritime arrivals,[110] maintaining the shipboard pre-screening process as a discretionary, compassionate measure that 'the Secretary of Homeland Security may conduct … [if] he deems [it] appropriate'.[111]

(b) Indirect Interdiction: Deflecting Rescue within the Australian 'Pacific Strategy'

A second modality of interdiction is 'indirect' and does not necessarily entail full-contact measures or the immediate repatriation of 'boat migrants'. It can be undertaken from a distance by escorting vessels out of jurisdictional waters, enlisting third parties to thwart journeys, or deflecting international responsibilities to third countries, with or without their explicit consent. In this scenario, rescue can be delegated through formal shiprider agreements[112] or via less explicit means of 'consensual containment',[113] such as orchestrating 'pullbacks' by proxy.[114] Recent variants of this practice rely on merchant vessels to carry out 'privatized' interdiction, following guidelines provided

[103] Executive Order No 12807, 3 CRF 303 (24 May 1992).
[104] *Sale v Haitian Centers Council*, 509 US 155 (1993). The US is not a Contracting State to the Refugee Convention, but as a party to the 1967 Protocol, it is required by art 1 'to apply articles 2 to 34 inclusive of the Convention'.
[105] Carl Anderson, 'Justice Blackmun's Query Said It All: Reflections on Haiti, Refugees, and the US Supreme Court' (1993) 1 Hybrid: A Journal of Law and Social Change 73, 73.
[106] Bill Frelick, '"Abundantly Clear": *Refoulement*' (2005) 19 Georgetown Immigration Law Journal 245, 251.
[107] Exchange of Notes Constituting an Agreement concerning the Interdiction of and Return of Haitian Migrants, Haiti–US, [1981] TIAS No 10241, 33 UST 3559.
[108] Angus Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20 IJRL 273.
[109] Committee Against Torture, 'Concluding Observations on the Third to Fifth Periodic Report of the US', UN doc CAT/C/USA/CO/3-5 (19 December 2014).
[110] Ghezelbash (n 16) 75.
[111] Executive Order No 13276, 3 CRF 252 (15 November 2002) as amended by Executive Order No 13286, 68 FR10619 (28 February 2003).
[112] In the US context, see Frenzen (n 100) 289–92.
[113] Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Elgar 2019) 81. See also Gammeltoft-Hansen and Tan's contribution in ch X.
[114] Moreno-Lax (n 3).

by the authorities of countries of intended destination, or on non-State actors, including repurposed militias and former traffickers, to keep unwanted arrivals at bay. [115]

Australia has pioneered this approach through its 'Pacific Strategy' following the so-called Tampa incident of August 2001. The incident involved a Norwegian-registered container ship that had rescued 433 asylum seekers within the SRR of Indonesia, but geographically closer to Christmas Island (part of Australia). Australia refused permission to disembark, claiming that it was Indonesia's responsibility to provide a 'place of safety'. This triggered a diplomatic stand-off lasting several days, after which time the asylum seekers were transferred by the Australian Navy to Nauru and New Zealand for refugee status determination.[116]

The incident led to the adoption of domestic legislation through which Australia has since 'excised' its national territory for immigration law purposes, such that no valid asylum claim can be made by unauthorized arrivals.[117] This is based on a legal fiction, according to which even if asylum seekers physically reach Australia's territorial jurisdiction, they are treated as if they had not entered Australia in the legal sense. Instead, in some cases they are taken to third countries, such as Nauru and PNG, where Australia has funded detention centres.[118] Those recognized as refugees are denied settlement in Australia and must remain in Nauru or PNG or be resettled elsewhere.[119] Within this scheme, maritime interdiction has been carried out through *Operation Relex* until 2008 and *Operation Sovereign Borders* since September 2013.[120] The Australian Navy has been instructed to 'turn back' migrant boats at sea or, that failing, to apprehend survivors and forcibly transport them to Nauru or PNG, based on legislative amendments that permit such actions regardless of whether 'the exercise of the power is inconsistent with Australia's international obligations'.[121]

The 'stop the boats' policy has been clothed in a rhetoric of pity and care for those concerned, presented as 'the most compassionate thing [one] can do'.[122] The majority of turn-backs, however, entail the return of migrant boats to the edge of Indonesian waters, often without Indonesia's knowledge, and sometimes after people have been transferred to purpose-built life-boats purchased

[115] Charles Heller, 'Forensic Oceanography—The Nivin Case: Migrants' Resistance to Italy's Strategy of Privatized Push-back' (Forensic Architecture December 2019 <https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf> accessed 25 May 2020.
[116] *Ruddock* (n 36); cf Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 AJIL 661.
[117] See generally Jane McAdam and Fiona Chong, *Refugee Rights and Policy Wrongs: A Frank, Up-to-date Guide by Experts* (UNSW Press 2019).
[118] The Migration Act initially provided important protections to ensure that transfers occurred consistently with international law (see Michelle Foster, 'The Implications of the Failed "Malaysia Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 Melbourne Journal of International Law 395), but those were later removed, such that now the only criterion to designate a country as a 'regional processing country' is that is 'in the national interest': Migration Act 1958 (Cth), s 198AB(2).
[119] Claire Higgins, 'The (Un-)sustainability of Australia's Offshore Processing and Settlement Policy' in Moreno-Lax and Papastavridis (n 8) 303. See also Foster/Hood ch X.
[120] Violeta Moreno-Lax, Daniel Ghezelbash, and Natalie Klein, 'Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia' (2019) 32 Leiden Journal of International Law 715; Ghezelbash, Moreno-Lax, Klein, and Opeskin (n 17).
[121] Maritime Powers Act 2013 (Cth), s 75A(1)(c).
[122] Richard Ackland, 'If Europe Listens to Tony Abbott, the Future for Refugees Will Be Cruel', *The Guardian* (21 April 2015) <https://www.theguardian.com/commentisfree/2015/apr/21/if-europe-listens-to-tony-abbott-the-future-for-refugees-will-be-cruel> accessed 25 May 2020/.

by Australia.[123] There are also reports of asylum seekers being handed over to Sri Lankan authorities on the high seas, exposing them to a direct risk of *refoulement*,[124] and of instances where interdiction has been carried out from within Australia's territorial waters, in contravention of UNCLOS provisions.[125] A Parliamentary inquiry was established in 2015 when it emerged that Australian authorities had paid smugglers to turn around 'boat migrants'.[126] The scandal exposed the government's objective of impeding boat arrivals through whatever means,[127] despite the 'saving lives' rhetoric.

(c) Interdiction by Omission: Negating Rescue in the Mediterranean

The third and most dangerous kind of interdiction is accomplished 'by omission'. This purportedly falls within the family of measures of neo-*refoulement*, defined by Hyndman and Mountz as measures that instrumentalize geography to restrict access to asylum.[128] These practices have flourished and acquired new proportions, particularly in the Mediterranean, since the eruption of the 'refugee crisis', consolidating 'policies based on deterrence, militarization and extraterritoriality' that incorporate 'the risk of migrant deaths as part of an effective control of entry'.[129] This modality is based on the negation of rescue, including through outright abandonment at sea,[130] the withdrawal of naval assets, or the reduction of operational areas covered by maritime missions to avoid contact with potential 'boat migrants'.[131] Port closures and the criminalization of 'solidarity rescues' undertaken by civil society organizations are also characteristic of this trend.[132]

[123] George Roberts, 'Asylum Seekers Give Details on Operation Sovereign Borders Lifeboat Turn-Back', *ABC News* (18 March 2014) <https://www.abc.net.au/news/2014-03-17/asylum-seekers-give-details-on-operation-sovereign-borders/5326546> accessed 25 May 2020.
[124] Azadeh Dastyari and Daniel Ghezelbash, 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures' (2020) 32 IJRL 1; 'Australia Sends Back Sri Lankan Asylum Seekers', *BBC News* (9 May 2016) <www.bbc.com/news/world-australia-36222959> accessed 25 May 2020.
[125] Andreas Schloenhardt and Colin Craig, 'Turning Back the Boats: Australia's Interdiction of Irregular Migrants at Sea' (2015) 27 IJRL 536, 549–550.
[126] Senate Legal and Constitutional Affairs References Committee, *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> accessed 25 May 2020.
[127] Oliver Laughland, 'Angus Campbell Warns Asylum Seekers Not to Travel to Australia by Boat', *The Guardian* (11 April 2014) <https://www.theguardian.com/world/2014/apr/11/angus-campbell-stars-in-videos-warning-asylum-seekers-not-to-travel-by-boat> accessed 25 May 2020.
[128] Jennifer Hyndmann and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43 Government and Opposition 249.
[129] UNGA, *Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, Agnès Callamard*, UN doc A/72/335 (15 August 2017) para 10.
[130] Charles Heller and Lorenzo Pezzani, 'Death by Rescue: The Lethal Effects of Non-assistance at Sea' (*Forensic Architecture*, 18 April 2016) <https://forensic-architecture.org/investigation/death-by-rescue-the-lethal-effects-of-non-assistance-at-sea> accessed 25 May 2020.
[131] Charles Heller and Lorenzo Pezzani, 'Forensic Oceanography—*Mare Clausum*: Italy and the EU's Undeclared Operation to Stem Migration across the Mediterranean' (Forensic Architecture May 2018) <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>.
[132] Charles Heller and Lorenzo Pezzani, 'Blaming the Rescuers' (2017) <https://blamingtherescuers.org>. For analysis, see Moreno-Lax, Ghezelbash, and Klein (n 120).

The replacement of *Mare Nostrum*,[133] an Italian mission launched in response to the mass drownings of Lampedusa of 2013,[134] with the much smaller EU border control operation *Triton*,[135] coordinated by the external frontiers agency (Frontex),[136] illustrates this approach. *Mare Nostrum* had been deployed after Italy's condemnation by the European Court of Human Rights in *Hirsi* for practices of interdiction and direct return of 'boat migrants' to their point of departure, similar to those of Australia and the US.[137] These practices had been praised by EU officials for having 'a positive impact', because, 'on the humanitarian level, fewer lives ha[d] been put at risk, due to fewer departures'.[138] The *Hirsi* judgment rejected the interdiction-rescue equation and declared pushbacks to Libya a violation of the prohibitions of ill-treatment and collective expulsion, clarifying the extraterritorial reach of *non-refoulement* at sea.[139]

With pushbacks banned and *Mare Nostrum* cancelled,[140] in the aftermath of the Lampedusa tragedy the EU launched *Triton*. The EU Council expressed 'its deep sadness' for the deaths and asserted that 'determined action should be taken … to prevent the loss of lives at sea'.[141] The solution proposed, however, was to strengthen 'the fight against trafficking and smuggling' by reinforcing Frontex.[142] *Triton*'s operational area, naval assets, and financial means were much smaller than those of *Mare Nostrum*.[143] Despite the grand language used to justify the mission, it was not designed as a SAR operation, since 'Frontex is not [intended as] a search and rescue body'.[144] As a result, only a small proportion of rescues in the Central Mediterranean have been carried out by Frontex-coordinated assets since 2014.[145] This is the consequence of *Triton*'s operational area lying far away from Libyan jurisdictional waters, where most distress incidents occur, and due to the strategic choice by Frontex that 'instructions to move … outside *Triton* operational area' for the purpose of rendering assistance to migrant boats '[would] not be considered'.[146] The breach of rescue obligations this involves is presented as necessary to avoid 'act[ing] as a pull factor'.[147]

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[133] 'Mare Nostrum Operation' (*Marina Militare*) <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx> accessed 25 May 2020.
[134] 'Lampedusa Boat Tragedy: Migrants "Raped and Tortured"', *BBC News* (8 November 2013) <https://www.bbc.co.uk/news/world-europe-24866338> accessed 25 May 2020.
[135] Sergio Carrera and Leonhard den Hertog, 'Whose *Mare*? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean' (2015) CEPS Paper in Liberty and Security No 79.
[136] Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard [Frontex] and Repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1.
[137] *Hirsi* (n 96).
[138] Human Rights Watch, 'Pushed Back, Pushed Around' (21 September 2009) 37 <https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf> accessed 25 May 2020.
[139] *Hirsi* (n 96); Violeta Moreno-Lax, '*Hirsi v Italy* or the Strasbourg Court *v* Extraterritorial Migration Control?' (2012) 12 Human Rights Law Review 574.
[140] Paolo Cuttitta, 'Delocalization, Humanitarianism and Human Rights: The Mediterranean Border between Exclusion and Inclusion' (2018) 50 Antipode 783.
[141] European Council, Presidency Conclusions, EUCO 169/13 (25 October 2013) 46.
[142] ibid 47.
[143] 'EU Migrants: Reduced Mediterranean Mission Set to Go', *BBC News* (31 October 2014) <https://www.bbc.co.uk/news/world-europe-29856458> accessed 25 May 2020.
[144] European Commission, 'Frontex Joint Operation "Triton": Concerted Efforts to Manage Migration in the Central Mediterranean' (31 October 2014) <https://www.europa-nu.nl/id/vjohgqgsbzzn/nieuws/frontex_joint_operation_triton_concerted> accessed 25 May 2020.
[145] For detailed statistics, see Eugenio Cusumano, 'Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarianism and Border Control' (2019) 54 Cooperation and Conflict 3, 10–11.
[146] Letter by Frontex Director of Operations, Klaus Rösler, to Italian General Director of Immigration and Border Police, Dr Giovanni Pinto (Ref 19846/25.11.2014, 25 November 2014) <https://assets.documentcloud.org/documents/3531242/Rosler-Pinto-Frontex-Letter-2014.pdf>.
[147] Frontex, *Risk Analysis for 2017* (2017) 32 <http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf> accessed 25 May 2020.

EUNAVFOR MED *Operation Sophia*,[148] deployed in 2015 as part of the EU's 'war on smugglers',[149] constituted another expression of the interdiction by omission strategy. Justified as an endeavour to 'save lives by reducing crossings',[150] its mission was to engage in a 'systematic effort to capture and destroy vessels used by the smugglers',[151] so as 'to better contain the growing flows of illegal migration' across the Central Mediterranean.[152] A UN Security Council Resolution provided the legal backing.[153] In the course of their interventions, *Sophia* assets were occasionally called upon to assist migrant vessels in distress. Although the operation played a relatively minor role in total rescues,[154] such that it could not be 'regarded as decisive in terms of a pull factor',[155] discontent among participating Member States led to the withdrawal of naval assets.[156] From March 2019 until the end of the operation one year later,[157] the EU conducted a naval mission without naval assets in an effort to avoid direct contact with migrant vessels in distress and evade rescue responsibilities. Instead, surveillance drones were used to capture relevant information,[158] communicated to the Libyan Coastguard for its intervention, through the intermediation of the Italian authorities.[159] Intercepted 'boat migrants' were thus pulled back to Libya, in disregard of 'place of safety' and *non-refoulement* provisions.[160]

5. CONCLUSION

As the foregoing has shown, rhetorical recourse to 'saving lives' has been instrumentalized to justify practices of interdiction impeding access to safety worldwide.[161] Besides the erosion of the principle of *non-refoulement* which such practices entail, they also undermine the right to leave any country and the right to seek asylum, converting rescue into a denier of international protection. While destination States inflate their interdiction powers through reliance on rescue discourse, beyond the provisions of the law of the sea (Part 2), they deflate their SAR obligations and detach them from

[148] Council Decision 2015/778/CFSP of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L122/31.
[149] European Commissioner Avramopoulos, 'Remarks', SPEECH/15/4840 (23 April 2015).
[150] European External Action Service (EEAS), 'European Union Naval Force: Mediterranean Operation Sophia' (15 September 2016) <https://eeas.europa.eu/sites/eeas/files/factsheet_eunavfor_med_en_0.pdf> accessed 25 May 2020.
[151] European Council, Statement, EUCO/18/15 (23 April 2015).
[152] European Council, Presidency Conclusions, EUCO 22/15 (26 June 2015).
[153] UNSC Resolution 2240 (9 October 2015).
[154] Cusumano (n 145) 13–14.
[155] EEAS, *EUNAVFOR Med Op Sophia—Six monthly report*, *1 January–31 October 2016* (30 November 2016) 7–8 <http://statewatch.org/news/2016/dec/eu-council-eunavformed-jan-oct-2016-report-restricted.pdf> accessed 25 May 2020.
[156] European Council, 'EUNAVFOR MED Operation Sophia: Mandate Extended until 30 September 2019' (29 March 2019) <https://www.consilium.europa.eu/en/press/press-releases/2019/03/29/eunavfor-med-operation-sophia-mandate-extended-until-30-september-2019/> accessed 25 May 2020.
[157] European Council, 'EU Launches Operation IRINI to Enforce Libya Arms Embargo' (31 March 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/> accessed 25 May 2020.
[158] Daniel Howden, Apostolis Fotiadis, and Antony Loewenstein, 'Once Migrants on Mediterranean Were Saved by Naval Patrols. Now They Have to Watch as Drones Fly Over', *The Guardian* (4 August 2019) <https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu> accessed 25 May 2020.
[159] Letter of Ms Paraskevi Michou, Director-General for Migration and Home Affairs, to Mr Fabrice Leggeri, Frontex Executive Director (Ref Ares(2019)1755075, 18 March 2019) <http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf> accessed 25 May 2020.
[160] This practice of employing the Libyan Coastguard as proxy for pullbacks has been denounced at the European Court of Human Rights: *SS v Italy* App No 21660/18 (ECtHR) (pending). See further Moreno-Lax (n 3).
[161] Adrian Little and Nick Vaughan-Williams, 'Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia' (2017) 23 European Journal of International Relations 533.

related human rights and refugee protections, quibbling with the definitions of 'safety' and 'distress' (Part 3). The precise modalities are varied and can range from forms of 'direct', 'indirect', and 'by omission' interdiction employed to deflect responsibilities to third countries or to neglect them altogether, as the examples from the US, Australia, and the Mediterranean illustrate (Part 4).

The ultimate consequence of these practices is to overwhelm rescue with interdiction, through a mechanism that launders the final effect. The invocation of humanitarian language masks the violence implicated. It makes measures that deny dignity and rights ethically more palatable. The line between SAR and security-related interdiction is, thereby, increasingly blurred and manipulated. SAR should be understood as an end in itself, not as a means to prevent 'boat migration' at the service of anti-smuggling strategies. Such an approach fundamentally fails to create protection space or to address the root causes of displacement, leaving both unchanged.[162] These policies do not remove the actual drivers of forced movements by sea. Rather, they erect barriers and divert flows to typically longer and more perilous routes, contributing to the rise of death tolls.[163] They also entrench insecurity, fuelling not only the original causes of flight but creating new dangers that make seeking protection a life-or-death exercise.[164] Rescue, in this guise, is fundamentally distorted and ultimately becomes a denier of asylum.

Scholars in the field need to be wary of developments in domestic law and practice which reinforce this slant. The renewed appeal of nationalist politics and anti-refugee sentiment globally endangers the integrity of the international protection regime and international law at large. Particular vigilance is required to monitor consolidating practices of interdiction by omission, which not only tolerate, but purposively embed, the risk of death as part of the migration control toolbox of destination States. The securitization of maritime borders risks becoming all-pervading, obfuscating rescue, asylum, and *non-refoulement* at sea. Further investigation is hence required of these dynamics which, if unchecked, will dismantle the most fundamental principles of international refugee law.

[162] Re Libya, see eg Human Rights Watch, 'No Escape from Hell' (January 2019) <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya> accessed 25 May 2020.
[163] UNHCR, 'Desperate Journeys' (January 2019) <https://www.unhcr.org/desperatejourneys/> accessed 25 May 2020; Tara Brian and Frank Laczko (eds), *Fatal Journeys: Identification and Tracing of Dead and Missing Migrants* (IOM 2016).
[164] Violeta Moreno-Lax and Martin Lemberg-Pedersen, 'Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization' (2019) 56 Questions of International Law 5.