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## Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception

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# Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception

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## **Abstract**

This Article undertakes a review of maritime interception and rescue-at-sea practices by evaluating the nature and scope of legal protection that each mechanism affords to refugees encountered at sea. For both interception and rescue, the underlying legal framework and State practice will be discussed, and longstanding protection gaps inherent in each will be examined. Attention is then turned to recent protection improvements in both rescue and interception. These recent changes will be analyzed for their strengths and weaknesses, and some suggestions for improving maritime interception safeguards are offered.

# IRREGULAR MARITIME MIGRATION: REFUGEE PROTECTION ISSUES IN RESCUE AND INTERCEPTION

*Barbara Miltner\**

No one knows how many boat people have died, but thousands have been rescued at sea. In the reality of dangerous journeys undertaken to gain access to reluctant coastal states, the time-honoured maritime traditions of rescue at sea collide with the growing determination of states to prevent illegal entry to their territory.<sup>1</sup>

## INTRODUCTION

Irregular maritime migration is not a new phenomenon.<sup>2</sup> What is relatively new is the growing trend towards mixed migration flows, whereby refugees move within population flows that include “both forced and voluntary movements.”<sup>3</sup> The present trend toward mixed migration means that refugees are likely to be present among the populations targeted by States’ migration control tactics, whether as persons traveling in makeshift, unseaworthy vessels, using forged documents, resorting to the use of a smuggler, or even among those unwittingly ensnared by a trafficker.<sup>4</sup> It also means that this same group of individuals is

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1. United Nations (“U.N.”) High Comm’n for Refugees (“UNHCR”), *THE STATE OF THE WORLD’S REFUGEES 2006, HUMAN DISPLACEMENT IN THE NEW MILLENNIUM*, CH. 2 *SAFEGUARDING ASYLUM 2006* (Oxford Univ. Press).

2. UNHCR Global Consultations on Int’l Protection, Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea ¶ 1 (Mar. 18, 2002) [hereinafter Background Note], <http://www.unhcr.org/protect/PROTECTION/3e5f35e94.pdf> (last visited Nov. 3, 2006).

3. UNHCR Global Consultations on Int’l Protection, Refugee Protection and Migration Control: Perspectives from UNHCR and IOM ¶ 2, U.N. Doc. EC/GC/01/11 (May 31, 2001) [hereinafter Perspectives from UNHCR and IOM].

4. Smuggling involves procuring illegal entry of persons into a country for financial benefit, whereas trafficking involves control over persons by means of threat, use of

more vulnerable to distress situations at sea requiring rescue.

There are many articles examining interception from a human rights or refugee law perspective,<sup>5</sup> and others that examine it from a law of the sea standpoint,<sup>6</sup> and still fewer undertake to examine interception from both perspectives.<sup>7</sup> This Article represents an attempt to examine the tension between these usually separate strands of law to identify gaps in refugee protection at sea affecting not just the migration-control tactic of interception, but also the universal humanitarian tradition of rescue at sea.

In recent years the importance of jointly addressing maritime interception and rescue issues has become more widely recognized by both scholars and the international community.<sup>8</sup> In February 2005, the Office of the United Nations (“U.N.”) High Commissioner for Refugees (“UNHCR”) announced a one-year project with the European Commission to gather information about mixed migration trends in the Mediterranean.<sup>9</sup> One im-

force, or coercion for the purpose of exploitation such as prostitution, forced labor, or slavery. See Protocol Against the Smuggling of Migrants by Land, Sea and Air, G.A. Res. 55/25, Annex III, at 41, U.N. Doc. A/Res/55/25 (Jan. 8, 2001); see also Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25, Annex II, at 32, U.N. Doc. A/Res/55/25 (Jan. 8, 2001).

5. See, e.g., Attila Ataner, *Refugee Interdiction and the Outer Limits of Sovereignty*, Vol. 3, No. 1, J.L. & EQUALITY, Spring (2004); see also Andrew Brouwer & Judith Kumin, *Interception and Asylum: When Migration Control and Human Rights Collide*, 21 (4) REFUGEE 6 (2003) (analyzing interception measures and effects); See generally Arthur Helton, *Securing Refugee Protection in the Americas: The Inter-American System on Human Rights and the Rights of Asylum-Seekers*, 6 SW. J.L. & TRADE AM. 129 (1999) (discussing background of recent migration of refugees in America, specifically Cuban and Haitian refugees).

6. See Jon Jacobson, *At-Sea Interception of Alien Migrants: International Law Issues*, 28 WILLIAMETTE L. REV. 811, 811-19 (1992); see also Canadian Council for Refugees (“CCR”) Int’l Workshop, *Interdiction and Refugee Protection: Bridging the Gap*, Ottawa, Canada (May 29, 2003), available at <http://www.ccrweb.ca/interdictionproceedings.PDF> (meeting discussing practical policy alternatives to current interdiction measures).

7. One of the first to examine the law of the sea from a human rights perspective was Bernard Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT’L L. 399 (1997). More recent work directly examining the legality of interception from both perspectives includes Mark Pallis, *Obligations of States Towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes*, 14 INT’L J. REFUGEE L. 329 (2002).

8. For an excellent and timely policy-based discussion of the intersection between maritime interceptions and rescue-at-sea, see Joanne van Selm & Betsy Cooper, *The New ‘Boat People’: Ensuring Safety and Determining Status*, MIGRATION POLICY INST., Jan. 2006; see also *Interception and Rescue at Sea, Breakfast Briefing*, MIGRATION POLICY INST., June 15, 2005, available at <http://www.migrationpolicy.org/events/050615.php>.

9. UNHCR, *Project to Shed Light on Africa-Europe Transit Migration*, UNHCR News

portant aspect of this project has been to examine refugee protection needs of those rescued or intercepted at sea.<sup>10</sup> The project, designed to formulate a regional migration strategy in response to Mediterranean migration movements, was launched in recognition of the “human tragedy associated with the rising death toll at sea,” which has been recognized as contributing “an added dimension of ‘humanitarian crisis’ to these maritime movements.”<sup>11</sup> The Mediterranean is but one example of the growing humanitarian crisis at sea.<sup>12</sup> News articles regularly report dangerously unsafe migration attempts along a variety of maritime routes worldwide, from Somalia to Yemen,<sup>13</sup> Ecuador to the United States,<sup>14</sup> and Libya to Italy,<sup>15</sup> among others. The issue of migrants encountered at sea is not a new one, but it is certainly one encountering a renaissance.<sup>16</sup>

Despite the differences in underlying policy objectives, rescue-at-sea and maritime interceptions share a great deal of common ground. A weakening maritime rescue regime in conjunction with an aggressively expanding interception framework

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Stories (Feb. 1, 2005), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=NEWS&id=41ffa0f54>.

10. So far the project has convened a meeting of experts in Athens in September 2005, as well as a meeting of State representatives that took place in Madrid in May 2006. See UNHCR, *Reconciling Protection Concerns with Migration Objectives*, Background Discussion Paper, Meeting of State Representatives on Rescue at Sea and Maritime Interception in the Mediterranean, p.2, Madrid (May 23-24, 2006).

11. See *id.* at 1.

12. See Stephen Legomsky, *The USA and the Caribbean Interdiction Program*, presented at *The Right to Seek Asylum? The Pacific, Mediterranean and Caribbean Plans Compared*, Prato, Italy (Sept. 26-27, 2005), in 18 INT'L J. REFUGEE L. 677 (2006); see also Michael Pugh, *Europe's Boat People: Maritime Cooperation in the Mediterranean*, INST. FOR SECURITY STUDIES, Western European Union, Chaillot Paper 41, Paris, (July 2000).

13. See, e.g., Marc Lacey, *Somalis Brave a Sea of Perils for Jobs Abroad*, N.Y. TIMES, May 29, 2006, at A1.

14. See Ginger Thompson & Sandra Ochoa, *Dangerous Passage: From Ecuador by Sea by a Back Door to the U.S.: A Migrant's Grim Sea Voyage*, N.Y. TIMES, June 13, 2004, at 1 (citing U.S. immigration and military authorities' statistics that from 2000-2004, “at least 250,000 people have left Ecuador on fishing boats,” representing nearly ten times number of Haitians undertaking a sea voyage to the United States during the 1990s).

15. See UNHCR, *Shipowners Facing 'Unfair' Migrant Rescue Burden, says UN Refugee Section*, NEWS ARCHIVES, Sept. 14, 2005 (quoting Vincent Cochetel, UNHCR's Deputy Director of Department of Int'l Protection as saying: “In 2004, at least 2,000 people died at sea whilst attempting to cross from Libya to Italy”).

16. See generally Ketty Kehayoylou, *UN and Maritime Experts Draw Up Life-Saving Recommendations for Those in Peril on the Sea*, UNHCR News Stories (Sept. 14, 2005), available at <http://www.unhcr.org/cgi-bin/texis/vtx/news/openssl.htm?tbl=NEWS&id=43283d744>.

combine to pose significant protection risks to refugees encountered at sea. Most notably are an increased risk of *refoulement*, a lack of systematic and uniform access to asylum procedures, and obstructed access to temporary protection of a uniform standard.<sup>17</sup> Ultimately, neither rescue nor interception adequately accommodates refugee protection.<sup>18</sup>

This Article undertakes a review of maritime interception and rescue-at-sea practices by evaluating the nature and scope of legal protection that each mechanism affords to refugees encountered at sea. For both interception and rescue, the underlying legal framework and State practice will be discussed, and longstanding protection gaps inherent in each will be examined.<sup>19</sup> Attention is then turned to recent protection improvements in both rescue and interception. These recent changes will be analyzed for their strengths and weaknesses, and some suggestions for improving maritime interception safeguards are offered.

## I. INTERCEPTION

Despite the growing prevalence of interception, much confusion and ambiguity persist with regard to the exact meaning of the term, and this confusion has been compounded by an array of associated terminology.<sup>20</sup> Terms that are frequently used in reference to interception include interdiction,<sup>21</sup> push-backs,<sup>22</sup> non-*entrée*,<sup>23</sup> and non-admission measures,<sup>24</sup> although each of

17. See van Selm & Cooper *supra* note 8.

18. See generally Guy S. Goodwin-Gill, *Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from the South Pacific*, 12 PAC. RIM L. & POL'Y J. 23 (2003) (discussing Tampa incident as a reminder that refugee regime is not a seamless web, even if certain core and often competing principles retain their normative power).

19. See van Selm & Cooper *supra* note 8.

20. See Andrew Brouwer & Judith Kumin, *Interception and Asylum: When Migration Control and Human Rights Collide*, 21 REFUGE 6, 7 (Dec. 1, 2003).

21. This term has become almost standard in North America as applied to maritime interceptions. See generally *Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 155 (1993).

22. This term tends to have a narrower meaning in the maritime context. It has been used interchangeably with interdiction, but it tends to characterize the specific practice of intercepting a foreign vessel, usually inside a State's territorial waters, and forcibly repelling it back out onto the high seas, thereby preventing access to a State's territory or territorial waters. See Human Rights Watch, *Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees* 113 (Sept. 2006), <http://www.hrw.org/reports/2006/libya0906/libya0906.pdf> (last visited Nov. 3, 2006).

23. See James C. Hathaway, *The Emerging Politics of Non-Entrée*, 91 REFUGEES 40, 40-41 (1992); see also Ataner *supra* note 5, at 23; Jessica C. Morris, *The Spaces in Between: Ameri-*

these may connote slightly narrower or broader meanings than “interception” itself. For purposes of this Article, reference will be limited to the term *interception*, which has recently been defined broadly enough to encompass all of the various terms listed above.<sup>25</sup> This section will examine the meaning of the concept before addressing State practice and the underlying policy context of interception.

### A. *Meaning and Definition of Interception*

At present, there is no universal definition of interception, notwithstanding recent attempts.<sup>26</sup> In 2000, UNHCR proposed to define interception as:

[A]ll 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.<sup>27</sup>

This definition reflects and emphasizes the *extraterritorial* character of interception. The extraterritorial aspect has important legal ramifications regarding State duties under international treaty law, and will be explored in further detail below. For purposes of this Article, an extraterritorial act is considered to involve action by one State that takes place either in the territory of another State or in international territory, such as the high seas.<sup>28</sup> It is the recognition of the extraterritorial nature of interceptions that makes this definition so relevant today.

Notwithstanding its potential relevance, the 2000 UNHCR definition was supplanted three years later by a new definition.

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*can and Australian Interdiction Policies and Their Implications for the Refugee Protection Regime*, 21 REFUGEE 51, 52 (2003).

24. See Jens Vedsted-Hansen, *Non-Admission Policies and the Right to Protection: Refugees' Choice Versus States' Exclusion?*, in REFUGEE RIGHTS & REALITIES: EVOLVING INTERNATIONAL CONCEPTS & REGIMES 269, 269-70 (Frances Nicholson & Patrick Twomey eds., 1999).

25. See UNHCR ExCom, Conclusion on Protection Safeguards in Interception Measures, No. 97 (LIV) (Oct. 10, 2003) [hereinafter Conclusion No. 97].

26. See *id.*; see also UNHCR Executive Committee of the High Commissioner's Program ("ExCom"), Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach ¶ 10, EC/50/SC/CRP.17 (June 9, 2000) [hereinafter Interception of Asylum Seekers and Refugees].

27. See UNHCR ExCom, Interception of Asylum Seekers and Refugees, *supra* note 26, ¶ 10.

28. See BLACK'S LAW DICTIONARY 869 (8th ed. 2004).

In 2003, the Executive Committee<sup>29</sup> (“ExCom”) of UNHCR issued a Conclusion<sup>30</sup> redefining interception as:

[O]ne of the measures employed by States to:

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

where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the traveling public as well as persons being smuggled or transported in an irregular manner.<sup>31</sup>

This definition maintains the focus on State intent to interrupt movement by undocumented persons, but it also makes several significant changes to the earlier definition. There are four noteworthy aspects to this proposed definition.

First, the ExCom definition deletes any explicit mention of an extraterritorial element. Whereas the Standing Committee’s earlier definition described interception as “all measures applied by a State, *outside its national territory*,”<sup>32</sup> the ExCom definition eliminates any such reference.<sup>33</sup> This change is noteworthy since extraterritoriality had previously been considered a dominant, if not always necessary element of interception in practice.<sup>34</sup> In the maritime context in particular, interceptions may

29. Established by ECOSOC in 1958, ExCom is made up of seventy Member States and meets annually to approve the UNHCR program and budget, and advise on international protection with UNHCR, its intergovernmental and non-governmental organization (“NGO”) partners. See UNCHR Website, <http://www.unhcr.org> (last visited Nov. 3, 2006).

30. Consensus reached by ExCom in the course of its discussions is expressed in the form of Conclusions on International Protection (“ExCom Conclusions”), which are not formally binding, but offer persuasive authority in interpreting international protection issues. See generally UNHCR ExCom, Conclusions on International Protection, <http://www.unhcr.org/cgi-bin/texis/vtx/excom?id=3bb1cb676> (last visited Nov. 3, 2006).

31. See UNHCR ExCom, Conclusion No. 97, *supra* note 25.

32. See UNHCR ExCom, Interception of Asylum Seekers and Refugees, *supra* note 26, ¶¶ 17-19.

33. See UNHCR ExCom, Conclusion No. 97, *supra* note 25.

34. See J.C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 312,



occur in a State's territorial waters or on the high seas, but current State practice reflects a definite trend toward high seas interceptions, as States begin to take advantage of the legal ambiguities that flow from intercepting vessels further out to sea.<sup>35</sup> It would thus seem counterproductive to remove from the definition a characteristic feature just as it is becoming more relevant to current State practice.

One consequence of eliminating the extraterritorial element from the definition of interception is overbreadth. By removing the extraterritorial component, the scope of interception (to "prevent embarkation," "prevent further onward international travel," or to "assert control of vessels" in relation to those without proper documentation) captures a radically wider range of activities, including those not traditionally viewed as interception.<sup>36</sup> By failing to acknowledge the existence of interceptions occurring on the high seas, involving extraterritorial disembarkation or processing,<sup>37</sup> or trapping asylum seekers and refugees within their state of origin,<sup>38</sup> the ExCom definition ob-

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312-13 (Cambridge Univ. Press, 2005) (characterizing interception as "extraterritorial *refoulement*").

35. See Bruce Finley, *U.S. 'Extends Borders' to S. American Coasts*, ARIZ. DAILY STAR, Dec. 19, 2004, at A17 (citing a U.S. Department of Homeland Security policy of "pushing our borders out" near the coast of Ecuador).

36. See UNHCR ExCom, Conclusion No. 97, *supra* note 25. Preventing embarkation from *inside* the intercepting State via the imposition of exit visas or border closures to prevent departure would technically qualify under the new definition. The legality of many such in-country activities implicates Article 12(2) of the International Covenant on Civil and Political Rights ("ICCPR") involving the right to leave any country. See Concluding Observations of the Human Rights Committee: France, ¶ 20, U.N. Doc. CCPR/C/79/Add.80 (Aug. 4, 1997); see also Concluding Observations of the Human Rights Committee: Austria, ¶ 11, U.N. Doc. CCPR/C/79/Add.103 (November 19, 1998); see generally HATHAWAY, *supra* note 34. Other activities such as detention within transit States—often used for irregular migrants awaiting processing, hearings, deportation, or removal—would also be captured under the ExCom definition.

37. See generally Amnesty Int'l, *Unlawful and Unworkable—Amnesty International's Views on Proposals for Extra-Territorial Processing of Asylum Claims*, AI Index: IOR 61/004/2003 (June 18, 2003).

38. See generally Mark Gibney, Katarina Tomasevski & Jens Vested-Hansen, *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267 (1999) (analyzing conflict in human rights law as regards universal versus state responsibility); see generally RICK LAWSON, *Concept of Jurisdiction and Extraterritorial Acts of State*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE (Gerard Kreijen et al. eds., 2002); Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739 (2005) (arguing that international treaties on civil and political rights do apply in "wartime" context).

scures the questionable legality of many aspects of modern day interception practices.

A second feature of the ExCom definition is its explicit distinction between interception and rescue. The Preamble of the document emphasizes that, “when vessels respond to persons in distress at sea, they are not engaged in interception.”<sup>39</sup> This distinction recognizes the predominantly humanitarian character of rescue, in contrast to the migration control policy objectives that underpin interception practices. Although the ExCom attempt to distinguish between these two practices is a useful starting point, there remains an inadequate distinction between rescue and interception, and more is needed to clarify the boundaries that define each activity. This issue will be explored more fully in Section IV.B.

Third, the ExCom definition of interception simultaneously blurs the line between rescue and interception by suggesting that interception “also serve[s] to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner.”<sup>40</sup> Humanitarian goals may be achieved in the interception of trafficking victims or smuggled persons exposed to serious harm, but the net result of interception activities as a generalized practice is less clear.<sup>41</sup> Whatever the humanitarian benefits to interception, the practice is driven largely by migration control and national security con-

39. UNHCR ExCom, Conclusion No. 97, *supra* note 25.

40. *Id.*

41. See, e.g., Michael Pugh, *Drowning Not Waving: Boat People and Humanitarianism at Sea*, 17 J. REFUGEE STUD. 50, 62 (2004). Because statistics are not available, there is no way of knowing how many refugees encountered at sea are summarily subjected to *refoulement*. Further, it is recognized that increasingly draconian migration control efforts reduce legal migration options and in turn drive the demand for illegal migration options such as smuggling. UNHCR, Update on Global Consultations on International Protection ¶ 11, UN Doc. EC/51/SC/CRP.12 (May 30, 2001) [hereinafter Update on Global Consultations] (noting that “[i]nterception on land and at sea, security checks and other measures have made legal access to a territory where asylum can be claimed increasingly difficult. Resort to smugglers has increased, as has the exposure to trafficking of women and children moving on their own.”). This vicious cycle is reflected in UNHCR’s repeated requests that States focus more on alternative legalized migration routes, and less on border enforcement measures. See generally UNHCR ExCom, Interception of Asylum Seekers and Refugees, *supra* note 26; UNHCR, Co-Operation to Address the Irregular Movement of Asylum-Seekers and Refugees: Elements for an International Framework (Mar. 17, 2005) [hereinafter Elements for an International Framework], [http://www.unhcr.bg/events\\_records/2005/2005\\_03\\_17\\_ld\\_present\\_en.pdf](http://www.unhcr.bg/events_records/2005/2005_03_17_ld_present_en.pdf) (last visited Nov. 3, 2006); UNHCR ExCom, Conclusion No. 97, *supra* note 25.

cerns, as recognized by the International Organization for Migration<sup>42</sup> (“IOM”) when it observed that States “which have the ability to do so find that intercepting migrants before they reach their territories is one of the most effective measures to enforce their domestic migration laws and policies.”<sup>43</sup> Issues of effectiveness aside, the attempt to portray interception as a humanitarian practice contributes to the blurred lines between interception and rescue by conflating migration control tactics with humanitarian rescue operations. Such language should be removed, as it directly undermines the explicit attempt to distinguish interception from rescue.

Finally, the ExCom definition makes explicit reference to physical interception practices when it speaks of “control of vessels” in contrast to the general reference to “all measures” proposed by UNHCR in 2000.<sup>44</sup> This explicit reference to a particular subset of interceptions indicates that physical interception has become important enough in its own right to warrant explicit recognition apart from administrative interception measures, which are briefly discussed in the next section.

### B. *Interception in Practice*

As noted in UNHCR’s proposed definition, interception is generally understood to constitute all *extraterritorial* activities applied by a State to prevent entry to its territory by undocumented migrants.<sup>45</sup> Interception activities can be further categorized as either administrative or physical in nature.<sup>46</sup> Administrative measures have evolved significantly in the last two decades and encompass a broad range of activities,<sup>47</sup> including: implementation of visa requirements, carrier sanctions (for failure to detect

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42. IOM is an intergovernmental organization that is not part of the U.N. system. It works with U.N. bodies and individual governments to address a variety of migration-related issues such as counter-trafficking, refugee resettlement, IDP returns, etc., and is a frequent player in regional consultative processes.

43. UNHCR, Perspectives from UNHCR and IOM, *supra* note 3, ¶ 14.

44. See UNHCR ExCom, Conclusion No. 97, *supra* note 25, ¶ iii.

45. See UNHCR ExCom, Interception of Asylum Seekers and Refugees, *supra* note 26.

46. See *id.*, ¶¶ 12-13. For an overview of tactics, including interception, adopted by States to bar access to domestic asylum procedures, see STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND PROCEDURE 1095-1135 (4th ed., 2005).

47. See Penelope Mathew, *Legal Issues Concerning Interception*, 17 GEO. I. L.J. 221, 221-49 (2003); see also HATHAWAY, *supra* note 34, at 40. See generally Ataner, *supra* note 5; Morris, *supra* note 23; Vedsted-Hansen, *supra* note 24, at 269-70.

and deter irregular migrants from entering the interdicting State), safe third country and country of first asylum determinations<sup>48</sup> (also known as “deflection”<sup>49</sup>), the posting of immigration officials in other countries’ transit points to identify false documents or suspicious migrants, and the training and posting of airline officials at overseas airports and other transit hubs to screen documents and migrants prior to boarding.<sup>50</sup> Administrative interception also includes legislative action such as the creation of “international zones”<sup>51</sup> or “excised” territories where more special immigration laws are put into force. Australia’s post-Tampa legislation is one such example, wherein certain territories were legislatively excised from Australia’s migration zone.<sup>52</sup>

By contrast, *physical* interception is more limited and involves interference with vessels, usually in the maritime context, and may include the boarding, inspection, seizure, and/or destruction of vessels.<sup>53</sup> Physical interception also encompasses activities such as “push-backs,” in which boats intercepted in territorial waters may be forcibly “escorted” back out onto the high seas to prevent disembarkation in the State territory.<sup>54</sup> This Article is specifically concerned with physical interception of maritime vessels, hereafter referred to as “maritime interception.”

### C. Policy Context of Interception

Interception has proven to be a highly effective tool for controlling migrant flows and because of this it is applied in a variety of different contexts and in furtherance of an array of different

48. See Stephen Legomsky, *Secondary Movements and the Return of Asylum Seekers*, 15 INT’L J. REFUGEE L. 567 (2003).

49. See James C. Hathaway & R. Alexander Neve, *Fundamental Justice and the Deflection of Refugees from Canada*, 34 OSGOODE HALL L.J. 213 (1996).

50. See A. James Vazquez-Azpiri & Daniel C. Horne, *The Doorkeeper of Homeland Security: Proposals for the Visa Waiver Program*, 16 STAN. L. & POL’Y REV. 513, 545-46 (2005); Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365, 368 (2005).

51. See *Amuur v France*, 19776/92 Eur. Ct. H.R. 25 (1996) (regarding France’s “international zone”).

52. Migration Amendment (Excision from Migration Zone) Act, 2001 (Austl.).

53. See UNHCR ExCom, *Interception of Asylum-Seekers and Refugees*, *supra* note 26, ¶ 10.

54. See Robert L. Newmark, Note, *Non-refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L. Q. 833, 847 (1993).

policy goals.<sup>55</sup> Some of the most common policy justifications for the use of interception are as a form of law enforcement, as a means of combating illegal immigration, smuggling or trafficking activity,<sup>56</sup> or as a deterrent against abuse of the asylum system. Interception, it is argued, may deter the irregular movement of refugees who have already secured protection in another country.<sup>57</sup> It is further justified as a national security measure, or even as an exercise of a State's humanitarian obligations.<sup>58</sup> Others argue that interception is a deliberate tactic to avoid or sidestep international refugee obligations.<sup>59</sup> At its most basic, however, interception is a migration management tool used to prevent undocumented migrants from crossing international borders.<sup>60</sup>

#### D. *Protection Gaps in Maritime Interception*

At present, States engaged in interception activities do so either unilaterally, i.e. physically intercepting vessels on the high seas, or via bilateral or multilateral agreements in which "host" States may agree to enforce, for example, visa requirements on behalf of a visa-issuing third country within their own borders. At present, interception activities are essentially self-regulating, relying on the goodwill of States to adhere to international human rights obligations stemming from treaty and customary norms.

The greatest risk posed by interception at present is the utter lack of any uniform procedural standards governing intercepted persons. Until such uniform standards are adopted, it will remain a challenge to identify potential refugees and prevent *refoulement*. States that characterize intercepted persons as mere "economic migrants" are willfully overlooking possibly valid refugee claims, thus increasing the likelihood that such

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55. See UNHCR, Perspectives from UNHCR and IOM, *supra* note 3, ¶ 2; see also Legomsky, *The USA and the Caribbean Interdiction Program*, *supra* note 12.

56. See UNHCR ExCom, Interception of Asylum Seekers and Refugees, *supra* note 26, ¶¶ 3, 14.

57. See *id.* ¶ 15.

58. See *id.* ¶ 16; see also U.S. Coast Guard, Alien Migrant Interdiction: Introduction, <http://www.uscg.mil/hq/g-o/g-opl/AMIO/AMIO.htm> (last visited Nov. 3, 2006) (characterizing interception as "primarily" a "humanitarian responsibility").

59. See Legomsky, *supra* note 48 at 601 (2003) (describing interception activities as methods to deny access and barriers to asylum determination systems).

60. See *id.* at 599.

persons will be returned to the persecuting States from which they fled.

A systematic method for identifying: 1) the country responsible for the protection of intercepted persons, and 2) the nature of the protection duties, is needed to safeguard such individuals from the risk of *refoulement*. At present, the UNHCR is working in partnership with member States (via ExCom), experts and international organizations to attempt to devise such a system.

## II. *THE MARITIME DUTY TO RESCUE*

### A. *The Nature of the Legal Obligation*

In contrast to the practice of maritime interception, the duty to rescue those in distress at sea is established by historical humanitarian and legal tradition.<sup>61</sup> It exists under both treaty<sup>62</sup> and general international law,<sup>63</sup> and applies to both State vessels<sup>64</sup> (military and non-military) as well as private commercial

61. See UNHCR ExCom, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, Conclusion No. 23 (XXXII) (Oct. 21, 1981) [hereinafter Conclusion No. 23]; see also UNHCR ExCom, Rescue of Asylum-Seekers in Distress at Sea, Conclusion No. 38 (XXXVI) (Oct. 18, 1985) [hereinafter Conclusion No. 38]; UNHCR ExCom, Subcomm. on Int'l Protection ("SCIP"), Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, EC/SCP/18 (Aug. 26, 1981) (describing the evolution of the rescue duty from its first emergence in an international instrument in 1910).

62. The principal maritime treaties that contain rescue obligations include: International Convention on Salvage, Apr. 28, 1989, S. Treaty Doc. No. 102-12 (1991), 1953 U.N.T.S. 193 [hereinafter Salvage Convention]; U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (superseding the four 1958 Law of the Sea conventions: Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311); International Convention on Maritime Search and Rescue, Apr. 27, 1979, T.I.A.S. No. 11,093, 1405 U.N.T.S. 97 [hereinafter SAR]; International Convention for the Safety of Life at Sea, Nov. 1, 1974, T.I.A.S. 9700, 1184 U.N.T.S. 278 [hereinafter SOLAS]. For a thorough overview of maritime treaty sources of the rescue obligation, see *Migration & International Legal Norms* Chapter 8 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); see also Goodwin-Gill, *supra* note 18.

63. Notwithstanding that it was largely superseded by UNCLOS in 1982, the Preamble to the 1958 Convention on the High Seas states that its provisions are "generally declaratory of established principles of international law." Convention on the High Seas, *supra* note 62, pmbli.; see IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 224 n.2 (2003).

64. UNCLOS obligates States Parties to enforce the rescue duty for *all* ships flying its flag including both commercial and State vessels. See UNCLOS, *supra* note 62, art.

vessels.<sup>65</sup> However, despite the broad reach of the rescue obligation,<sup>66</sup> the protection that maritime rescue affords is not comprehensive, due to a lack of clarity in the drafting of rescue-related instruments. Until July 2006, a longstanding ambiguity surrounding the disembarkation duty of coastal States has contributed to a weakening of the rescue regime. Recent maritime treaty amendments to address this problem will be discussed in Part IV.A. of this Article.

Rescue itself has been defined only very recently in the principal search and rescue treaty as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.”<sup>67</sup> Problematically, this instrument fails to define “a place of safety,”<sup>68</sup> but new Guidelines<sup>69</sup> adopted in 2004 attempt to clarify its meaning and will also be discussed further in Part IV of this Article. This section will briefly survey the rescue obligations of various actors before turning to a discussion of the decades-old ambiguity over disembarkation responsibility. It will then discuss recent international efforts to address these deficiencies, as well as the challenges that remain.

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98(1). The SAR Treaty calls for coordination of search and rescue services using either designated “rescue units” (public or private) or other (non-rescue) appropriate public or private services. *See* SAR, *supra* note 62, ch. 2.4.1. Similarly, SOLAS requires States Parties to enforce rescue compliance by all of its shipmasters. *See* SOLAS, *supra* note 62.

65. The SOLAS Convention requires States Parties to coordinate and rescue those in distress off their coasts (Ch. V, Reg 7(1)), and requires shipmasters of merchant vessels to assist with the rescue of any persons in distress at sea (Ch. V, Reg 33(1)). Similarly, the Salvage Convention imposes a duty on shipmasters of salvage vessels to rescue, and obligates States Parties to enforce the rescue duty with regard to commercial vessels, under arts. 10(1), (2). *See* Salvage Convention, *supra* note 62. The Salvage Convention does not apply to warships or any other non-commercial vessels that enjoy sovereign immunity. *See id.* art. 4.

66. At the treaty level, rescue obligations extend to coastal States, flag States, and to shipmasters of commercial or merchant vessels. Coastal States Parties are required to arrange and coordinate effective search and rescue services, and flag States, coastal or otherwise, are required to enforce the rescue obligation among shipmasters. Shipmasters therefore have both an indirect duty to rescue, by virtue of flag State enforcement, and a direct duty under certain instruments. *See* UNCLOS, *supra* note 62, arts. 98(1) and (2); *see also* Salvage Convention, *supra* note 62, art. 10; SAR, *supra* note 62, chs. 2-3.

67. *See* SAR, *supra* note 62, ch. 1.3.2.

68. Int’l Maritime Org. (“IMO”), Guidelines for the Treatment of Persons Rescued at Sea, Maritime Safety Comm. (“MSC”) Res. 167(78), app. ¶ 3, MSC Doc. 78/26/Add.2, Annex 34 [hereinafter IMO Guidelines] (stating “[t]he SAR Convention does not define ‘a place of safety’”).

69. *See id.*

Under the Search and Rescue (“SAR”) Treaty, search and rescue services<sup>70</sup> must be established by States Parties and coordinated regionally to be capable of responding to distress signals in their particular rescue regions.<sup>71</sup> As part of this, SAR calls for the designation of rescue units, which are to participate in search and rescue functions at sea.<sup>72</sup> Perhaps even more importantly, the rescue regime foresees that, where a designated rescue unit may not be available in the distress area, the relevant rescue coordinating center may properly designate a non-rescue vessel, public or private, to respond to the distress call,<sup>73</sup> or may even requisition a private vessel in the vicinity to participate in a particular rescue operation.<sup>74</sup>

### B. *The Disembarkation Problem*

Until 2006, the longstanding weakness of the rescue regime involved ambiguities concerning the *completion* of a rescue. Before the rescue duty was codified in the various instruments discussed above, the rescue duty involved a routine and established practice of disembarking rescuees at the next port of call.<sup>75</sup> Crucially, when the rescue duty was later codified into various international treaties, reference to an explicit disembarka-

70. A search and rescue service has been defined as: “The performance of distress monitoring, communication, co-ordination and search and rescue evolutions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircraft, vessels and other craft and installations.” See SAR, *supra* note 62, Annex ch. 1.3.3.

71. See *id.*, ch. 2.1.1.

72. See *id.* ch. 2.4.1. The rescue units themselves may consist of “State or other appropriate public or private services,” including warships, thus indicating that the rescue regime established by this treaty places no public/private restrictions on the nature of designated rescue vessels. *Id.* chs. 2.4.1.1, 5.8.1 (referencing “rescue unites (including warships)”).

73. See *id.* ch. 2.4.1.2.

74. See SOLAS, *supra* note 62, ch. V, reg. 33. This means that regional SAR coordination centers are vested with the authority to coordinate rescue arrangements among the most appropriate vessels in the rescue area, whether they are merchant vessels, specialized rescue vessels, or even warships. See SAR, *supra* note 62, ch.5.8.1. This becomes important in a later discussion of the blurred lines that exist between State-based rescue and interception. *Id.* ¶¶ 19-21.

75. See UNHCR ExCom, SCIP, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, *supra* note 61. This practice succeeded for centuries, principally because the vast majority of those rescued at sea could be quickly returned to the protection of their State of origin. Disembarkation was therefore a simple matter in which the rescued person remained only briefly in the State of disembarkation while their return was arranged through diplomatic or consular channels.



tion duty was entirely overlooked; no such corresponding duty was codified into any rescue instrument.<sup>76</sup> According to UNHCR, the problem stems in part from the fact that disembarkation was “until recently considered so obvious that it was not found necessary in any of the instruments [pertaining to rescue-at-sea] to stipulate an express obligation for the country of the first port of call to permit the disembarkation of rescued persons.”<sup>77</sup>

With the advent of sea-borne refugees, the rescue framework’s implied disembarkation practice was turned on its head. Boat people, unlike those formerly encountered in distress at sea, did not enjoy the protection of their State, and return to their State of origin was not a viable option. Disembarkation of such persons frequently burdened the receiving State with long-term resettlement and protection obligations, creating a strong disincentive to coastal States to permit further disembarkations.<sup>78</sup> As coastal States began to refuse disembarkation permission, the problem was transferred to rescuing vessels, creating a drain on financial and personnel resources for the on-board care of those rescued, as well as serious interruptions to commercial shipping schedules as vessels moved from port to port, seeking disembarkation permission.<sup>79</sup>

The disembarkation problem reached crisis proportions in the 1980s when Vietnamese refugees took to the South China Sea.<sup>80</sup> In response, ExCom issued several Conclusions<sup>81</sup> calling

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76. *See id.* ¶ 19.

77. *Id.* ¶ 20.

78. *See* UNHCR, Background Note, *supra* note 2, ¶¶ 13, 38, 40.

79. *See* UNHCR ExCom, SCIP, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, EC/SCP/30 ¶¶ 2-3 (Sept. 1 1983).

80. *See* UNHCR, Background Note, *supra* note 2, ¶¶ 37-38. Many of these so-called “boat people” became victims of violent attacks by both military elements and pirates at sea as they sought safe landing. *See* UNHCR ExCom, Protection of Asylum-Seekers at Sea, Conclusion No. 20 (XXXI) (Oct. 16, 1980) [hereinafter Conclusion No. 20] (expressing concern about criminal attacks on asylum-seekers at sea in the South China Sea “involving extreme violence and indescribable acts of physical and moral degradation, including rape, abduction and murder”). Commercial vessels became more reluctant to rescue persons whom no coastal State would allow to disembark, and with this came a corresponding decline in rescues. *See* UNHCR ExCom, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, Conclusion No. 34 (XXXV), ¶ (a) (Oct. 18, 1984) [hereinafter Conclusion No. 34]; UNHCR ExCom, Rescue of Asylum Seekers in Distress at Sea, Conclusion No. 31 (XXXIV), ¶ (a) (Oct. 20, 1983) [hereinafter Conclusion No. 31]. Both ExCom Conclusions highlight the decrease in rescues of asylum-seekers in distress at sea. Consequently, deaths at sea began to mount. *See* Josh Briggs,

on States to extend protection and rescue duties to asylum-seekers at sea, and reiterating the “established international practice”<sup>82</sup> to permit “next port of call” disembarkation for those rescued at sea.

Eventually, UNHCR initiated resettlement guarantee programs, in which developed States agreed to resettle those individuals in exchange for the coastal States permitting their disembarkation and temporary processing.<sup>83</sup> These programs were only temporary, however, and were never designed to resolve the protection gap created by the ambiguity surrounding disembarkation.<sup>84</sup>

### C. *Protection Gaps in the Rescue Context*

The disembarkation ambiguity discussed above constitutes a critical protection gap for refugees rescued at sea<sup>85</sup> by exposing them to serious risks of harm, ranging from *refoulement* to violence or mistreatment on board a vessel.<sup>86</sup> States which do per-

Comment, *Sur Place Refugees Status in the Context of Vietnamese Asylum Seekers in Hong Kong*, 42 AM. U. L. REV. 433, 437 (1993).

81. See UNHCR ExCom, Conclusion 38, *supra* note 61, ¶ (a) (“Reaffirmed the fundamental obligation under international law for shipmasters to rescue all persons, including asylum-seekers, in distress at sea.”); see also UNHCR ExCom, Conclusion No. 34, *supra* note 80; UNHCR, ExCom, Conclusion No. 31, *supra* note 80; UNHCR ExCom, Report of the Working Group on Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, Conclusion No. 26 (XXXIII) (Oct. 20, 1982) [hereinafter Conclusion No. 26]; UNHCR ExCom, Conclusion No. 23, *supra* note 61; UNHCR ExCom, Conclusion No. 20, *supra* note 80; UNHCR ExCom, Refugees Without an Asylum Country, Conclusion No. 15 (XXX) (Oct. 16, 1979) (referring to a “humanitarian obligation”) [hereinafter Conclusion No. 15].

82. UNHCR ExCom, Conclusion No. 23, *supra* note 61, ¶ 3. For more information regarding rescue of asylum-seekers in distress at sea, see UNHCR ExCom, Conclusion No. 38, *supra* note 61; UNHCR ExCom, Conclusion No. 34, *supra* note 80; UNHCR ExCom, Conclusion No. 31, *supra* note 80; UNHCR ExCom, Conclusion No. 26, *supra* note 81.

83. Two such initiatives were the Rescue at Sea Resettlement Offers (“RASRO”) and the Disembarkation Resettlement Offers (“DISERO”) schemes, initiated in response to the Vietnamese boat people crisis of the 1970s. These programs were later replaced by the Comprehensive Plan of Action in 1989. See generally UNHCR ExCom, Conclusion No. 34, *supra* note 80; Conclusion No. 31, *supra* note 80; See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 157-59 (2d ed., 1996).

84. See GOODWIN-GILL, *supra* note 83, at 157-60.

85. See generally Richard Barnes, *Refugee Law at Sea*, 53 INT’L. & COMP. L. Q. 47 (2004) (examining legal obligations existing upon coastal States and flag States in respect of asylum-seekers rescued at sea).

86. This latter scenario involves the possibility of additional harm arising on board, ranging from lack of access to appropriate medical or basic care, to the risk of being

mit disembarkation are under no clear obligation to allow entry or to conduct an initial screening to distinguish those requiring international protection.<sup>87</sup> Yet another risk is that those in distress will simply be abandoned at sea by vessels unwilling to risk the costly burden of being unable to disembark those it rescues. Tragically, there are indications that this trend is on the rise.<sup>88</sup>

Beyond the disembarkation ambiguity, another problem threatens to weaken the rescue regime. As interceptions become a more established practice, there is growing concern that some interception operations are being characterized as rescue operations, both in practice<sup>89</sup> and in policy.<sup>90</sup> For example, if a State military vessel encounters an unseaworthy vessel suspected of transporting undocumented irregular migrants, should the encounter properly be characterized as a rescue, or an interception? Similarly, if a vessel suspected of transporting undocumented irregular migrants is encountered in distress, but would have been intercepted even if it were not in distress, is it a res-

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thrown overboard or otherwise exposed to harmful deterioration of conditions similar to those seen aboard the MV Tampa off the coast of Australia in 2001.

87. See generally Kathleen Newland, *Troubled Waters: Rescue of Asylum-Seekers and Refugees at Sea*, MIGRATION POL'Y INST., <http://www.migrationinformation.org/feature/print.cfm?ID=80> (last visited Jan. 1, 2003).

88. See UNHCR, Summary of Discussions and Recommendations, Expert Meeting on Interception and Rescue in the Mediterranean, Cooperative Responses, Sept. 12-13, 2005, Athens (citing among the possible consequences of the disembarkation problem the risk of refusal by shipmasters to respond to distress calls, and the possibility of rescued persons being thrown overboard or encouraged to swim ashore.). In 2005, Vincent Cochetel, Deputy Director of UNHCR's Department of International Protection, observed that disembarkation refusal could have serious consequences on the rescue regime itself when he observed that, "[t]he next time (captains) see a ship at sea they will turn a blind eye, not answer a distress call, or throw (the migrants) overboard." See *Ship Owners Facing "Unfair" Migrant Rescue Burden, Says UN Refugee Section*, UNHCR NEWS ARCHIVES, Sept. 14, 2005; see also Kehayoiyolu, *supra* note 16 (mentioning a rescue by the Clementine Maersk, after "several other boats either ignored them altogether or promised to summon help which never materialized").

89. See Brouwer & Kumin, *supra* note 5, at 6, 11, 14; see also van Selm & Cooper, *supra* note 8, at 5-10 ("If rescue is conducted by state authorities, however, a situation more similar to that of interception might ensue").

90. UNHCR and ExCom documents contain contradictory notions of rescue and interception, suggesting on the one hand that rescue "in context of interception" is a legitimate action, while declaring on the other hand that vessels responding to those in distress at sea are *not* engaged in interception. For mention of interception in the rescue context, see UNHCR, Background Note, *supra* note 2, ¶ 9. For mention of rescue in the interception context, see generally UNHCR ExCom, Interception of Asylum-Seekers and Refugees, *supra* note 26, ¶ 16; UNHCR ExCom, Conclusion No. 97, *supra* note 25.

cue, or an interception? These issues remain ambiguous, and at present there are no guidelines dictating how such encounters should be labeled by State authorities that engage in both interception and rescue operations.

An intercepting State may have incentive to characterize its actions as one of rescue, particularly if it permits greater interference with a vessel and reduced responsibilities regarding disembarkation and temporary protection of its occupants. Ultimately, this problem highlights the need for greater clarification of the boundaries, legal limits, and specific circumstances unique to interception, and of those more intrinsically characteristic of rescue.

In summary, the rescue regime is challenged by both long-standing problems pertaining to disembarkation duties, and an emerging trend in which maritime interceptions are being characterized as rescue operations. The disembarkation duty has only recently been addressed by maritime treaty amendments and the issuance of *Guidelines on the Treatment of Persons Rescued at Sea*. The problem of interception operations co-opting the rescue framework remains to be addressed. Potential resolution of these protection gaps in rescue will be examined in Section IV.A.

### III. *OTHER DUTIES AFFECTING REFUGEES AT SEA*

Maritime interceptions implicate several intersecting areas of law,<sup>91</sup> including international refugee law,<sup>92</sup> international human rights law,<sup>93</sup> and maritime law, as well as international

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91. See UNHCR ExCom, *Interception of Asylum-Seekers and Refugees*, *supra* note 26, ¶ 20.

92. See, e.g., 1967 Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter *Refugee Protocol*]; See *generally* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*].

93. See, e.g., Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 14 U.N.T.S. 85 [hereinafter *Convention Against Torture*]; Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter *CEDAW*]; International Covenant on Civil and Political Rights (“ICCPR”), Dec. 19, 1966, 999 U.N.T.S. 172; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 4; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

criminal law.<sup>94</sup> A brief survey of international legal obligations affecting refugees and asylum seekers at sea reveals a range of sources from treaty, international legal principles, and custom affecting States' rights and duties with regard to persons and/or vessels encountered at sea.

#### A. *The Non-refoulement Obligation in the Refugee Convention*

Widely regarded as the cornerstone of the Convention Relating to the Status of Refugees ("Refugee Convention" or the "Convention"), Article 33 requires that States Parties shall not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on account of a protected ground.<sup>95</sup>

##### 1. Non-Admittance as *Refoulement*?

There remains persistent disagreement among commentators about the scope of the Article 33 non-*refoulement* obligation.<sup>96</sup> Some scholars have suggested that, whatever its scope at the time of drafting, the non-*refoulement* obligation is now regarded as applying at "the moment at which asylum seekers present themselves for entry," so that the principle has progressively evolved and "now encompasses both non-return and non-rejection" at the frontier.<sup>97</sup> This interpretation of Article 33 as man-

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94. See, e.g., Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/55/383 (Jan. 8, 2001).

95. Refugee Convention, *supra* note 92, art. 33. This provision applies to recognized refugees as well as asylum seekers who meet the Convention criteria, whether or not they have been formally processed. The dual application stems from the declaratory nature of refugee status, by which a person is considered to be a refugee as soon as the refugee criteria have been satisfied, whether or not a formal status determination has occurred. Because refugees exist as refugees even in the absence of formalized status determinations, States may not sidestep Article 33 by simply refusing to initiate status determinations. *Id.*; see also UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ¶ 28, <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> (last visited Nov. 6, 2006); see also GOODWIN-GILL, *supra* note 83, at 121, 141. Such a practice would also be contrary to Article 27 of the Vienna Convention on the Law of Treaties, which precludes a State Party from invoking internal law provisions to disregard its treaty duties. See Vienna Convention on the Law of Treaties, art. 27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

96. See GOODWIN-GILL, *supra* note 83, at 121.

97. See Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 114 (Erika Feller

dating entry at the State's frontiers has important consequences in the maritime context, where a coastal State's territorial waters represent an extension of its territorial boundaries.<sup>98</sup> In effect, under such an interpretation, refugees arriving by sea who manage to reach a State's territorial waters should not be turned away. However, such an argument has greater force with regard to land boundaries, where rejection at one State's border may inevitably result in *refoulement* if the neighboring State is the country of persecution.

By contrast, other commentators argue that because Article 33 “does not affirmatively establish a duty on the part of states to receive refugees” that “State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted.”<sup>99</sup> It is important to note, however, that this interpretation relies on the qualification that, where rejection at the frontier involves any real risk of harm, “Art[icle] 33 amounts to a de facto duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk.”<sup>100</sup> Under this reading, Article 33 is not violated where refugees are rejected at the border, unless such rejection involves any real risk of return.<sup>101</sup> In the rescue-at-sea context, coastal State refusal of disembarkation would result in an unknown final destination—something that, depending on the proximity of the persecuting State to later disembarkation points, could qualify as an “impermissible . . . exposure to risk.”<sup>102</sup>

Ultimately, whether one subscribes to the notion that non-

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et al. eds., 2003) [hereinafter *REFUGEE PROTECTION IN INTERNATIONAL LAW*] (espousing the view that Article 33 extends to rejection at the frontier); see also GOODWIN-GILL, *supra* note 83, at 123-24 (arguing that, while non-*refoulement* did not encompass non-rejection at the frontier in 1951, State practice has contributed to progressive development of the law and has led to the establishment of a broader interpretation of the concept).

98. See UNCLOS, *supra* note 62, arts. 2(1), 2(3) (establishing that the “sovereignty of a coastal State extends, beyond its land territory . . . to an adjacent belt of sea, described as the territorial sea” and noting that “sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law,” respectively).

99. HATHAWAY, *supra* note 34, at 301 (citations omitted).

100. *Id.*

101. See *id.*

102. *Id.*

*refoulement* requires admission or can permit the denial of entry at the frontier, the two schools of opinion appear to converge at the point where refusal at the border could mean a return to harm, either directly or indirectly.<sup>103</sup> In cases where such a threat exists, the non-*refoulement* obligation does not permit rejection at the frontier.<sup>104</sup>

### 2. Extraterritorial Effect of Article 33

The debate as to the extraterritorial scope of Article 33 is also pronounced. The majority view characterizes Article 33 as having full extraterritorial effect, based on the plain language of the provision, and the object and purpose of the Convention itself, which would be rendered meaningless if States could sidestep legal safeguards by moving their actions outside of their territory.<sup>105</sup> Another argument in support of this interpretation involves a comparative analysis of other international human rights instruments in order to draw parallels to the Refugee Convention.<sup>106</sup> Notoriously, the interpretation that Article 33 applies extraterritorially was rejected by the U.S. Supreme Court when it held in *Sale v. Haitian Centers Council* that the U.S. Coast Guard's high seas interception and return of Haitian asylum seekers did not contravene Article 33 or its domestic counterpart, because "return" in the context of "refoulement" did not encompass actions taken on the high seas, beyond the U.S. territorial frontier.<sup>107</sup> Despite a stinging dissent by Justice Blackmun and widespread criticism by scholars and commentators, the United States continues to adhere to the position that Article 33

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103. See HATHAWAY, *supra* note 34, at 301; Lauterpacht et al., *supra* note 97, at 113-14. *But see* David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 11 (1999).

104. See HATHAWAY, *supra* note 34, at 301. *But see* Lauterpacht et al., *supra* note 97, at 113-14 (suggesting an alternative to admission to the State's territory); *see also* Weissbrodt et al., *supra* note 103, at 11 (discussing Article 33 exceptions preventing a person from obtaining refugee status).

105. The plain language of Article 33 explicitly bans *refoulement* "in any manner whatsoever," and the view that the provision has extraterritorial effect has been supported by the UNHCR in a variety of contexts, including an amicus curiae brief to the U.S. Supreme Court in *Sale v. Haitian Centers Council Inc.*, 509 U.S. 155, 113 S.Ct. 2549 (1993).

106. See Lauterpacht et al., *supra* note 97, at 87-164.

107. See *Sale*, 509 U.S. at 182-83.

of the Refugee Convention has no extraterritorial effect, and does not therefore constrain actions taken beyond its own territorial frontiers such as the high seas.<sup>108</sup> The U.S. position has been soundly rejected by the Inter-American Commission on Human Rights, which concluded simply that “Article 33 ha[s] no geographical limitations.”<sup>109</sup> The U.S. view therefore appears to constitute a minority position, although its actions remain nonetheless influential on the world scene, and some have argued that the *Sale* case helped to shape Australia’s response to the MV Tampa incident.<sup>110</sup>

A more nuanced position in support of extraterritorial effect of Article 33 is advocated by Professor James C. Hathaway.<sup>111</sup> According to Professor Hathaway, refugees are entitled to a range of rights, the nature and extent of which depend on the level of a refugee’s level of attachment to the asylum State.<sup>112</sup> He argues that Article 33 is among “a small number of core rights” that apply to asylum-seekers regardless of their “level of attachment” to a State territory, so that certain rights and protections inhere even before a refugee reaches a particular State, where a refugee is merely subject to a State’s jurisdiction.<sup>113</sup> Drawing on both the text of the Convention and general principles of public international law, he concludes that, “the governments of state parties are bound to honor these rights not only in territory over which they have formal, de jure jurisdiction, but equally in places where they exercise effective or de facto jurisdiction outside their own territory.”<sup>114</sup> This would include situations “in which a state’s consular or other agents take control of persons abroad,”<sup>115</sup> such as the high seas. This Article thus adopts the position that the geographic scope of Article 33, while still debated, is likely to extend beyond State territory to encompass State exercises of effective or de facto jurisdiction.

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108. See *Cuban Am. Bar Ass’n, Inc. v. Christopher*, 43 F.3d 1412, 1425-26 (11th Cir. 1995). See generally *Sale*, 509 U.S. at 154-92; *Aerolineas Argentinas v. U.S.*, 77 F.3d 1564 (Fed. Cir. 1996); *Rodriguez v. Ridge*, 310 F.Supp. 2d 1242 (S.D. Fla. 2004).

109. *Haitian Centre for Human Rights v. United States*, Case 10.675, Report No. 51/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550, ¶ 157 (1997).

110. See *Morris*, *supra* note 23, at 51.

111. See generally HATHAWAY, *supra* note 34, at 160.

112. See *id.*

113. See *id.* at 304.

114. *Id.* at 169.

115. *Id.* at 170.



### B. *The Non-refoulement Obligation in Other Legal Sources*

In the last half-century, the non-*refoulement* obligation has emerged in other international instruments, including the Convention Against Torture (“CAT”)<sup>116</sup> and various regional treaties,<sup>117</sup> although the latter sources are beyond the scope of this Article and will not be surveyed here. Still other treaty provisions have been interpreted so as to include an implied non-*refoulement* obligation, such as Article 7 of the International Covenant on Civil and Political Rights (“ICCPR” or “Covenant”)<sup>118</sup> which will be discussed below, as well as various regional treaties<sup>119</sup> which are beyond the scope of this Article. Additionally, there is also support for the notion that non-*refoulement* has become an established principle of customary international law,<sup>120</sup> although scholarly debate continues on this issue.

#### 1. Convention Against Torture

The CAT contains an express non-*refoulement* provision, which states: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>121</sup> In terms of its geographic scope, some have argued that the textual similarity between the CAT and Refugee Convention provisions could render the CAT provision equally vulnerable to an interpretation, extended from the U.S. Supreme Court in the *Sale* case, of having merely territorial effect.<sup>122</sup> Although Article 3 makes no mention of extraterritorial

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116. See Convention Against Torture, *supra* note 93, art. 3(1).

117. See, e.g., Organization of American States (“OAS”), American Convention on Human Rights art. 22(8), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; Organization of African Unity (“OAU”), Convention Governing the Specific Aspects of Refugees Problems in Africa art. 2(3), Sept. 10, 1969, 1001 U.N.T.S. 45, 8 I.L.M. 1288.

118. ICCPR, *supra* note 93, art. 7.

119. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted as including a non-*refoulement* element as well. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222.

120. See *Summary Conclusions: The Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 178, ¶ 1 (Erika Feller et al. eds., 2003).

121. Convention Against Torture, *supra* note 93, art. 3(1).

122. See John C. Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1229 (2004). See generally *Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 155 (1993).

application, Article 2 nonetheless requires States to take *all* measures to prevent acts of torture and applies it “in any territory under [a State’s] jurisdiction,” a provision broad enough to possibly subsume the scope of returns under Article 3.<sup>123</sup> The Committee Against Torture recently reiterated that this latter provision should be interpreted to include “all areas under the de facto effective control of the State party,” and should be considered to extend the rights under CAT to “all persons under the effective control of its authorities.”<sup>124</sup> Moreover, the Committee Against Torture found that, in the case of the United States, any attempt to construe Article 3 as not applying extraterritorially was erroneous.<sup>125</sup> Thus, CAT’s Article 3 non-*refoulement* provision should be construed as having extraterritorial effect.

## 2. International Covenant on Civil and Political Rights

The Covenant contains no express non-*refoulement* duty. It does, however, contain a torture ban provision under Article 7<sup>126</sup> that has been construed by its treaty body, the U.N. Human Rights Committee (“UNHCR”), as encompassing such a duty. In a General Comment, the Committee declared that States must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country “by way of their extradition, expulsion or *refoulement*.”<sup>127</sup>

The scope of the Covenant’s legal obligations are outlined in Article 2, which requires States Parties to respect the rights of those “within its territory and subject to its jurisdiction.”<sup>128</sup> The UNHRC has interpreted this provision to extend Covenant rights to persons either within its territory or subject to its juris-

123. Convention Against Torture, *supra* note 93, art. 2.

124. Conclusions and recommendations of the Committee against Torture, United States of America, U.N. Doc. CAT/C/USA/C/2, ¶ 15 (2006).

125. *Id.* at ¶ 20.

126. See Convention Against Torture, *supra* note 93, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”).

127. U.N. Human Rights Committee, General Comment 20: Article 7, *reprinted in* Compilation of General Requirements and General Recommendations Adopted by Human Rights Treaty Bodies, at 30, ¶ 9, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

128. ICCPR, *supra* note 93, art. 2(1).

diction.<sup>129</sup>

It can thus be concluded from language of the Covenant itself and the General Comments of the UNHRC that Article 7 includes a non-*refoulement* obligation, and that obligation applies where the State exerts power *or* effective control over individuals, even if such individuals are outside the State Party's territory.

### 3. Customary International Law

One final embodiment of the non-*refoulement* obligation is as a principle of customary international law. There is not yet consensus as to whether the principle has been incorporated into a custom.<sup>130</sup> During the last two decades, some scholars have continued to express cautious reservation on this issue,<sup>131</sup> while others have strongly refuted that it has achieved such status.<sup>132</sup> In recent years, however, the weight of scholarly opinion appears to favor the view of non-*refoulement* as an established principle of customary law,<sup>133</sup> which thereby requires compliance even by States that are not a party to the Refugee Convention, the CAT, or the ICCPR. Still others have suggested that the

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129. U.N. Human Rights Committee, General Comment 31: Nature of the General Obligation on States Parties to the Covenant ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained. *Id.*

130. See Lauterpacht et al., *supra* note 97, at 140-64; see also Guy S. Goodwin-Gill, *Non-refoulement and the New Asylum Seekers*, in INTERNATIONAL REFUGEE LAW: A READER 109-10 (B.S. Chimni ed., 2000) (proposing that the core meaning of Article 33 had been incorporated into customary international law and that it also extended to persons outside the Refugee Convention definition). *But see* GOODWIN-GILL, *supra* note 83, at 134-37 (noting that both Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture are of a fundamentally norm-creating character regarded as forming the basis of a general rule of law as described by the International Court of Justice ("ICJ") in the North Sea Continental Shelf Case, 1969 I.C.J. 3, but observing nonetheless that "establishing the status of the principle in general on customary international law presents greater problems").

131. See Lauterpacht et al., *supra* note 97, at 140-64; see also Goodwin-Gill, *Non-refoulement and the New Asylum Seekers*, *supra* note 130, at 109-10.

132. See HATHAWAY, *supra* note 34, at 363.

133. See Lauterpacht et al., *supra* note 97, at 140-64; see also Goodwin-Gill, *supra* note 130.

principle of non-*refoulement* may be of a peremptory norm,<sup>134</sup> but this Article declines to take a position on what appears to be an evolving issue.

The combined breadth of coverage provided by these instruments and principles is significant. The scope, application, and possible limitations of the non-*refoulement* duty may differ according to its source under law, but the general nature of the prohibition can be said to require widespread compliance by States Parties to the Refugee Convention, CAT, and the ICCPR, and may be broadly characterized as extending extraterritorially to actions in which power or effective control over persons is jurisdictionally exercised by the State.

### C. *State Rights and Duties at Sea*

The maritime context involves different sets of rights and duties depending on the particular zone in which activity occurs.<sup>135</sup> A brief overview of the maritime zones and corresponding international obligations relevant to rescue and interception follows. The 1982 U.N. Convention on the Law of the Sea (“UNCLOS”)<sup>136</sup> identifies and defines the scope of the boundaries, legal rights and duties pertinent to each maritime zone.

#### 1. Territorial Sea

The territorial sea extends twelve nautical miles from the low water mark of a State’s coastline<sup>137</sup> and represents the zone in which States have the greatest exercise of sovereignty at sea.<sup>138</sup> Notwithstanding this, sovereignty in a State’s territorial sea is not as complete as it would be in its land-based territories.<sup>139</sup> Rather,

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134. See Jean Allain, *The Jus Cogens Nature of Non-refoulement*, 13 INT’L J. REFUGEE L. 533, 533-58 (2001) (citing, among other justifications, the established status of non-*refoulement* under customary international law; ExCom conclusions reflecting consensus of States Parties; the 1984 Cartagena Declaration; and assertions of scholar Harold Koh).

135. See generally Karen M. Hansen et al., *Trends in Commercial Development of Ocean Resources*, 14(5) METROPOLITAN CORP. COUNS. 21 (May 2006).

136. The UNCLOS supersedes the four 1958 Law of the Sea Conventions. See *supra* note 62.

137. See UNCLOS, *supra* note 62, art. 3.

138. See *id.* art. 2(1) (“The sovereignty of a coastal State extends, beyond its land territory . . . to an adjacent belt of sea, described as the territorial sea.”); see also *id.* art. 2(3) (“The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.”).

139. See BROWNLIE, *supra* note 63, at 186 (“In practical terms, the coastal state has

States' exercise of sovereignty in their territorial sea is limited by UNCLOS provisions, such as the right of innocent passage, and by "other rules of international law."<sup>140</sup> Potentially included among such "other rules" are the maritime rescue duty, the non-*refoulement* duty,<sup>141</sup> and Article 31 of the Refugee Convention,<sup>142</sup> each of which must be balanced against the State's right to act within this zone.

#### a. The Right of Innocent Passage

The most significant limitation on a State's exercise of sovereignty in the territorial sea is that of the right of innocent passage.<sup>143</sup> This right is extended to *all* vessels, whether merchant ships or government ships operated for either commercial or non-commercial purposes (including warships).<sup>144</sup> Innocent passage generally permits "continuous and expeditious" crossing by one flag State vessel through the territorial sea of another State, but may also include stopping and anchoring as necessary for navigation, distress situations, or rescue.<sup>145</sup> However, passage involving the "loading or unloading of any commodity, currency or *person* contrary to the customs, fiscal, *immigration* or sanitary laws and regulations of the coastal State"<sup>146</sup> is not innocent, and therefore gives the coastal State the authority to "take the necessary steps in its territorial sea"<sup>147</sup> to bar such passage.

#### b. Other Limits on State Sovereignty in Territorial Waters

Several ambiguities arise in the context of innocent passage.

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rights and duties inherent in sovereignty, although foreign vessels have privileges, associated particularly with the right of innocent passage, which have no counterparts in respect of the land domain apart from special agreement or customary rights.").

140. UNCLOS, *supra* note 62, art. 2(3) ("The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.").

141. *See generally* Refugee Convention, *supra* note 92; *see generally* Convention Against Torture, *supra* note 93; *see generally* ICCPR, *supra* note 93.

142. *See* Refugee Convention, *supra* note 92.

143. The right of innocent passage is recognized under treaty, in UNCLOS, and as customary law. *See* UNCLOS, *supra* note 62, arts. 17-19. For a discussion of the right of innocent passage as customary law, *see* BROWNLE, *supra* note 63, at 186-91.

144. UNCLOS, Section 3, Subsection A is entitled "Rules Applicable to All Ships" and includes Articles 17-26, which define the right and meaning of innocent passage. *See* UNCLOS, *supra* note 62, art. 17 ("[S]hips of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea.").

145. *Id.* art. 18(2).

146. *Id.* art. 19(2)(g) (emphases added).

147. *Id.* art. 25(1).

For example, what happens when the UNCLOS rules governing innocent passage conflict with “other rules of international law,” such as the Refugee Convention non-*refoulement* obligation, or the rescue duty? How do the rules governing innocent passage operate in rescue or interception scenarios? If a vessel enters a State’s territorial waters in distress from having undertaken a rescue, does the vessel’s distress situation trump the State’s exercise of immigration jurisdiction? In this situation, drawing parallels to the Australian Tampa scenario,<sup>148</sup> such a vessel should be permitted to remain within the territorial waters for purposes of stopping and anchoring, although a corresponding right of disembarkation remains elusive.

Recently, guidelines issued by the International Maritime Organization (“IMO”) have acknowledged this ambiguity and suggest that an obligation may exist under customary international law to allow a vessel in distress to come to port.<sup>149</sup> The *Guidelines* suggest that the right is not absolute, however, and an assessment would involve:

[A] balancing of the nature and immediacy of the threat to the ship’s safety against the risks to the port that such entry may pose. Thus, a coastal State might refuse access to its ports where the ship poses a serious and unacceptable safety, environmental, health or security threat to that coastal State after the safety of persons onboard is assured.<sup>150</sup>

Under such a reading, it appears that a State’s general immigration laws are insufficient to justify refusal of access to port for a vessel in distress where its occupants pose no serious threat to that State.<sup>151</sup> Unfortunately, in the present climate of securitized

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148. In 2001, the Norwegian cargo ship, the MV Tampa, ended up sending a distress signal to the Australian government after taking on board more than 400 rescuees; the vessel was designed for a crew of only fifty. For more detail on the Tampa situation, see generally Chantal Marie-Jeanne Bostock, *The International Legal Obligations Owed to the Asylum Seekers on the MV Tampa*, 14 INT’L J. REFUGEE L. 279 (Apr. 2002); Jessica Howard, *To Deter and Deny: Australia and the Interdiction of Asylum Seekers*, 21(4) REFUGEE 35 (2003); Tara Magner, *A Less Than “Pacific” Solution for Asylum Seekers in Australia*, 16 INT’L J. REFUGEE L. 53 (2004); Morris, *supra* note 23.

149. “UNCLOS does not specifically address the question of whether there exists a right to enter a port in cases of distress, although under customary international law, there may be a universal, albeit not absolute, right for a ship in distress to enter a port or harbour when there exists a clear threat to safety of persons aboard the ship.” IMO Guidelines, *supra* note 68, annex 34, § 1.1.

150. *Id.* annex 34, app. ¶ 6.

151. *See id.*

migration control, migration policies may be more driven by national security concerns than by technical immigration rules.<sup>152</sup>

The territorial sea also implicates Article 31 of the Refugee Convention, which precludes a State from imposing penalties upon refugees who, “on account of their illegal entry or presence,” “enter or are present in [the] territory without authorization.”<sup>153</sup> Refugees on a vessel within a State’s territorial sea are technically already “present in the territory” and are therefore subject to protection from penalties for their illegal entry. Article 31 should therefore constitute one of the “other rules of international law” that can trump a State’s exercise of sovereignty in its own territorial sea.<sup>154</sup>

## 2. Contiguous Zone<sup>155</sup>

Immigration control is cited as a permitted activity within the contiguous zone, although it has been argued that the jurisdictional rights available in the contiguous zone “do not clearly include the interception of vessels believed to be carrying asylum-seekers,” premised on the notion that only those powers permitted under international law may be exercised in the contiguous zone.<sup>156</sup> However, this assertion pre-dated the entry into force of the Smuggling Protocol, which has since explicitly recognized a State right of interception in the anti-smuggling con-

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152. See generally Michael Pugh, *Drowning not Waving: Boat People and Humanitarianism at Sea*, 17 J. REFUGEE STUD. 50 (2004) (discussing the conflict of humanitarian refugee regimes and perceived threat of refugees).

153. See Refugee Convention, *supra* note 92, art. 31.

154. See generally IMO Guidelines, *supra* note 68.

155. Extending another twelve miles from the outer limits of the territorial sea, contiguous zones exist as specialized zones of State jurisdiction, but do not afford States the sovereignty of the territorial sea. A contiguous zone may be designated for limited purposes: to prevent or punish “infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.” See UNCLOS, *supra* note 62, art. 33(1). The concept of contiguous zones has been described as areas in which jurisdiction is given to States, for particular purposes, *over the high seas*. See BROWNLIE, *supra* note 63, at 192. Such language was present in Article 24 of the 1958 Convention on the Territorial Sea, but was removed in Article 33 in UNCLOS 1982, which largely superseded the earlier instrument. See UNCLOS, *supra* note 62, art. 33. Because the contiguous zones are zones of special jurisdiction within the high seas, “the rights of the coastal state in such a zone do not amount to sovereignty, and thus other states have rights exercisable over the high seas except as they are qualified by the existence of jurisdictional zones.” See BROWNLIE, *supra* note 63, at 192.

156. See GOODWIN-GILL, *supra* note 83, at 165.

text,<sup>157</sup> so the observation may no longer hold sway.<sup>158</sup>

### 3. Freedom of High Seas and the Right of Visit<sup>159</sup>

The freedom of the high seas has been described as a general principle of international law,<sup>160</sup> and many of the specific rules supporting this broad concept have been provided by treaty in order to promote the freedom of navigation. On the high seas, all ships are under the exclusive jurisdiction of their flag State,<sup>161</sup> and each flag State has a corresponding duty to exercise jurisdiction and control over ships flying its flag.<sup>162</sup> As such, no State may exercise jurisdiction over another State's vessel except in very limited circumstances, such as a right of "visit" or a right of hot pursuit.<sup>163</sup>

#### a. Right of Visit<sup>164</sup>

It is essentially a right of visit that is being exercised in the context of maritime interceptions. Attempts by some States to expand the right of visit to include a national security justification have been for the most part rejected as inappropriate due to the potential for abuse and manipulation,<sup>165</sup> although this view may be changing as anti-terrorism tactics aggressively evolve

157. See Protocol Against the Smuggling of Migrants, *supra* note 4, art. 8.

158. See generally IMO Guidelines, *supra* note 68.

159. Beyond the contiguous zone and the exclusive economic zone lie the high seas, where all States enjoy the freedom of navigation, and upon which no State may exert its sovereignty. See UNCLOS, *supra* note 62, arts. 87, 89. Essentially, "[t]he freedom of the high seas does not mean that a state can simply take any action it pleases against other vessels." Mark Pallis, *Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes*, 14 INT'L J. REFUGEE L. 329, 350 (2002).

160. See BROWNLIE, *supra* note 63, at 225.

161. UNCLOS, *supra* note 62, art. 92.

162. See *id.* art. 94.

163. Under UNCLOS, the right of hot pursuit exists where there is "good reason to believe that the ship has violated the laws and regulations of that State," although this provision is unlikely to permit push-backs in the refugee context. UNCLOS, *supra* note 62, art. 111.

164. The right of visit allows a State military vessel to interfere with a foreign vessel by verifying its right to fly its flag, or by boarding, inspection, or even seizure. Because of the significance of the interference, it is permitted only under strictly enumerated circumstances. Interferences with a foreign flagged vessel are only permitted where there is: reasonable suspicion of slavery, piracy, unauthorized broadcasting; a flagless ship; or where suspicion exists that a foreign-flagged ship is, in reality, of the same flag as the inspecting vessel. See UNCLOS, *supra* note 62, art. 110.

165. See BROWNLIE, *supra* note 63, at 234-35.



in the post-September 11 era.<sup>166</sup> Of the circumstances permitting a right of visit, the ground most likely to justify interception (or most likely to arise in that context) involves flagless vessels.

The ability of States to intercept flagless vessels (or vessels of questionable flag origin) is of particular relevance in the refugee context, because such vessels are likely to be relied upon by asylum seekers, their smugglers, or traffickers.<sup>167</sup> Despite the ability of non-flag States to exercise control over such a vessel, State exercises of jurisdiction are restricted by UNCLOS itself (and its rules on the right of visit) and also by “other rules of international law,”<sup>168</sup> including the principle of non-*refoulement* and the rescue duty.<sup>169</sup>

#### 4. Duties and Rights with Regard to Smuggled Migrants

With the entry into force of the Protocol Against Smuggling,<sup>170</sup> maritime interception was implicitly acknowledged as a legitimate tool for border control and enforcement.<sup>171</sup> Article 8 of the Protocol allows the search, boarding, and seizure of persons and cargo where there are reasonable grounds to suspect that the vessel is engaged in smuggling.<sup>172</sup> In this instrument, interception is contemplated in a more cooperative context, where flag States may grant authorization to foreign-flagged

166. See generally UNCLOS, *Hearing Before the Committee on International Relations*, 108th Cong. 18 (2004) (statement of Sen. Richard G. Lugar, Chairman, S. Comm. on Foreign Rel.).

167. See GOODWIN-GILL, *supra* note 83, at 161. Quite problematically, such vessels are also the most likely to be unseaworthy, vulnerable to distress, and prone to requiring rescue. This intersection of grounds for justifying both interception and rescue highlights the need for greater clarification of these two practices by more clearly defining and delineating the scope of each, and will be discussed more thoroughly in Section IV.B.

168. See UNCLOS, *supra* note 62, art. 87(1).

169. See GOODWIN-GILL, *supra* note 83, at 162; see also Pallis, *supra* note 7.

170. See Protocol Against the Smuggling of Migrants by Land, Sea and Air, *supra* note 4.

171. See *id.* art. 2.

172. The Protocol Against the Smuggling of Migrants by Land, Sea and Air permits a State vessel to act with regard to vessels suspected of being of the same nationality as the State vessel by requesting assistance from other flag State vessels to suppress the use of the vessel for that purpose. The Protocol also permits boarding, search, and “appropriate measures . . . as authorized by the flag State” where the suspected vessel is under the jurisdiction of another State, and that State has given authorization for search and boarding; and boarding and search where the suspected vessel is without nationality, “in accordance with relevant domestic and international law.” *Id.* arts. 8(1), 8(2), 8(7).

State vessels in order to facilitate interception of suspected smuggling vessels.<sup>173</sup> This provision effectively dispenses with the concept of exclusive flag State jurisdiction by creating an interception-sharing scheme where authorized by the flag State. These provisions are exclusive to the maritime context of the Protocol, and include particular safeguards that include obligations to “ensure the safety and humane treatment of persons on board” and “not to endanger the security of the vessel or its cargo.”<sup>174</sup>

Additional protection for those found aboard smuggling vessels is provided by a savings clause<sup>175</sup> preventing any Protocol provisions from infringing upon rights guaranteed under international humanitarian law, international human rights law, the Refugee Convention, “and the principle of non-*refoulement* as contained therein.”<sup>176</sup> This is an important provision given the growing recognition that refugees, with increasing prevalence, are now resorting to smuggling as a means of escaping persecution and reaching safer territory.<sup>177</sup> These provisions require corresponding guidelines to safeguard the rights of intercepted persons in need of international protection vis à vis the intercepting State.

#### IV. ADDRESSING THE PROTECTION GAPS

##### A. *Improved Safeguards in the Rescue Regime*

Efforts aimed at improving safeguards in the rescue context have been both considerable and promising. This section traces the evolving response by the international community since 2002 to address the disembarkation issue which emerged prima-

173. *See id.* art. 8(4).

174. *Id.* arts. 9(a), 9(b).

175. A similar savings clause is also present in the Trafficking Protocol. *See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, *supra* note 4.

176. *See Protocol Against the Smuggling of Migrants by Land, Sea and Air*, *supra* note 4, art. 19(1).

177. Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 *WASH. U.J.L. & POL'Y* 129, 135 (2001) (“Increasingly, asylum seekers have opted for what has become an important option; being smuggled to sanctuary.”); *see also* Amnesty Int’l Austl., *People Smuggling—Fact Sheet*, [http://www.amnesty.org.au/resources/fact\\_sheets/people\\_smuggling\\_-\\_fact\\_sheet](http://www.amnesty.org.au/resources/fact_sheets/people_smuggling_-_fact_sheet) (last visited Nov. 6, 2006) (“There is now growing consensus that the restrictive asylum practices introduced by many of the industrialized states have converted what was a relatively visible and quantifiable flow of asylum seekers into a covert, irregular movement that is even more difficult for states to control.”).

rily from a roundtable discussion begun in 2002.<sup>178</sup> It focuses in particular on a series of maritime treaty amendments and a set of accompanying guidelines that entered into force in July 2006.

In 2002, UNHCR revived discussions on the issue of protection for asylum seekers and refugees rescued at sea. In a 2002 Background Note, UNHCR confirmed the “lack of clarity” in maritime law with regard to disembarkation,<sup>179</sup> revived its call for prompt disembarkation at the *next port of call*,<sup>180</sup> and recommended that screenings for refugees be performed on dry land rather than on board a vessel, reasoning that prompt disembarkation would be more likely to lead to timely screenings, processing, and protection access.<sup>181</sup>

At the Expert Roundtable in Lisbon later in 2002, the “next port of call” recommendation was discarded and replaced with a recommendation to increase shipmasters’ discretion in determining the time and place for disembarkation,<sup>182</sup> although ultimately no firm rule was recommended. Instead of adopting forceful language to encourage the establishment of a new practice, the Roundtable merely observed shipmasters’ “right to expect the assistance of coastal States,” and called upon coastal States to *provide assistance* where requested by rescue vessels.<sup>183</sup> Absent were any criteria to determine the State or States responsible for disembarkation, screening, access to asylum procedures, temporary protection and resettlement. Ultimately, the Roundtable conclusions failed to definitively resolve the disembarkation issue, although the suggestion to respect shipmasters’ discretion created a potential starting point.<sup>184</sup>

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178. See UNHCR, Expert Roundtable on Rescue-at-sea, Lisbon, Port., Mar. 25-26, 2002, Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees: Summary of Discussions ¶ 1 [hereinafter Summary of Discussions].

179. UNHCR, Background Note, *supra* note 2, ¶ 11.

180. This term was viewed as encompassing a variety of concepts, including the nearest port, the port of embarkation, the next scheduled port of call, or the best-equipped port of call. The “next port of call” recommendation was based upon a number of factors, including: (1) the narrow scope and limits of shipmasters’ rescue duty; (2) the need to ensure continued success of the rescue regime by promoting swift and predictable responses by all parties; and (3) the need to guarantee the safety of the rescuing vessel and those aboard. See UNHCR, Summary of Discussions, *supra* note 178, ¶ 10.

181. See *id.* ¶ 14.

182. See *id.* ¶¶ 6-8.

183. *Id.* ¶ 6.

184. See *id.* ¶ 5.

A much more tangible and promising consequence of the Roundtable resulted from its follow-up efforts with the IMO.<sup>185</sup> As the U.N. agency primarily responsible for issues of maritime safety, the IMO is the drafting and amending body for the SAR and the Safety of Life at Sea Convention (“SOLAS”),<sup>186</sup> the latter instrument being the principal international treaty concerned with the safety of merchant ships. One of the follow-up goals of the 2002 Lisbon Roundtable was to encourage the IMO to address “any inadequacies in the law”<sup>187</sup>—a pointed reference to the drafting inadequacies of the treaty instruments pertaining to rescue.

In May 2004, the IMO adopted amendments to both the SOLAS<sup>188</sup> and SAR<sup>189</sup> Conventions, and created a set of *Guidelines on the Treatment of Persons Rescued at Sea*,<sup>190</sup> that addressed, among others, the disembarkation issue. The two sets of amendments entered into force on July 1, 2006,<sup>191</sup> and contain a nearly identical provision for identifying the coastal State responsible for disembarkation:

[Parties] shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from [these obligations] does not further endanger the safety of life at sea. *[The party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such coordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these*

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185. See generally IMO Website, [www.imo.org](http://www.imo.org) (last visited Nov. 6, 2006).

186. See SAR, *supra* note 62, art. III; SOLAS, *supra* note 62, art. VIII.

187. See UNHCR, Summary of Discussions, *supra* note 178, ¶ 16.

188. See IMO, Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, *as amended*, MSC Res. 153(78), MSC Doc. 78/26.Add.1, Annex 3 (May 20, 2004) [hereinafter SOLAS Amendments].

189. See IMO, Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, *as amended*, Res. MSC 155(78), MSC Doc. 78/26.add.1, Annex 5 (May 20, 2004) [hereinafter SAR Amendments].

190. See IMO Guidelines, *supra* note 68.

191. Under the terms of SOLAS and SAR, amendments are deemed to have been accepted unless more than one third of Parties object to the amendments. See SOLAS, *supra* note 62, art. VIII(b)(vi)(2)(bb); see also SAR, *supra* note 62, art. III(2)(f).

cases, *the relevant [parties] shall arrange for such disembarkation to be effected as soon as reasonably practicable.*<sup>192</sup>

Interestingly, the IMO amendments reflect neither the UNHCR Background Note recommendation to vest the disembarkation duty with the “next port of call” State, nor the muddled Roundtable approach to merely respect shipmasters’ discretion as to where disembarkation should occur.<sup>193</sup> Instead, primary authority for disembarkation decisions lies (since July 1, 2006) with the State responsible for search and rescue in the region where the rescue occurs.<sup>194</sup> What this means in practical terms is that the Rescue Co-ordination Centres (“RCCs”)<sup>195</sup> may now designate where disembarkation will occur on behalf of the assisting vessel, regardless of the status of that vessel as private or State-owned, military or non-military.<sup>196</sup>

It remains to be seen how this new disembarkation scheme will affect rescue in practice. In theory, vesting the disembarkation decision with the State responsible for the rescue coordination represents a practical solution, while potentially involving prospective risks in actual implementation.<sup>197</sup> Perhaps even

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192. See SOLAS Amendments, *supra* note 188, Reg. 33-1-1 (emphasis added); see also SAR Amendments, *supra* note 189, ¶ 3.1.9 (emphasis added). The bracketed terms reflect the actual language of the SOLAS amendment; under the SAR amendment the term “Contracting Governments” replaces “Party/Parties” and the expression “the obligations under the current regulation” replaces the expression “these obligations” used in the SOLAS amendment.

193. New regulation 34-1 of the SOLAS Convention, however, supplemented the disembarkation provision with another governing the issue of shipmasters’ discretion. IMO, Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, Res. 153(78), MSC Doc. 78/26/Add.1, Annex 3. New regulation 34-1 notes that a shipmaster’s professional judgment as to decisions necessary for safety of life at sea should not be interfered with by a ship owner, charterer, or company operator. *Id.*

194. See SAR Amendments, *supra* note 189, ¶ 3.1.9.

195. See SAR, *supra* note 62, Annex Ch. 1.3.5 (Defining a Rescue Co-ordination Centre (“RCC”) as a “unit responsible for promoting efficient organization of search and rescue services and for co-ordinating the conduct of search and rescue operations within a search and rescue region”).

196. See *id.* ¶ 4.8.5 (“The rescue co-ordination centre or rescue sub-centre concerned shall initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea. It shall inform the ship or ships and other relevant parties concerned thereof.”).

197. First, the RCC responsible for the rescue may find itself under pressure from other government departments not to designate its own State as the place of disembarkation, and to “dump” the disembarkation responsibility on neighboring coastal States, creating the potential for the framework to fail for lack of political will. The second and related concern is the likelihood that the RCC’s will become highly politicized

more consequential than the amendments are the accompanying *Guidelines on the Treatment of Persons Rescued at Sea*. This instrument is designed to “provide guidance to [States Parties to SAR and/or SOLAS] and to shipmasters with regard to humanitarian obligations and obligations under the relevant international law relating to treatment of persons rescued at sea.”<sup>198</sup> It attempts to address many important issues that are conspicuously missing from the maritime treaty amendments, including, for example, clarification of the meaning of “place of safety.”<sup>199</sup>

The *Guidelines* do not attempt to provide a singular definition of the concept of “place of safety,” but they do give insight into its meaning. For example, a place of safety is “a location where rescue operations are considered to terminate,” and from which survivors’ safety and basic human needs can be met.<sup>200</sup> It can also be a very temporary transit point, however, since it is also “a place from which transportation arrangements can be made for the survivors’ next or final destination.”<sup>201</sup> Moreover, a place of safety may not even necessarily be on dry land; it “may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination.”<sup>202</sup> This poses an immediate problem of robbing the new amendments of any meaningful improvements, since they require that survivors be “disembarked from the assisting ship and delivered to a place of safety.” If disembarkation from one ship can simply mean delivery to another vessel, then clearly the disembarkation problem has not been solved. It is thus clear that a place of safety is a much narrower and more limited concept than that of disembarkation, and that the potential for survivors to languish on board a vessel remains a risk.

The *Guidelines* also discuss the potential conflict between

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State organs, perhaps infused with delegated duties to assess refugee status and powers to grant or deny humanitarian protections. At present, RCCs have a limited scope of authority and expertise pertaining only to rescue, and a politicization of the role of the RCC would likely weaken the rescue regime by injecting non-rescue-related considerations into the disembarkation decision. See IMO Guidelines, *supra* note 68, at ¶ 6.4; see also SAR, *supra* note 62, Annex Ch. 2.3.

198. See IMO Guidelines, *supra* note 68, ¶ 1.1.

199. See *id.* ¶¶ 6.12-6.18, app. ¶ 3.

200. See *id.* ¶ 6.12.

201. *Id.*

202. *Id.* at ¶ 6.14.

the need to promptly disembark rescued persons and States' non-rescue-related interests in screening such individuals before permitting disembarkation. On this matter, the *Guidelines* are clear that delivery to a place of safety should take precedence over any non-SAR concerns, and that these should not delay disembarkation:

Any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation of survivors from the assisting ship(s).<sup>203</sup>

This paragraph suggests that concern over a rescued individual's refugee status may not be used as grounds for delaying disembarkation. It also implies that the State of disembarkation retains responsibility for screening of rescued persons, since any State concerns over status assessment must necessarily follow disembarkation. In this sense, it suggests that responsibility for screening (to identify rescued persons in need of international protection) lies with the State of disembarkation.

The SAR and SOLAS amendments offer promising new changes to the rescue instruments by finally making the disembarkation duty the explicit responsibility of the RCCs. The accompanying *Guidelines* offer new insight into the meaning of "place of safety" and permissible bases for delaying disembarkation of rescued persons. One problem with the *Guidelines*, however, is its legal status as a non-binding instrument.

### B. *Interception "Cloaked" as Rescue*

Finally, a serious concern among experts and States is the growing trend of characterizing interceptions as rescue operations. At a May 2006 meeting of State representatives convened by UNHCR to discuss maritime interception and rescue in the Mediterranean basin, concern was raised over "the practice whereby several States were classifying some interception measures as rescue at sea operations, in order to use SAR operational capacity for such activities."<sup>204</sup> This section will first examine potential reasons for this trend, from legal and practical stand-

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203. *See id.* ¶ 6.20.

204. *See* State Representatives' Meeting on Rescue at Sea and Maritime Interception in the Mediterranean, Chairman's Summary, ¶ 1, 23-24, Madrid, May 2006.

points, before assessing the nature of rescue and interception dialogue at the international level. It will conclude that such dialogue is partly responsible for conflating these normally separate concepts, further contributing to the practice of “cloaked” interceptions and a weakening of the rescue regime. Key terms are examined to provide greater clarity and a sharper distinction between rescue and interception.

When, then, is a rescue a rescue, rather than an interception? The answer may lie partly in the motives underlying State practice. In the first place, calling an act a “rescue” provides an instant legal basis to interfere with another vessel, particularly on the high seas, where the limited “right of visit” exceptions may be otherwise unavailable.<sup>205</sup> In short, if a flag vessel is clearly from another flag State,<sup>206</sup> and not under suspicion of smuggling or piracy, no interference with a vessel is permitted without the flag State’s express authority, unless it is in distress. The combination of the remote and unsupervised high seas locale combined with increased State pressure to intercept<sup>207</sup> makes rescue a more tempting justification for interference on the high seas.

The trend is also emerging in response to the relative ease with which rescue vessels can be discharged of further responsibility following disembarkation. Due to the very recent changes to the rescue regime designed to improve the efficiency of rescue disembarkations, the problem of “cloaked” interceptions is likely to get worse. This is because a rescue operation on the high seas now affords prompt disembarkation coordinated by a third party (the regional RCC), whereas a high seas interception affords no clear responsibilities to discharge a protection responsibility. The temptation to characterize an interception as a rescue is therefore strong.

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205. The most common grounds permitting a right of visit on the high seas would involve reasonable suspicion of being: flagless, of another flag, or engaged in smuggling. *See supra* note 164 and accompanying text.

206. That is to say, the vessel is not of the same flag State as the military vessel, nor is it flagless.

207. The U.S. Coast Guard operates under a performance goal “to keep the success rate of undocumented migrants arriving by sea to less than 12%. The remaining 88% of the migrants are to be interdicted at sea, ashore, or be deterred from departing.” U.S. Coast Guard Office of Law Enforcement, *Frequently Asked Questions: Coast Guard Migrant Interdiction*, <http://www.uscg.mil/hq/g-o/g-opl/AMIO/amiofaq.htm> (last visited Nov. 6, 2006).



Rescue at sea by a State's military vessels can and does occur under legitimate circumstances, and the SAR Convention contemplates such vessels playing a valid role in maritime search and rescue.<sup>208</sup> Today, it is not uncommon for a State's marine military service to be vested with twin rescue and interception duties—the U.S. Coast Guard is one such example.<sup>209</sup> But what happens when a dual service State vessel identifies an unseaworthy boat under reasonable suspicion of smuggling? Is the unseaworthiness of the craft enough to justify a rescue, or is the strong suspicion of smuggling more determinative of an interception? The response will dictate disembarkation and protection responsibilities for those on board, given that SAR and SOLAS amendments have created one disembarkation scheme for rescue victims, and the ExCom Conclusion has proposed a separate disembarkation and protection responsibility scheme for intercepted persons.<sup>210</sup> There is not only little explicit guidance available,<sup>211</sup> there remains pervasive confusion as to the distinction between rescue and interception in certain contexts.

In a September 2005 *Background Paper for an Expert Roundtable on Rescue at Sea and Maritime Interception in the Mediterranean*, UNHCR provided a brief overview of the “range of concerns and objectives” motivating States to intercept.<sup>212</sup> Listed among the factors motivating interception is, “the humanitarian imperative to come to the aid of those travelling in unseaworthy vessels,” which “constitutes an added element of interception practices.”<sup>213</sup> Such a position is also taken by the U.S. Coast Guard, for example, which characterizes its Alien Migrant Interdiction program as involving “*primarily*” a “humanitarian responsibility to prevent the loss of life at sea, since the majority of migrant vessels are dangerously overloaded, unseaworthy or otherwise

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208. See generally SAR, *supra* note 62, ch. 2.

209. See generally U.S. Coast Guard Website, <http://www.uscg.mil/uscg.shtm> (last visited Nov. 6, 2006).

210. See UNHCR, Summary of Discussions, *supra* note 178.

211. The Lisbon Roundtable, which limited its scope to the rescue-at-sea issue, declined to address rescue-at-sea issues involving State military vessels, perhaps because they are more frequently involved on the interception side of maritime activity. See Summary of Discussions *supra* note 178, at 7.

212. UNHCR, Expert Roundtable on Rescue at Sea and Maritime Interception in the Mediterranean, Athens, Greece, Sept. 12-13, 2005, Background Discussion Paper, Reconciling Protection Concerns with Migration Objectives, Protection Policy & Legal Advice Section, at 7 [hereinafter Athens Background Discussion Paper].

213. *Id.*

unsafe.”<sup>214</sup> Such language clearly equates interception with an underlying humanitarian-based rescue objective.

If the ExCom position is that vessels responding to persons in distress at sea are *not* engaged in interception, how can *interception* include the humanitarian imperative to aid those in unseaworthy vessels? These seemingly irreconcilable positions were recognized by the Expert Roundtable<sup>215</sup> convened in Athens to discuss interception and rescue in the Mediterranean basin, but no concrete proposals were put forward to address the problem.<sup>216</sup>

At present, one clear source of guidance appears to be the ExCom *Conclusion on Protection Safeguards in Interception Measures*, which observes in its preamble that “when vessels respond to persons in distress at sea, they are *not* engaged in interception.”<sup>217</sup> This provision implies that distress is determinative of rescue, yet an ambiguity remains over the meaning of the term “distress,” and the fact that it is frequently conflated with “unseaworthiness” in the maritime context, which is inappropriate. Under a strict reading of this authoritative, but non-binding clause, *any* encounter with a migrant vessel in distress should be characterized as a rescue.<sup>218</sup> Apparently, not even UNCHR is very clear about how this issue is to be interpreted.

More helpful, perhaps, is the SAR definition of a distress phase, which may shed some light on the more technical meaning of distress itself. The distress phase is defined as: “A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.”<sup>219</sup> The “reasonable certainty” characteristic of the distress phase is distinguished from other phases that are characterized by either uncertainty or apprehen-

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214. U.S. Coast Guard Office of Law Enforcement, Alien Migrant Interdiction: Introduction, <http://www.uscg.mil/hq/g-o/g-opl/AMIO/AMIO.htm> (last visited Nov. 6, 2006).

215. The Roundtable consisted of “35 participants, drawn from international organisations, academia, non-governmental organizations, the shipping industry and some national maritime and migration authorities.” UNHCR, Summary of Discussions, *supra* note 178, ¶ 1.

216. See UNHCR, Athens Background Discussion Paper, *supra* note 212.

217. See UNHCR ExCom, Conclusion No. 97, *supra* note 25.

218. *Id.*

219. SAR, *supra* note 62, at Annex Ch. 1.3.13.

sion as to the safety of the vessel.<sup>220</sup> This language clearly implies that the unseaworthiness of a vessel is, after all, a matter of degree, and in order to justify a bona fide rescue operation, there must be reasonable certainty of grave and imminent danger.

The recent trend of States characterizing interception operations as rescue is a dangerous one. It threatens not only to weaken the rescue regime by burdening coastal States with undue disembarkation (and screening) responsibility, but constitutes a real risk that persons deserving of international protection will be exposed to harm. A greater clarification of the boundaries and distinctions between rescue and interception is necessary to stem the abuse, and a logical starting point is perhaps the SAR definition relating to distress.

### C. Addressing Protection Gaps in Interception

As discussed in Section I.D., the key protection gaps arising in the interception context involve the twin problems of 1) determining the State responsible for initial protection concerns, so that 2) intercepted refugees can be distinguished from those not requiring international protection. A significant concern remains that refugees intercepted within broader migration flows are summarily returned to harm for lack of any uniform procedural standards governing initial screening of such persons.<sup>221</sup> At present, there are no international regulations governing disembarkation in the interception context. This section will discuss recent efforts by UNHCR<sup>222</sup> and the wider international community to address and improve refugee protection in the

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220. *Id.*, ¶¶ 1.3.11 & 1.3.12, respectively.

221. See *Refugees May Be Caught Up In European Crackdown On Illegal Migrants*, UN NEWS SERVICE, Feb. 2, 2005, available at <http://www.un.org/apps/news/printnewsAr.asp?nid=13214>.

222. UNHCR has repeatedly recommended the establishment of: measures distinguishing asylum-seekers from those not in need of international protection, protection from *refoulement*, access to status determination procedures, the enjoyment of temporary protection, and the coordination of durable solutions for refugees. It has also recommended that States channel some of their focus away from border control enforcement towards alternative channels for legal migration. See *Perspectives from UNHCR and IOM*, *supra* note 3. UNHCR, *Global Consultations on International Protection, Conclusions and Recommendations from the Regional Meetings in Ottawa and Macau*, EC/GC/01/13 (May 31, 2001) [hereinafter *Regional Meetings in Ottawa and Macau*]; UNHCR, *Interception of Asylum Seekers and Refugees*, *supra* note 26, ¶ 34.

maritime context.<sup>223</sup>

The competing interests of safeguarding international protection and promoting States' migration control tactics remain nearly deadlocked, but State practice has the clear upper hand. A perfect illustration of this tension is found in a Global Consultations paper co-authored by UNHCR and IOM.<sup>224</sup> While IOM hails interception as "one of the most effective measures to enforce [States'] domestic migration laws and policies,"<sup>225</sup> UNHCR soberly observes that, "one of the main challenges resulting from interception is the difficulty of reconciling this practice with relevant international legal responsibilities."<sup>226</sup> In effect, UNHCR suggests that interception activities do not coexist neatly with States' legal obligations, and that serious concerns have not been fully resolved.<sup>227</sup> The cooperative effort between the two agencies (and more broadly between the protection community and the migration control community) is thus severely limited by these seemingly irreconcilable approaches.

In recent years, UNHCR has examined interception in the broader migration context,<sup>228</sup> in the smuggling/trafficking context,<sup>229</sup> and, most recently, in relation to rescue-at-sea.<sup>230</sup> The overriding concern for UNHCR is to incorporate protection safeguards into interception measures in order to prevent violations of refugee and human rights laws<sup>231</sup> with a view towards

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223. See UNHCR, *Interception of Asylum Seekers and Refugees*, *supra* note 26, ¶¶ 39-41.

224. See *Perspectives from UNHCR and IOM*, *supra* note 3.

225. *Id.* ¶ 14.

226. *Id.* ¶ 35.

227. *Id.* ¶¶ 34-38.

228. See UNHCR, *Regional Meetings in Ottawa and Macau*, *supra* note 222; see also UNHCR, *Interception of Asylum Seekers and Refugees*, *supra* note 26.

229. See UNHCR, *Elements for an International Framework*, *supra* note 41.

230. See generally UNHCR, *Reconciling Protection Concerns with Migration Objectives*, *supra* note 10; see also UNHCR, *Summary of discussions and recommendations, Expert Meeting on Interception and Rescue in the Mediterranean, Cooperative Responses*, Sept. 12-13, 2005, *supra* note 88.

231. The importance of the issue is reflected by the selection of interception as a topic for one of the substantive meetings of the third track of the Global Consultations process in June 2001. UNHCR's Global Consultations on International Protection was a forum convened in recognition of the fiftieth anniversary of the Refugee Convention, and the third track meetings were held within the framework of the Executive Committee to tackle issues not adequately covered by the Convention. See generally UNHCR, *Update on Global Consultations on International Protection*, *supra* note 41, ¶¶ 12-16.

eventually issuing protection guidelines on the subject.<sup>232</sup> Since 2000, much of this work has focused on identifying gaps and suggesting broad areas for improvement rather than promoting specific rules, criteria, or standards.<sup>233</sup> A noteworthy exception to this practice has been a proposed ExCom rule for identifying the State primarily responsible for addressing protection needs of intercepted persons. This document has been considered an important milestone<sup>234</sup> for setting out a working definition of interception and proposing clear recommendations to improve protection in the interception context.<sup>235</sup> While the proposed rule fails to accommodate every interception scenario, it represents the first concrete effort to create a framework linking interception activities to protection duties for those intercepted.<sup>236</sup>

### 1. Identifying the State Responsible for Protection of Intercepted Persons

In October 2003, the ExCom *Conclusion on Protection Safeguards in Interception Measures* was issued.<sup>237</sup> While some of the recommendations are neither new nor novel<sup>238</sup> (many have already been integrated into the Smuggling Protocol),<sup>239</sup> the document nonetheless lays the groundwork for UNHCR's eventual issue of guidelines on refugee protection safeguards in interception measures, forthcoming in the next several months.<sup>240</sup>

The ExCom *Conclusion* proposed to identify the State responsible for protection of intercepted persons as follows: "The State within whose sovereign territory, or territorial waters, inter-

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232. UNHCR, Perspectives from UNHCR and IOM, *supra* note 3, ¶ 47.

233. See generally UNHCR, Interception of Asylum Seekers and Refugees, *supra* note 26.

234. See Brouwer & Kumin, *supra* note 5, at 18.

235. See UNHCR ExCom, Conclusion No. 97, *supra* note 25 ("[R]ecalling also Conclusions of the Executive Committee of relevance to the particular needs of asylum-seekers and refugees in distress at sea and affirming that when vessels respond to persons in distress at sea, they are not engaged in interception.")

236. See UNHCR ExCom, Conclusion No. 97, *supra* note 25.

237. See *id.*

238. Other recommendations reiterate the importance of distinguishing between populations in need of protection, and call for protection from prosecution for intercepted asylum-seekers and refugees, the need for swift returns where appropriate, specialized training, information sharing, and further study the impact of interception on other States. See *id.*

239. See Protocol Against the Smuggling of Migrants by Land, Sea and Air, *supra* note 4, arts. 5, 9-10, 14, 16, 18.

240. See Brouwer & Kumin, *supra* note 5, at 18.

ception takes place has the primary responsibility for addressing any protection needs of intercepted persons.”<sup>241</sup> An examination of this policy, first with regard to its application in the maritime context, and later in a land-based context, is necessary to assess both the shortcomings of this proposed rule and the policy consequences that are likely to flow from it. Importantly, the duties that comprise “primary responsibility for addressing any protection needs” remain ambiguous; there is no formalized identification or enumeration of basic protection needs. Initial screening to identify those in need of international protection, access to formal status determination procedures, and resettlement issues are not addressed, and the door remains open for possible extraterritorial screening and processing of asylum-seekers, a practice of ambiguous legality. Beyond this deficit, additional problems arise in application of the test.

a. What Happens When State A Intercepts a Vessel in its Own Territorial Waters?

In this scenario, the ExCom rule produces a logical, practical and fair result: The intercepting State itself is required to provide the necessary protection safeguards for persons within its sovereign territory.<sup>242</sup> Here it is worth recalling that sovereignty in territorial waters is limited only by innocent passage—and that passage of vessels seeking to disembark persons in violation of that State’s immigration rules is not innocent.<sup>243</sup> States therefore remain free to intercept vessels suspected of violating domestic migration laws so long as their interception does not result in any violations of other international legal commitments.<sup>244</sup> Now that State A has intercepted the vessel, it is primarily responsible for addressing protection needs, including initial screening of intercepted persons, to ensure that those in need of international protection are not summarily returned to harm in violation of non-*refoulement* obligations.<sup>245</sup>

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241. See UNHCR ExCom, Conclusion No. 97, *supra* note 25.

242. See Brouwer & Kumin, *supra* note 5, at 18.

243. See UNHCR ExCom, Conclusion No. 97, *supra* note 25 (stating “interception is one of the measures employed by States to assert control of vessels when there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law.”).

244. See *id.*

245. See UNHCR, Interception of Asylum-Seekers and Refugees, *supra* note 26; see also Brouwer & Kumin, *supra* note 5, at 19.

b. What Happens When State A Intercepts a Vessel in State B's Territorial Waters?

Under the law of the sea, territorial waters represent an extension of State territory<sup>246</sup> and generally, any entry into it other than innocent passage would require that State's authorization. In this scenario, the ExCom rule would designate State B, rather than the intercepting State A, as primarily responsible for protection needs of intercepted persons.<sup>247</sup> At first glance, allocating the protection burden to the venue State might seem an anomalous choice, since the proposed rule essentially allows one State's interception activity to impose legal protection duties on another State. However, State B retains sovereign authority over its own territorial sea, and State A cannot conduct an interception without State B's express permission to do so.<sup>248</sup> Because State A can only intercept in State B's territorial waters with State B's express authorization, it is appropriate that State B be designated as having primary protection responsibility over those intercepted within its waters, since its authorization constituted an exercise of its sovereign authority.<sup>249</sup> State B had alternatives: It could have refused permission to State A and conducted the interception itself (in which case it would still have primary protection responsibility) or it could have taken a more proactive stance and attempted to intercept the vessel further out to sea.<sup>250</sup>

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246. See UNCLOS, *supra* note 62, at art. 2(1) ("The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea").

247. See Brouwer & Kumin, *supra* note 5, at 18 ("This provision assigns primary responsibility for the protection of intercepted persons not to the active, intercepting state, but rather to the passive state within whose territory or territorial waters the interception takes place").

248. The only scenario in which State A's vessel could enter State B's territorial waters without permission would be to conduct a rescue under the conditions of UNCLOS Article 18(2), and under ExCom's Conclusion No. 97, "when vessels respond to persons in distress at sea, they are not engaged in interception." Because such a scenario would qualify as a rescue rather than interception, the proposed ExCom rule would not apply. But whether State A would seek State B's permission to disembark those rescued, or whether it would treat them as intercepted persons remains unclear. Under current practice, either option is possible. This problem illustrates the pitfalls of failing to address rescue disembarkation duties in a manner that foresees State military rescues. The protection duties and responsibilities for military maritime rescue have yet to be addressed.

249. See UNHCR ExCom, Conclusion No. 97, *supra* note 25; see also Brouwer & Kumin, *supra* note 5, at 18-19.

250. See UNHCR ExCom, Conclusion No. 97, *supra* note 25.

This last scenario is a likely policy consequence of the proposed rule, and will be discussed further below.

c. What Happens When State A Intercepts a Vessel in a Contiguous Zone (its own or that of another State)?

Traditionally the contiguous zone had been a *high seas* zone permitting certain jurisdictional exercises. Today it remains a zone where States may “exercise the control necessary” to prevent or punish infringement of their immigration laws and regulations, although the extent to which such control encompasses interception is less clear.<sup>251</sup> Yet, even assuming that States may properly conduct interceptions in the contiguous zone, identification of “[t]he State within whose sovereign territory, or territorial waters, interception takes place” is not possible because a contiguous zone does not represent sovereign territory. This is a serious shortcoming considering that maritime interception is recognized as not only a growing phenomenon, but one seemingly endorsed as legitimate in the Smuggling Protocol.<sup>252</sup> Ultimately, the ExCom rule has no application in the contiguous zones.

d. What Happens When a State Intercepts a Vessel on the High Seas?

As with the contiguous zone scenario, the ExCom rule does not accommodate interceptions occurring on the high seas, since they are not within any State’s sovereign territory.<sup>253</sup> This oversight is so significant that it essentially renders the proposed rule meaningless on grounds of practical ineffectiveness. As a practical matter, States prefer to undertake maritime interceptions on the high seas<sup>254</sup> precisely to prevent vessels from entering the contiguous zone (considered the maritime frontier), or their territorial waters, where greater protections attach. Such a preference for high seas interceptions is illustrated by the U.S. Coast Guard, which maintains bilateral agreements with more than twenty States permitting it to board foreign flagged ves-

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251. See UNCLOS, *supra* note 62, art. 33.

252. See Protocol Against the Smuggling of Migrants by Land, Sea and Air, *supra* note 4.

253. See UNHCR ExCom, Conclusion No. 97, *supra* note 25.

254. See Brouwer & Kumin, *supra* note 5, at 11.



sels.<sup>255</sup> The U.S. Coast Guard implicitly acknowledges the benefits of high seas interception when it observes that “[i]nterdicting migrants at sea means they can be quickly returned to their countries of origin without the costly processes required if they successfully enter the United States.”<sup>256</sup>

e. What Happens with Land-based Interceptions?

The proposed rule is equally problematic when its application is evaluated in the context of non-maritime interceptions, such as the posting of immigration officers in a foreign airport to identify false documents and prevent onward travel. In such scenarios, the extraterritorial nature of interception means that the intercepting State may be acting from within the confines of the “venue” State to block undocumented migrants from onward travel.<sup>257</sup> The proposed ExCom rule suggests that the “venue” State, not the intercepting State, would be primarily responsible for the protection of intercepted persons.<sup>258</sup> Since land-based interceptions halt migrants in *another* State’s sovereign territory (as opposed to the high seas), there is an increased risk that a prospective refugee may end up trapped inside his/her country of origin. Therefore, where the venue State constitutes the State of origin (rather than merely a transit State), interceptions continue to pose protection concerns.<sup>259</sup> Applying the ExCom rule to this scenario would render the State of origin (possibly the persecuting State) primarily responsible for the protection of persecuted persons trapped within its borders,<sup>260</sup> surely an absurd result.

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255. *See id.* at 8.

256. U.S. Coast Guard Office of Law Enforcement, Alien Migrant Interdiction: Overview, <http://www.uscg.mil/hq/g-o/g-opl/AMIO/AMIO.htm> (last visited Nov. 6, 2006).

257. In other cases, such as those of visa requirements, the so-called intercepting State may not even maintain a presence in the venue State, allowing that State’s authorities to conduct the requisite document checks and to block those not in conformity from onward travel.

258. *See* UNHCR ExCom, Conclusion No. 97, *supra* note 25.

259. By definition, a refugee must be outside of his/her country of origin in order to trigger protections under the Refugee Convention. However, while the inability to leave one’s country does not violate Article 33 of the Refugee Convention, it is likely to constitute a violation of Article 12 of the ICCPR. *See* HATHAWAY, *supra* note 34, at 310-12.

260. *See* UNHCR ExCom, Conclusion No. 97, *supra* note 25.

## 2. A Supplemental Proposal

The ExCom rule operates sufficiently well in cases where interception clearly occurs within a State territory; in such cases, it is the venue State that is assigned primary protection duties.<sup>261</sup> The shortcoming of the ExCom rule is its failure to address the more likely scenarios of interception occurring further out to sea—in the contiguous zones and on the high seas.

One proposal for improvement would be to provide a supplemental rule that would operate in conjunction with ExCom's existing rule:

The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons.<sup>262</sup>

[Proposed Supplemental Rule]:

*For interceptions taking place beyond the sovereign territory or territorial waters of any State, including the contiguous zones and on the high seas, the State exercising its jurisdiction over the interception has the primary responsibility for addressing any protection needs of intercepted persons.*

Under this proposal, the ExCom rule would apply to interceptions occurring in sovereign territory or territorial waters, and the Proposed Supplemental Rule would apply to interceptions beyond the territorial zones.

How would such a rule apply in the contiguous zones? Where State A intercepts in its own contiguous zone, it has clearly exercised jurisdiction over the interception and would reasonably be held primarily responsible for protection matters. Where State A intercepts in State B's contiguous zone with State B's permission to intercept, State B would remain primarily responsible for protection of those intercepted. This is so because State B retains jurisdiction over immigration matters in its own contiguous zone, and it has exercised its jurisdiction to authorize State A to act in its contiguous zone. If State B refuses such permission, it retains the option of conducting the interception itself, which it may be free to do within the constraints of interna-

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261. *See id.* ¶ (a)(1).

262. *See* UNHCR ExCom, Conclusion No. 97, *supra* note 25, ¶ (a)(1).

tional law. Similarly, if State A were to intercept within State B's contiguous zone without the requisite permission to do so, then State A would retain primary responsibility for the protection needs of those intercepted.

How would the proposed rule apply on the high seas? In the high seas context, the act of interception would trigger a corresponding protection duty upon the intercepting State as the actor exercising its jurisdiction over the vessel. The loophole in ExCom's present rule currently has several consequences. First, it is likely to lead to a decline in interceptions in the territorial sea because it is presently the only maritime zone in which protection duties clearly attach. Where a State intercepts in its own territorial sea, it is essentially penalized for not having intercepted further out to sea where it could have sidestepped primary protection responsibilities. Where a State permits another to intercept in its sovereign territory (both on land and at sea), it is similarly penalized by having to assume protection responsibilities.<sup>263</sup> In consequence of this, the ExCom rule is likely to indirectly encourage push-backs and high seas interceptions.

The supplemental rule proposed above would eliminate these consequences by attaching protection duties to all interceptions, regardless of the maritime zone in which they occur. Moreover, it would create an equitable and consistent outcome by equating the exercise of jurisdiction with a concomitant protection duty for those intercepted. The proposal has its limitations, however. Most obviously, instances involving more than one State exercising jurisdiction, (such as where a flag State authorizes a foreign-flagged vessel to intercept) are inevitable and will admittedly raise more complex issues of shared jurisdiction. Additionally, it is conceivable that in the foreseeable future States will contemplate "outsourcing" interception duties to private contractors, which may or may not operate under that State's flag. This practice of relying on private companies to provide a traditionally public service has already emerged in the maritime context when it was reported last year that Somalia had contracted with a private U.S. company to help protect its shores from attacks by pirates along its coastline.<sup>264</sup> Another scenario raising similar issues is the sub-contracting out to other States for

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263. *Id.*

264. *See U.S. Firm to Fight Somali Pirates*, BBC NEWS, Nov. 25, 2005, <http://news.bbc>.

high seas interception activities, which may also emerge over time.<sup>265</sup>

Ultimately, while the ExCom proposal is a useful starting point, it has yet to engage with more troublesome and complex aspects of maritime interception and international legal obligations. Significantly, it fails to apply in the contiguous or high seas zones, perversely allowing States to avoid protection responsibilities there. Second, the document fails to clarify what is entailed in protection responsibilities. Here, what is needed is strict language concerning both disembarkation and initial screening. Third, the document scrupulously avoids the issue of extraterritorial disembarkation, detention, and processing. Guidance as to the legal ramifications of such actions is sorely needed. Finally, a uniform protocol governing initial screening to carefully identify those in need of international protection to prevent *refoulement* is also sorely needed.

#### V. CONCLUSIONS

In the last twenty years there has been a persistent effort to strengthen refugee safeguards in rescue and interception contexts, but little progress until very recently. In the rescue context, treaty amendments to SOLAS and SAR that entered into force in July 2006 create greater clarity surrounding disembarkation by designating the regional rescue centre with primary responsibility for coordinating rescue and ensuring that survivors are disembarked and delivered to a place of safety. By formally closing a longstanding maritime loophole, the amendments should help restore the integrity and viability of a humanitarian practice that relies largely on commercial vessels as its first line of defense. However, the amendments themselves are silent as to the meaning of a “place of safety,” and attempted clarification

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co.uk/go/pr/fr/-/1/hi/world/africa/4471536.stm (reporting on a two-year, \$50 million contract to a US firm to fight piracy off the coasts of Somalia).

265. When the private contractors failed to appear to protect the Somali coastline, the Somali government signed a contract with the U.S. Navy to provide assistance in protecting its territorial waters from pirates operating off its coasts. *See id*; *see also U.S. to Help Tackle Somali Pirates*, BBC NEWS, Apr. 17, 2006, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/4915726.stm>. Although such an agreement demonstrates an exercise of Somali jurisdiction to allow the U.S. Navy to operate within its own territorial waters, such a scenario raises broader questions about the possibility of a state delegating its own high seas interception duties to another State, which raises novel jurisdictional issues.

of this key term remains relegated to a non-binding set of guidelines, which raise further potential for confusion. In particular, the guidelines themselves define a place of safety in a way that leaves open the possibility of survivors being disembarked onto yet another vessel, thereby failing to definitively resolve the disembarkation issue. The success of these amendments in solving the disembarkation problem in the rescue context will be determined over time.

In the interception context, there is some acknowledgement in the ExCom Conclusion that international protection duties must flow from the control exerted by State-based interception practices, but conceptual problems nonetheless remain. The ExCom provision for identifying the State responsible for screening and protection fails to apply throughout every maritime zone, creating incentives for States to intercept on the high seas. A proposed supplemental rule would impose legal obligations on the State exercising jurisdiction over interceptions in the contiguous zones and on the high seas, although its acceptability to States is less clear. Additional shortcomings remain: the absence of any uniform procedural standards governing initial screenings for intercepted persons, and silence on the issue of responsibility concerning extraterritorial detention, processing and protection arrangements.

Finally, dialogue at both scholarly and diplomatic levels reveals concern over an emerging State practice in which interceptions are being characterized as rescue operations, so that States may take advantage of SAR disembarkation procedures and quickly divest themselves of concomitant protection responsibilities. There is a serious need to clarify when an action taken by military vessels validly constitutes a rescue operation, and when it is a maritime interception. Failure to address this issue in a clear and authoritative manner will undermine the recent attempts to strengthen the rescue instruments by allowing interception to inappropriately co-opt rescue resources. While States remain resistant to self-regulation in this regard, the UNHCR should be encouraged to issue comprehensive guidelines sooner, rather than later.