

DESPERATE CROSSINGS, UNJUST SEAS: CHALLENGING THE INTERDICTION AND FORCIBLE RETURN OF ASYLUM SEEKERS ON THE HIGH SEAS

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In the past two years, irregular maritime migration has reached levels not seen in decades. International human rights law requires that states screen migrants' asylum claims and prohibits states from returning migrants to a place where they face persecution. However, due to recent trends in refugee securitization, states attempt to dodge their international obligations by going to the high seas and forcibly returning migrant vessels. States are not held accountable for these forced returns, owing to gray areas in overlapping provisions of maritime and human rights law. This Essay analyzes ambiguous maritime law provisions, interpreting them in accordance with relevant principles of human rights law. Ultimately, it concludes that these high-seas interdictions violate both maritime and human rights law, and it proposes a more results-oriented approach to international law.

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INTRODUCTION

Since 2014, at least 35,571 migrants have lost their lives at sea after leaving their countries of origin to seek refuge abroad.¹ Embarking on overcrowded, makeshift vessels that are ill equipped for high waves and strong currents, these journeys quickly become death sentences.² And yet, for many asylum seekers who are desperate to flee persecution, taking to the dangerous seas is the only way out.³

These attempts to reach and enter a destination country by sea without that country's authorization constitute what is referred to as irregular maritime migration.⁴ Although Europe and Australia statistically bear the brunt of these unauthorized maritime arrivals, the United States has been facing an influx of irregular migration not seen in decades.⁵ In 2022, the U.S. Coast Guard reportedly interdicted approximately 7,000 Haitian migrants and 6,000 Cuban migrants on the Caribbean Sea, as well as thousands from other countries such as the Dominican Republic, Venezuela, and Kazakhstan.⁶ So

1. See *Data*, MISSING MIGRANTS PROJECT, <https://missingmigrants.iom.int/data> [<https://perma.cc/KQ6M-RBVN>] (last visited Apr. 25, 2024).

2. See Michael Feltovic & Robert O'Donnell, USCG, *Coast Guard Migrant Interdiction Operations Are in a State of Emergency*, U.S. NAVAL INST. (Feb. 2023), <https://www.usni.org/magazines/proceedings/2023/february/coast-guard-migrant-interdiction-operations-are-state-emergency> [<https://perma.cc/QN7S-CBMG>].

3. See, e.g., *'I Am Alive, but I Feel Like I am Dead': A Migrant Grieves the Drowning of 3 Children*, UN NEWS (May 9, 2021), <https://news.un.org/en/story/2021/05/1091272> [<https://perma.cc/B8VT-8BCD>]; Chris Kenning, *On the High Seas between Florida and Cuba, US Immigration Policy a Matter of Life and Death*, USA TODAY (Jan. 25, 2023, 5:39 PM), <https://www.usatoday.com/story/news/nation/2023/01/23/cubans-face-life-death-journey-u-s-immigration-policy-shifts/10994551002/> [<https://perma.cc/P7QA-NZZX>].

4. See *Key Migration Terms*, INT'L ORG. MIGRATION, <https://www.iom.int/key-migration-terms> [<https://perma.cc/CH6M-DWDE>] (last visited Apr. 25, 2023).

5. See Feltovic & O'Donnell, *supra* note 2; see also Muzaffar Chishti, Kathleen Bush-Joseph & Colleen Putzel-Kavanaugh, *Can the Biden Immigration Playbook be Effective for Managing Arrivals via Sea?*, MIGRATION POL'Y INST. (Oct. 25, 2023), <https://www.migrationpolicy.org/article/biden-migration-sea> [<https://perma.cc/9MRK-LW6W>].

6. See Chishti et al., *supra* note 5; Feltovic & O'Donnell, *supra* note 2.

far, reports of 2023 interdictions reflect similar numbers.⁷ Notably, these numbers only include those who survived and were caught by the U.S. Coast Guard.⁸

However, these interdictions rarely mark the end of migrants' perilous journeys.⁹ International refugee law requires that states screen migrants for possible asylum claims to prevent arbitrary returns to places where they may face persecution.¹⁰ But the United States and many other countries rarely abide these mandates, citing domestic immigration law and national security justifications for their noncompliance.¹¹ Instead, to avoid owing irregular migrants protections, states go out to the high seas to interdict and forcibly return migrants to their countries of origin.¹² The U.S. Coast Guard claims that only 1 percent of these interdicted migrants are eligible for refugee protections, but human rights advocates dispute that estimate due to the lack of systemic asylum screening procedures during interdictions.¹³ This estimate is further undercut by the United Nations High Commissioner for Refugees's (UNHCR) report that 80–90 percent of boat arrivals are comprised of asylum seekers, typically coming from “war-ravaged, refugee-producing regimes.”¹⁴

These high-seas interdictions and forcible returns of potential asylum seekers are governed not only by international refugee law, but also by maritime law.¹⁵ Though these two areas of law intersect, their open-ended and ambiguous references to each other allow states to manipulate their provisions to evade protections for refugees.¹⁶ With this intersection in mind, this Essay analyzes the maritime justifications for high-seas interdictions, arguing that those justifications do not extend to forcible returns.¹⁷ This Essay proposes that once the maritime purpose of a stop is satisfied, humanitarian principles should govern the next steps of the interdiction.¹⁸ More broadly, it suggests a results-oriented approach to

7. See Chishti et al., *supra* note 5; Feltovic & O'Donnell, *supra* note 2.

8. See Chishti et al., *supra* note 5; Feltovic & O'Donnell, *supra* note 2.

9. See *infra* notes 12–14 and accompanying text.

10. See generally Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

11. See Max O. Stephenson Jr. & Yannis A. Stivachtis, *Refugees: From Securitization to Integration*, E-INT'L RELS. (May 3, 2023), <https://www.e-ir.info/2023/05/03/refugees-from-securitization-to-integration/> [<https://perma.cc/D5Z7-MUY3>].

12. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 159–64 (1993); see also Barbara Miltner, *Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception*, 30 FORDHAM INT'L L.J. 75, 81 (2006).

13. See Chishti et al., *supra* note 5.

14. VIOLETA MORENO-LAX, KALDOR CTR. FOR INT'L REFUGEE L., POLICY BRIEF 4: THE INTERDICTION OF ASYLUM SEEKERS AT SEA: LAW AND (MAL)PRACTICE IN EUROPE AND AUSTRALIA 2 (2017), https://uploads.guim.co.uk/2017/05/02/Policy_Brief_4_Interdiction_of_asylum_seekers_at_sea.pdf [<https://perma.cc/DYD7-S8J8>]; UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, at 32, 35 (2016), <https://www.unhcr.org/media/unhcr-global-trends-2015> [<https://perma.cc/BM7E-44A7>].

15. See *infra* Part I.

16. See *infra* Part II.

17. See *infra* Part II.

18. See *infra* Part III.

maritime and human rights law so that states may no longer exploit their (often necessary) ambiguities.¹⁹

I. BACKGROUND: THE RELEVANT LAW GOVERNING MARITIME INTERDICTIONS OF MIGRANTS

The interdiction of potential asylum seekers on the high seas implicates many areas of international law, including maritime law, human rights law, refugee law, and even criminal law.²⁰ This Essay focuses predominantly on international maritime law, human rights law, and refugee law. This part provides an overview of the relevant international law provisions discussed in this Essay.

A. Relevant Maritime Law

The United Nations Convention on the Law of the Sea (UNCLOS), described as the “constitution for the oceans,”²¹ is the starting point for many issues of international maritime law. Effective in 1994, UNCLOS established a legal framework that governs the world’s oceans and seas and their resources.²² UNCLOS is also described as “one of the most comprehensive and well-established bodies of international regulatory norms in existence.”²³ With an overwhelming 169 state parties, it is considered the most successful of the international conventions.²⁴ Although the United States is one of the few countries that has not ratified UNCLOS, it has consistently accepted UNCLOS as customary international law for decades.²⁵

UNCLOS emphasizes the need for international cooperation to promote states’ peaceful, equitable, and efficient use of the seas.²⁶ To achieve these

19. *See infra* Part III.

20. *See infra* Parts I.A–C.

21. U.N. President of the Third U.N. Conference on the Law of the Sea, Remarks at the Final Session of the Conference at Montego Bay, xxiii (Dec. 11, 1982), https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf [<https://perma.cc/ZT4V-XFDN>].

22. *See generally* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

23. NIGEL CHAMBERLAIN, BRITISH AMERICAN SECURITY INFORMATION COUNCIL, INTERDICTION UNDER THE PROLIFERATION SECURITY INITIATIVE: COUNTER-PROLIFERATION OR COUNTER-PRODUCTIVE? 4 (2003), <https://basicint.org/wp-content/uploads/2018/06/PUB051003.pdf> [<https://perma.cc/UDL5-WH4Z>].

24. *See Depositary, Ch. XXI, 6. United Nations Convention on the Law of the Sea*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en [<https://perma.cc/KQV4-CHMG>] (last visited Apr. 25, 2024).

25. The United States has not ratified UNCLOS because it rejects UNCLOS’s seabed mining provisions. *See, e.g.*, *United States v. Dire*, 680 F.3d 446, 459 (4th Cir. 2012) (noting that the United States has “not ratified the UNCLOS ‘but has recognized that its baseline provisions reflect customary international law’” (quoting *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992))); *United States v. Hasan*, 747 F. Supp. 2d 599, 634–35 (E.D. Va. 2010).

26. *See United Nations Convention on the Law of the Sea, supra* note 22, pmbl.

goals, UNCLOS defines states' rights and obligations at sea.²⁷ But although UNCLOS broadly regulates the extent of state jurisdiction over the seas, its provisions are generally not self-executing and rarely prescribe enforcement measures.²⁸ So, to enforce its obligations, several articles of UNCLOS instruct that a "competent international organization" will promulgate specific operative regulations.²⁹ The International Maritime Organization (IMO) is one such competent organization that may issue rules and standards to enforce UNCLOS's obligations.³⁰ IMO only has the authority, however, to act on the obligations contained in articles that specifically mention the "competent international organization."³¹

The rights and duties of states under UNCLOS depend on the delineated maritime zone where the state activity occurs. The first twelve miles extending out from the low water mark of a state's coastline constitute its territorial sea.³² This is the area of the sea over which states possess the greatest degree of sovereignty.³³ A state's sovereignty over its territorial sea, however, is less complete than that over its land territories.³⁴ The next zone, which covers the next twelve miles past the territorial sea, is the contiguous zone.³⁵ This entails a lesser degree of sovereignty, including a qualified right to police through which the coastal state can "exercise the control *necessary*" to prevent violations of its laws, such as unauthorized immigration.³⁶ Beyond the contiguous zone are the high seas, which are marked by principles of freedom and peace.³⁷ They are open for use by all states, coastal and landlocked alike, and this usage is reserved for peaceful purposes.³⁸ States' abilities to exercise jurisdiction over another state's vessel on the high seas is greatly limited;³⁹ typically, a state's control over vessels on the high seas is limited to vessels that are flying that state's flag.⁴⁰

Interdictions are one way that states exercise jurisdiction over other vessels on the high seas.⁴¹ In the irregular maritime migration context, interdictions generally encompass state extraterritorial activities that are meant to prevent

27. *See generally id.*

28. *See* Jasmine Coppens, *Chapter 7 The Law of Sea and Human Rights in the Hirsi Jamaa and Others v. Italy Judgment of the European Court of Human Rights*, 30 *IUS GENTIUM* 179, 190–91 (2014).

29. *Id.* at 190.

30. *See id.*

31. *Id.*

32. *See* United Nations Convention on the Law of the Sea, *supra* note 22, arts. 2–4.

33. *See id.* art. 2(1); *see also* Miltner, *supra* note 12, at 100.

34. *See* Miltner, *supra* note 12, at 100.

35. *See* United Nations Convention on the Law of the Sea, *supra* note 22, art. 33.

36. *Id.* (emphasis added); *see* MORENO-LAX, *supra* note 14, at 3–4.

37. *See* United Nations Convention on the Law of the Sea, *supra* note 22, arts. 87–88.

38. *Id.* arts. 17, 38, 87, 88. Note that there is another zone, the Exclusive Economic Zone (EEZ), which extends 200 miles out from the end of the territorial sea. *Id.* arts. 55, 57. However, the EEZ primarily deals with the usage of natural resources, and for the purposes of maritime interdictions it is treated as the same as the high seas. *See* Penelope Mathew, *Address—Legal Issues Concerning Interception*, 17 *GEO. IMMIGR. L.J.* 221, 224 (2003).

39. *See* United Nations Convention on the Law of the Sea, *supra* note 22, art. 92.

40. *See id.*

41. *See* MORENO-LAX, *supra* note 14, at 3–4.

migrants from entering that state's territory.⁴² These activities include physical interference with migrant vessels, such as stopping, boarding, seizing, inspecting, and forcibly redirecting those vessels.⁴³ Naturally, interdictions of foreign vessels at sea are easier to justify in zones of the sea over which a state has sovereignty, such as its territorial sea or the contiguous zone.⁴⁴ But on the high seas, which are marked by freedom and peace, there are far fewer circumstances in which physical interference with foreign vessels is permissible.⁴⁵ For example, states have a limited right to "visit"—i.e., approach and potentially board—vessels that are flagless.⁴⁶ States may also interfere with vessels upon a suspicion of smuggling.⁴⁷ There are also humanitarian justifications for interfering with a vessel—for example, when the vessel is in distress and its occupants need rescuing.⁴⁸

B. Relevant International Human Rights and Refugee Law

International human rights and refugee law are important considerations in the maritime context because asylum seekers often take to the seas to flee persecution.⁴⁹ Traveling by makeshift vessels made of debris and tarps, asylum seekers risk dying at sea or being interdicted and turned away.⁵⁰ Refugee law is especially relevant to the treatment of interdicted peoples given the high estimates of asylum seekers among boat migrants.⁵¹

42. See Miltner, *supra* note 12, at 83. The UNHCR has defined interdictions as "one of the measures employed by States to: prevent embarkation of persons on an international journey; prevent further onward international travel by persons who have commenced their journey; or 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 travelling public as well as persons being smuggled or transported in an irregular manner." UNHCR Executive Committee of the High Commissioner's Programme, 54th Sess., *Conclusion on Protection Safeguards in Interception Measures: No. 97 (LIV) – 2003*, U.N. Doc. A/AC.96/987 & No. 12A (A/58/12/Add.1) (Oct. 10, 2003), <https://www.unhcr.org/us/publications/conclusion-protection-safeguards-interception-measures> [<https://perma.cc/PPN4-E6VT>].

43. See Miltner, *supra* note 12, at 84.

44. See United Nations Convention on the Law of the Sea, *supra* note 22, art. 2 (establishing the extent of state sovereignty over the territorial sea); *see also id.*, art. 33 (listing the justifications for state exercises of control in the contiguous zone).

45. See *infra* notes 46–48 and accompanying text.

46. United Nations Convention on the Law of the Sea, *supra* note 22, art. 110.

47. See Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime art. 8, Nov. 15, 2000, 2241 U.N.T.S. 507.

48. See United Nations Convention on the Law of the Sea, *supra* note 22, art. 98; International Convention on Maritime Search and Rescue, Apr. 27, 1979, T.I.A.S. No. 11,093, 1405 U.N.T.S. 97.

49. See MORENO-LAX, *supra* note 14, at 2.

50. See Feltovic & O'Donnell, *supra* note 2.

51. See GLOBAL TRENDS, *supra* note 14, at 35.

The United Nations created the UNHCR to aid in the refugee crisis resulting from World War II.⁵² The UNHCR's work is guided by the Convention Relating to the Status of Refugees ("the 1951 Convention"), which contains standards for the international community's treatment of refugees.⁵³ It established an internationally recognized definition for "refugees" and created refugee status determination procedures.⁵⁴ Although the 1951 Convention previously applied only to European refugees from World War II, its scope was expanded in 1967 to apply to all refugees.⁵⁵ The 1951 Convention's Article 33 introduced the fundamental principle of "non-refoulement," which prohibits the return of asylum seekers to a place where they will be in danger of persecution based on their "race, religion, nationality, membership of a particular social group or political opinion."⁵⁶ Article 33 is one of the few articles that states cannot waive or modify when becoming parties to the 1951 Convention or its 1967 Protocol.⁵⁷

Although it is a fundamental principle of international refugee law,⁵⁸ the scope of non-refoulement has generated debate in the international community.⁵⁹ Some scholars argue that non-refoulement has become customary international law and is therefore legally binding on all countries regardless of their membership in the 1951 Convention.⁶⁰ Notably, several other international conventions have adopted non-refoulement provisions.⁶¹ For example, the Convention Against Torture contains an express non-refoulement provision, and the International Covenant on Civil and Political Rights is interpreted to prohibit refoulement.⁶² Others, however, argue that non-refoulement has not yet attained the international recognition required to become customary international law.⁶³ As such, only parties to the 1951

52. See *History of UNHCR*, UNHCR, <https://www.unhcr.org/us/about-unhcr/overview/history-unhcr> [<https://perma.cc/R2HZ-SDDA>] (last visited Apr. 25, 2023).

53. UNHCR, AN INTRODUCTION TO INTERNATIONAL PROTECTION: PROTECTING PERSONS OF CONCERN TO UNHCR 26–27 (2005), <https://www.unhcr.org/us/media/self-study-module-1-introduction-international-protection-protecting-persons-concern-unhcr> [<https://perma.cc/VAU4-99SN>].

54. See Convention Relating to the Status of Refugees, *supra* note 10, art. 1; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

55. See Protocol Relating to the Status of Refugees, *supra* note 54, art. 1(2).

56. Convention Relating to the Status of Refugees, *supra* note 10, art. 33.

57. See UNHCR, *supra* note 53, at 26–27.

58. See *The 1951 Refugee Convention*, UNHCR, <https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention> [<https://perma.cc/QXM7-CYCL>] (last visited Apr. 25, 2024).

59. See *infra* notes 60–64 and accompanying text.

60. See MORENO-LAX, *supra* note 14, at 9; Miltner, *supra* note 12, at 99.

61. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85; UNHCR, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

62. See *supra* note 61 and accompanying text.

63. See, e.g., U.S. DEP'T OF STATE, *U.S. Observations on UNHCR Advisory Opinion on Extraterritorial Application of Non-refoulement Obligations* (Dec. 28, 2007), <https://2001-2009.state.gov/s/I/2007/112631.htm> [<https://perma.cc/692D-NQ88>].

Convention and its 1967 Protocol are subject to non-refoulement obligations.⁶⁴

States' conflicting interpretations of the territorial scope of non-refoulement create even more confusion.⁶⁵ There are three main views. First, some scholars posit that non-refoulement obligations do not apply extraterritorially.⁶⁶ Under this view, non-refoulement obligations only prevent rejection at the "threshold of initial entry," such as at the border or the territorial sea.⁶⁷ So, when states interdict vessels outside of their territory, such as on the high seas, the return of those migrants would not violate non-refoulement. This is the United States Supreme Court's view in *Sale v. Haitian Centers Council, Inc.*⁶⁸

Second, others argue that the plain language of the 1951 Convention clearly requires that non-refoulement applies extraterritorially.⁶⁹ They argue that protections against non-refoulement would be pointless if a state could merely leave its territory to avoid owing those protections to refugees.⁷⁰ Translating the French word "refouler" as "to drive back, repel, or re-conduct," proponents of this view argue that these words do not require presence in any territory.⁷¹ This is the European Court of Human Rights' view, as well as Justice Harry A. Blackmun's view as expressed in his dissent in *Sale*.⁷²

The final argument is that Article 33 is not exclusively tied to territory—it is also tied to a state's exercise of jurisdiction over the people it interdicts.⁷³ For non-refoulement protections to attach, therefore, refugees do not necessarily need to enter a state's territory.⁷⁴ If the state subjects them to its jurisdiction—for example, by interdicting their vessel—the state cannot arbitrarily return them to their countries of origin.⁷⁵

C. Humanitarian Principles in Maritime Law

Although UNCLOS itself is not a human rights treaty, its preamble clearly establishes overarching humanitarian principles as a basis for its creation.⁷⁶ For example, the preamble cites as its goals the maintenance of peace, justice,

64. *See id.*

65. *See* Miltner, *supra* note 12, at 93–94.

66. *See* *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *see also* Miltner, *supra* note 12, at 95.

67. *Sale*, 509 U.S. at 180 (quoting *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958)).

68. 509 U.S. 155, 180 (1993).

69. *See* Miltner, *supra* note 12, at 95.

70. *See id.*

71. *Sale*, 509 U.S. at 191–92 (Blackmun, J., dissenting); MORENO-LAX, *supra* note 14, at 9.

72. *See* *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, ¶ 177 (Eur. Ct. H.R., Feb. 23, 2012); *id.* at 68 (Pinto de Albuquerque, J., concurring); *Sale*, 509 U.S. at 190 (Blackmun, J., dissenting).

73. *See* J.C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 312–13 (2005); *Hirsi Jamaa*, ¶¶ 178, 180.

74. *See* HATHAWAY, *supra* note 73, at 312–13.

75. *See id.*

76. *See* United Nations Convention on the Law of the Sea, *supra* note 22, pmbl.

and progress for all peoples of the world.⁷⁷ It emphasizes that these goals should promote a “just and equitable international economic order which takes into account the interests and needs of mankind as a whole.”⁷⁸ These duties to “all peoples of the world” and “mankind as a whole” are significant, given the number of states that are parties to this convention.⁷⁹ Beyond these broad humanitarian principles, UNCLOS contains specific provisions that protect human rights and safety on the seas,⁸⁰ as well as carveouts requiring those provisions to be read with “other rules of international law.”⁸¹

i. Specific UNCLOS Provisions That Protect Human Rights and Safety

Article 98 of UNCLOS is one such provision protecting human safety at sea. Under this provision, a state must require that shipmasters flying its flag (a) render assistance to those found at sea who are in danger of being lost and (b) rescue those in distress.⁸² This rescue duty is a long-established tradition on the seas that applies to all vessels, state and commercial alike.⁸³ To provide a more specific and comprehensive international cooperation regime for rescues, IMO subsequently issued the International Convention on Maritime Search and Rescue (SAR) in 1980, which was amended in 2004.⁸⁴ SAR clarified states’ rescue obligations, explaining how states should carry out rescues when they receive information that a person is in distress.⁸⁵ It defines distress as “[a] situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance.”⁸⁶

However, SAR did not define “place of safety,” the ambiguity of which resulted in inconsistent applications by rescuing states.⁸⁷ After repeated instances of noncompliance, IMO amended SAR to provide better safeguards for those in distress at sea.⁸⁸ The amendment required that an assisting ship “disembark” the rescued individuals at a place of safety.⁸⁹ IMO simultaneously issued guidelines recognizing the implausibility of an assisting vessel qualifying as a “place of safety.”⁹⁰ The guidelines clarified

77. *See id.*

78. *Id.*

79. *See Depositary, supra* note 24 and accompanying text.

80. *See* United Nations Convention on the Law of the Sea, *supra* note 22, arts. 98–99.

81. *Id.* arts. 2, 19, 21, 31, 87, 138.

82. *Id.* art. 98.

83. INT’L MAR. ORG. [IMO], Res. MSC.167(78) app. 1, *Guidelines on the Treatment of Persons Rescued at Sea* (May 20, 2004).

84. *See* International Convention on Maritime Search and Rescue, *supra* note 48.

85. *Id.* at Annex ch. 2.1.9.

86. *Id.* at Annex ch. 1.3.11.

87. *See* MORENO-LAX, *supra* note 14, at 8.

88. *See id.*

89. INT’L MAR. ORG. [IMO], Res. MSC 155(78), MSC Doc. 78/26.add.1, 3.1.9, *Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, As Amended* (May 20, 2004).

90. *See* INT’L MAR. ORG., *supra* note 83, ¶ 6.13; Coppens, *supra* note 28, at 192.

that states must avoid disembarkation in territories where the lives and freedom of refugees would be threatened.⁹¹

While these additions to the duty of assistance more clearly protect asylum seekers' rights at sea, they are not binding on the parties to UNCLOS.⁹² This is because Article 98 does not mention any "competent international organization" and, thus, does not grant IMO the authority to extend its rescue obligations.⁹³ Rather, SAR, its amendments, and IMO's guidelines are merely interpretive tools that states need to sign onto to be bound.⁹⁴ Notably, only 114 states are parties to SAR, as opposed to UNCLOS's 169 state parties.⁹⁵ Even fewer states have agreed to the SAR amendments because they reject the disembarkation obligation, which requires them to admit the rescued individuals to their territory or arrange for another state to take them.⁹⁶

ii. UNCLOS Carveouts and Savings Clauses

Maritime law also protects human rights and safety at sea through carveouts and savings clauses explicitly requiring that those provisions conform with "other rules of international law."⁹⁷ Although not every UNCLOS article includes this directive, its preamble broadly affirms that any unaddressed matters are governed by "rules and principles of general international law."⁹⁸ Article 87, which establishes freedom on the high seas, explicitly qualifies that states must exercise this principle "*under* the conditions laid down by . . . other rules of international law."⁹⁹ So, states' freedom of navigation on the high seas is explicitly subject to other areas of international law, such as human rights and refugee law. These savings clauses appear in other international instruments, such as the Protocol Against the Smuggling of Migrants by Land, Sea, and Air ("Smuggling Protocol").¹⁰⁰ The Smuggling Protocol expressly carves out human rights and refugee protections, even going as far as to mention the 1951 Convention and its prohibition of refoulement.¹⁰¹

91. See INT'L MAR. ORG., *supra* note 83, ¶ 6.17.

92. See Coppens, *supra* note 28, at 191.

93. See *id.*

94. See *id.*

95. *Status of Treaties*, IMO (Jan. 5, 2024), <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreaties.pdf> [<https://perma.cc/TW9G-MW6C>]; see also *Depositary*, *supra* note 24.

96. Felicity Attard, *Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Smuggling on the High Seas?*, 47 J. MAR. L. & COM. 219, 235, 239 (2016).

97. See, e.g., United Nations Convention on the Law of the Sea, *supra* note 22, arts. 2, 19, 21, 31, 58, 87; see also *id.* pmbl.

98. *Id.* pmbl.

99. *Id.* art. 87 (emphasis added).

100. Protocol Against the Smuggling of Migrants by Land, Sea and Air, *supra* note 47.

101. See *id.* arts. 9, 19.

II. WHAT'S NEXT?: AN ANALYSIS OF THE LEGAL JUSTIFICATIONS FOR INTERDICTIONS AND HOW THEY SHOULD BE READ WITH REFUGEE LAW

Maritime law and refugee law inevitably intersect in the interdiction context, raising a question as to what should happen to migrants interdicted on the high seas. Under international refugee law, forcibly returning or redirecting a vessel's course back to a country where asylum seekers may face persecution likely violates the principle of non-refoulement.¹⁰² UNCLOS also governs interdictions, however, so it is also important to determine whether maritime law sanctions the forcible return of refugees on the high seas.¹⁰³ Given UNCLOS's emphasis on human needs and the visualization of the sea as a place that preserves the equal rights of all mankind,¹⁰⁴ it is not clear that maritime law should be read to permit forcible returns on the high seas.

However, states often read maritime law in exactly this way—including the United States, Europe, and Australia, among others.¹⁰⁵ This is because many of the international legal instruments that govern the stopping and boarding of vessels at sea are ambiguous as to the legality of the next steps of those interactions.¹⁰⁶ Some argue that the ambiguities are in place to allow for the insertion of humanitarian principles.¹⁰⁷ Instead, however, states often exploit these ambiguities, attempting to circumvent their human rights obligations in favor of security or migration control purposes.¹⁰⁸ These conflicting interpretations highlight UNCLOS's inability to require that its provisions be enforced, which is exacerbated by ambiguous language regarding its scope.¹⁰⁹ There are concerns that these ambiguities act as conduits for human rights violations through the arbitrary return of asylum seekers to their persecutors.¹¹⁰

This Essay explores these ambiguities by analyzing three main justifications for the interdiction of migrant vessels at sea and supplementing their gaps with relevant human rights and refugee law. In doing so, it clarifies that none of these justifications legally permit the forcible return or

102. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, at 69 (Eur. Ct. H.R., Feb. 23, 2012) (Pinto de Albuquerque, J., concurring); *see also* Miltner, *supra* note 12, at 85.

103. *See* MORENO-LAX, *supra* note 14, at 4; *Depositary*, *supra* note 24 and accompanying text.

104. *See* United Nations Convention on the Law of the Sea, *supra* note 22, pmbl.

105. *See generally* MORENO-LAX, *supra* note 14; *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

106. *See infra* Parts II.A–C.

107. *See* MORENO-LAX, *supra* note 14, at 8.

108. *See* Stephenson & Stivachtis, *supra* note 11.

109. Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131, 133 (2005).

110. *See, e.g.*, MORENO-LAX, *supra* note 14, at 2 (arguing that states' overbroad application of interdiction powers and selective interpretation of the rescue doctrine harm refugees and other migrants); Daniel Ghezalbash, *Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees*, 68 AM. J. COMPAR. L. 479, 480 (2020) (discussing states' exploitation of "legal black holes" in international maritime and human rights law that render certain refugees rightless).

redirection of migrant vessels without refugee status determination procedures.

A. UNCLOS Article 110: The Right of Visit

Article 110 of UNCLOS establishes a right of visit of foreign vessels on the high seas where there are reasonable grounds for suspecting that the vessel is engaged in piracy, slave trade, unauthorized broadcasting, lacks a nationality, or is concealing its nationality.¹¹¹ This allows a state to send an officer or commander to the vessel and, if their suspicion remains after checking documents, they may proceed with a “further examination on board the ship.”¹¹² Article 110 clarifies that vessels must carry this out with “all possible consideration.”¹¹³

The right of visit is a common pretense for the interdiction of refugee vessels, as it is not uncommon for asylum seekers to travel by makeshift rafts that lack a flag.¹¹⁴ To interdicting vessels, it appears that the migrant vessel lacks a nationality, and they can verify that by sending an official to the vessel.¹¹⁵ Assuming the asylum seekers lack documentation, as many do, the official may then examine the vessel.¹¹⁶ But UNCLOS does not say what officials should do after this examination; it is unclear what the consequences of statelessness are.¹¹⁷ As explained above, Article 110 requires that the state proceed with “all possible consideration”—but there is no further explanation of what this consideration entails.¹¹⁸

Some states, such as the United States, construe this open-ended provision to imply enforcement jurisdiction over the stateless vessel, permitting an interdicting ship to forcibly return migrant vessels.¹¹⁹ This is consistent with the view in the United States that stateless vessels are “international pariahs” with no right to navigate freely on the high seas.¹²⁰ Thus, there are no limitations on a state’s power to subject a stateless vessel to its jurisdiction—even under international law.¹²¹ Beyond conflicting with UNCLOS’s proclamation that freedom of navigation marks the high seas, this

111. See United Nations Convention on the Law of the Sea, *supra* note 22, art. 110.

112. *Id.* art. 110(2).

113. *Id.*

114. See Richard Barnes, *The International Law of the Sea and Migration Control*, in EXTRATERRITORIAL MIGRATION CONTROL: LEGAL CHALLENGES 103, 130 (Bernard Ryan & Valsamis Mitsilegas eds., 2010); see also MORENO-LAX, *supra* note 14, at 5.

115. See Barnes, *supra* note 114, at 130 (explaining that under international law, it is a general rule that flagless vessels are stateless, and thus warships can approach for verification).

116. See *id.* at 131; United Nations Convention on the Law of the Sea, *supra* note 22, art. 110.

117. See Barnes, *supra* note 114, at 131; United Nations Convention on the Law of the Sea, *supra* note 22, art. 110.

118. See *supra* note 113 and accompanying text.

119. See Barnes, *supra* note 114, at 130–31.

120. *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 (11th Cir. 1982).

121. *Id.*; see also *United States v. Aybar-Ulloa*, 987 F.3d 1, 9 (1st Cir. 2021) (citing *Marino-Garcia*, 679 F.2d at 1383); *United States v. Pinto-Mejia*, 720 F.2d 248, 260 (2d Cir. 1983); *United States v. Howard-Arias*, 679 F.2d 363, 371 (4th Cir. 1982).

interpretation of the right of visit has sparse support among the international community.¹²²

This interpretation not only lacks international support, but it is also inconsistent with the structure of UNCLOS. This is because, under UNCLOS, the right of visit is structurally separate from enforcement jurisdiction.¹²³ In two of the other circumstances for which there is a right of visit—piracy and unauthorized broadcasting—UNCLOS, in separate articles, has laid out enforcement actions that may be taken.¹²⁴ First, Article 110(1)(a) lays out the right to visit and examine a vessel upon suspicion that the vessel is engaged in piracy.¹²⁵ Article 105 separately permits the seizure of vessels engaged in piracy on the high seas and the arrest of its occupants.¹²⁶ Next, Article 110(1)(c) lays out the right to visit and examine a vessel upon suspicion that it is engaged in unauthorized broadcasting.¹²⁷ Article 109 then separately permits the arrest of people and ships on the high seas who are engaged in such broadcasting “in conformity with article 110.”¹²⁸ This structural separation suggests that the right of visit does not, by itself, confer enforcement jurisdiction.

However, for a lack of a nationality, as mentioned in Article 110(1)(d),¹²⁹ UNCLOS is silent as to what enforcement actions, if any, are permissible. It seems that if UNCLOS’s drafters had intended for a consequence of statelessness on the high seas to be arrest, seizure, or the like, it would have provided for that consequence in a separate article.¹³⁰ Moreover, seizure and arrest in these contexts are in response to crimes committed on the high seas—for example, piracy and unauthorized broadcasting.¹³¹ But the mere navigation of flagless asylum seekers on the high seas is not a crime in and of itself.¹³² UNCLOS emphasizes that the high seas are reserved for peaceful purposes and free navigation,¹³³ and it thus makes sense that enforcement authority over foreign vessels is limited to the prevention of crime. And UNCLOS, by failing to provide any enforcement article, suggests that being stateless on the high seas should not be treated as a crime.¹³⁴ Instead, asylum seekers’ journeys in search of refuge are more akin to the “peaceful purposes” in Article 88 than to anything that requires punitive consequences.¹³⁵ In sum, the right of visit does not clearly confer

122. See Barnes, *supra* note 114, at 132.

123. See *infra* notes 126–28 and accompanying text.

124. See *id.*

125. See United Nations Convention on the Law of the Sea, *supra* note 22, art. 110(1)(a).

126. See *id.* art. 105.

127. *Id.* art. 110(1)(c).

128. *Id.* art. 109(4).

129. *Id.* art. 110(1)(d).

130. See MORENO-LAX, *supra* note 14, at 5.

131. See *id.*; Barnes, *supra* note 114, at 131.

132. See MORENO-LAX, *supra* note 14, at 5.

133. See United Nations Convention on the Law of the Sea, *supra* note 22, arts. 87–88.

134. See MORENO-LAX, *supra* note 14, at 5.

135. See United Nations Convention on the Law of the Sea, *supra* note 22, art. 88.

enforcement jurisdiction and thus does not justify the forcible return or redirection of migrant vessels on the high seas.¹³⁶

B. The Protocol Against the Smuggling of Migrants

Although UNCLOS itself lacks specific provisions to address smuggling on the high seas, the Smuggling Protocol addresses this issue.¹³⁷ Article 8 of this Protocol permits the boarding and searching of flagless vessels (i.e., those lacking a nationality) where there are reasonable grounds to believe that they are involved in smuggling migrants.¹³⁸ If this suspicion is confirmed, the state may then take “appropriate measures in accordance with relevant domestic and international law.”¹³⁹

The Smuggling Protocol provides flagged vessels more protections than it does flagless vessels. For example, it only allows a state to take action against a flagged vessel suspected of smuggling if it receives permission from the flag state first.¹⁴⁰ The state may take no additional measures without the flag state’s consent.¹⁴¹ But if a vessel is flagless, the state may board and search the vessel so long as there are reasonable grounds to suspect that it is engaged in smuggling migrants.¹⁴² If evidence confirms the suspicion, they may then take “appropriate measures” against that vessel—no state needs to give authorization.¹⁴³ This seems in line with the United States’s view that stateless vessels, lacking the protection of any particular state, can be subjected to the jurisdiction of any state vessel on the high seas.¹⁴⁴ However, as with the United States’s interpretation of the right of visit, this seems to be at odds with the principle of freedom of navigation on the high seas.

As with the right of visit, the Smuggling Protocol does not elaborate on what happens to a flagless migrant vessel after the searching and boarding

136. Recently, there has been an increase in multilateral agreements among states that permit coast guards to interdict and return migrant vessels to their countries of origin. *See, e.g.,* Feltovic & O’Donnell, *supra* note 2; Barnes, *supra* note 114, at 133. The U.S. Supreme Court has accepted the legitimacy and legality of these agreements. *See generally* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993). However, there is debate in the international community over the legality of these agreements when they permit interdictions of migrant vessels on the high seas. *See* Barnes, *supra* note 114, at 133. This is because a high seas interdiction, which inevitably involves a restriction of the other vessel’s movement, may violate UNCLOS’s principle of freedom on the high seas. *See id.* at 133–34. For a discussion on these agreements, see Joseph E. Kramek, Comment, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?*, 31 U. MIA. INTER-AM. L. REV. 121 (2000).

137. *See generally* Protocol Against the Smuggling of Migrants by Land, Sea and Air, *supra* note 47.

138. *See id.* art. 8.

139. *Id.* art. 8(7) (emphasis added).

140. *Id.* art. 8(2).

141. *Id.* art. 8(5). That is, “except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.” *Id.*

142. *Id.* art. 8(7).

143. *Id.*

144. *See* Attard, *supra* note 96, at 231; *see also supra* notes 120–21 and accompanying text.

has concluded.¹⁴⁵ It only allows “appropriate measures,” with no further explanation as to this ambiguous phrase.¹⁴⁶ There does seem to be more support that this phrase encapsulates some sort of enforcement jurisdiction, as the word “measures” more directly suggests physical interference than the right of visit’s “proceed with all possible consideration.”¹⁴⁷ Still, states cannot merely use suspicion of smuggling as a guise to interdict and forcibly redirect migrant vessels.¹⁴⁸ The Smuggling Protocol emphasizes the importance of the humane treatment of interdicted persons, as well as the importance of not endangering the vessel or its cargo.¹⁴⁹ Moreover, it contains a saving clause in Article 19 that states that nothing in the Smuggling Protocol shall affect any other rights or obligations under international human rights law, specifically mentioning the 1951 Convention and 1967 Protocol by name.¹⁵⁰ Therefore, states must still uphold the principle of non-refoulement in these contexts, and states cannot forcibly return or redirect interdicted vessels after they have finished their smuggling investigations.¹⁵¹

C. Rescues as a Pretext for Interdictions

Due to the ambiguities under UNCLOS Article 98 and disagreements regarding the scope of the rescue duty, states have begun to mask interdictions as rescues.¹⁵² States have an incentive to mischaracterize rescues because it allows for greater interference with a vessel, thus permitting them to enforce migration or national security measures.¹⁵³ However, this more readily enables the arbitrary return of asylum seekers without any evaluation of their asylum claims.¹⁵⁴ Recognizing the danger of the rescue doctrine’s ambiguities, UNHCR attempted to clearly distinguish between rescue and interdiction by defining interdictions as acts where a state “assert[s] control” over a vessel.¹⁵⁵ So, when a state forces a vessel to turn around, this constitutes an interdiction. Rescues, on the other hand, are solely for humanitarian purposes.¹⁵⁶ Moreover, rescues have a much broader

145. *See id.* at 230.

146. *See* Protocol Against the Smuggling of Migrants by Land, Sea and Air, *supra* note 47, art. 8.

147. *See* Attard, *supra* note 96, at 230.

148. *See infra* notes 149–51.

149. *See* Protocol Against the Smuggling of Migrants by Land, Sea and Air, *supra* note 47, art. 9.

150. *See id.* art. 19.

151. *See id.*; *see also* Attard, *supra* note 96, at 231–32.

152. *See* Miltner, *supra* note 12, at 78; MORENO-LAX, *supra* note 14, at 5.

153. *See* Miltner, *supra* note 12, at 92.

154. *See id.* at 78; MORENO-LAX, *supra* note 14, at 5.

155. *See* UNHCR Executive Committee of the High Commissioner’s Programme, *supra* note 42 (“[W]hen vessels respond to persons in distress at sea, they are not engaged in interception.”).

156. Press Release, UNHCR, UNHCR and IOM appeal for urgent disembarkation of all stranded refugees and migrants in central Mediterranean (Nov. 7, 2022), <https://www.unhcr.org/us/news/press-releases/unhcr-and-iom-appeal-urgent-disembarkation-all-stranded-refugees-and-migrants> [<https://perma.cc/W5SQ-UPJ2>].

geographical scope than interdictions. Article 98 uses the broad term “at sea,” and SAR similarly indicates that the rescue obligation applies “throughout the oceans”; both terms appear to encompass the high seas.¹⁵⁷ Interdictions lack this same breadth; they are limited to areas over which a state has sovereignty or where the vessel is engaged in suspicious activity.¹⁵⁸

Still, to the detriment of asylum seekers, ambiguities in the rescue doctrine remain. Article 98 by itself does not define “rescue” or “distress,” nor does it provide for what should happen to migrants after they have been rescued.¹⁵⁹ And IMO’s additions to the rescue regime produce inconsistent results when applied to refugees. For example, its nonbinding guidelines explain that a “place of safety” does not have to be on land and can potentially be on board the rescuing vessel.¹⁶⁰ But the IMO has also said that states should not carry out refugee status determinations on board a vessel, instead requiring disembarkation in these situations.¹⁶¹ As explained above, however, many states have rejected the disembarkation duty, which creates a gap in refugee protections.¹⁶² If states refuse to disembark asylum seekers for status determination, and if the rescuing ship lacks the capacity to assess their claims, there is a high chance that states will arbitrarily return them to their countries of origin.¹⁶³ But if disembarkation was required in every situation, this might disincentivize the coast guard or private vessels from initiating rescues.¹⁶⁴ These issues are amplified by restrictive interpretations of non-refoulement, which enable the forcible return of asylum seekers “rescued” on the high seas to their countries of origin without international accountability.¹⁶⁵

These provisions may be purposefully ambiguous to allow for individualized consideration of migrants’ circumstances and needs.¹⁶⁶ However, this goal can only be met if states interpret these provisions in good faith and within the spirit of UNCLOS and SAR. Interdicting states who prefer to prioritize their migration and national security goals are unlikely to

157. See United Nations Convention on the Law of the Sea, *supra* note 22, art. 98; International Convention on Maritime Search and Rescue, *supra* note 48.

158. See *supra* Part I.A.

159. See United Nations Convention on the Law of the Sea, *supra* note 22, art. 98.

160. See INT’L MAR. ORG., *supra* note 83, at app. (3); *id.* ¶ 6.14.

161. See INT’L MAR. ORG. [IMO], *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, FAL.3/Circ.194 (June 22, 2009), ¶ 2.2 (“[A]ny operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress are to be carried out after disembarkation to a place of safety.”).

162. See Attard, *supra* note 96, at 235, 239.

163. See Miltner, *supra* note 12, at 90–92.

164. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 221 (2019); *id.* ¶ 91 (discussing that the cost of the disembarkation requirement may cause vessels to abandon those in distress at sea).

165. See, e.g., MORENO-LAX, *supra* note 14, at 9–10 (discussing NATO Units’ returns of rescued migrants to their origin countries or third-party countries as inconsistent with its non-refoulement obligations).

166. See *id.* at 8.

meet the goal of accounting for migrants' individual circumstances and needs.¹⁶⁷

Regardless of these obscurities, it is clear that the rescue doctrine does not extend to or permit forcible returns. Once a state has completed a rescue and initiates a forcible return of a migrant vessel without considering possible asylum claims, it has crossed the line to an interdiction—under UNHCR's definition—by asserting control over that vessel.¹⁶⁸ This enforcement jurisdiction is beyond the scope of what the rescue doctrine permits. To have the requisite enforcement jurisdiction to interdict and forcibly return a vessel, there must be some independent justification for that jurisdiction other than the rescue. This is similar to the right of visit, which does not itself confer enforcement jurisdiction but can evolve into an interdiction when independent justifications—such as the crimes of piracy or unauthorized broadcasting—are discovered.¹⁶⁹ This is also true in the rescue context, where other articles can provide justifications (e.g., crime prevention) to extend the rescue beyond its humanitarian purpose to one of law enforcement.¹⁷⁰ This interpretation is also consistent with the humanitarian text and carveouts throughout UNCLOS, which likely require consideration of asylum claims.¹⁷¹

III. PROPOSAL: MOVING TOWARDS A RESULTS-ORIENTED APPROACH TO MARITIME LAW

Both the right of visit and the Smuggling Protocol permit limited interference—i.e., stopping, boarding, and searching—with a foreign vessel on the high seas upon suspicion of nefarious activity.¹⁷² But neither mentions what should happen to the vessels after these maritime and crime prevention purposes are satisfied.¹⁷³ Article 98 and SAR similarly leave their provisions broad, unelaborated, and ambiguous.¹⁷⁴ Given the increased securitization of asylum seekers, which has led to more offshore interdictions and forcible returns, these ambiguities are convenient excuses that states use to justify their acts.¹⁷⁵ Failure to specify next steps or necessary results—e.g., that people in distress are saved or that asylum claims are considered—will lead

167. *See id.* at 1 (discussing the replacement of SAR missions with border security missions and the harm that this causes asylum seekers).

168. *See* UNHCR Executive Committee of the High Commissioner's Programme, *supra* note 42.

169. *See supra* Part II.A.

170. *See supra* Part II.C.

171. These carveouts require that UNCLOS provisions be read with "other rules of international law." *See, e.g.,* United Nations Convention on the Law of the Sea, *supra* note 22, arts. 2, 19, 21, 31, 87, 138. The 1951 Refugee Convention and its 1967 Protocol are such sources of international law. *See supra* Part I.B.

172. *See supra* Parts II.A–B.

173. *See id.*

174. *See supra* Part II.C.

175. *See* Stephenson & Stivachtis, *supra* note 11.

to continued violations of asylum seekers' human rights by forcible return on the high seas.¹⁷⁶

Given the migration and national security concerns that support continued expansion of states' interdiction powers, it is important to level these law enforcement powers with UNCLOS's humanitarian principles. Of course, there will always be some tension between these two goals. But the international community must maintain minimum standards of humanitarian protections to prevent arbitrary human rights violations on the high seas.

Thus, this Essay proposes that once the maritime purpose of a stop on the high seas is satisfied, international human rights and refugee law should govern the interaction. By intervening with a vessel on the high seas, states have taken human lives into their hands and, therefore, must proceed in accordance with international human rights law. This is consistent with arguments that maritime law provisions are intentionally vague to allow for flexible, individualized consideration of migrants' circumstances.¹⁷⁷ It also suggests that UNCLOS's drafters intended for humanitarian principles to take over once maritime purposes are satisfied.

Unfortunately, there is no single change that will serve as a panacea for these issues. But there are several adjustments to the maritime interdiction context that may prevent the arbitrary return of refugees while also maintaining states' sovereignty. These adjustments are largely aimed at transparency of interdictions on the high seas.

A. Increased Availability of Refugee Status Determination Procedures

To start, one of the most important steps is the adoption of minimum level procedures for assessing asylum claims on the high seas.¹⁷⁸ These procedures must be made available to asylum seekers to avoid non-refoulement. As described above, IMO recognizes that interdicting vessels rarely have the capacity to provide status determination procedures and it advises against screening on board the vessel.¹⁷⁹ If a state refuses to disembark migrants to its territory, however, this may be the only option for asylum seekers to have their claims evaluated.

If the interdicting vessel itself does not have the capacity, states should make some arrangements to screen migrants. One possibility for states who refuse to disembark the migrants is to send another state vessel with an adjudicator on board who can conduct screening interviews.¹⁸⁰ Another option is offshore processing, which the United States currently uses at Guantanamo Bay.¹⁸¹ These are realistic solutions for states to prioritize

176. See *supra* note 165 and accompanying text.

177. See *supra* note 164 and accompanying text.

178. See Miltner, *supra* note 12, at 78.

179. See *supra* note 161 and accompanying text.

180. See Barnes, *supra* note 114, at 391 (describing U.S. policy of stationing a USCIS asylum officer on board coast guard vessels that patrol areas where Cuban refugees are often encountered).

181. See Muzaffar Chishti & Jessica Bolter, *Rise in Maritime Migration to the United States Is a Reminder of Chapters Past*, MIGRATION POL'Y INST. (May 25, 2022),

migration control and national security while still abiding by their international human rights obligations.

B. More Government Data on Interdictions and Migrant Flows

Just because states *can* provide these determinations at sea does not mean they *will actually do so* in a nondiscriminatory way and in good faith. As discussed above, the United States has an offshore processing facility in Guantanamo Bay to screen asylum seekers.¹⁸² However, studies show that few interdicted migrants make it to Guantanamo for screening; of the 95,937 migrants that the Coast Guard interdicted from 1996–2014, only 425 were brought to Guantanamo.¹⁸³ Presumably, the coast guard redirected the rest to their countries of origin.¹⁸⁴ Although the remaining 95,512 may not have qualified for refugee status under the 1951 Convention, this seems unlikely given the UNHCR’s previous estimate of asylum seekers among boat migrants.¹⁸⁵ Moreover, the United States has historically engaged in discriminatory refugee screening patterns.¹⁸⁶ For example, the United States has treated interdicted Cubans more favorably than Haitians by leniently admitting Cubans and turning Haitians away regardless of their asylum claims.¹⁸⁷

It is also important, therefore, that states provide more documentation on their interdictions and data on how often they occur. This is a position that UNHCR supports,¹⁸⁸ and it recognizes that the desolate nature of the high seas enables states to hide their interdictions by failing to report them.¹⁸⁹ In fact, the U.S. government used to report its interdictions; beginning in 1981, it released monthly updates of statistics regarding the Coast Guard’s “Alien Migration Interdiction Program.”¹⁹⁰ While they did not describe specific events, the reports contained aggregated statistics, the number of people interdicted, and their nationalities.¹⁹¹ In 2017, however, the Trump Administration stopped issuing these monthly updates and removed all of this data from the Coast Guard’s website.¹⁹² Reimplementing these reports would be a step in the right direction. It is not only important to include the number of people interdicted and their nationalities; states should also

<https://www.migrationpolicy.org/article/maritime-migration-united-states-rise/>
[<https://perma.cc/Z792-JDJF>].

182. *See id.*

183. *See* Ghezelbash, *supra* note 110, at 491.

184. *See id.*

185. *See supra* Introduction.

186. *See* Chishti & Bolter, *supra* note 181.

187. *See id.*

188. *See* UNHCR Executive Committee of the High Commissioner’s Programme, *supra* note 42 (“*Encourages* States to generate and share more detailed information on interception, including numbers, nationalities, gender and numbers of minors intercepted, as well as information on State practice, having due consideration for security and data protection concerns subject to the domestic laws and international obligations of those States.”).

189. *See* Ghezelbash, *supra* note 110, at 503.

190. *See id.* at 504.

191. *Id.*

192. *Id.*

describe the specific event and the next steps for the interdicted persons. Moreover, a legal justification for the interdiction should accompany these next steps.¹⁹³

C. A Departure from Increased Trends of Refugee Securitization and a Move Towards Alternative Pathways for Admission

Instead of prioritizing securitization, states should instead focus on protecting the human rights of migrants.¹⁹⁴ Currently, national security and migration control concerns strongly motivate the rejection of asylum seekers at sea.¹⁹⁵ Since the attacks on September 11, 2001, migration flows have been increasingly securitized out of states' fear of potential terrorism.¹⁹⁶ However reasonable these concerns may or may not be, they do not justify violations of non-refoulement obligations. The European Court of Human Rights in *Hirsi Jamaa and Others v. Italy*¹⁹⁷ stated that mere conjecture of asylum-seeking migrants someday carrying out a terrorist attack does not justify forcible return in violation of non-refoulement.¹⁹⁸

Human rights advocates agree with this perspective.¹⁹⁹ One way to quell both fears of terrorism and the danger of high-seas travel is for states to make available alternative admission pathways for asylum seekers.²⁰⁰ These pathways would allow for safe, streamlined, and legal entry to destination countries. These pathways are recent developments—states are only beginning to make use of them.²⁰¹ The Biden Administration, for example, has recently implemented a “humanitarian parole” program, under which up to 30,000 migrants from Cuba, Haiti, Nicaragua, and Venezuela can apply to temporarily move to the United States.²⁰² The United States also recently resumed the family reunification program for Cubans and Haitians.²⁰³ Although these are not perfect solutions to the maritime migration and securitization crisis, they are steps in the right direction.

CONCLUSION

As irregular maritime migration continues to increase, it is important for states to look beyond their own national security concerns and avoid arbitrary deprivations of human rights. UNCLOS is meant to be read through a human

193. *Id.* at 503–04.

194. *See* MORENO-LAX, *supra* note 14, at 12–13.

195. *See* Stephenson & Stivachthis, *supra* note 11.

196. *See id.*; *see also* Sara K. McGuire, *Offshore Interdiction Operations and the Refugee Rights of Irregular Migrants*, E-INT'L RELS. (Apr. 12, 2015), <https://www.e-ir.info/2015/04/12/offshore-interdiction-operations-and-the-refugee-rights-of-irregular-migrants/> [<https://perma.cc/V6AR-4R59>].

197. App. No. 27765/09 (Eur. Ct. H.R., Feb. 23, 2012).

198. *See id.*; *see also* McGuire, *supra* note 196.

199. *See* MORENO-LAX, *supra* note 14, at 12–13.

200. *See id.* at 13.

201. *See* Chishti et al., *supra* note 5.

202. *See id.*

203. *See id.*

rights lens—states cannot manipulate it to avoid owing protections to asylum seekers on the high seas. A combination of the aforementioned procedural and policy changes would increase transparency in high-seas interdictions and fill gaps in the maritime legal instruments governing interdictions. These solutions also address the dangers of remote high-seas interdictions by requiring states to both provide status determination procedures and inform the public about what is happening to the people they interdict. Additionally, these changes would allow for greater protections of asylum seekers at sea by preventing their arbitrary return and would provide states with alternative strategies for upholding their international human rights obligations. Finally, they may even lead to greater international cooperation and problem-solving strategies regarding irregular maritime migration, as states may be influenced by the status determination procedures of other states and adopt or improve upon them.