

The Outlaw of the Sea: Balancing Navigational Freedom and Maritime Interdiction Practices in the Context of Transnational Irregular Movement of People by Sea

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I. INTRODUCTION

The sea is emotion incarnate. It loves, hates, and weeps. It defies all attempts to capture it ... and rejects all shackles.

— Christopher Paolini¹

A. Background of the Study

In the summer of 2015, the European Union (E.U.), through its High Representative for Foreign Affairs and Security Policy Federica Mogherini, called for the support of the United Nations Security Council (UNSC) to authorize its novel “framework of international legality,” a plan designed to conduct military strikes on boats used for migrant smuggling in the territorial waters of North African States.² Since the first 130 days of 2015, almost 1,800 people have drowned while attempting to cross the Mediterranean Sea from Africa.³ Premised on transnational crime prevention and the rescue of lives at sea, the plan to destroy the boats is central to Europe’s comprehensive

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1. CHRISTOPHER PAOLINI, ERAGON 169 (2003).
2. Niels W. Frenzen, Mogherini at UN Seeking “Framework of International Legality” for Military Strikes on Smuggling Boats; Security Council Expected to Consider Issue in Coming Weeks, *available at* <http://migrantsatsea.org/2015/04/29/mogherini-at-un-seeking-framework-of-international-legality-for-military-strikes-on-smuggling-boats-security-council-expected-to-consider-issue-in-coming-weeks> (last accessed Aug. 31, 2016).
3. Colum Lynch, Libya to Europe: Please Don’t Come to Our Rescue, *available at* <http://foreignpolicy.com/2015/05/14/libya-to-europe-please-dont-come-to-our-rescue> (last accessed Aug. 31, 2016).

response to end a humanitarian emergency and security crisis.⁴ The E.U.'s ambitious proposal in the Mediterranean signals the next step in the evolution of the interception policies against irregular migrants in the high seas. The Cuban and Haitian migration to the United States (U.S.),⁵ the *Tampa* crisis in the Commonwealth of Australia (Australia),⁶ and the waves of migrants crossing from North Africa to Europe⁷ all point to a rampant strategy of interdiction in the oceans today — stop the boats and push them back.

B. Collision of Legal Paradigms

The policing of the oceans strikes at the very grain of the complex and often convoluted language of peace and security. The ocean operates both as the arena and the nexus of the struggle for legal order in balancing State interests and common concerns.⁸ The seas are “critical to both [S]tates’ interests and to human prosperity being a highway for commerce, a shared resource[,] and a vector of threats to security.”⁹ The seas set the stage for both the pursuance of legitimate activities as well as illegal objectives such as piracy,¹⁰ terrorism,¹¹ transfer of weapons at sea,¹² and the trafficking and smuggling of

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4. See U.N. Security Council, Cooperation between the United Nations and regional and subregional organizations in maintaining international peace and security, at 2, 7439th meeting, U.N. Doc. S/PV.7439 (May 11, 2015).
 5. Constitutional Rights Foundation, History Lesson 9: Refugees from the Caribbean: Cuban and Haiti “Boat People,” available at <http://crfimmigrationed.org/index.php/lessons-for-teachers/148-hl9> (last accessed Aug. 31, 2016).
 6. Donald R. Rothwell, *The Law of the Sea and the M/V Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty*, 13 PUB. L. REV. 118, 118 (2002).
 7. Pia Acconci, et al., *Italian Practice Relating to International Law: Legislation*, 9 ITALIAN Y.B.I.L. 311, 360 (1999).
 8. MYRES SMITH MCDUGAL & WILLIAM THOMAS BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 51 (1987); NATALIE KLEIN, *MARITIME SECURITY AND THE LAW OF THE SEA* 3 (2011) [hereinafter KLEIN, *MARITIME SECURITY*]; & DOUGLAS GUILFOYLE, *SHIPPING INTERDICTION AND THE LAW OF THE SEA* 4 (2009).
 9. GUILFOYLE, *supra* note 8, at 3.
 10. JACK A. GOTTSCHALK & BRIAN P. FLANAGAN, *JOLLY ROGER WITH AN UZI: THE RISE AND THREAT OF MODERN PIRACY* 11 (2000).
 11. NATALINO RONZITTI, *MARITIME TERRORISM AND INTERNATIONAL LAW* 1 (1990).
 12. Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 526 (2004).

persons.¹³ The United Nations Convention on the Law of the Sea (UNCLOS)¹⁴ serves as the “constitution for the world’s oceans”¹⁵ and the central and most important overarching legal framework for the rights, duties, and interests of States with respect to maritime areas.¹⁶ Essential to this legal framework is the principle of the freedom of the seas or *mare liberum*.¹⁷ The freedom of the seas is one of the oldest customary principles to be observed by many sovereign entities and nation-States, and as such, the principle of *mare liberum* has gained a preeminent place under international law.¹⁸ The international law of the sea, therefore, has for its central framework the maintenance and the protection of the fundamental principle of the freedom of the seas.

However, the regime of maritime security, which includes a wide array of activities ranging from legislative to police actions, initially appears to be inconsistent with the paradigm promoted by the principle of *mare liberum*.¹⁹ Security measures are often treated as exclusive interests that run afoul to the broad regulation to preserve common interests over ocean space.²⁰ The proliferation of isolated security measures known collectively as “interdiction or interception” are seen as a challenge, if not an aberration, to established navigational freedoms and the regime of control and regulation of ocean use.²¹ The ubiquity of variations of security regimes today poses the

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13. Tomoya Obokata, *Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System*, 54 INT’L & COMP. L.Q. 445, 445 (2005).
 14. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
 15. James Kraska, *The Law of the Sea Convention: A National Security Success — Global Strategic Mobility Through the Rule of Law*, 39 GEO. WASH. INT’L L. REV. 543, 543 (2007) (citing Tommy T. B. Koh, ‘A Constitution for the Oceans,’ *available at* http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf (last accessed Aug. 31, 2016)).
 16. See EDWARD L. MILES, GLOBAL OCEAN POLITICS: THE DECISION PROCESS AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, 1973-1982 50 & 374 (1998).
 17. HUGO GROTIUS, THE FREEDOM OF THE SEAS 4 (Ralph Van Deman Magoffin trans., 1916).
 18. Tanja E. Aalbertsa & Thomas Gammeltoft-Hansen, *Sovereignty at Sea: The law and politics of saving lives in the Mare Liberum*, 17 J. INT’L RELATIONS & DEV’T 439, 440 (2014).
 19. KLEIN, MARITIME SECURITY, *supra* note 8, at 3.
 20. *Id.*
 21. See Sue Soo-ha Yang, Legal Basis for State Interception of Shipments on High Seas: Legality of the Naval Interdiction under the “Proliferation Security Initiative” (A Paper on File with the Proliferation Security Initiative) 7, *available*

contentious task of balancing both inclusive and exclusive interests of States in light of the proliferation of illicit activities in the high seas.

Therefore, the *problematique* of transnational irregular movement of persons at sea as a contemporary phenomenon essentially resides within the overarching framework of international criminal law and of international law of the sea.

The transnational irregular mobility of persons by sea occurs in three instances: slave trading,²² human trafficking,²³ and people smuggling.²⁴ Regulated opportunities for the legal entry and migration of people, especially from impoverished and developing States to developed countries, “create [a] demand for, and an economic incentive to supply, irregular migration services.”²⁵ Migrant smuggling and human trafficking are considered “frontier enterprise[s]”²⁶ and are undertaken with “much lower risk of detection and arrest [by sea] compared to land or air trafficking.”²⁷ At present, human trafficking and migrant smuggling, collectively, is considered the second largest and most profitable organized crime in the world.²⁸ In 2001, the international community criminalized human trafficking and

at <http://www.psi-online.info/Vertretung/psi/en/01-about-psi/0-about-us.html> (last accessed Aug. 31, 2016).

22. See *Prosecutor v. Kunarac*, Case No. IT-96-23-T, Trial Chamber, ¶ 533 (Feb. 22, 2001); Slavery Convention art. 1, Sep. 25, 1926, 60 L.N.T.S. 253 (1927); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1, signed Sep. 7, 1956, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957); & *The Antelope*, 23 U.S. 66, 115 (1825).
23. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, pmbl. U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter Human Trafficking Protocol].
24. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 2000, G.A. Res. 55/25, Annex III, pmbl., U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter Migrant Smuggling Protocol].
25. GUILFOYLE, *supra* note 8, at 182 (citing Andreas Schloenhardt, *Organized Crime and the Business of Migrant Trafficking*, 32 CRIME, L. & SOC. CHANGE 203, 204 & 206 (1999)).
26. Sheldon Zhang & Ko-Lin Chin, *Enter the Dragon: Inside Chinese Human Smuggling Organizations*, 40 CRIMINOLOGY 737, 747 (2006).
27. Schloenhardt, *supra* note 25, at 224.
28. Geoffrey Ramsey, Human Trafficking is World’s 2nd Most Profitable Crime: Report, available at <http://www.insightcrime.org/news-briefs/human-trafficking-is-worlds-2nd-most-profitable-crime-report> (last accessed Aug. 31, 2016).

migrant smuggling in international law through the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Human Trafficking Protocol)²⁹ and the Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol)³⁰ supplementing the United Nations Convention against Transnational Organized Crimes (UNTOC).³¹ Armed with the duty to prevent and punish transnational crimes under international law, States set out various interdiction measures to detect, intercept, and take appropriate steps to combat human trafficking and migrant smuggling in the high seas.³²

The primary complication of enforcing crime prevention obligations under UNTOC and its Protocols at sea lies with their convergence with the principle of navigational freedom embodied in the UNCLOS. Under the UNCLOS, vessels in the high seas enjoy the freedom of navigation, and the right against interference from any State other than the flag State.³³ Except in cases where there are reasonable grounds to believe that a vessel is engaged in piracy, slave trade, unauthorized broadcasting, and statelessness,³⁴ or where the vessel violates rules and regulations within the jurisdiction of another State,³⁵ the observance of and respect for the principle of exclusivity of flag State jurisdiction, and the right to navigation must not unduly suffer.³⁶ These few exceptions exist only in extreme circumstances.³⁷ With illegal activities such as trafficking and smuggling rampantly being committed

29. Human Trafficking Protocol, *supra* note 23, art. 5.

30. Migrant Smuggling Protocol, *supra* note 24, art. 6.

31. United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

32. See the discussion in Part II. This Note presents an extensive account of the various interdiction practices of States in combatting the smuggling and trafficking of persons in the high seas.

33. UNCLOS, *supra* note 14, art. 92, ¶ 1.

34. *Id.* art. 110, ¶ 1.

35. *Id.* art. 111, ¶ 1.

36. UNCLOS, *supra* note 14, art. 92, ¶ 1; Convention on the High Seas art. 6, ¶ 1, adopted Apr. 29, 1958, 450 U.N.T.S. 82 (entered into force Sep. 30, 1962); JAMES LESLIE BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 304-10 (1963); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 238-42 (1979); DANIEL PATRICK O'CONNELL & IVAN ANTHONY SHEARER, *THE INTERNATIONAL LAW OF THE SEA* 735-37 & 799-801 (1984); & I LASSA FRANCIS LAWRENCE OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 582-94 (1955).

37. Robert C. Reuland, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 VAND. J. TRANSNAT'L L. 1161, 1162 (1989) [hereinafter Reuland, *Interference with Non-National Ships*].

in the high seas, States are now confronted with the challenge of balancing the right to navigation and the duty to prevent transnational crimes.

The convergence between interdiction measures of States designed to prevent migrant smuggling and human trafficking, and the navigational freedoms guaranteed in the UNCLOS, creates a web of legal intricacies that confronts the normative framework under international law. In an attempt to analyze and reconcile this seemingly inconsistent convergence, this Note seeks to assess the legality of the actions undertaken by States in the high seas using the legal framework of the UNCLOS, and keeping in mind their duties and obligations under the Human Trafficking and Migrant Smuggling Protocols (collectively “the Protocols”). In this respect, this Note undertakes to uncover what might initially seem as a legal deadlock by analyzing the gaps and ambiguities within the respective legal regimes.

In the dialectics between transnational crime prevention and maintenance of the freedom of the seas, where do State interdiction practices against transnational irregular migrants in the high seas legally stand? Can a coastal State undertake measures to prematurely prevent the entry of vessels suspected of human trafficking or migrant smuggling in the high seas? Can a State lawfully interfere with the voyage of these vessels despite the exclusive jurisdiction of flag States? Does the prevention of the transnational crimes of human trafficking and migrant smuggling operate as a permissible exception to non-interference of ships and flag State jurisdiction under the UNCLOS? Are there adequate measures or enforcement tools available for States to counter the imminent threat of illegal activities at sea? Does international law offer a relevant alternative framework to address the proper enforcement jurisdiction on these crimes vis-à-vis maritime security?

Given the factors to be considered and legal parameters to be examined, this Note posits that the proliferation of interdiction practices of States against transnational irregular movement of people in the high seas, under the guise of compliance with the duty to prevent and punish transnational crimes, constitutes a systematic relegation of the freedom of the seas and the right to navigation, and ultimately defeats humanitarian and crime prevention obligations under international law.

C. Significance of the Study

Human trafficking and migrant smuggling have reached a global scale of unimaginable proportions.³⁸ According to the United Nations Office on Drugs and Crime (UNODC), human trafficking generates \$32 billion per

38. Ramsey, *supra* note 28.

year, while migrant smuggling brings in \$7 billion annually.³⁹ According to the International Labor Organization's report in 2009, approximately 2.45 million people are being trafficked every year globally.⁴⁰ It is genuinely a global concern as victims come from at least 137 reported countries.⁴¹ Further, at least 50 million irregular migrants have been transported in the past 30 years.⁴²

Migrants smuggling and human trafficking by sea are the predominant mode of transporting victims to their destination.⁴³ Of all the migrant smuggling and human trafficking routes, 40–75% of the vessels make successful landfall to their destination.⁴⁴ For instance, the International Center on Immigration Policy Development concluded that some 100,000 to 120,000 illegal migrants cross the Mediterranean annually.⁴⁵ Even the International Maritime Organization (I.M.O) has recognized the need to provide for interim measures for preventing and combatting unsafe practices associated with trafficking and smuggling of persons by sea.⁴⁶

The Republic of the Philippines (“Philippines”) is no stranger to the gravity of the situation involving human trafficking and migrant smuggling. The Philippines, being a developing country, is considered as a sending State in trafficking and smuggling of persons.⁴⁷ In the past decade, according to

39. Global Research, Turnover of Global Organized Crime: \$870 Billion ... a Year, available at <http://www.globalresearch.ca/turnover-of-global-organized-crime-870-billion-a-year/31995> (last accessed Aug. 31, 2016).

40. UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT, at 39, U.N. Sales No. E.10.IV.6 (2010) [hereinafter UNODC, GLOBALIZATION OF CRIME].

41. *Id.*

42. *Id.* at 55.

43. UNODC, Issue Paper: Smuggling of Migrants by Sea (An Issue Paper of the UNODC) 11, available at http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf (last accessed Aug. 31, 2016) [hereinafter UNODC, Issue Paper].

44. GUILFOYLE, *supra* note 8, at 182.

45. Andreas Fischer-Lescano, et al., *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, 21 INT'L J. REFUGEE LAW 256, 256 (2009).

46. International Maritime Organization, Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, MSC/Circ.896/Rev.1 (June 21, 2001).

47. Narcisa H. Guevarra, Trafficking in Women and Children and Smuggling of Migrants (A Paper Published by the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders for its 122d

the Commission on Filipinos Overseas, there have been 959 cases recorded of human trafficking and migrant smuggling, while many go undocumented.⁴⁸ In fact, at least 2,000 victims were assisted each year in 2006 and 2007.⁴⁹ This number is steadily increasing, as 3,534 people were recorded as victims of trafficking in 2010.⁵⁰ It is feared that the numbers will hit a total of 1.62 million Filipinos.⁵¹

The figures provided both on a global and national scale cannot be ignored or underestimated. Transnational organized crime is rising rapidly; yet States all over the world remain reluctant to give up a portion of their sovereignty to implement effective and cooperative enforcement regimes that would hinder, at the very least, the proliferation of instances of trafficking and smuggling of persons by sea.⁵² President José Luis Jesus of the International Tribunal on the Law of Sea (ITLOS) urged the international community to break out from the idea that the law of the sea is divorced from other branches of law.⁵³ He said,

[f]or any system of law to be able to respond to the needs of society, it has to be able to change and adapt to the changing circumstances affecting the relations or the reality it purports to discipline and regulate. It should reflect the mood of new times and situations, absorb new requirements and dominant trends[,] and adopt measures to prevent or repress negative developments that pose a serious threat.⁵⁴

He emphasized that reforms in the law of the sea are not politically unimaginable; rather, he proposes —

International law of the sea is no exception to this. Like any other branch of law, international sea law is not static. To the extent that it embodies or attempts to interpret and reflect a legal order for the oceans, it should be

International Training Course) 126, *available at* http://www.unafei.or.jp/english/pdf/RS_No62/No62_17PA_Guevarra.pdf (last accessed Aug. 31, 2016).

48. *Id.* at 128.

49. UNODC, Global Report on Trafficking in Persons (Report Produced in the Policy Analysis and Research Branch of UNODC) 181, *available at* http://www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf (last accessed Aug. 31, 2016) [hereinafter UNODC, Global Report on Trafficking].

50. No to Trafficking, Thousands of trafficking victims, *available at* http://trafficking.org.ph/v5/index.php?option=com_frontpage&Itemid=1 (last accessed Aug. 31, 2016).

51. Guevarra, *supra* note 47, at 126.

52. GUILFOYLE, *supra* note 8, at 181.

53. José Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 381-82 (2003).

54. *Id.*

able to change and evolve in response to the challenges required by the need to secure and maintain an orderly use of the oceans.⁵⁵

Clearly then, the legal regime concerning the seas today must adapt to the global demands for reform, especially in the context of global crime prevention.

II. “IMAGINED BORDERS” — HISTORICAL AND CONTEMPORARY PRACTICES ON INTERDICTION OF IRREGULAR MIGRANTS AT SEA

The central phenomenon examined in this Note involves various strategies employed by States to intercept vessels at sea suspected of human trafficking and migrant smuggling. According to the Executive Committee of the United Nations High Commissioner on Refugees (U.N.H.C.R.), the term *interception* or *interdiction* covers “all measures applied by a State, outside its national territory, in order to prevent, interrupt[,] or stop the movement of persons without the required documentation crossing international borders by land, air[,] or sea, and making their way to the country of prospective destination.”⁵⁶ Moreover, interception or interdiction in this Note involves a two-step process: “first, the boarding, inspection[,] and search of a ship at sea suspected of prohibited conduct; [and] second, where such suspicions prove justified, taking measures [which include] any combination of arresting the vessel, arresting persons aboard[,] or seizing cargo.”⁵⁷ This definition encompasses the customary right of approach by warships to demand the subject vessel to reveal its identity and nationality,⁵⁸ as well as the right of visit of warships to board and to search the vessel.⁵⁹ Further, this definition is broad enough to include push back strategies,⁶⁰ non-entry,⁶¹ and non-admission⁶² measures.

Notably, however, the power of interdiction or interception of vessels, which is a function of the valid exercise of enforcement jurisdiction, vested

55. *Id.* at 382.

56. Executive Committee of the High Commissioner Programme, U.N. High Commissioner for Refugees, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, ¶ 10, U.N. Doc. EC/50/SC/CRP.17 (June 9, 2000).

57. GUILFOYLE, *supra* note 8, at 4.

58. See International Law Commission, *Report of the Seventh Session*, at 22-23, U.N. Doc. A/2934 (May 2 - July 8, 1955).

59. UNCLOS, *supra* note 14, art. 110.

60. See generally *Sale v. Haitian Centers Council Inc.*, 509 U.S. 155, 191-92 (1993).

61. Jessica Morris, *The Spaces in Between: American and Australian Interdiction Policies and Their Implications for the Refugee Protection Regime*, 21 REFUGE 51, 52 (2003).

62. *Id.*

exclusively in the flag State,⁶³ does not lie with the coastal State, save only in exceptional circumstances.⁶⁴ The authority of the coastal State to intercept a vessel is limited to its internal waters⁶⁵ and its territorial sea.⁶⁶ Measures enforced over the contiguous zone and exclusive economic zone are exceptionally limited to their corresponding purposes.⁶⁷ Therefore, in the high seas and adjacent maritime areas, coastal States do not possess any enforcement jurisdiction over that area and over foreign-flagged vessels.

While the standards of these aforementioned conditions and exceptions are vital to the understanding of the legality of interception strategies of States,⁶⁸ it is equally important to determine the relevant practices of various States in intercepting a vessel suspected of trafficking and smuggling at sea. This Section, therefore, shall give an account of the relevant State practice with respect to enforcement regimes against illegal entry of persons at sea. Moreover, this Section shall demonstrate how interdiction is used as a common tool for law enforcement to combat vessels suspected of illegal activities particularly human trafficking and migrant smuggling.

A. United States: Setting a Dangerous Paradigm

The issue of unwanted and undocumented migration is “a paradigmatically transnational [one].”⁶⁹ This observation was crystallized into the Migrant Smuggling Protocol, as it identified transnational movement as one of its constitutive elements.⁷⁰ An examination of the legal development on transnational movement in domestic and international law goes at the heart of assessing the validity of their interception.⁷¹ The U.S. policy on the migration of Haitians and Cubans in the 1980s helped shape the legal trends that soon became the basis for interception by other States.⁷²

After the collapse of the oppressive regime of Jean Claude Duvalier in Haiti, a massive influx of Haitian migrants and refugees attempted to enter

63. UNCLOS, *supra* note 14, art. 92.

64. *Id.* arts. 110 & 111.

65. *Id.* art. 2, ¶ 1.

66. *Id.* art. 17.

67. *Id.* arts. 33, 56, 110, & 111.

68. These exceptions will be discussed in Part III.

69. Itamar Mann, *Dialectics of Transnationalism: Unauthorized Migration and Human Rights*, 54 HARV. INT'L L.J. 315, 327 (2013).

70. Migrant Smuggling Protocol, *supra* note 24, art. 3.

71. Mann, *supra* note 69, at 327-28.

72. *Id.* at 328.

U.S. territory by boat through the coast of Florida.⁷³ In response to this wave of unwanted migration, President Ronald W. Reagan, through Executive Order 12324, granted the U.S. Coast Guard the authority to intercept vessels in the high seas and to return illegal aliens back to Haiti.⁷⁴ This was promulgated in conjunction with a bilateral agreement with the government of Haiti.⁷⁵ The agreement granted the U.S. Coast Guard the authority to stop, board, and search private Haitian vessels in the high seas if there was a good reason to believe that such vessel was involved in the carriage of illegal or undocumented migrants.⁷⁶ Consequently, Haitians seeking asylum in the U.S. were sent to a facility in Guantanamo Bay for processing.⁷⁷ In 1992, just as the political turmoil in Haiti culminated in the ouster of then Haitian President Jean-Bertrand Aristide,⁷⁸ the U.S. government, through Executive Order 12807 issued by President George H. Bush, took a more aggressive stance on interdiction, as it directed the Coast Guard, not only to intercept a Haitian vessel in the high seas, but also to perform summary repatriation of those aboard the vessel, thus denying them the opportunity to be processed legally.⁷⁹

This order, known as the *Kennebunkport Order*,⁸⁰ was notorious in finding a legal loophole that would not only trigger claims to exceptions to flag State jurisdiction, but would also shield the U.S. from any human rights obligations, especially from the principle of *non-refoulement*.⁸¹ The policy led to the detention of several migrants and refugees, most of whom were infected with Human Immunodeficiency Virus in Guantanamo Bay.⁸² This met strong opposition from various human rights groups,⁸³ which led to the

73. Gary W. Palmer, *Guarding the Coast: Alien Migrant Interdiction Operations at Sea*, 29 CONN. L. REV. 1565, 1570 (1997).

74. Interdiction of Illegal Aliens, 3 C.F.R. § 2 (c) (3) (1981).

75. Agreement Effected by Exchange of Notes Regarding Migrants and Interdiction, U.S.-Haiti, Sep. 23, 1981, 33 U.S.T. 3559 [hereinafter Migrant Interdiction Agreement].

76. *Id.*

77. Mann, *supra* note 69, at 329.

78. Palmer, *supra* note 73, at 1570.

79. Interdiction of Illegal Aliens, 57 Fed. Reg. 23133 (May 24, 1992).

80. STEVEN SHAPIRO, HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES 80 (1993).

81. Convention Relating to the Status of Refugees art. 33, *adopted* July 28, 1951, 189 U.N.T.S. 137.

82. Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109, 1110-11 (11th Cir. 1991) (U.S.) & Haitian Centers Council, Inc. v. Sale, 823 F. Supp. 1028, 1035 (E.D.N.Y. 1993) (U.S.).

83. SHAPIRO, *supra* note 80, at 78.

decision by the Eastern District Court of New York condemning the refusal of the U.S. government to release Haitian refugees from Guantanamo, as a violation of the prohibition against cruel, inhuman, and degrading treatment.⁸⁴ Judge Sterling Johnson, Jr. strongly opined that those who were detained were not criminals, nor were they a security risk to the U.S.⁸⁵ Yet, the policy on extraterritorial interdiction and summary repatriation was not outlawed, but was, in fact, sustained by the U.S. Supreme Court in its decision in *Sale v. Haitian Centers Council, Inc.*⁸⁶ In that case, the U.S. Supreme Court held that the U.S. policy on summary repatriation did not violate the obligation of *non-refoulement* as the government did not expel migrants from U.S. territory.⁸⁷ Bearing in mind the obligations of the U.S. under the Refugee Convention, the U.S. Supreme Court held that

a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 [of the Refugee Convention] cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, [the treaty] does not prohibit such actions.⁸⁸

Essentially, Justice John Paul Stevens, reflecting on the majority opinion, interpreted the treaty obligation governing *non-refoulement* of refugees as strictly territorial.⁸⁹ While this case's *lis mota* was primarily on the question of whether interception and forcible repatriation in the high seas constituted a violation of the principle of *non-refoulement*, it nonetheless admitted, albeit in an *obiter*, that Section 243 (h) of the Immigration and Naturalization Act (I.N.A.) embodying the domestic codification of the principle of *non-refoulement* does not apply extraterritorially, thus interception and forcible return are not governed by such law.⁹⁰ Two points of observation can be gleaned from the decision of the U.S. Supreme Court in *Sale*: first, that the U.S. Supreme Court had a narrow textual interpretation in ruling that both the Refugee Convention and the I.N.A., a domestic law, had no extraterritorial application;⁹¹ and second, that the decision created a paradox — if a domestic law cannot be applied extraterritorially, then by what authority did the Coast Guard act when it implemented the U.S. policy on interdiction and repatriation in the high seas? Not surprisingly, Justice Harry

84. *Haitian Centers Council, Inc.*, 823 F. Supp. at 1045.

85. *Id.*

86. *Sale*, 509 U.S. at 187-88.

87. *Id.* at 177 & 179-87.

88. *Id.* at 183.

89. *Id.* (citing GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 74-76 (1983)).

90. *Sale*, 509 U.S. at 176-77.

91. Mann, *supra* note 69, at 330.

A. Blackmun, in his dissenting opinion, viewed the majority's opinion as disregarding the concept of effective control of the U.S. Coast Guard in the high seas.⁹²

This strategy to curb migration from Haiti continues to this day. For instance, Operation *Able Manner* was engaged in interdicting and arresting some 25,000 Haitian migrants from January 1993 to 1994.⁹³ In 2004, after another ouster of President Aristide from office, various interdiction operations were able to intercept several vessels carrying undocumented Haitian migrants.⁹⁴ In an article by the Associated Press, the U.S. Coast Guard cutter *Diligence* was reported to have shackled the migrants aboard the vessel for being unruly upon finding out that they were being transported back to Haiti.⁹⁵

This controversial saga on Haitian migration, however, did not deter the U.S. in extending its enforcement jurisdiction in more areas in the high seas. The U.S. experience of Cuban migration traces its roots from the "Freedom Flights" phenomenon in the 1960s and 1970s, in which Cuban President Fidel Castro opened its northern borders without need of any restriction.⁹⁶ Further, at the height of all the riots and protests in 1994, President Castro again opened its northern borders for unrestricted migration to quell the mob in Cuba.⁹⁷ Contrary to its earlier response to Cuban migration during the Freedom Flights, the U.S. undertook efforts to intercept the incoming Cuban vessels, and transported them to Guantanamo Bay rather than directly to its coasts.⁹⁸ In the same year, Cuba and the U.S. established the Migration Accords, a series of bilateral arrangements allowing the U.S. to conduct interception operations over vessels carrying undocumented Cuban migrants and to return them to Cuba.⁹⁹ Under the Migration Accords, the U.S.

92. *Id.* & *Sale*, 509 U.S. at 190-93 (J. Blackmun, dissenting opinion).

93. GUILFOYLE, *supra* note 8, at 187 (citing United States Coast Guard, Operation Able Manner, available at <https://www.uscg.mil/hq/cg5/cg531/AMIO/AbM.asp> (last accessed Aug. 31, 2016)).

94. TERRY F. BUSS, HAITI IN THE BALANCE: WHY FOREIGN AID HAS FAILED AND WHAT WE CAN DO ABOUT IT 78 (2008).

95. Bill Frelick, "Abundantly Clear": *Refoulement*, 19 GEO. IMMIGR. L.J. 245, 246 (2004) [hereinafter Frelick, "Abundantly Clear"].

96. Donald Brown, *Crooked Straits: Maritime Smuggling of Humans from Cuba to the United States*, 33 U. MIAMI INTER-AM. L. REV. 273, 275 (2002) (citing ALEX LARZELERE, *THE 1980 CUBAN BOATLIFT* 12-13 (1988)).

97. Brown, *supra* note 96, at 275.

98. *Id.* at 276.

99. *Id.* & Joint Statement on the Normalization of Migration, Building on the Agreement of Sep. 9, 1994, Cuba-U.S., May 2, 1995, 35 I.L.M. 327 [hereinafter Migration Accords].

would no longer allow Cubans intercepted at sea to come into their territory; instead, the migrants would be placed in a safe camp in a location outside of U.S. territory.¹⁰⁰ Pursuant to this bilateral agreement, Operation *Able Vigil*, a task force formed by the U.S. Coast Guard, managed to halt multiple attempts to introduce some 31,000 to 40,000 Cuban migrants to its borders, from August 1993 to September 2004.¹⁰¹ Moreover, the Migration Accords also embodied the commitment by the U.S. to provide for some 20,000 visas annually to Cuban citizens to legally stay in the U.S.¹⁰² However, many Cubans grew unwilling or unable to wait for visa raffles to legally enter the U.S. and began resorting to extralegal measures to reach U.S. shores.¹⁰³ In fact, some Cuban-Americans, desperate to be reunited with their family members from Cuba, traveled by boat or by homemade rafts to pick up their loved ones in Cuba and sail back to Florida.¹⁰⁴

Additionally, the U.S. Department of Justice, in a 1996 memorandum, clarified the details of a new method, known as the “Feet Wet/Feet Dry” distinction, in determining whether a certain immigrant would be processed for admission.¹⁰⁵ The Memorandum provides that

[u]ndocumented aliens seeking to reach the [U.S.] aboard a transit vessel that has reached the internal waters of the [U.S.] at the time of interdiction, but who have not come ashore on [U.S.] “dry land,” are not entitled to deportation proceedings [] or other proceedings under the [I.N.A.].¹⁰⁶

In other words, the U.S. government will not consider those who have been intercepted at sea, be it in its internal waters or otherwise, but have not landed ashore, as an applicant for admission in the U.S. In contrast to those who have landed ashore, the said Memorandum clarifies that “[i]f such aliens

100. Migration Accords, *supra* note 99.

101. GUILFOYLE, *supra* note 8, at 187.

102. Brown, *supra* note 96, at 276.

103. *Id.* at 278 (citing United States Coast Guard, Total Interdictions, Fiscal Year 1982-Present, available at <http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/FY.asp> (last accessed Aug. 31, 2016)).

104. Brown, *supra* note 96, at 278.

105. See generally United States Department of Justice, Procedural Rights of Undocumented Aliens Interdicted in U.S. Internal Waters (A Memorandum from the U.S. Office of the Legal Counsel to the Immigration and National Service), available at <https://www.justice.gov/sites/default/files/olc/opinions/1996/11/31/op-olc-v020-p0381.pdf> (last accessed Aug. 31, 2016) [hereinafter U.S. Department of Justice, Procedural Rights of Undocumented Aliens] & Dan Moffett, U.S. Allows Cuban Migrants Different Treatment, available at <http://immigration.about.com/od/immigrationlawandpolicy/a/U-S-Allows-Cuban-Migrants-Different-Treatment.htm> (last accessed Aug. 31, 2016).

106. U.S. Department of Justice, Procedural Rights of Undocumented Aliens, *supra* note 105, at 381.

are brought ashore on [U.S.] dry land, [] they would acquire the status of ‘applicants for admission’ and would have to be inspected and screened pursuant to [S]ection 23 of the I.N.A.”¹⁰⁷

This means that an alien who has entered the internal waters of the U.S. but has not disembarked on land cannot be said to have established a physical presence in the U.S.¹⁰⁸ This policy seems consistent with American jurisprudence, which holds that “an alien attempting to enter the [U.S.] by sea has not satisfied the physical presence element ... until he has landed.”¹⁰⁹

In light of this development, the combination of the “Feet Wet/Feet Dry” distinction, the interception measures under the Migration Accords, and the slow progress of the promised U.S. visas, ultimately triggered the race to American shores by aspiring Cuban immigrants.¹¹⁰ The American response to build an aggressive policy-oriented fortress at all fronts served as the perfect recipe for professional smuggling to thrive in Cuba.¹¹¹ In stark contrast with the homemade rafts of Cuban citizens, professional smugglers offer superior logistical coordination, vessels with speed and maneuverability to match or outlast law enforcement vessels, and a complex underground network of financing and collecting fees from Cuban-Americans, who desire to bring their family members to the U.S.¹¹² Ironically, the practice of interception of vessels at sea, which was originally geared to combat the smuggling of illegal migrants, became a catalyst for the very crime it sought to prevent, as many people in vulnerable situations grew desperate in looking for new ways to leave their country for another.

At the other end of the spectrum, the Government of Cuba for its part claimed that it exercised diligence in preventing and prosecuting smugglers.¹¹³ It claimed that upon detection of a potential smuggling enterprise, the Cuban Border Guard would send via fax smuggler information to the U.S. Coast Guard Command Center in Florida.¹¹⁴ However, Cuban officials criticized the U.S. Coast Guard’s failure to follow through and reciprocate with the results of the interdiction.¹¹⁵ The Migration Accords, therefore, present a curious case that details both cooperative and unilateral measures employed by U.S. and Cuba. Somehow,

107. *Id.* at 382.

108. *Id.* at 385.

109. *Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995) (U.S.).

110. *Brown*, *supra* note 96, at 279.

111. *Id.*

112. *Id.*

113. *Id.* at 284.

114. *Id.*

115. *Id.*

it showcases a good model of cooperation, one that focuses on a specific area known to be a hotspot for smuggling and trafficking. Yet it also serves as an example of how the framework is heavily unbalanced in favor of the developed and more capable State.

With the practice of interdiction of vessels and the summary repatriation of unwanted migrants delivering desirable results to its immigration control goals, the U.S. successfully created a maritime blockade in an area of the high seas that would not otherwise be subject to any State's jurisdiction. Consequently, the practices of the U.S. in the interception of vessels at sea set a precedent for other States to follow suit.

B. Australia: The Pacific Problem?

The American model of interdiction in the high seas played a critical role in the formulation of border control policies abroad. Developed States were quick to adopt similar responses. Australia's vast area of responsibility in the Pacific and Indian Oceans is no exception to this practice of interdiction. In fact, Australian policies represent a more ambitious framework compared to the interception regime in the U.S. Prior to 2001, the Australian policy on interdiction was to bring the intercepted irregular migrant vessel to port for processing.¹¹⁶ However, since 2001, the policy has shifted and is now geared towards measures "to detect, intercept[,] and deter vessels transporting unauthorized arrivals from entering Australia through the North West maritime approaches."¹¹⁷ The controversial *Tampa* crisis signaled the turning point in Australian border control policies.

On 26 August 2001, M/V *Tampa*, a Norwegian-flagged cargo ship navigating in Republic of Indonesia's (Indonesia) waters, received a distress call to rescue a sinking ferry carrying 438 passengers bound for Australia in the Indian Ocean, around 140 kilometers or 73 nautical miles north of Christmas Island.¹¹⁸ Upon the request of Australian authorities with the guidance of the Australian Coast Guard, and after having been told that the ship merely carried 80 people, Captain Arne Rinnan of the M/V *Tampa*

116. See Senate Select Committee on a Certain Maritime Incident Secretariat, Report (Australian Senate Report on "Children Overboard" Incident), available at http://www.aph.gov.au/~media/wopapub/senate/committee/maritime_incident_ctte/report/report_pdf.ashx (last accessed Aug. 31, 2016).

117. GUILFOYLE, *supra* note 8, at 168 (citing Australian Department of Defence, Overview, available at http://www.defence.gov.au/annualreports/05-06/volume_01/chapter_01/index.html (last accessed Aug. 31, 2016)).

118. Victoria Council for Civil Liberties Incorporated v. Minister for Immigration and Multicultural Affairs, [2001] FCA 1297, ¶ 14 (Austl.) [hereinafter *VCCL*]; See also Jessica E. Tauman, *Rescued at Sea, But Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis*, 11 PAC. RIM. L. & POL'Y J. 461, 462 (2002); & Rothwell, *supra* note 6, at 188.

proceeded to rescue the people on board though it was only licensed to carry no more than 50 people.¹¹⁹ Despite the fact that Christmas Island was the closest port in the area, Captain Rinnan was forced by Australian authorities to alter its course and to undertake a 246-nautical mile journey to the Indonesian port of Merak.¹²⁰ When the *Tampa* started to head to Indonesia instead of Christmas Island, the rescuees, who were mainly composed of Afghan migrants and refugees, threatened to commit suicide if the ship maintained its course.¹²¹ Fearing for the safety of the rescuees and his crew, Captain Rinnan decided to head back to Australian waters instead of risking a voyage into the open ocean.¹²² However, Captain Rinnan was then informed by Australian authorities that any attempt to enter its territorial sea and disembark rescued persons ashore would constitute people smuggling under the Australian Migration Act.¹²³ To make matters worse, the Governments of Indonesia and Singapore, two other possible areas for disembarkation, manifested that the *Tampa* would likewise not be admitted to their waters.¹²⁴ A protracted stand-off then ensued between the governments of Indonesia, Norway, and Australia.¹²⁵ When the *Tampa* had finally crossed into Australian territorial waters, rather than receiving medical and humanitarian assistance, armed officials from Australia's Special Air Services unit boarded the vessel and "demanded that the *Tampa* leave Australian territorial waters."¹²⁶ Concurrently, that same evening, Prime Minister John Howard hastily introduced the Border Protection Bill of 2001 and moved that it be read the second time.¹²⁷ In one swift move, the Australian Parliament successfully passed a law that empowered Australian law enforcement officials to direct the master of the ship within the outer limits of its territorial sea to take the ship and any person on board outside of its territorial sea.¹²⁸ Finally, on 1 September 2001, Australia announced that the rescuees and refugees on board the *Tampa* would be transferred to Nauru and New Zealand for processing, thus ending the week-long standoff.¹²⁹

119. *VCCL*, FCA 1297, ¶ 15-16.

120. GUILFOYLE, *supra* note 8, at 199.

121. *VCCL*, FCA 1297, ¶ 18.

122. *Id.*

123. *Id.* ¶¶ 20-21.

124. GUILFOYLE, *supra* note 8, at 200.

125. Tauman, *supra* note 118, at 461.

126. *Id.* at 465.

127. *VCCL*, FCA 1297, ¶ 27.

128. Border Protection (Validation and Enforcement Powers) Act of 2001 (Cth), sch. 1 (amending Subsection 185(3A) of the Customs Act of 1901) & sch. 2, (amending Subsection 245F(9) of the Migration Act of 1958) (Austl.).

129. *VCCL*, FCA 1297, ¶ 32.

The *Tampa* crisis staged the debate on the validity of a coastal State's action to push back vessels in distress at sea, in relation to a State's obligation regarding the safety of life of persons, refugee protection, and maritime enforcement powers.

In the wake of the *Tampa* crisis, Australian immigration and border control laws aimed at preventing more "boat people" from reaching territorial waters grew more stringent.¹³⁰ The amendment to the Australian Migration Act in 2001 considers all persons arriving at the outlying islands of Australia as "excised" from making an "on shore" admission for processing, and provides for the expulsion or repatriation of such irregular migrants.¹³¹ Dubbed as the "Pacific Solution," the law empowers the Coast Guard to intercept vessels carrying irregular migrants at sea, take such migrants aboard naval vessels, and bring them to offshore processing centers located in a third country.¹³² Moreover, the Australian government launched Operation Relex, which enhanced detection of Suspected Illegal Entry Vessels (S.I.E.Vs) with the use of air and sea surveillance mechanisms.¹³³

In 2008, after a change in the administration, the government of Australia abandoned the Pacific Solution as its core immigration policy.¹³⁴ The practice of interception and escorting (or towing) a S.I.E.V. was nonetheless continued as the Border Protection Act of 2001 remained in operation and was broad enough to encompass "any actions" against any vessel suspected of entering Australia unlawfully.¹³⁵ In fact, in the recent 2013 elections, the "Stop the Boats" policy served as a catchphrase for the Liberal Party of Australia.¹³⁶ With the Liberal Party's accession into power, the Australian government made good on their promise to stop the boats with Operation Sovereign Borders,¹³⁷ which empowers officials to prevent

130. Senate Select Committee on a Certain Maritime Incident Secretariat, Chapter 1 - Border Protection: A New Regime, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/c01 (last accessed Aug. 31, 2016).

131. Migration Amendment (Excision from Migration Zone) Act of 2001 (Cth), sch. 1 (Austl.).

132. See Jared L. Lacertosa, *Unfriendly Shores: An Examination of Australia's "Pacific Solution" under International Law*, 40 BROOKLYN J. INT'L L. 321, 322 (2014).

133. GUILFOYLE, *supra* note 8, at 207-08.

134. *Id.* at 205.

135. *Border Protection Act*, § 4.

136. Natalie Klein, *Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*, 15 MELB. J. INT'L L. 413, 414 (2014) [hereinafter Klein, *Assessing Push Back the Boats Policy*].

137. *Id.* (citing Australian Government Department of Immigration and Border Protection, Operation Sovereign Borders, available at <http://www.customs.gov>).

the passage of vessels carrying illegal migrants from reaching Australian shores.¹³⁸ In one instance, the Australian Coast Guard transferred irregular migrants to lifeboats and forced them to return to Indonesia.¹³⁹ Some operations would escort or tow vessels to as far as Sri Lanka after determining that they were indeed irregular migrants.¹⁴⁰ In one extreme circumstance, Coast Guard officials even detained 157 migrants from India at sea for almost a month.¹⁴¹ This month-long detention was challenged before the High Court of Australia.¹⁴² Curiously, however, the High Court of Australia, in *CPCF v. Minister for Immigration and Border Protection*,¹⁴³ decided that the detention was lawful and in accordance with the Australian Maritime Powers Act, despite admitting that no arrangement exists between Australia and India.¹⁴⁴ Since its effectivity in September 2013, there have been at least 23 detected incidences of irregular vessel arrivals in Australian waters under Operations Sovereign Borders.¹⁴⁵

The Australian practice of interdiction started in a similar fashion as the U.S. practice. However, the *Tampa* crisis served as the main driving force in

au/site/operation-sovereign-borders.asp (last accessed Aug. 31, 2016) [hereinafter Operation Sovereign Borders]).

138. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 414.

139. *Id.* (citing The Australian, *Asylum boat washes up in Java after Australian 'push-back'*, AUSTRALIAN, Feb. 6, 2014, available at <http://www.theaustralian.com.au/news/asylum-boat-washes-up-in-java-after-australian-pushback/story-e6frg6n6-1226819865525> (last accessed Aug. 31, 2016)).

140. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 414 (citing Matthew Knott, *Asylum seekers screened at sea returned to Sri Lanka*, SYDNEY MORNING HERALD, July 7, 2014, available at <http://www.smh.com.au/federal-politics/political-news/asylum-seekers-screened-at-sea-returned-to-sri-lanka-20140707-3bh3x.html> (last accessed Aug. 31, 2016)).

141. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 414 (citing Dennis Shanahan, *Immigration Minister Scott Morrison takes hard line: 157 sent to Nauru*, AUSTRALIAN, Aug. 2, 2014, available at <http://www.theaustralian.com.au/national-affairs/immigration-minister-scott-morrison-takes-hard-line-157-sent-to-nauru/news-story/32532cb3a5522ac67903e4c55681ace5> (last accessed Aug. 31, 2016)).

142. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 414.

143. *CPCF v. Minister for Immigration and Border Protection*, Case No. S169/2014 (2014) (Austl.).

144. *See CPCF*, Case No. S169/2014, ¶ 392.

145. Australian Department of Immigration and Border Protections, *Illegal Entry Vessels Arrivals - 18 September 2014 to 17 October 2014*, available at <https://www.border.gov.au/OperationSovereignBorders/Documents/illegantentryvesselarrivals-18september2013to17october2014.pdf> (last accessed Aug. 31, 2016).

the evolution of Australian policy on illegal migration by sea. The policy considerations of Australia are the same with those of the U.S. — illegal migration is seen as undesirable and a potential security threat. Australian policies broadened as to create a network of offshore strategies to prevent vessels from entering its territorial waters. Contrary to the reasons of the U.S. in Cuban migrant smuggling, Australia was not so keen in fulfilling its obligations to rescue those in distress at sea.¹⁴⁶ Rather, the circumstances of Australia were primarily directed towards exclusion as its ultimate goal. Upon interception, Australian officials forcibly transfer migrants to seaworthy boats and direct them to alter their course, presumably to the State of embarkation or to third States acting as off-shore processing centers.¹⁴⁷ Nonetheless, the Australian practice sheds light into the complex responses by coastal States in preventing smuggling and trafficking by sea.

C. Europe: Towards Building a Fortress at Sea

Known as the gateway to Europe, Italy has become a major destination for irregular migrants.¹⁴⁸ The Mediterranean Sea is viewed as a crucial hotspot for irregular migration and is considered the principal route from Albania to Italy.¹⁴⁹ In a span of two decades, some 100,000 to 200,000 irregular migrants reached Europe each year.¹⁵⁰ Illegal migration in Europe, however, is undergoing a sea of change. The Mediterranean Sea is no longer considered the sole hub of migration; instead, the Strait of Gibraltar, seas contiguous to the Canary Islands in Spain, and the Maltese waters, among others, are now also considered major routes for unwanted immigrants.¹⁵¹ In the early 2000s, Spain detected around 17,000 illegal migrants at sea while France, Italy, and Greece managed to intercept some 3,375.¹⁵² With an ever-growing transnational movement of people by sea, European nations needed to

146. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 414 (citing The Australian, *supra* note 139.).

147. *See* Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 414.

148. GUILFOYLE, *supra* note 8, at 209.

149. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 417; Fischer-Lescano, et al., *supra* note 45; & Efthymios Papastavridis, *Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas*, 25 INT'L J. MARINE COASTAL L. 569, 570 (2010).

150. *See* Philippe De Bruycker, et al., *Migrants Smuggled by Sea to the EU: facts, laws and policy options* (A Report by the Migration Policy Centre) 4, available at <http://www.migrationpolicycentre.eu/docs/MPC-RR-2013-009.pdf> (last accessed Aug. 31, 2016).

151. GUILFOYLE, *supra* note 8, at 209.

152. U.N. Secretary-General, *Report of the Secretary-General on Oceans and the Law of the sea*, at 11, 56th Session of the General Assembly, U.N. Doc. A/56/58/Add.1 (Oct. 5, 2001).

formulate a policy to counteract this phenomenon. They turned to the Italian practice of interdiction as their initial basis for the European model.¹⁵³

In 1997, wary of the massive influx of irregular migrants in Europe, Italy, through an exchange of letters, entered into a bilateral agreement with Albania.¹⁵⁴ The Protocol between the two States empowered Italian warships to demand information about Albanian-flagged vessels; to board and inspect the same to verify the information received; and to order any vessel back to an Albanian port.¹⁵⁵ Refusal of the Albanian vessel to the order of return would result in the detention, arrest, and repatriation of unauthorized migrants.¹⁵⁶ Similar to the U.S. policy on forced repatriation, Italy employs a push back policy without any process for potential asylum-seekers and refugees.¹⁵⁷ The Protocol between Italy and Albania is eerily similar to the U.S.-Haitian Agreement, precisely because the Executive Order 12807 issued by President Bush is cited as the primary legal basis of the Italian interdiction practice.¹⁵⁸ Italy imported the American model of interdiction and applied it on Mediterranean waters. It effectively created a maritime blockade similar to what the U.S. had done in Haiti and in Cuba.¹⁵⁹ However, early implementation of this agreement proved to be difficult in the Mediterranean. In 1997, while *Kater I Rades*, an Albanian smuggling vessel bound for Italy, was attempting to evade Italian military vessel *Zeffiro*, *Kater I* collided with another law enforcement Italian warship, and sank in the Mediterranean Sea, leaving hundreds dead and many injured.¹⁶⁰ The European Court of Human Rights (E. Ct. H.R.) decided that Italy did not have any liability since all its acts were done pursuant to a lawful sanction, that is, the control of non-nationals' entry into their territory.¹⁶¹ In this case, the E. Ct. H.R. indirectly acknowledged Italy's

153. Efthymios Papastavridis, *Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law*, 6 SYRACUSE J. INT'L L. & COM. 145, 181 (2009) [hereinafter Papastavridis, *Interception of Human Beings on the High Seas*] (citing Protocol Between Italy and Albania to Prevent Certain Illegal Acts and Render Humanitarian Assistance to those Leaving Albania, It.-Alb., Apr. 2, 1997, G.U. July 15, 1997, Suppl. No. 163 [hereinafter Italy-Albania Protocol]).

154. Papastavridis, *Interception of Human Beings on the High Seas*, *supra* note 153, at 181.

155. Italy-Albania Protocol, *supra* note 153, art. 4.

156. *Id.* art. 13.

157. Mann, *supra* note 69, at 333.

158. *Id.*

159. *Id.*

160. *Xhavara and others v. Albania and Italy*, Decision, Eur. Ct. H.R., App. No. 39473/98 (Jan. 11, 2001).

161. *Id.*

power to control the entry of non-nationals in an area that is outside of Italy's territorial boundaries.¹⁶²

In view of the success of its partnership with Albania, the Italian government likewise made an agreement with Libya through the Treaty of Friendship, Partnership and Cooperation.¹⁶³ It provided Italy the power to patrol the high seas as well as to intercept vessels in Libya's territorial waters.¹⁶⁴ In one instance, Italy's exercise of the power to intercept, detain, and deport irregular Libyan migrants in the high seas became a subject of a controversial case before the E. Ct. H.R.¹⁶⁵ The European Court in *Hirsi Jamaa v. Italy* held Italy responsible for its flagrant violation of human rights in the process of interception of Libyan vessels in the high seas.¹⁶⁶

The efforts of individual States to establish mechanisms to prevent migration did not deter the "onslaught" of irregular migrants to Europe.¹⁶⁷ Spain has traditionally experienced a difficulty in regulating the influx of immigrants traveling to Canary Islands by sea from North Africa.¹⁶⁸ In 2004, Spain intercepted 10,400 irregular migrants in the Strait of Gibraltar.¹⁶⁹ In a span of just two years, those figures grew to 31,000 in 2006.¹⁷⁰ Malta remains in the same dilemma as it detected 142 boats carrying 5,700 migrants from 2002 to 2006.¹⁷¹ The "problem" persisted in Malta as the numbers rose to 6000 in the years 2007 and 2008.¹⁷² Aggregately, about 65,000 irregular

162. *Id.* at A1.

163. Benghazi Treaty of Friendship, Partnership and Cooperation between Italy and Libya, It.-Libya, Aug. 30, 2008, 150 G.U. No. 89 [hereinafter Benghazi Treaty].

164. *Id.*

165. *Hirsi Jamaa v. Italy*, Judgment, Eur. Ct. H.R., Grand Chamber No. 27765/09 (Feb. 23, 2012).

166. *Id.* at 57, ¶¶ 6-7, 9, & 11.

167. Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS L. REV. 625, 626 (2009).

168. GUILFOYLE, *supra* note 8, at 207 (citing Anthony Browne, *Looking to halt the tide from the sea*, TIMES, July 11, 2006, available at <http://www.thetimes.co.uk/tto/news/world/europe/article2601078.ece> (last accessed Aug. 31, 2016)).

169. GUILFOYLE, *supra* note 8, at 207.

170. Nessel, *supra* note 167, at 651 (citing Dirk Kohnert, African Migration to Europe: Obscured Responsibilities and Common Misconceptions (A Working Paper for the German Institute of Global and Area Studies) 12, available at https://www.giga-hamburg.de/en/system/files/publications/wp49_kohnert.pdf (last accessed Aug. 31, 2016)).

171. Nicholas De Blouw, *Drowning Policies: A Proposal to Modify the Dublin Agreement and Reduce Human Rights Abuses in the Mediterranean*, 40 CAL. W. INT'L L.J. 335, 346 (2010).

172. *Id.*

migrants from Sub-Saharan African States — such as Cape Verde, Senegal, Gambia, Guinea, Liberia, Mali, and Mauritania — attempt to enter Europe by sea every year.¹⁷³ As Europe continued to experience a “flood” of immigrants attempting to reach their shores,¹⁷⁴ it realized that it needed a more ambitious and a more potent response to irregular migration.

With individual European coastal States struggling to prevent the waves of migration from North Africa and Albania, the E.U. took the helm in 2004 and established a border agency named Frontex¹⁷⁵ as the centerpiece for one of the most ambitious enforcement networks in the world today.¹⁷⁶ Frontex serves as a “specialised expert body[,] tasked with improving the coordination of operational cooperation between Member States in the field of external border management[,] [] in the shape of a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the [E.U.]”¹⁷⁷ It is an “intelligence-based, independent[,] and depoliticized”¹⁷⁸ agency tasked with managing the operational cooperation at the external borders of the E.U.¹⁷⁹ Notably, the functions of the agency revolve around achieving the peace and security goals of the E.U. in its external borders,¹⁸⁰ but are silent on obligations such as combatting human trafficking, migrant smuggling, or human rights protection.¹⁸¹ Within its competencies, Frontex shall “assist Member States in circumstances requiring increased technical and operational assistance at external borders”¹⁸² and “provide [them] with the necessary support [in organising] joint return operations.”¹⁸³ Frontex’s mission is primarily geared towards integrating the national border security systems among Member States and not to the protection of persons in distress at sea.¹⁸⁴

173. Alexander Betts, *Towards a Mediterranean Solution? Implications for the Region of Origin*, 18 INT’L J. REFUGEE L. 652, 652 (2006).

174. De Blouw, *supra* note 171, at 337.

175. Council Regulation 2007/2004, 2004 O.J. (L 349) (EC) [hereinafter Frontex Regulation].

176. Mann, *supra* note 69, at 340.

177. Frontex Regulation, *supra* note 175, whereas cl., ¶ 3.

178. De Blouw, *supra* note 171, at 342.

179. Frontex Regulation, *supra* note 175, whereas cl., ¶ 3.

180. *Id.* whereas cl., ¶¶ 3-6.

181. *See generally* Frontex Regulation, *supra* note 175.

182. *Id.* art. 2 (e).

183. *Id.* art. 2 (f).

184. Nessel, *supra* note 167, at 655 (citing Wies Maria Maas, *Fleeing to Europe: Europeanization and the Right to Seek Refugee Status* (A Working Paper for the Institute of Social Studies of Erasmus University of Rotterdam, The Hague)

In 2006, Frontex organized *Operacion Hera II*, a joint operation composed of eight Member States designed to intercept boats carrying illegal migrants from Africa into the Canary Islands just off the coast of Spain.¹⁸⁵ *Operacion Hera II* is the largest joint operation coordinated by Frontex and led to the arrest and repatriation of 3,500 illegal immigrants.¹⁸⁶ Moreover, Frontex spearheaded the creation of Rapid Border Intervention Teams, ready to expediently provide assistance in urgent circumstances,¹⁸⁷ including the arrival of illegal third-country nationals.¹⁸⁸

Formal and informal bilateral agreements aligned with Frontex's programs have also been arranged between African States. For instance, in 2007, Spain and Mauritania agreed to combat "irregular migration" by providing efficient assistance services in Mauritania.¹⁸⁹ The agreement entails the creation of a processing center in Mauritania for all illegal migrants intercepted in the waters leading to the Canary Islands.¹⁹⁰ This Spain-financed center will serve as the site for immigrants who were forcibly returned by Spanish vessels.¹⁹¹ Moreover, the Spanish authorities managed to intercept thousands of irregular migrants not only in its territorial waters but also in the high seas and in waters within the jurisdiction of Mauritania and Senegal.¹⁹² Pursuant to the 2008 Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahiriya,¹⁹³ Italian warships began intercepting illegal migrants in the high seas to return them back to Libya.¹⁹⁴ In May 2009, the Italian Coast Guard intercepted 230 migrants 35 miles off the coast of Lampedusa and forcibly repatriated them to Libya, without assessing whether

42, available at <http://repub.eur.nl/pub/18740/wp454.pdf> (last accessed Aug. 31, 2016)).

185. Frontex, Longest Frontex Coordinated Operation — Hera, The Canary Islands, available at <http://frontex.europa.eu/news/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQlsc> (last accessed Aug. 31, 2016).

186. *Id.*

187. Council Regulation 863/2007, 2007 O.J. (L 199) (EC).

188. *Id.*

189. Nessel, *supra* note 167, at 660. (citing Comisión Española de Ayuda al Refugiado, La Situación de los refugiados en España (A Report Prepared by the Comisión Española de Ayuda al Refugiado) 43, available at http://www.2015ymas.org/IMG/pdf/informe_CEAR_2007.pdf (last accessed Aug. 31, 2016)).

190. *Id.*

191. *Id.*

192. *Id.*

193. Benghazi Treaty, *supra* note 163.

194. *Id.*

or not they needed international protection.¹⁹⁵ This practice was repeated on numerous occasions against vessels carrying Libyan¹⁹⁶ and Somali¹⁹⁷ migrants.

As part of its “holistic” approach to combat illegal entry of third country nationals, many E.U. Member States have enacted criminal laws against irregular migrants themselves.¹⁹⁸ In 2009, through the ardent cajolery of Prime Minister Silvio Berlusconi, Italy passed a new law criminalizing unlawful entry, thus punishing illegal migrants with up to six months in prison.¹⁹⁹ Through the financial backing of Spain, Gambia successfully prosecuted 37 Senegalese youths for merely attempting to embark on a boat to Canary Islands without valid immigration documents.²⁰⁰ In Mauritania, another country financed by Spain, legal applicants for immigration allege that they are being arrested and detained, without any evidence, and are being accused of intending to leave Mauritania to travel to Europe illegally.²⁰¹ In some occasions, merely “wearing two pairs of pants on a cool evening can lead the Mauritanian security forces to believe that an immigrant is intending to emigrate to Spain, resulting in arrest, detention, and likely deportation.”²⁰²

Frontex displays its own successful joint operations and strategies for combatting illegal entries in partner non-E.U. States as a humanitarian mission directed towards saving human lives at sea.²⁰³ Frontex also purports to base its strategies on private risk-assessments as to “the roots, routes, [*modus operandi*], patterns of irregular movements, conditions of the countries

195. Michael Campagna, *Effective Protection against Refoulement in Europe: Minimizing Exclusionism in Search of a Common European Asylum System*, 17 U. MIAMI INT'L & COMP. L. REV. 125, 129-30 (2010) (citing United Nations High Commissioner for Refugees (UNHCR), UNHCR deeply concerned over returns from Italy to Libya, *available at* <http://www.unhcr.org/print/4a02d4546.html> (last accessed Aug. 31, 2016)).

196. Campagna, *supra* note 195, at 130.

197. *Id.*

198. *Id.* at 128-29.

199. *Id.* at 129 (citing BBC News, Italy adopts law to curb migrants, *available at* <http://news.bbc.co.uk/2/hi/europe/8132084.stm> (last accessed Aug. 31, 2016)).

200. Nessel, *supra* note 167, at 660.

201. *Id.*

202. *Id.* (citing Amnesty International Secretariat, Mauritania: Nobody wants to have anything to do with us: Arrests and Collective Expulsions of Migrants Denied Entry into Europe (A Report Prepared by the AI Internatioal Secretariat) 21, *available at* <http://www.amnesty.org/download/Documents/52000/afr380012008eng.pdf> (last accessed Aug. 31, 2016)).

203. *Id.* at 656.

of transit, statistics of irregular flows[,] and displacement.”²⁰⁴ Yet, all the risk assessments of Frontex, from which all the joint operations are based, are being withheld from the public.²⁰⁵ In fact, when Frontex’s policies are strictly examined, its aims are solely for nationalistic purposes, as opposed to humanitarian ones. In stark contrast to the claim that the practice saves lives, there is mounting evidence that immigrants now purposely evade Frontex-patrolled waters and instead, take more hazardous routes where Frontex is absent.²⁰⁶ Human traffickers and migrant smugglers also take advantage of Frontex’s presence in the high seas — these perpetrators have now begun to use less expensive materials to build their boats and provide them with low fuel so that they would not be charged with the responsibility of refueling the vessel for the return trip if intercepted by Frontex.²⁰⁷ Further, the presence of Frontex also forced traffickers and smugglers to take creative but more dangerous strategies for transporting people.²⁰⁸ They would transport migrants on faster inflatable rubber boats that would fan out when detected by Frontex-coordinated naval vessels.²⁰⁹ In some situations, smugglers and traffickers leave migrants by themselves to navigate their way into the seas to avoid any opportunity of being caught.²¹⁰ No less than Frontex head Ilka Laitenen admitted that “traffickers force migrants to sink the boats they are sailing in, so that they will be rescued by Frontex vessels.”²¹¹ Furthermore, Frontex does not seem to be concerned or aware of protecting the rights of smuggled migrants, trafficked persons, and potential refugees. When asked in an interview on whether they encountered trafficked migrants or refugees on board the arrested vessels, Frontex director, after *Hera II* operations, merely exclaimed, “Refugees? They aren’t refugees, they’re illegal immigrants.”²¹²

In sum, Europe’s response to illegal migration evolved from discrete and disparate national efforts to complex politico-legal enforcement measures designed to create a virtually impregnable external border through operational cooperation. Frontex serves as the E.U.’s version of an evolved,

204. *Id.* at 655 (citing Maas, *supra* note 184, at 40).

205. *Id.*

206. De Blouw, *supra* note 171, at 344.

207. *Id.* & Nessel, *supra* note 167, at 652 (citing Jorgen Carling, *Migration Control and Migrant Fatalities at the Spanish-African Borders*, 41 INT’L MIGRATION REV. 316, 327 (2007)).

208. *Id.*

209. Nessel, *supra* note 167, at 652 (citing Carling, *supra* note 207, at 327).

210. Nessel, *supra* note 167, at 652.

211. Jim Brundsen, Frontex chief warns about failure to reduce migration, *available at* <http://www.europeanvoice.com/article/imported/frontex-chief-warns-about-failure-to-reduce-migration/62224.aspx> (last accessed Aug. 31, 2016).

212. Nessel, *supra* note 167, at 655 (citing Maas, *supra* note 184, at 42).

integrated, and organized Australian Pacific Solution. The collective response to illegal migration in Europe effectively erected the “Berlin Wall [at sea]” that is free from public scrutiny.²¹³ The amalgamation of cooperative strategies of interdiction at sea, the solicited consent from poor and underdeveloped African States, and the financial capacities of E.U. Member States led to the creation of yet another maritime blockade in the high seas.²¹⁴

III. THE MARITIME BLOCKADE — LEGAL JUSTIFICATIONS, COMPLICATIONS, AND CONTRADICTIONS OF INTERCEPTION PRACTICES WITHIN THE FRAMEWORK OF THE LAW OF THE SEA

The UNCLOS represents a watershed moment in unifying the rule of law in what was previously an arena for maritime disputes and naval warfare, and in advancing the vision of the “public order of the oceans”²¹⁵ today. The UNCLOS remains an important document that defines the extent of a State’s maritime jurisdiction,²¹⁶ delimits maritime zones,²¹⁷ and creates permissible regimes of control to ensure peace and order in the areas of the seas not subject to the jurisdiction of any State.²¹⁸ Yet, the apparent inconsistency between the extent of a coastal State’s exercise of jurisdiction over adjacent maritime areas, and the breadth of navigational rights enjoyed by maritime States, has endured for much of the history of the UNCLOS and its predecessor regimes.²¹⁹ In this light, it is important to map out the rights and powers granted to States by the UNCLOS concerning navigational and security matters. To determine such, an examination of instances where one State exercises jurisdiction over another State’s vessel at sea is warranted.

A. Basic Principles of Jurisdiction: An Overview

213. Nessel, *supra* note 167, at 656 (citing BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF LAW STUDENTS FOUGHT THE PRESIDENT – AND WON* 119 (2006)).

214. *See generally* Nessel, *supra* note 167.

215. MCDUGAL & BURKE, *supra* note 8.

216. UNCLOS, *supra* note 14, arts. 2, 27, & 28.

217. *Id.* arts 2 & 4-7.

218. *Id.*

219. Donald R. Rothwell, *Navigational Rights and Freedoms in the Asia Pacific Following Entry Into Force of the Law of the Sea Convention*, 35 VAND. J. INT’L L. 587, 587 (1995).

Jurisdiction refers to a State's power under international law to subject persons and property to their national laws,²²⁰ judicial institutions,²²¹ or enforcement capacity.²²² This exercise of jurisdiction is inherent in and an attribute of sovereignty²²³ that is limited only by binding rules and norms of international law.²²⁴ As held by the Permanent Court of International Justice (P.C.I.J.) in the seminal *Lotus* case,²²⁵ jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention."²²⁶

International law distinguishes between three types of jurisdiction: prescriptive, adjudicative, and enforcement jurisdiction.²²⁷ Prescriptive jurisdiction refers to the authority of the State to apply a law to a particular conduct or individual.²²⁸ It is generally accepted that States are entitled to prescribe laws and rules of conduct within their territory.²²⁹ In fact, as an

220. Hessel E. Yntema, *The Comity Doctrine*, 65 MICH L. REV. 9, 19 (1966). See also ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW (1994).

221. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 (b) (1987).

222. DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 265 (2010); Vaughan Lowe & Christopher Staker, *Jurisdiction*, in INTERNATIONAL LAW 335 (Malcolm D. Evans ed., 2010) & Ilias Bantekas, *Criminal Jurisdiction of States under International Law*, MAX PLANCK ENCYC. PUB. INT'L L. (2011). See Joseph Henry Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241 (1923) & Christopher L. Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982).

223. *Island of Palmas (U.S. v. Neth.)*, 2 R.I.A.A. 829 (1928); BROWNLIE, *supra* note 36, at 105-06; & JOSEPH GABRIEL STARKE, STARKE'S INTERNATIONAL LAW 144 (1994).

224. *Nationality Decrees in Tunis and Morocco*, PCIJ Reports, Series B, No 4, 23-4 (1923) & *Legal Status of Eastern Greenland (Den. v. Nor.)*, PCIJ Reports, Series A/B, No. 53, 48 (1933).

225. *The Case of S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, 18-19 (Sep. 7).

226. *Id.*

227. Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 YALE J. INT'L L. 433, 436 (2012) & Claus Kreß, *International Criminal Law*, in MAX PLANCK ENCYC. PUB. INT'L L. (2009).

228. MALCOLM N. SHAW, INTERNATIONAL LAW 645 (2008); DONALD R. ROTHWELL, INTERNATIONAL LAW: CASES AND MATERIALS WITH AUSTRALIAN PERSPECTIVES 294 (2011); & *Lotus*, 1927 P.C.I.J. at 19.

229. *Lotus*, 1927 P.C.I.J. at 18-19.

aspect of sovereignty, States can prescribe laws to apply to persons not within its territory for a particular conduct outside its own borders.²³⁰

While laws and measures authorizing interception in the high seas are enacted by States by virtue of their prescriptive jurisdiction, readily enforcing such laws and measures are far from being warranted in international law.²³¹ States are entitled to prescribe laws, but it is generally accepted that States are not entitled to enforce laws outside of their territory, except by virtue of a permissive rule derived from custom or convention.²³² Thus, enforcement jurisdiction relates to the authority of the State to compel an entity or a person to comply with its laws,²³³ and/or to legally arrest, try, convict, and imprison an individual for breach of its laws.²³⁴

In order for enforcement jurisdiction to arise, a State must lawfully exercise its prescriptive jurisdiction.²³⁵ Even when a State enacts a national law, full enforcement of that law does not necessarily follow.²³⁶ Therefore, both aspects of jurisdiction must be present for States to justify any enforcement action on particular activities over certain ocean spaces.²³⁷ As to adjudicative jurisdiction, a State will only be entitled to prosecute a crime if it has recognized grounds to claim jurisdiction over a certain instance permitted in international law, and its municipal law expressly claims jurisdiction.²³⁸ Thus, the authority of domestic courts to decide matters permitted in international law is generally limited by what is granted by the State's criminal law.²³⁹

Thus, as seen in the discussion above, the power of States to impose its own laws, to enforce such laws, and to take adjudicative jurisdiction is generally limited within its territory. Extraterritorial application of these kinds of jurisdiction is merely an exception under international law. These exceptions must not be interpreted liberally and their application is narrowly

230. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (citing *Strassheim v. Daily*, 221 U.S. 280, 284-85 (1911); *Lamar v. United States*, 240 U.S. 60, 65-66 (1916); & *Ford v. United States*, 273 U.S. 593, 620-21 (1927)).

231. ROBERT CRYER, ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 43 (2010).

232. *Lotus*, 1927 P.C.I.J. at 18-19.

233. SHAW, *supra* note 228, at 645.

234. *Id.*

235. KLEIN, *MARITIME SECURITY*, *supra* note 8, at 63.

236. *Id.*

237. *Id.*

238. Rothwell, *supra* note 228, at 9.

239. EVANS, *supra* note 222, at 3-5.

construed against the State claiming them.²⁴⁰ One must distinguish between extraterritorial application for prescriptive jurisdiction and for enforcement jurisdiction. In the former case, the prohibition or regulation of certain classes of conduct may be extraterritorial.²⁴¹ However, as in the latter case, the enforcement of such prohibition or regulation may only be done within one's own territory.²⁴² Hence, enforcement jurisdiction is necessarily constrained within a State's territory.²⁴³ Prescriptive jurisdiction, therefore, is "logically independent from enforcement."²⁴⁴

For States to invoke jurisdiction, apply its domestic laws, and enforce sanctions for criminal conduct, they must successfully establish a jurisdictional nexus between the conduct criminalized and the enforcement action over a particular area.²⁴⁵

Under Customary International Law, territoriality serves as the general principle of jurisdiction.²⁴⁶ By way of exception, States may exercise extraterritorial jurisdiction, that is, their national laws may be given extraterritorial effect, provided these laws can be justified by one of the recognized principles of extraterritorial jurisdiction.²⁴⁷ Under international law, there are five customary bases of extraterritorial jurisdiction, namely: objective territoriality,²⁴⁸ nationality,²⁴⁹ passive personality,²⁵⁰ protective,²⁵¹

240. Reuland, *supra* note 37, at 1161.

241. CRYER, ET AL., *supra* note 231, at 45.

242. *Id.* at 45-46.

243. GUILFOYLE, *supra* note 8, at 7-8.

244. *Id.* at 8.

245. Bennet, *supra* note 227, at 436.

246. Cedric Ryngaert, et al., *Preface* to CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW vii (2d ed. 2015).

247. *Id.*

248.2 MAHMOUD CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 100 (2008) [hereinafter BASSIOUNI, INTERNATIONAL CRIMINAL LAW]; CRYER, ET AL, *supra* note 231, at 46; RYNGAERT, *supra* note 246, at 75; & Bantekas, *supra* note 222.

249. Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 68, 69 (1992) & Wade Estey, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177, 182 (1997).

250. Arrest Warrant of April 11, 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶¶ 16 & 47 (Feb. 14); United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968); Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967); & Rocha v. United States, 366 U.S. 948 (1961).

and universality.²⁵² Although the UNCLOS does not explicitly grant States these bases of jurisdiction, Customary International Law is deemed to be an independent source for coastal and maritime States to establish such jurisdiction.²⁵³

In the context of interdiction measures in the high seas, coastal States such as the U.S., Australia, and E.U. Member States participating in Frontex rely on their prescriptive jurisdiction to enact laws to intercept boats carrying illegal migrants to their territory. As such, Executive Orders 12324 and 12807 of the U.S.,²⁵⁴ Border Protection Act of 2001²⁵⁵ and Operations Sovereign Borders of Australia,²⁵⁶ and the operational coordination of Frontex over E.U.'s external border²⁵⁷ all ground their legitimacy on prescriptive jurisdiction vested in their respective States. These said laws purport to apply in areas not fully subject to their jurisdiction as all relevant laws point to their power to intercept vessels in the high seas or in the outer limit of their territorial waters. To assess the legality of the enforcement of these laws over particular maritime area, it is critical to map out the rights, duties, and limitations of States within a particular maritime zone.

B. Zones of Maritime Jurisdiction

The rights granted to coastal and maritime States and the operability or inoperability of certain freedoms with respect to a particular conduct primarily depends on the area of the sea over which the coastal State may exercise sovereignty or sovereign rights. Under the UNCLOS, there are three areas where a coastal State may exercise sovereign rights, namely: the territorial sea, the contiguous zone, and the exclusive economic zone.

1. Territorial Sea

The territorial sea is that area of the sea adjacent and beyond the internal waters of a State which shall not exceed beyond 12 nautical miles from that State's baselines.²⁵⁸ Within this area, a State exercises sovereignty and its

251. Harvard Research, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 480, 519 (1935); *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988); *Attorney General v. Eichmann*, 36 I.L.R. 277 (1962); *In Re: Urios*, 1 A.D. 107 (1920); & CRYER, ET AL, *supra* note 231, at 50.

252. *Ex Parte Pinochet Ugarte*, 2 All E.R. 97 (1999) & SHAW, *supra* note 228, at 592.

253. JOAQUIN G. BERNAS, S.J., *INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 132 (2009 ed.).

254. 3 C.F.R. § 2 & 57 Fed. Reg. 23133.

255. Border Protection Act, *supra* note 128.

256. Operation Sovereign Borders, *supra* note 137.

257. Frontex Regulation, *supra* note 175.

258. UNCLOS, *supra* note 14, art. 3.

airspace extends over this adjacent belt of sea.²⁵⁹ Since the State exercises sovereignty over the territorial sea, the coastal State exercises complete and absolute prescriptive, adjudicative, and enforcement jurisdiction over the territorial sea.²⁶⁰ The coastal State can prescribe and regulate almost all kinds of activities in this area and it has the right to exclusively exploit, explore, and develop its territorial sea.²⁶¹ Additionally, the freedoms of the high seas do not apply to the territorial sea.²⁶²

While this area is subject to the sovereignty of the coastal State, however, the UNCLOS still assures the non-impairment of the right of innocent passage through the territorial sea.²⁶³ According to publicist Robert MacLean, some of the authorities that coastal States enjoy are as follows:

- (a) The exclusive right over fisheries and the exploitation of the living and non-living resources of the seabed and subsoil[;]
- (b) The right to exclude foreign vessels from trading along its coast (cabotage)[;]
- (c) The right to impose regulations concerning navigation, customs, fiscal, sanitary health, and immigration[;]
- (d) The exclusive enjoyment of the airspace above the territorial sea[; and]
- (e) The duty of belligerents in time of war to respect the neutral States' territorial sea and refrain from belligerent activities therein.²⁶⁴

Moreover, the coastal State cannot exercise criminal jurisdiction over foreign ships merely passing through their territorial waters.²⁶⁵ This means that the coastal State may only establish criminal jurisdiction against ships bound for or coming from its internal waters.²⁶⁶ By way of exception, there are instances where the coastal State may exercise criminal jurisdiction over a foreign ship, to wit:

- (1) if the consequences of the crime extend to the coastal State;
- (2) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

259. *Id.* art. 2.

260. ROBIN ROLF CHURCHILL & ALAN VAUGHAN LOWE, *THE LAW OF THE SEA* 63 (1999) [hereinafter CHURCHILL & LOWE, *LAW OF THE SEA*].

261. *Id.*

262. UNCLOS, *supra* note 14, arts. 86-87.

263. *Id.* art. 17.

264. ROBERT M. MACLEAN, *PUBLIC INTERNATIONAL LAW: TEXTBOOK* 250 (1994).

265. UNCLOS, *supra* note 14, art. 27.

266. GUILFOLYE, *supra* note 8, at 11.

- (3) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (4) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.²⁶⁷

As a general rule, coastal States must claim and declare those maritime areas adjacent to their territory.²⁶⁸ The maritime jurisdiction of the coastal State over these areas is therefore elective.²⁶⁹ However, customary rules of international law impose at least three nautical miles of territorial sea on coastal States.²⁷⁰ Today, the breadth of the territorial sea that extends up to 12 nautical miles now forms part of Customary International Law.²⁷¹

2. Contiguous Zone

According to Article 33 (2) of the UNCLOS, the contiguous zone “may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”²⁷² Consequently, a State may exercise control within the contiguous zone as it is necessary to “(a) prevent infringement of its customs, fiscal, immigration[,] or sanitary laws and regulations within its territory or territorial sea; [and] (b) [to] punish infringement of the above laws and regulations committed within its territory or territorial sea.”²⁷³

While the contiguous zone is measured from the same baselines, it does not form part of the territorial sea.²⁷⁴ The rights granted in the contiguous zone are not proprietary and non-exclusive.²⁷⁵ Within the contiguous zone, States have limited powers to enforce customs, fiscal, sanitary, and

267. UNCLOS, *supra* note 14, art. 27 (1).

268. U.N. International Law Commission, 1956 Year Book International Law Commission 1, 87, UN Doc. A/CN.4/Ser. A/1956 [hereinafter ILC Yearbook].

269. GUILFOYLE, *supra* note 8, at 10.

270. *Id.* at 11.

271. Sarah Wolf, *Territorial Sea*, in MAX PLANCK ENCYC. PUB. INT’L L. (2013).

272. UNCLOS, *supra* note 14, art. 33 (2).

273. *Id.* art. 33 (1).

274. Kevin Aquilina, *Territorial Sea and the Contiguous Zone*, in I THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW: LAW OF THE SEA 56 (David Joseph Attard, et al. eds. 2014).

275. Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea, Part I: The Territorial Sea and the Contiguous Zone and Related Topics*, 8 INT’L & COMP. L. Q. 73, 119-20 (1959).

immigration laws²⁷⁶ and only possess the power of “control” and not absolute sovereignty.²⁷⁷ This exercise of control must be limited to measures such as inspections and warnings, and cannot include arrest or forcible taking into port.²⁷⁸ Contiguous zones, as Malcolm N. Shaw articulates, were intentionally excluded from the territorial sea and must be separated from the applicability of claims to full sovereignty over such area.²⁷⁹

In the *travaux préparatoires* of the 1958 Geneva Convention, the International Law Commission (I.L.C.) conceived the purpose of the contiguous zone in the narrowest possible terms, confining the authority of the coastal State to protection of rigidly categorized interests.²⁸⁰ The I.L.C., by motion of several countries, rejected the application of security as a permissible purpose for the contiguous zone, which in turn curbed the evident tendency of coastal States to claim competence over large areas of the high seas, purporting to protect their security or in the interests of self-defense, under the guise of protection or security zones or defensive sea areas.²⁸¹ It is important to reiterate that the contiguous zone is designed to prevent or punish infringement of coastal State’s laws on immigration, sanitation, finance, and customs laws over events occurring from within the territorial sea.²⁸² This is an exhaustive list and cannot be extended by any coastal State.²⁸³ Within the contiguous zone, the littoral State may avail two kinds of control — prevention and punishment.²⁸⁴ For the former, the coastal State may take preventive means to ensure that its immigration, fiscal, sanitary, and customs laws are not violated either within its internal waters, its territory, or its territorial sea.²⁸⁵ This may include measures such as border security and customs inspection.²⁸⁶ For the latter option, the coastal State partakes of a reactive role in arresting and prosecuting a vessel that has violated any of its four kinds of law.²⁸⁷ In sum, the power of prevention is a

276. GUILFOYLE, *supra* note 8, at 97.

277. KLEIN, *MARITIME SECURITY*, *supra* note 8, at 87.

278. STARKE, *supra* note 223, at 330.

279. SHAW, *supra* note 228, at 576.

280. ILC Yearbook, *supra* note 268, at 39-40.

281. 1951 Y.B. Int’l L. Comm’n 1, 20, UN Doc. A/CN.4/Ser. A/1951.

282. Lloyd C. Fell, *Maritime Contiguous Zones*, 62 MICH. L. REV. 848, 849-50 (1964).

283. Aquilina, *supra* note 274, at 62-63.

284. *Id.* at 64.

285. *Id.*

286. *Id.*

287. *Id.*

measure for inward bound ships, while punitive measures are aimed at outward-bound vessels.²⁸⁸

3. Exclusive Economic Zone

The exclusive economic zone (E.E.Z.) is that belt of sea of a State that extends up to 200 nautical miles from the baselines used to measure the territorial sea.²⁸⁹ Within the E.E.Z., the coastal State exercises “sovereign rights for the purpose of exploring and exploiting, conserving[,] and managing the natural resources [of a State], whether living or non-living.”²⁹⁰ While the coastal State may enjoy rights to the resources within such area, other States have the right of freedom of navigation and overflight, among others.²⁹¹ Particularly, the coastal State has jurisdiction over the E.E.Z. with respect to: “(i) the establishment and use of artificial islands, installations[,] and structures; (ii) marine scientific research; [and] (iii) the protection and preservation of the marine environment.”²⁹²

The E.E.Z. was the creation of the conference which eventually adopted the UNCLOS.²⁹³ Common to the theme of the UNCLOS as an instrument that balances the rights and duties of maritime and coastal States, the E.E.Z. was designed to assure equilibrium between inclusive and exclusive interests of States.²⁹⁴ Specifically, while the littoral State enjoys the right of exploration and exploitation of resources over the E.E.Z., the maritime State enjoys freedom of navigation and overflight.²⁹⁵ States are also under the obligation to give “due regard to the rights and duties of the coastal State” and to “comply with the laws and regulations adopted by the coastal State” in relation to the UNCLOS and general international law.²⁹⁶ Consequently, Article 59 of the UNCLOS mandates that in cases where a conflict between States arises from the attribution (or the lack thereof) of rights and duties under the Convention, such conflict “should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account

288. Harm M. Dottinga & Alex G. Oude Elferink, *Current Legal Developments: The Netherlands*, 22 INT’L J. MARINE & COASTAL L. 317, 321 (2007).

289. UNCLOS, *supra* note 14, art. 57.

290. *Id.* art. 56 (1) (a).

291. Dolliver Nelson, *Maritime Jurisdiction*, in MAX PLANCK ENCYC. PUB. INT’L L. (2010).

292. UNCLOS, *supra* note 14, art. 56 (1).

293. Nelson, *supra* note 291.

294. *Id.*

295. UNCLOS, *supra* note 14, art. 87.

296. *Id.* art. 58 (3).

the respective importance of the interests involved to the parties as well as to the international community as a whole.”²⁹⁷

Similar to the contiguous zone, the E.E.Z. is an area where States only exercise sovereign rights. It is an area of limited jurisdiction and the power of control of the coastal State is limited to the purposes unique to the E.E.Z. Clearly, then, a coastal State has the power to exercise jurisdiction with respect to the unique purposes of the E.E.Z.²⁹⁸

C. Navigational Freedoms and Jurisdiction in the High Seas

The sea serves as a vast expanse of paradox incarnate — an embodiment of division among the landmasses, yet also a gateway for free movement. It is a respite for seclusion, but also a transmission belt for interaction. After all, the sea, as well-known publicists Myres McDougal and William Burke put it, is “a spatial-extension resource [and] ... a domain for movement.”²⁹⁹ Ever since the antiquity, the sea has been open to everybody and common to mankind.³⁰⁰ It has, since time immemorial, been “free from the sovereignty of any State.”³⁰¹ By this very foundation, the freedom of the seas grew to be a universally acceptable norm under international law and has been regarded as a core doctrine in maritime law.

1. Freedom of the High Seas

The principle of the freedom of the high seas is embodied in Article 89 of the UNCLOS, which provides that “[n]o State may validly purport to subject any part of the high seas to its sovereignty.”³⁰² Owing to this, no State has the right to exercise prescriptive, adjudicative, or enforcement jurisdiction over those parts of the high seas.³⁰³ It is outside the commerce of men and cannot be acquired by any State, individual, or entity.³⁰⁴ The rationale behind this rule on the exclusion of the high seas is “to ensure that

297. *Id.* art. 59.

298. GUILFOYLE, *supra* note 8, at 14.

299. MCDUGAL & BURKE, *supra* note 8, at vii.

300. Albert Hofmann, *Freedom of Navigation*, in MAX PLANCK ENCYC. PUB. INT’L L. (2010).

301. *Id.* (citing Dufour, Grotius et l’ordre juridique international, Travaux du Colloque Hugo Grotius, Genève 10–11 November 1983 (Haggenmacher ed. 1985)).

302. UNCLOS, *supra* note 14, art. 89.

303. *Id.* art. 87.

304. *Id.* art. 89.

all [S]tates, whether coastal or not, enjoy, subject to law, the so-called freedoms of the high seas.”³⁰⁵

Article 87 of the UNCLOS lays down several freedoms included in the freedom of the high seas, to wit:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
 - (a) freedom of navigation;
 - (b) freedom of overflight;
 - (c) freedom to lay submarine cables and pipelines, subject to Part VI;
 - (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
 - (e) freedom of fishing, subject to the conditions laid down in [S]ection 2;
 - (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.³⁰⁶

Save in cases of fishing and scientific marine research, all the enumerated freedoms in Article 87 are consequential to the function of the high seas as a space for transportation and a portal for communication for all States.³⁰⁷ The sea is open to the free navigation of all vessels from all nations. As succinctly provided in the UNCLOS, “[e]very State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.”³⁰⁸ Clearly then, the freedom of navigation is a right guaranteed under the UNCLOS and any impairment of such a right is subject to permissible and exceptional instances recognized under international law.

2. Right of Innocent Passage

Another pillar of navigational freedom under the UNCLOS is the right to innocent passage. As set forth in Articles 17 to 32 of the UNCLOS, the right of innocent passage represents a regime that promotes the safety of

305. *The Freedom of the High Seas*, in OPPENHEIM’S INTERNATIONAL LAW: VOLUME I PEACE 727 (Robert Jennings & Arthur Watts, eds., 9th ed. 2008).

306. UNCLOS, *supra* note 14, art. 87.

307. *The Freedom of the High Seas*, *supra* note 305, at 728.

308. UNCLOS, *supra* note 14, art. 90.

navigation through international straits and territorial seas. All vessels of any State, whether coastal or landlocked, enjoy this right of innocent passage through the territorial sea.³⁰⁹ To avail of this right, two elements must concur: passage and innocence. No less than the International Court of Justice (I.C.J.) affirmed in *Corfu Channel*³¹⁰ the customary right of States to send their vessels through straits used for international navigation between two parts of the high seas and through territorial waters provided that the passage is innocent.³¹¹

For the first element, under the UNCLOS, the term “passage” is defined as the act of navigating through the territorial sea for the purpose of: (1) “traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters;”³¹² or (2) “proceeding to or from internal waters or a call from such roadstead or port facility.”³¹³ Such passage is characterized in a “continuous and expeditious”³¹⁴ manner and stopping and anchoring must not be too substantial a pause as to constitute interruption but instead, should be merely “incidental to ordinary navigation or rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.”³¹⁵

As to the second element of innocence, the UNCLOS characterizes a certain passage of a foreign ship as innocent so long as such “is not prejudicial to the peace, good order[,] or security of the coastal State.”³¹⁶ Moreover, passage of a foreign ship is deemed not innocent if it was done in a manner that is inconsistent with the rules prescribed in international law.³¹⁷ As to what would constitute prejudicial conduct to the peace, order, and security of the coastal State is a factual determination by the authorities of that State. However, the UNCLOS lists down several instances where a certain passage is deemed to be prejudicial to another State’s interest when such foreign ship engages in the following:

- (a) any threat or use of force against the sovereignty, territorial integrity[,] or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

309. *Id.* art. 17.

310. *Corfu Channel* (U.K./N. Ir. v. Alb.), 1949 I.C.J. 1645 (Apr. 9).

311. *Id.* at 28.

312. UNCLOS, *supra* note 14, art. 18 (1) (a).

313. *Id.* art. 18 (1) (b).

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

315. *Id.*

316. *Id.* art. 19 (1).

317. *Id.*

- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing[,] or taking on board of any aircraft;
- (f) the launching, landing[,] or taking on board of any military device;
- (g) 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;
- (h) any act of willful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; [or]
- (l) any other activity not having a direct bearing on passage.³¹⁸

The list provided for by the UNCLOS is not exclusive and only details those instances that are prohibited by the Convention or those which constitute hostile actions against the peace and security of another State. It could take the form of a violation of a State's custom, fiscal, immigration, or sanitary laws.³¹⁹ In another vein, some activities may also constitute use of force or threat of use of force, which are prohibited under the United Nations Charter.³²⁰ If a foreign ship engages in these activities, such ship cannot be entitled to freedom of innocent passage.

Correlatively, the coastal State is not left without measures that would regulate the right to innocent passage in a manner that conforms to the provisions of the UNCLOS. The UNCLOS further provides, to wit:

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:
 - (a) the safety of navigation and the regulation of maritime traffic;
 - (b) the protection of navigational aids and facilities and other facilities or installations;
 - (c) the protection of cables and pipelines;

³¹⁸ UNCLOS, *supra* note 14, arts. 19 (2) (a)-(l).

³¹⁹ *Id.* art. 33.

³²⁰ U.N. Charter art. 2 (4).

- (d) the conservation of the living resources of the sea;
 - (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
 - (f) the preservation of the environment of the coastal State and the prevention, reduction[,] and control of pollution thereof;
 - (g) marine scientific research and hydrographic surveys;
 - (h) the prevention of infringement of the customs, fiscal, immigration[,] or sanitary laws and regulations of the coastal State.
2. Such laws and regulations shall not apply to the design, construction, manning[,] or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.
 3. The coastal State shall give due publicity to all such laws and regulations.
 4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.³²¹

Concomitant to these powers, the coastal State is only empowered to take the necessary steps in its territorial sea to prevent the passage of a ship that is not innocent.³²² Innocent passage of ships through the territorial sea may not be hindered or otherwise defeated under the guise of legitimate regulation, except in a manner that is consistent with the Convention.³²³ With this regard, the coastal State shall not: “(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.”³²⁴

Moreover, there can be “no charges levied upon ships by reason only of their passage through the territorial sea.”³²⁵ Consequently, coastal States may establish sea-lanes or safe routes that direct the passage of foreign ships in their territorial sea.³²⁶

In sum, the right of innocent passage is well-entrenched under maritime law. It is composite of the regime of safe and free navigation in the oceans. Generally, the right of innocent passage is non-suspendable and cannot be

³²¹UNCLOS, *supra* note 14, art. 21.

³²²*Id.* art. 25.

³²³*Id.* art. 24.

³²⁴*Id.* art. 24 (1).

³²⁵*Id.* art. 26 (1).

³²⁶*Id.* art. 22 (1).

interfered with unless there are reasonable grounds to believe that the foreign ship is suspected of smuggling or drug trafficking.³²⁷ It is in this sense that the right of innocent passage cannot be said to be available to ships carrying irregular migrants.

3. Transit Passage

Not far from the conceptual foundations of the right to innocent passage, the right of transit passage was first articulated and created in the UNCLOS.³²⁸ Under this Convention, transit passage refers to “the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an [E.E.Z.] and another part of the high seas or an [E.E.Z].”³²⁹

In parallel, the UNCLOS added that the right of transit passage³³⁰ and innocent passage³³¹ also apply to E.E.Zs³³² and reiterated that such right shall remain unimpeded³³³ and non-suspendable.³³⁴ Furthermore, a State bordering a strait has the right to adopt laws and regulations relating to transit passage³³⁵ in respect of the safety of navigation³³⁶ and the loading or unloading of persons in contravention of its immigration laws and regulations.³³⁷

Correlative to this right are the duties of foreign ships exercising the right of transit passage to comply with such laws and regulations of the States of bordering straits,³³⁸ to refrain from any threat or use of force against the States bordering a strait,³³⁹ and to refrain from any activities other than those incident to their normal modes of continuous or expeditious transit.³⁴⁰

While the rights of innocent passage and transit passage are closely interrelated, there are notable differences that need to be articulated in the

327. Kari Hakapää, *Innocent Passage*, in MAX PLANCK ENCYC. PUB. INT’L L. (2013).

328. Rothwell, *supra* note 219, at 593.

329. UNCLOS, *supra* note 14, art. 38 (2).

330. *Id.* art. 38.

331. *Id.* art. 45.

332. *Id.* art. 37.

333. *Id.* art. 38 (1).

334. *Id.* art. 45 (2).

335. UNCLOS, *supra* note 14, art. 42.

336. *Id.* art. 42 (1) (a).

337. *Id.* art. 42 (1) (d).

338. *Id.* art. 42 (4).

339. *Id.* art. 39 (1) (b).

340. *Id.* art. 39 (1) (c).

application of either principle. On the one hand, innocent passage allows the coastal State to define and set unilateral regulations over the conduct of foreign ships exercising such a right.³⁴¹ On the other hand, transit passage does not grant the coastal State the same unilateral regulatory powers; instead, its “regulatory powers are subject to coordination with the [I.M.O.]” and its subsequent approval.³⁴² Moreover, navigation of submarines under the right of innocent passage must be on the surface, while the right of transit passage applies to submarines that are still submerged underwater.³⁴³

Transit passage grants a foreign ship in the territorial waters of a strait more freedom than it would otherwise be entitled to under the right of innocent passage. The rationale behind this rule is that States could effectively strike a balance between the interests of the coastal States and the maritime States.³⁴⁴ Yet the addition of this new regime of passage empowers maritime States as against the regimes of control that was previously imposed by the coastal States.

D. The Principle of Exclusive Flag State Jurisdiction

Vessels on the high seas are subject to no other jurisdiction other than that of the State whose flag it flies.³⁴⁵ As a general rule, the flag State has exclusive right to exercise legislative and enforcement jurisdiction over its own vessels.³⁴⁶ Moreover, under Article 94 (2) (b) of the UNCLOS, it is the duty of the flag State to assume jurisdiction under its internal law over each ship flying its flag.³⁴⁷ Hence, the flag State plays a crucial role in maintaining order in the oceans, especially in areas not subject to the control of any State. This importance was highlighted in the case of *Lauritzen v. Larsen*,³⁴⁸ when the U.S. Supreme Court opined that “[e]ach [S]tate under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it.”³⁴⁹

341. Said Mahmoudi, *Transit Passage*, in MAX PLANCK ENCYC. PUB. INT’L L. (2008).

342. *Id.*

343. *Id.*

344. *Id.*

345. UNCLOS, *supra* note 14, art. 92.

346. *Id.*

347. *Id.* art. 94 (2) (b).

348. *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

349. *Id.* at 584.

Apart from events occurring within its territory, a State also has jurisdiction over all events occurring in ships registered under its flag³⁵⁰ and, accordingly, the jurisdiction over incidents occurring in these vessels on the high seas remains exclusively with the flag State.³⁵¹ The observance of this principle is of paramount importance considering the common economic interests that States possess over the oceans to facilitate commercial and trade activities at sea.³⁵² Curiously, while the importance of flag State jurisdiction cannot be undermined, the UNCLOS does not enumerate requirements for the formal registration of ships in order to determine their nationality.³⁵³

The principle of exclusive flag State jurisdiction is not without exceptions. There are universally acknowledged exceptions to this rule.³⁵⁴ For instance, when there are reasonable grounds that a vessel is engaged in piracy, slave trading, unauthorized broadcasting, or statelessness, the coastal State, through its warship or a vessel duly authorized and mark as part of government service, may undertake the right of visit.³⁵⁵ More specifically, vessels who are not flying the flag of any State or are without a nationality pose a question on jurisdiction.³⁵⁶ To fill this apparent gap, international law prescribes that any State may exercise jurisdiction over stateless vessels³⁵⁷ — that is to say that States may lawfully exercise their right of visit under Article 110 of the UNCLOS. The importance of vessels possessing a nationality was stressed in the case of *Molvan v. Attorney General for Palestine*,³⁵⁸ where the English Privy Council held that a vessel's right to be entitled to the freedom of navigation is available only if it is sailing under the flag of one State.³⁵⁹ The right to non-interference is therefore corollary to the right of navigation extended to the vessels.

Another exception to the principle of exclusive flag State jurisdiction is when the coastal State has good reasons to believe that a foreign ship has violated such State's rules and regulations within its jurisdiction or in an area

350. CRYER, ET AL., *supra* note 231, at 46.

351. Convention on the High Seas, *supra* note 36, art. 6 (1).

352. GUILFOYLE, *supra* note 8, at 16.

353. O'CONNELL, *supra* note 8, at 753 & Alan Vaughan Lowe & Robin Rolf Churchill, *The International Tribunal for the Law of the Sea: Survey for 2001*, 12 INT'L J. MARINE & COASTAL L. 463, 474 (2002).

354. *See, e.g.*, UNCLOS, *supra* note 14, art. 110.

355. *Id.*

356. MCDUGAL & BURKE, *supra* note 8, at 1084-85.

357. CHURCHILL & LOWE, LAW OF THE SEA, *supra* note 261, at 172.

358. *Naim Molvan v. Attorney General of Palestine (The "Asya")*, 81 LLOYD'S LIST L. REP. 277 (1948).

359. *Id.*

where sovereign rights are being exercised by that State.³⁶⁰ This refers to the right of hot pursuit.³⁶¹ In relation to flag State jurisdiction, this right operates as an exception only and in extreme circumstances.³⁶² In all the above mentioned exceptions, observance of the principle of exclusivity of flag State jurisdiction must not unduly suffer.³⁶³ Therefore, the exercise of another State's exceptional right must first be clearly proved to be lawful before any assertion of jurisdiction over a non-nationality ship may occur.

Jurisdiction to interdict a vessel without flag State permission depends upon its location.³⁶⁴ For example, in *United States v. Alexander Best*,³⁶⁵ where the U.S. Coast Guard seized Brazilian-flagged *Cordeiro de Deus* and arrested Alexander Best in the contiguous zone of the U.S. out of a reasonable suspicion of possible infringement of immigration laws, the U.S. Court of Appeals ruled that the seizure, arrest, and prosecution of Best was unlawful because he was intercepted and seized while on a foreign vessel on the high seas without the consent of the country under whose flag he was sailing.³⁶⁶ Congruently, maritime enforcement thus requires flag State action or consent if the vessel is not in a location or engaged in an activity that is subject to coastal State enforcement jurisdiction.³⁶⁷

Generally, the criminal jurisdiction of a vessel is the flag State.³⁶⁸ Moreover, another State may not take any steps to arrest a person on board a foreign ship or to conduct any investigation in connection with any crime committed before the ship entered that coastal State's territorial sea.³⁶⁹ Finally, in cases of collision, no penal or disciplinary proceedings may be instituted against a person who has committed an offense except before the

360. UNCLOS, *supra* note 14, art. 111.

361. This doctrine, discussed further later on in this Note, provides for the constructive extension of a State's jurisdiction against suspect foreign vessels that flee from law enforcement action within a jurisdictional zone. Robert C. Reuland, *The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention*, 33 VAND. J. INT'L L. 557, 557 (1993) [hereinafter Reuland, *Customary Right of Hot Pursuit*].

362. Reuland, *Interference with Non-National Ship*, *supra* note 37, at 1161.

363. UNCLOS, *supra* note 14, art. 92 (1).

364. GUILFOYLE, *supra* note 8, at 10.

365. *United States v. Alexander Best*, 172 F. Supp.2d 656, 665 (D.V.I. 2001).

366. *Id.*

367. GUILFOYLE, *supra* note 8, at 19.

368. UNCLOS, *supra* note 8, art. 27 (1).

369. *Id.* art. 27 (5).

judicial or administrative authorities either of the flag State or of the State of which such person is a national.³⁷⁰

According to codified maritime law,³⁷¹ a State may regulate the conduct of vessels of any nationality while they are within its territorial waters.³⁷² In matters relating to the control of criminal offenses, it is imperative that the vessel's flag state be in a position to apply its criminal authority aboard its vessels.³⁷³ The flag state must exercise its jurisdiction and control in a manner that does not constitute an abuse of rights.³⁷⁴

The case of *M/V Saiga* decided by the ITLOS illustrates this principle. In that case, it was held that "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag state. The nationalities of the persons are not relevant."³⁷⁵ Consistent with the principle of the freedom of the seas,³⁷⁶ absent any territorial sovereignty on the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.³⁷⁷

In the past, the flag State or the State of the injured party may exercise jurisdiction over the captain of the offending ship.³⁷⁸ However, at the advent of the creation of the UNCLOS, this rule has since been overturned which now provides that jurisdiction over incidents occurring on the high seas exclusively rests on either the flag State of the vessel or the nation State of the alleged offender.³⁷⁹ Further, pursuant to the UNCLOS, the application of the rule has been extended to incidents taking place in the E.E.Z.³⁸⁰

370. *Id.* art. 97.

371. Convention on the Territorial Sea and the Contiguous Zone, *adopted* Apr. 29, 1958, 516 U.N.T.S. 205 (entered into force Sep. 10, 1964).

372. *Id.* art. 17.

373. Myres S. McDougal, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 AM. J. INT'L L. 25, 26-27 (1960).

374. UNCLOS, *supra* note 14, art. 300.

375. *M/V Saiga* (No. 2) (St. Vincent v. Guinea), Case No. 2, Order of July 1, 1999, 2 ITLOS Rep., ¶ 106.

376. UNCLOS, *supra* note 14, art. 87.

377. *The Marianna Flora*, 24 U.S. 1, 42 (1826) & *Le Louis*, (1817) 165 Eng. Rep. 1464, 1475 (High Ct. of Adm.) (U.K.).

378. *Lotus*, 1927 P.C.I.J. at 23 & 30.

379. Convention on the High Seas, *supra* note 36, art. 11 (1) & UNCLOS, *supra* note 14, art. 97 (1).

380. UNCLOS, *supra* note 14, art. 58.

Thus, under Article 97, a conflict of law rule,³⁸¹ “in the event of a collision or any other accident of navigation involving the penal responsibility of a crewmember, only the flag State or the State of which the responsible person is a national can institute proceedings.”³⁸²

In sum, flag State jurisdiction acts as an assurance and a safeguard for vessels legally allowed to sail under the flag of one State that their voyage will not be unduly interfered. Yet, as will be discussed, the exclusive flag State jurisdiction, in some instances, may be derogated.

E. Exceptional Enforcement Regimes Under the UNCLOS

The preparatory conferences leading to the creation of the UNCLOS convey a sense of urgency — a perturbed astuteness of a foreboding crisis, of what former United Nations Ambassador Arvid Pardo warned as the “breakdown of law and order on the oceans.”³⁸³ The UNCLOS was framed to address and restore the rule of law over the sea, which, at that time, was slowly being eroded by novel and extralegal exercise of jurisdiction.³⁸⁴ The UNCLOS then introduced and clarified maritime interdiction principles to counter the challenges of criminality in the high seas.³⁸⁵ Moreover, the UNCLOS, as in former discussions, attempted to balance the inclusive and exclusive interests of States with respect to enforcement jurisdiction.³⁸⁶ Further, the UNCLOS provides for a strong legal bases for establishing maritime jurisdiction yet, the provisions on substantial criminal law of the sea remain inadequate, if not entirely absent.³⁸⁷ This portion, then, focuses on the existing maritime interdiction principles under the UNCLOS.

1. Right of Visit

Generally, the rule on the exclusivity of flag State jurisdiction must not be interfered with except in instances provided for by the UNCLOS.³⁸⁸ These instances serve as exceptions to the flag State jurisdiction that coastal States

381. ROBIN GEISS & ANNA PETRIG, *PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN* 151 (2011).

382. Anne Bardin, *Coastal State's Jurisdiction over Foreign Vessels*, 14 *PACE INT'L L. REV.* 27, 45-46 (2002).

383. 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, 131 (2005).

384. *Id.* at 132.

385. *Id.*

386. GUILFOYLE, *supra* note 8, at 24.

387. *Id.* at 23.

388. *See, e.g.*, UNCLOS, *supra* note 14, arts. 110-11.

may undertake. One of these exceptions is the right of visit. The right of coastal State to visit a foreign vessel provides that:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with [A]rticles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
 - (a) the ship is engaged in piracy;
 - (b) the ship is engaged in the slave trade;
 - (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under [A]rticle 109;
 - (d) the ship is without nationality; or
 - (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
4. These provisions apply *mutatis mutandis* to military aircraft.
5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.³⁸⁹

Under Article 110 of the UNCLOS, there are four elements for a coastal State to exercise the right of visit:

- (1) that the foreign ship is suspected of engaging in piracy, slave trading, unauthorized broadcasting, statelessness, or misrepresentation of its flag;
- (2) that the coastal State must have a reasonable ground to suspect that the foreign ship is engaged in the aforementioned activities;
- (3) that the foreign ship about to be visited is not a vessel that enjoys immunity under the UNCLOS; and
- (4) that a warship or a duly authorized ship or aircraft marked and identifiable as part of government service undertakes the visit.³⁹⁰

³⁸⁹UNCLOS, *supra* note 14, art. 110.

Moreover, the State exercising the right of visit may expand the grounds for proper and valid visit, provided that such additional grounds were established in a treaty.³⁹¹ As such, States may establish, via a treaty, certain offenses that are subject to the right of visit. This is one of the few jurisdictional provisions under the UNCLOS that promotes for cooperative measures among States with respect to a power relating to the interdiction of vessel. The right of visit attaches even in the absence of consent from the flag State.³⁹² As held in the case of *United States v. Green*,³⁹³ obtaining prior consent from the flag State does not offend the rule on boarding and valid interference of a foreign vessel.³⁹⁴

There are, however, instances under the UNCLOS where cooperation is promoted but the right to visit is not conferred to a particular State. For instance, Article 108 of the UNCLOS mandates States to cooperate in the suppression of illicit traffic of narcotic drugs and psychotropic substances.³⁹⁵ All of what is required under the UNCLOS is for the coastal State to request assistance from the flag State.³⁹⁶ Given the limited powers granted by the UNCLOS and the generic mandate of cooperation among the States, the right to visit is one of those interdiction policies that present a promise for greater maintenance of peace and order in the oceans yet a dangerous premise if interpreted liberally, and a scant and inoperative exercise if construed narrowly.

2. Right of Hot Pursuit

The doctrine of hot pursuit provides for the constructive extension of jurisdiction against suspect foreign vessels that flee from law enforcement action within a jurisdictional zone.³⁹⁷

Under Article 111 of the UNCLOS, for the right of hot pursuit to be valid, the following requisites must be present: (1) a coastal State has good reason to believe that the ship has violated the laws and regulations of that State;³⁹⁸ (2) that the hot pursuit be commenced when the foreign vessel is within the internal waters, the archipelagic waters, the territorial sea, or the

390. The standard for the element of "reasonable ground to believe" will be discussed in great detail under the right of hot pursuit. *Id.*

391. *Id.* art. 110, ¶ 1.

392. *United States v. Green*, 671 F.2d 46, 51 (1st Cir. 1982).

393. *Id.*

394. *Id.*

395. UNCLOS, *supra* note 14, art. 108.

396. *Id.* art. 108, ¶ 2.

397. Reuland, *Customary Right of Hot Pursuit*, *supra* note 361, at 557.

398. UNCLOS, *supra* note 14, art. 111, ¶ 1.

contiguous zone of the pursuing State;³⁹⁹ and (3) the pursuit must not be interrupted.⁴⁰⁰ Moreover, procedural safeguards warrant that the pursuit should commence only “after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship,”⁴⁰¹ and the pursuit must also be conducted by warships or military aircraft,⁴⁰² or “other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”⁴⁰³ The right of hot pursuit deviates from the exclusive flag State jurisdiction by allowing military and governmental law enforcement agents to pursue and arrest foreign vessels on the high seas that are suspected of violating maritime laws within the jurisdictional waters of the coastal State.⁴⁰⁴

The right of hot pursuit has been recognized as an exceptional instance where a foreign vessel may be arrested and seized by another State.⁴⁰⁵ Therefore, the assertion of another State’s jurisdiction, in the lawful exercise of the right of hot pursuit, falls within the ambit of exceptional cases to the exclusive flag State jurisdiction.⁴⁰⁶

The right of hot pursuit in a State’s territorial sea attaches “when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State.”⁴⁰⁷ Generally, when the foreign ship is within a contiguous zone or E.E.Z., the pursuit may be undertaken if there has been a violation of the rights established for the protection of that zone.⁴⁰⁸ The requirement of having a “good reason” to suspect an infringement prevents a State from pursuing a ship on the bare suggestion that she has violated some local law or regulation,⁴⁰⁹ and is not limited to the availability of hot pursuit to circumstances in which the coastal

399. *Id.*

400. *Id.*

401. *Id.* art. III, ¶ 4.

402. *Id.* art. III, ¶ 5.

403. *Id.*

404. CHURCHILL & LOWE, *LAW OF THE SEA*, *supra* note 260, at 151; O’CONNELL, *supra* note 8, at 1077; & NICHOLAS M. POULANTZAS, *THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW* 39 (1969).

405. *United States v. F/V Taiyo Maru*, 395 F. Supp. 413, 417-18 (D. Maine 1975) (citing *The Newton Bay*, 36 F.2d 729, 731-32 (2d Cir. 1929) (U.S.); *Gillam v. United States*, 27 F.2d 296, 299-300 (4th Cir. 1928); *The Resolution*, 30 F.2d 534, 537 (E.D. La. 1929) (U.S.); *The Pescawha*, 45 F.2d 221, 222 (D. Ore. 1928) (U.S.); & *The Vincennes*, 20 F.2d 164, 172-73 (E.D.S.C. 1927) (U.S.)).

406. MCDUGAL & BURKE, *supra* note 8, at 894 & Reuland, *supra* note 37, at 1161.

407. UNCLOS, *supra* note 14, art. III, ¶ 1.

408. *Id.*

409. Reuland, *Customary Right of Hot Pursuit*, *supra* note 361, at 569.

State has actual knowledge of an infringement.⁴¹⁰ The appropriate standard, therefore, lies in the nexus of mere suspicion and actual knowledge of the commission of the offense.⁴¹¹ This means that the belief of the competent authorities must be founded on strong indications and not on sheer suspicions and suppositions.⁴¹² The appropriateness of the exercise of the hot pursuit based on reasonable suspicion standards depends on the factual milieu from which the pursuit arises.⁴¹³

However, in the case of *United States v. F/V Taiyo Maru*,⁴¹⁴ where a Japanese fishing vessel was caught on the high seas after hot pursuit by U.S. vessels, which began in the contiguous zone, the U.S. District Court of Maine opined that while hot pursuit commencing from the contiguous zone under the Geneva Convention pertains to those rights established for the protection of the purposes laid down for the contiguous zone, the Geneva Convention does not prohibit the establishment of the right of hot pursuit in the contiguous zones for other purposes such as those set out in the U.S. Contiguous Fisheries Zone Act.⁴¹⁵ The Court further stated that there was no impediment under the Geneva Convention which prevented the actions of the U.S., and that the Convention, in laying down the purposes for the contiguous zone, did not curtail the enforcement rights of the U.S., especially if there is a law specially providing for the protection of the contiguous zone other than those in the treaty, including powers for maritime enforcement.⁴¹⁶

The pronouncement in *F/V Taiyo Maru* is reminiscent of the *dictum* in the *Lotus* case where the P.C.I.J. opined that “international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad and in which it cannot rely on some permissive rule of international law.”⁴¹⁷ The Court went on to say that “in this respect, States [have] a wide measure of discretion limited only in certain instances by prohibitive rules.”⁴¹⁸ This rationale in *Lotus* — *permitted as long as not expressly prohibited* logic — spells out the primary conflict in interpretation of permissive rules under the UNCLOS by both coastal and maritime States. Yet, by virtue of Article 97 of the UNCLOS,

410. *Id.*

411. O’CONNELL, *supra* note 8, at 1088 & MCDUGAL & BURKE, *supra* note 8, at 906-08.

412. POULANTZAS, *supra* 404, at 156-57.

413. Reuland, *Customary Right of Hot Pursuit*, *supra* note 361, at 569.

414. *F/V Taiyo Maru*, 395 F. Supp.

415. *Id.* at 419. (citing Convention on the High Seas, *supra* note 36, art. 23).

416. *Id.* at 420.

417. *Lotus*, 1927 P.C.I.J. at 19.

418. *Id.*

the law of the sea has expressly abandoned such permissive and liberal exercise of jurisdiction.⁴¹⁹ Hence, a coastal State may not take any steps to arrest a person on board a foreign ship or to conduct any investigation in connection with any crime committed before the ship entered that coastal state's territorial sea.⁴²⁰ Otherwise, the criminal jurisdiction of a vessel lies in the flag State.⁴²¹

As succinctly stated by the ITLOS in the *M/V Saiga (No. 2)*,⁴²² States may not seek to enforce laws that are not specifically related to coastal state rights in the E.E.Z., an area whose rights of States for its protection are laid down in the UNCLOS.⁴²³ In that case, Guinea customs patrol exercised its right of hot pursuit motivated by a violation of its customs laws in the contiguous zone and its "customs radius," then arrested and subsequently detained the *M/V Saiga*, an oil tanker sailing under the flag of Saint Vincent and the Grenadines, and its crew when the vessel entered the E.E.Z. of Guinea to supply fuel to three fishing vessels.⁴²⁴ Saint Vincent and the Grenadines argued that Guinea was not entitled to extend its customs laws — by virtue of the Guinean Customs Code providing for a "customs radius" of 250 kilometers from its coasts — to the E.E.Z. and that the Guinean authorities' action violated the right to exercise the freedom of navigation as the supply of fuel oil fell within "other internationally lawful uses of the sea related to the freedom of navigation."⁴²⁵ The Tribunal held that Guinean customs laws did not find application to parts of the E.E.Z. and was contrary to UNCLOS.⁴²⁶

The cases cited above are crucial in determining the standards laid out in the UNCLOS for an exceptional interdiction measure afforded to coastal States. In *Cook* and *M/V Saiga*, both the U.S. District Court and the ITLOS took a restrictive stance in interpreting the provisions on the exceptional exercise of enforcement jurisdiction. In both cases, the tribunals made reference to the need for an express provision set out in a treaty before any enforcement jurisdiction over maritime zones can attach.⁴²⁷

419. American Society of International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 439-40 (1935).

420. UNCLOS, *supra* note 14, art. 27 (5).

421. *Id.* arts. 27 (1) & 92.

422. *M/V Saiga (No. 2)*, 2 ITLOS Rep., ¶ 117.

423. *Id.*

424. *Id.* ¶¶ 116-17, 124-25, & 142.

425. *Id.* ¶¶ 119 & 123.

426. *Id.* ¶ 136.

427. *M/V Saiga (No. 2)*, 2 ITLOS Rep., ¶ 117 & *Cook v. United States*, 288 U.S. 102 (1933).

F. Out of Sight, Out of Mind: Analyzing the Legal Justifications of “Push Back Policies” Under the Law of the Sea

In all of its preceding Sections, Part III outlined all the rules, scope, and standards of all the relevant provisions of the UNCLOS in relation to navigational rights and maritime zones of both coastal States and foreign-flagged vessels. In this particular Section, the conceptual framework on maritime jurisdiction and its corresponding exceptions will be applied to determine the legality of the actions employed by coastal States in relation to all the interdiction practices laid down in Part II.

1. On Binding Effect of the UNCLOS Provisions

In examining the legality of the interception measures of coastal States in the high seas, it is important to note and identify conventions and norms in international law that bind each concerned State. Countries previously identified as involved in the interdiction practices⁴²⁸ such as Albania, Australia, Gambia, India, Indonesia, Italy, Malta, Mauritania, Norway, Senegal, Singapore, Spain, and Sri Lanka are all parties to the UNCLOS.⁴²⁹ As such, these States are bound to observe and perform their obligations under such treaty in good faith.⁴³⁰ Libya has signed the UNCLOS but has not ratified it.⁴³¹ This creates a minimum obligation on the part of the signing State not to defeat the purpose and object of the treaty.⁴³² The U.S., however, is neither a party nor a signatory to the UNCLOS.⁴³³ It remains a party to the four 1958 Geneva Conventions on the Law of the Sea.⁴³⁴ Nonetheless, the U.S. has clarified its intention to respect rules of the

428. Refer to Part II of this Note.

429. UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, ch. XXI, § 6, U.N. Doc. ST/Leg/Ser.E/26, U.N. Sales No. E.09.V.3 (2009) [hereinafter MULTILATERAL TREATIES]. See also Office of the Legal Affairs for the Division for Ocean Affairs and the Law of the Sea, Table recapitulating the status of the Convention and of the related Agreements, as at 10 October 2014, available at http://www.un.org/depts/los/reference_files/status2010.pdf (last accessed Aug. 31, 2016).

430. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 115 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

431. See Office of the Legal Affairs for the Division for Ocean Affairs and the Law of the Sea, *supra* note 429.

432. VCLT, *supra* note 430, art. 18.

433. Office of the Legal Affairs for the Division for Ocean Affairs and the Law of the Sea, *supra* note 429.

434. See MULTILATERAL TREATIES, *supra* note 429.

UNCLOS on navigation matters⁴³⁵ and baseline provisions.⁴³⁶ Moreover, with 166 State Parties to the UNCLOS,⁴³⁷ the provisions relating to navigation has attained customary status.⁴³⁸ As such, the provisions of the UNCLOS that have crystallized into custom⁴³⁹ exist independently as sources of obligation for States and a derogation of which entails State responsibility.⁴⁴⁰

2. Varying Zones of Legality

Under the Law of the Sea, the location of the vessel is crucial in determining the rights and duties of coastal States, the flag States, and the subject vessel. Many of the interdiction or “push back” practices are carried out in the E.E.Z. or in the high seas.⁴⁴¹ Some occur in the straits used for international navigation such as the Strait of Gibraltar.⁴⁴²

In its territorial sea, the jurisdiction of the coastal State is plenary.⁴⁴³ This plenary jurisdiction, as a logical consequence of sovereignty over the territorial sea, allows coastal States to enact laws to intercept and arrest vessels and forcibly return them, and to enforce these laws in their territorial waters.⁴⁴⁴ The U.S., Australia, and E.U. Member States may use this plenary jurisdiction to justify its actions. Since freedom of the seas does not apply to the territorial sea,⁴⁴⁵ foreign-flagged vessels are only assured of their non-suspendable right to innocent passage through the territorial sea.⁴⁴⁶ Any conduct that is prejudicial to the peace, good order, or security of the coastal State is deemed not innocent.⁴⁴⁷ The UNCLOS has also specified that the

435. Ryan P. Kelley, *UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 MINN. L. REV. 2285, 2297 (2011) (citing *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2d 1358, 1372 (S.D. Fla. 1998)).

436. *United States v. Alaska*, 503 U.S. 569, 588 (1992).

437. Office of the Legal Affairs for the Division for Ocean Affairs and the Law of the Sea, *supra* note 429.

438. *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1082 (9th Cir. 2006) (U.S.).

439. *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 269 (Nov. 20).

440. JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 28 (2012).

441. Refer to Part II of this Note.

442. Refer to Part II-C of this Note.

443. GUILFOYLE, *supra* note 8, at 201; CHURCHILL & LOWE, *LAW OF THE SEA*, *supra* note 261, at 63; O'CONNELL, *supra* note 8, at 853-85; & MCDUGAL & BURKE, *supra* note 8, at 110. See UNCLOS, *supra* note 14, art. 27.

444. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 418.

445. UNCLOS, *supra* note 14, arts. 86-87.

446. *Id.* art. 17.

447. *Id.* art. 19, ¶ 1.

unloading of persons in violation of the State's immigration law is considered non-innocent.⁴⁴⁸ Thus, the American, Australian, and European policies authorizing their officials "to take necessary actions" enjoy strong legal support when they are enforced in their corresponding territorial waters.

As examined in Part II, many interdiction practices do not occur in the territorial sea since governmental vessels set out to intercept vessels carrying irregular migrants even before they could enter its territorial sea. The justification for this practice may be found in the regime of control provided for in the contiguous zone. In the contiguous zone, coastal States are allowed to exercise control necessary to prevent or punish infringement of its customs, fiscal, immigration, or sanitary laws.⁴⁴⁹ The purposes enumerated are exhaustive⁴⁵⁰ and outside of these purposes, vessels enjoy the freedom of navigation.⁴⁵¹ The language of Article 33 relating to the prevention of infringement of the coastal State's immigration law lends legitimacy to the practice of States not to wait until a vessel is in their territorial waters for them to impose their laws, intercept the vessel, and force them to alter their course. In fact, the Government of Australia cited this right to justify its act of intercepting vessels carrying 157 migrants in its contiguous zone.⁴⁵² However, unlike in the territorial sea, the contiguous zone is not subject to the full sovereignty of the State.⁴⁵³ Rather, the coastal State merely exercises control.⁴⁵⁴

As discussed above,⁴⁵⁵ there are two competing schools of thought in the interpretation. On the one hand, the exercise of control is limited only to measures such as inspections and warnings which cannot include arrest or forcible taking into port;⁴⁵⁶ and on the other hand, preventive measures include a wide array of responses including interdiction and forcible removal of the vessel from the contiguous zone.⁴⁵⁷ The former adheres to the purpose of the contiguous zone as merely a buffer zone and such should not be subject to the full sovereignty of the State via an enforcement measure.⁴⁵⁸

448. *Id.* art. 19, ¶ 2 (g).

449. *Id.* art. 33 ¶ 1.

450. Fitzmaurice, *supra* note 275, at 119-20.

451. KLEIN, MARITIME SECURITY, *supra* note 8, at 87.

452. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 418.

453. SHAW, *supra* note 228, at 576.

454. *Id.*

455. Refer to Part III-B-2 of this Note.

456. SHEARER, *supra* note 36, at 330.

457. DONALD R. ROTHWELL & TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 80 (2010).

458. SHAW, *supra* note 228, at 576.

The latter, however, adheres to the ordinary interpretation of language of the UNCLOS.

At this point, it is this Note's submission that the legality of the interdiction practices dubbed as "push back policies" by States is at its greatest when committed within its territorial sea. The justification for interdiction of vessels and their forced return to the State of embarkation flows from the legal foundations of the UNCLOS which enable States to exercise sovereignty over such area. As such practices move outward to the contiguous zone, the legality of these acts is much less precise than they were in the territorial sea. Relevant to intercepting vessels carrying illegal migrants, the regime of control in the contiguous zone empowers the coastal State to employ measures necessary to prevent an infringement of its immigration laws. While the interpretation of this provision is still unsettled under international law, coastal States may still rely on the text of the UNCLOS in conjunction with the exceptional exercise of the right of hot pursuit commenced in this zone. Hence, the interdiction practices of States in the contiguous zone may be considered as *ostensibly* legal in light of the lack of a binding rule in interpreting the provisions relating to the its purposes.

3. Jurisdictional Mess

Since immigration laws, which are the primary basis for interdiction of illegal migrants at sea, have no application in the E.E.Z., the waters beyond the contiguous zone are under the legal regime of the high seas.⁴⁵⁹ Therefore, the actions taken by coastal States outside of their contiguous zone must be tested with the standards set out in the high seas. It is well-settled that the high seas is not subject to the prescriptive, adjudicative, and enforcement jurisdiction of any State.⁴⁶⁰ Moreover, vessels in the high seas are only subject to exclusive jurisdiction of the flag State.⁴⁶¹ The only exceptions under the UNCLOS are the right of hot pursuit and right of visit which are discussed thoroughly in the previous Sections. Aware of this limitation, bilateral arrangements secured by the U.S. with Haiti⁴⁶² and Cuba;⁴⁶³ and the cooperation agreements by Italy with Albania⁴⁶⁴ and Libya,⁴⁶⁵ are aimed at legalizing the presence of the governmental ships in the high seas and the interception strategies against foreign-flagged vessels.

459. UNCLOS, *supra* note 14, arts. 56 & 89.

460. *The Freedom of the High Seas*, *supra* note 305, at 1727.

461. UNCLOS, *supra* note 14, art. 92.

462. Migrant Interdiction Agreement, *supra* note 75.

463. Migration Accords, *supra* note 99.

464. Italy-Albania Protocol, *supra* note 154.

465. Benghazi Treaty, *supra* note 163.

At the other end of the spectrum, Australian practices of interception lack consent from flag States.⁴⁶⁶ Indonesia has consistently criticized Australia's Operation Sovereign Borders and thus, has continued to withhold its consent.⁴⁶⁷ Operations intercepting Indian vessels also do not enjoy any legitimacy from any prior arrangement with the Government of India.⁴⁶⁸ Hence, the Australian practice of intercepting foreign-flagged vessels particularly from Indonesia and India has no semblance of legality under the UNCLOS.

The only way to establish a jurisdictional nexus over the person or the vessel outside the exclusive flag State jurisdiction is through customary bases of criminal jurisdiction.⁴⁶⁹ Two bases of jurisdiction — namely, protective principle and objective territoriality principle — may be invoked by States, such as Australia. Under the protective principle, a State may establish extraterritorial jurisdiction over a person for a specific conduct that threatens national security⁴⁷⁰ such as espionage,⁴⁷¹ rebellion, or selling of State secrets.⁴⁷² This principle of jurisdiction, however, is contentious as it is prone to abuse by States, which enjoy discretion in determining those prejudicial to their interests.⁴⁷³ However, the securitization rhetoric surrounding illegal migration presents dubious grounds that a State's security is actually prejudiced.⁴⁷⁴ In fact, the Eastern District Court of New York in *Haitian Centers Council, Inc.*⁴⁷⁵ opined that irregular migrants are neither criminals nor security risks.⁴⁷⁶ Clearly, mere inchoate supposition that irregular migrants present substantial risk to security is not enough to trigger protective jurisdiction.

As to the second relevant base of jurisdiction, under the objective territoriality principle, a State's extraterritorial jurisdiction is established when

466. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 423 (citing Bridie Jabour, Indonesian military chief rejects asylum seeker boat turnback policy, available at <http://www.theguardian.com/world/2014/jan/10/indonesian-military-chief-rejects-boat-turnback-policy> (last accessed Aug. 31, 2016)).

467. *Id.*

468. *See CPCF*, Case No. S169/2014.

469. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 423.

470. *Eichmann*, 36 I.L.R. at 304.

471. *See In Re: Urios*, 1 A.D. 107.

472. CRYER, ET AL., *supra* note 231, at 50.

473. *Rocha v. United States*, 288 F.2d 545 (9th Cir. 1961); *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968); & *United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960).

474. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 421.

475. *Haitian Centers*, 823 F. Supp. at 1045.

476. *Id.*

any material element of an offense or any of its significant effects occur within the territory of a State.⁴⁷⁷ Correlatively, a State may validly exercise jurisdiction over a violation that has produced effects within its territory, even if the actual violation was committed outside the waters under the State's jurisdiction.⁴⁷⁸ However, the objective territoriality principle has been expressly abandoned in the UNCLOS.⁴⁷⁹ Hence, Australia, having no valid jurisdictional anchor for its exercise of enforcement measures, should be declared in violation of the principle of exclusive flag State jurisdiction and the freedom of navigation in the high seas.

Further, the U.S. practice of interdicting vessels containing Haitian migrants shares the same dubious legal ground with Australia. In 1994, President Aristide terminated its bilateral agreement with the U.S., thus ending a decade-long cooperative interdiction of Haitian vessels.⁴⁸⁰ Yet, the U.S. still continued to intercept Haitian vessels in the high seas.⁴⁸¹ Moreover, rather than ceasing its operations in the high seas, the U.S. made arrangements with other Caribbean States which empower them to interdict vessels in the territorial waters of these countries as States of transit.⁴⁸² Though the interception may not be done in the high seas, the proliferation of these bilateral arrangements that authorize the boarding State to enforce its domestic laws across various areas in the seas, signals a systematic exercise of sovereignty over areas not originally subject to its jurisdiction.

With respect to those States who have established bilateral agreements to mutually participate in the interception of vessels in the high seas, the legal complication occurs when the coastal State attempts to enforce its own domestic laws in the high seas. It is important to note that though bilateral agreements between the State of embarkation and the receiving States exist, the rule that the high seas cannot be subjected to any State's sovereignty still stands. In light of this consideration, the interception practices of receiving States — the U.S., Italy, Spain, and others — against foreign vessels carrying

477. *Lotus*, 1927 P.C.I.J. at 9; & BASSIOUNI, *INTERNATIONAL CRIMINAL LAW*, *supra* note 248, at 100.

478. CRYER, ET AL., *supra* note 231, at 46.

479. American Society of International Law, *supra* note 251.

480. Palmer, *supra* note 73, at 1577.

481. Stephen H. Legomsky, *The U.S.A and the Caribbean Interdiction Program*, 18 INT'L J. REFUGEE L. 677, 682 (2006).

482. Papastavridis, *Interception of Human Beings on the High Seas*, *supra* note 153, at 180 (citing Memorandum of Understanding for the Establishment within the Jamaican Territorial Sea and Internal Waters of a Facility to Process Nationals of Haiti Seeking Refuge within or Entry to the United States of America, U.S.-Jam., art. 7, Hein's No. KAV 3901 (June 2, 1994)).

irregular migrants often draw their authority from municipal laws.⁴⁸³ While the receiving States are entitled to their prescriptive jurisdiction, they will be only entitled to enforcement jurisdiction by virtue of a permissive rule in international law.⁴⁸⁴ There is nothing in the UNCLOS that authorizes coastal States to apply their immigration laws in the high seas, more so in the context of irregular migration. In fact, the UNCLOS is clear to prohibit any imposition of sovereignty in the high seas.⁴⁸⁵

In respect of irregular movement of persons by sea, there is only one instance in the UNCLOS that remotely addresses illegal movement of persons — slave trading. A ship reasonably believed to be engaged in slave trading may be the subject of the right of visit.⁴⁸⁶ However, slave trading relates to acts of capture, disposal, or transport of a person with the intent to reduce him or her to slavery.⁴⁸⁷ The crucial element in slave trading is the intent to reduce a person to slavery where ownership is exerted over him or her.⁴⁸⁸ The “violation” that the interdiction practices of receiving States has sought to prevent is far from slave trading. Upon examination of the domestic laws of States, mere lack of legal documents of a person is enough to trigger their authority to intercept vessels carrying undocumented persons.⁴⁸⁹ Clearly then, this right of visit over vessels suspected of slave trading cannot be used to justify the enforcement of municipal laws in the high seas.

Another rule used by coastal States in intercepting suspected illegal entry vessels in the high seas comes from the special rule on interdiction in the Migrant Smuggling Protocol.⁴⁹⁰ Under this Protocol, a State Party, having a good reason to believe that a vessel is engaged in migrant smuggling, must notify and obtain authorization of the flag State in order to board, search, and take appropriate measures as authorized by the flag State.⁴⁹¹ Applying this provision, the contemporary practices of interception by coastal States

483. 3 C.F.R. § 2; 57 Fed. Reg. 23133; Border Protection Act, *supra* note 128; & Operation Sovereign Borders, *supra* note 137.

484. *Lotus*, 1927 P.C.I.J. at 18–19.

485. UNCLOS, *supra* note 14, art. 89.

486. *Id.* art. 110, ¶ 1 (d).

487. Slavery Convention, *supra* note 22, art. 1, ¶ 2.

488. *Id.* art. 1, ¶ 1.

489. See 3 C.F.R. § 2; 57 Fed. Reg. 23133; Border Protection Act, *supra* note 128; & Operation Sovereign Borders, *supra* note 137.

490. It is important to note that all States mentioned in this Note namely, Albania, Australia, Canada, France, Gambia, India, Indonesia, Italy, Malta, Mauritania, Norway, Senegal, Singapore, Spain, Sri Lanka, and the U.S. have ratified the Migrant Smuggling Protocol. See MULTILATERAL TREATIES, *supra* note 429, ch. XVIII, § 12 (b).

491. Migrant Smuggling Protocol, *supra* note 24, art. 8 (2).

violate this right of visit under the Migrant Smuggling in two ways. First, the right of visit only entails the right to board and search the subject vessel.⁴⁹² There is nothing in the said Protocol that empowers the boarding State to apply the full force of its domestic law. This is also analogous to the right of visit in the UNCLOS where boarding and inspection are only allowed.⁴⁹³ Hence, the wide array of enforcement mechanisms that the coastal State employs — such as the act of towing or escorting the vessel up to the territorial sea of another State, the act of forcibly altering the subject vessel's course in the high seas, and the forcible relocation of vessels to off-shore processing centers — all point to a transgression of the right of visit under the Migrant Smuggling Protocol and in the UNCLOS. Excess of such jurisdiction would entail responsibility on the part of the State.⁴⁹⁴ Second, the grounds for good reason to believe in cases of migrant smuggling are not being complied with by receiving States. As discussed, the good reason to believe standards must engender a well-founded belief that the offense has in fact been committed.⁴⁹⁵ It should not be based on a bare suggestion that the vessel has violated some local law.⁴⁹⁶ It requires that the suspicion must be based on concrete intelligence.⁴⁹⁷ In interception practices, the “reasonable grounds to believe” standard is barely met by the coastal State.⁴⁹⁸ For instance, Cuban officials have criticized the lack of correspondence by U.S. Coast Guard officials during interdiction measures.⁴⁹⁹ In Australia, there is no pre-existing arrangement between Indonesia that would justify its Coast Guard's suspicions over vessels coming from Indonesia.⁵⁰⁰ Further, Frontex's operations with E.U. Member-States are purportedly based on private risk-assessments that are kept secret from the public.⁵⁰¹ In these instances, the safeguard on good reasons to believe cannot be said to have been complied with.

In sum, even assuming that a permissive rule in international law exists, the substantive and procedural safeguards of the right of visit, as provided in the Migrant Smuggling Protocol and in the UNCLOS relating to the illegal movement of persons, remain absent or lacking in State practice. Being exceptions to the freedom of the high seas, these practices must, in *strictissimi*

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

493. UNCLOS, *supra* note 14, art. 110.

494. Migrant Smuggling Protocol, *supra* note 24, art. 8.

495. *United States v. Pinto Mejia*, 720 F.2d 248, 260 (2d Cir. 1984).

496. Reuland, *supra* note 356, at 569.

497. Migrant Smuggling Protocol, *supra* note 24, art. 10 (1).

498. Brown, *supra* note 96, at 284.

499. *Id.*

500. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 423.

501. Nessel, *supra* note 167, at 656.

juris, pass the procedural and substantive standards set out in international law.

4. On Statelessness

While some of the boats subject to interception are foreign-flagged vessels from the State of embarkation, many irregular migrants — trafficked persons, smuggled migrants, and asylum-seekers alike — travel by sea on stateless vessels.⁵⁰² The rule on stateless vessels, however, is plagued with contentious interpretations. Once again, there are two competing views on the interdiction of stateless vessels in the high seas. The first school of thought adheres to the view that stateless vessels enjoy no protection under international law and are susceptible to the full measure of the boarding State's sovereignty.⁵⁰³ The stateless vessel therefore is treated as *quasi res nullius*.⁵⁰⁴ In the case of *Pamuk and others*,⁵⁰⁵ where an Italian warship intercepted a stateless vessel carrying illegal migrants, the Italian Court held that the interception, arrest, and detention of illegal immigrants by Italian officials were lawful since stateless vessels do not enjoy protection under international law.⁵⁰⁶ The U.S. and the United Kingdom also share the same view.⁵⁰⁷ The second school of thought insists that States must still possess a jurisdictional nexus to impose its sovereignty over the vessel.⁵⁰⁸ The rationale behind this jurisdictional requirement is that the right of visit over stateless vessels in the high seas is placed to ensure minimum public order in the oceans.⁵⁰⁹ The right of visit is also meant to verify the ship's nationality or in the absence of the former, to identify the nationality of those on

502. See generally Papastavridis, *Interception of Human Beings on the High Seas*, *supra* note 153 & Klein, *Assessing Push Back the Boats Policy*, *supra* note 136.

503. HERSCH LAUTERPACHT, *OPPENHEIM'S INTERNATIONAL LAW* 546 (1948).

504. Papastavridis, *Interception of Human Beings on the High Seas*, *supra* note 153, at 160.

505. Tribunale di Crotone, 27 settembre 2001, *Giur. it.* 2001, 1155 (It.).

506. *Id.* & PHILIPP WENDEL, *STATE RESPONSIBILITY FOR INTERFERENCES WITH THE FREEDOM OF NAVIGATION IN PUBLIC INTERNATIONAL LAW* 32 (2007).

507. *Naim Molvan*, 81 *LI L Rep.* at I & *United States v. Cortes*, 588 F.2d 106, 110 (1979).

508. CHURCHILL & LOWE, *LAW OF THE SEA*, *supra* note 261, at 214; GUILFOYLE, *supra* note 8, at 17; & Papastavridis, *Interception of Human Beings on the High Seas*, *supra* note 153, at 160.

509. Louis B. Sohn, *International Law of the Sea and Human Rights Issues*, in *THE LAW OF THE SEA: WHAT LIES AHEAD?* 58 (Thomas Clingan ed., 1988).

board.⁵¹⁰ Consequently, a better approach is to establish a jurisdictional nexus under the nationality principle.⁵¹¹

Out of the two competing schools of thought, this Note adheres to the latter theory as it is more consistent with the high seas regime in the UNCLOS. Moreover, any attempt to exercise non-flag State jurisdiction in the high seas would be considered as an exception to the general rule. Ultimately, however, there is no definitive stance on the matter of stateless vessels due to the lack of widespread acceptance and consistent practice in support of either views.

5. Creeping Jurisdiction

During his speech delivered before the United Nations General Assembly, Arvid Pardo called for the need to restore order in the oceans, as more and more practices of States slowly erode the sanctity of the common interests inscribed in the oceans.⁵¹² The UNCLOS became a response to the fear of unilateral extension of claims over areas of the seas that are not subject to the sovereignty of any State. It is of no surprise, then, that the UNCLOS provided for the delimitation of maritime zones, outlined sovereign rights over particular areas, and reserved the high seas for peaceful purposes. This unilateral extension of jurisdiction beyond the territorial seas is called creeping jurisdiction.⁵¹³ As succinctly stated by Richard Bilder, “coastal [S]tate extension of jurisdiction into the contiguous high sea, even if functionally limited, tends over time to expand to include more claims, until it becomes the functional equivalent of a territorial sea, in substance if not in name.”⁵¹⁴ Creeping jurisdiction not only covers extending maritime claims over other areas in the sea but also the “thickening of jurisdiction” as more areas in the seas are being subjected to the regulation and control of one State.⁵¹⁵ No less than the ITLOS, in *M/V Saiga*, held that the unilateral extension through regulation and control of a purpose outside those set by the UNCLOS in a particular area of the sea, is a violation of international law.⁵¹⁶ Clearly then, any regulation or control of the high seas outside of those allowed in the UNCLOS violates international law.

510. GUILFOYLE, *supra* note 8, at 18.

511. Estey, *supra* note 249, at 182.

512. Becker, *supra* note 383, at 131.

513. *Id.*

514. Northcutt Ely, *United States Seabed Minerals Policy*, 4 NAT. RESOURCES L. 597, 619 (1971).

515. Wayne S. Ball, *The Old Grey, Mare, National Enclosure of the Oceans*, 27 OCEAN DEV. INT'L L. 97, 103 (1995).

516. *M/V Saiga* (No. 2), 2 ITLOS Rep., ¶¶ 119 & 123.

Hence, when a coastal State solicits the consent of various flag States to vest in the former, the authority in advance to exercise control over the latter's vessels within a particular section of the high seas; that disaggregated compartmentalized parcel of sovereignty, when lodged collectively in one sovereign entity, wields a powerful force over the high seas, which is originally intended to be immaculate and subject to the jurisdiction of no one. In this sense, because of the authority conferred to them by various bilateral agreements, coastal States such as inter alia the U.S., Spain, and Italy exercise effective control over a particular area of the high seas where irregular migration usually happens. This maritime blockade must be considered as a systematic erosion, if not a clear violation, of the right to navigation and the freedom of the high seas.

IV. COMBATTING MODERN SLAVERY — INTERNATIONAL LEGAL STANDARDS ON HUMAN TRAFFICKING AND MIGRANT SMUGGLING

The formulation and adoption of the Human Trafficking and Migrant Smuggling Protocols represent a milestone in the collective efforts by the international community in combatting trafficking and smuggling as contemporary practices of slavery. It was an initiative seen as a step closer to the total elimination of all forms exploitation and forced labor. Trafficking is regarded as the face of modern slavery and is an “unspeakable and unforgivable crime against the most vulnerable members of the global society.”⁵¹⁷ The movement to end human trafficking dawned a renewed commitment to fight modern slavery, a problem that persists in many parts of the world despite it being outlawed centuries ago.⁵¹⁸ Yet, the efforts and measures employed to curb the growth of cross-border criminal movement of persons created a “legal slippery slope”⁵¹⁹ as to include other criminal businesses such as people smuggling,⁵²⁰ a phenomenon that is broader in scope and one that practically blurs the distinction between trafficked persons and economic migrants.⁵²¹ The result is an international community that wrestles with two distinct phenomena that are usually committed in similar means or modes. One mode of transportation is by sea and the sea serves as a

517. James Hathaway, *The Human Rights Quagmire of Human Trafficking*, 49 VA. J. INT'L L. 1, 7 (2008) (citing George W. Bush, President of the United States, Remarks at the White House Conference on Missing, Exploited, and Runaway Children (Oct. 2, 2002), available at <https://georgewbush-whitehouse.archives.gov/infocus/children/action.html> (last accessed Aug. 31, 2016)).

518. Hathaway, *supra* note 517, at 5.

519. *Id.*

520. *Id.*

521. *Id.*

gateway for the “commerce of human beings”⁵²² like commodities transported from one country to another. This “commerce” becomes a very profitable enterprise. For instance, human trafficking is considered the world’s second largest organized crime and generates about \$32 billion annually.⁵²³ Growing global demand for cheap labor has resulted into waves of migration as evidenced by almost 50 million irregular and undocumented migrants that have been transported to one continent to another for the past three decades.⁵²⁴ With success rates of at most 75%, the threat of human trafficking and migrant smuggling at sea is increasing at all fronts, easily becoming the most dominant mode of transporting trafficked and smuggled migrants.⁵²⁵

In this light, Part IV opens with a discussion on the historical legal roots of trafficking and smuggling. Further, to establish the distinction between the two transnational crimes namely, human trafficking and migrant smuggling, this Note seeks to discuss the main characteristics that make each crime separate and discrete from each other. Furthermore, this portion will thresh out the various responsibilities of the States under the respective Protocols, pointing out accordingly their similarities and differences.

A. Slave Trading: The Historical Antecedent

The “special evil”⁵²⁶ of human trafficking and migrant smuggling, as forms of illegal migration, traces its roots from the commercial trade in human beings known as slave trading. In fact, the adoption of the Migrant Smuggling and Human Trafficking Protocol was lauded to pave the way to end human struggle and was situated within the greater narrative of the “abolitionist movement.”⁵²⁷ In contrast, slavery and slave trading were considered to be legitimate enterprises throughout human history as infamously evidenced by “the importation of more than 15 million slaves from Africa into the New World.”⁵²⁸

522. Papastavridis, *Interception of Human Beings on the High Seas*, *supra* note 153, at 147.

523. Ramsey, *supra* note 28.

524. UNODC, *GLOBALIZATION OF CRIME*, *supra* note 40, at 55.

525. GUILFOYLE, *supra* note 8, at 182.

526. Hathaway, *supra* note 517, at 2.

527. *Id.* at 7 (citing Condoleeza Rice, *Introduction to U.S. Department of State, Trafficking in Persons Report 1*, available at <http://www.state.gov/documents/organization/66086.pdf> (last accessed Aug. 31, 2016)).

528. Neil Boister, *Slave Trading, Human Trafficking, and Migrant Smuggling*, in *AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW* 36 (2012) (citing Mahmoud Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT’L L. & POL. 445, 451 (1991) [hereinafter Bassiouni, *Enslavement*]).

Slave trading was primarily a commercial endeavor intended to trade human beings, who were forcibly abducted and unlawfully transported to another person with the latter's intention to exercise legal ownership over the former.⁵²⁹ Efforts to abolish slavery and other related practices also began as Great Britain declared slave trade illegal in 1807.⁵³⁰ Immediately after such declaration, the U.S. made a similar prohibition.⁵³¹ Yet, the movement to suppress slave trading under international law did not quickly follow suit. In fact, in the case of *Le Louis*,⁵³² the practice of slave trading was advocated to be outlawed internationally as a crime against the law of nations; however, the English court sustained that slave trading was not a violation of international law.⁵³³ Attempts to treat slave trading akin to piracy also failed as the U.S. Supreme Court upheld the validity of the international practice of slave trading in the case of *The Antelope*.⁵³⁴

It was only on 25 September 1926, that slavery and slave trading were outlawed internationally, when the League of Nations adopted the Slavery Convention.⁵³⁵ Under this Convention, slavery is defined as "the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised."⁵³⁶ Consequently, slave trading covers

all acts involved in the capture, acquisition[,] or disposal of a person with intent to reduce him [or her] to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him [or her]; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.⁵³⁷

Correlatively, the United Nations took a firm stance against slavery in the 1948 Universal Declaration of Human Rights that prohibits all forms of slavery and slave trade.⁵³⁸ The International Covenant on Civil and Political Rights also prohibited involuntary servitude and has mandated States to ensure positive measures to prevent and punish all forms of slavery and forced labor.⁵³⁹ At present, the only existing regime of control that relates to

529. *Id.*

530. Boister, *supra* note 528, at 37.

531. *Le Louis*, 165 Eng. Rep.

532. *Id.*

533. *Id.*

534. *The Antelope*, 23 U.S.

535. Boister, *supra* note 528, at 37.

536. Slavery Convention, *supra* note 22, art. 1 (1).

537. *Id.* art. 1 (2).

538. Universal Declaration of Human Rights art. 4, G.A. Res. 217A (III), U.N. Doc A/810 (Dec. 10, 1948).

539. International Covenant on Civil and Political Rights art. 8, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

human trafficking and migrant smuggling in the UNCLOS is the regime on slave trading.⁵⁴⁰ Under the Convention, vessels suspected of engaging in slave trading may be the subject of the right of visit.⁵⁴¹ However, there is nothing in the right of visit that enables the visiting vessel to arrest or prosecute the offending ship.⁵⁴² As such, the default jurisdiction must lie with the flag State. Clearly then, in instances of modern transnational crimes of human trafficking and migrant smuggling, the UNCLOS is silent in providing for an effective enforcement jurisdiction.

B. Rights and Obligations Under the Human Trafficking Protocol

Under the Human Trafficking Protocol, human trafficking refers to

the recruitment, transportation, transfer, harboring[,] or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability[,] or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁵⁴³

Moreover, such Protocol describes exploitation as to include, at a minimum, “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude[,] or the removal of organs.”⁵⁴⁴ The Protocol was adopted to achieve three main objectives: “[t]o prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist the victims of trafficking, with full respect for their human rights; and to promote cooperation among States parties in order to meet those objectives.”⁵⁴⁵ Additionally, victims under the Human Trafficking Protocol are generally classified into two: (1) those who are trafficked for the purpose of sexual exploitation; and (2) those who are forced into labor.⁵⁴⁶

Human trafficking is seen as a means to achieve the goal of exploitation — that is to say that transporting persons alone is not the goal of human trafficking but the subsequent profit attached to it. This goal of profiting

⁵⁴⁰ UNCLOS, *supra* note 14, art. 110.

⁵⁴¹ *Id.*

⁵⁴² *See* UNCLOS, *supra* note 14, art. 110.

⁵⁴³ Human Trafficking Protocol, *supra* note 23, art. 3 (a).

⁵⁴⁴ *Id.* art. 3 (a).

⁵⁴⁵ Alice Edwards, *Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor*, 36 DENV. J. INT’L L. & POL’Y 9, 17 (2007).

⁵⁴⁶ Sarah King, *Human Trafficking: Addressing the International Criminal Industry in Our Own Backyard*, 15 U. MIAMI INT’L & COMP. L. REV. 369, 372 (2008) (citing Human Trafficking Protocol, *supra* note 23, art. 3 (a)).

from exploitation is done through coercion and deception.⁵⁴⁷ According to the I.L.O., about 2.4 million people are being trafficked every year.⁵⁴⁸ This highlights the gravity and breadth of the criminal activity of trafficking in persons. Because of these growing concerns, the Human Trafficking Protocol was adopted following the creation of the UNTOC. The Human Trafficking Protocol was aimed at protection from, prevention of, and prosecution against human trafficking.⁵⁴⁹ While the crime of human trafficking under the Protocol does not have, for one of its elements, the crossing of a border, the Protocol itself mandates the parties to it to cooperate in the prevention, investigation, and prosecution of such crime.⁵⁵⁰ In fact, the UNODC identified that one of the key areas where the parties to the Protocol are lacking, is in international cooperation.⁵⁵¹ As a response, in 2007, an agency called the United Nations Global Initiative to Fight Human Trafficking was formed to promote and facilitate greater cooperation among State parties.⁵⁵² The obligations concerning the duty to prosecute and investigate cannot be simply subjected to mere paper compliance. In the case of *Ranstev v. Cyprus and Russia*,⁵⁵³ the E. Ct. H.R. held that the obligation to prosecute, investigate, and cooperate with concerned parties is mandatory and that the failure of which would entail responsibility on the part of the State.⁵⁵⁴

The Human Trafficking Protocol can be divided into three main parts: (1) scope, objectives, and criminalization; (2) protections afforded to victims of trafficking; and (3) measures on prevention and prevention of trafficking in persons.⁵⁵⁵

547. LeRoy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L L. REV. 227, 230 (2003).

548. UNODC, Factsheet on Human Trafficking, available at http://www.unodc.org/documents/human-trafficking/UNVTF_fs_HT_EN.pdf (last accessed Aug. 31, 2016) (citing Director General of the International Labor Organization, A global alliance against forced labor (A Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work) 10, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf> (last accessed Aug. 31, 2016)).

549. Potts, *supra* note 547, at 230.

550. Human Trafficking Protocol, *supra* note 23, art. 5.

551. UNODC, Issue Paper, *supra* note 43, at 51-52.

552. Boister, *supra* note 530, at 46.

553. *Ranstev v. Cyprus and Russia*, Eur. Ct. H.R., App. No. 25965/04 (Jan. 7, 2010).

554. *Id.* & Boister, *supra* note 530, at 46.

555. King, *supra* note 546, at 376.

The definition of trafficking in the Protocol is purposely expansive and non-exhaustive.⁵⁵⁶ It was intended to include all acts that lead to exploitation. Exploitation or propensity for exploitation is the fundamental aspect of trafficking and the Protocol intends to cover a wide array of exploitative practices.⁵⁵⁷ Consent by the victim is seen as irrelevant⁵⁵⁸ and where consent is obtained through force, fraud, and deception, it cannot be truly presumed as valid.⁵⁵⁹ Consistent with general international law and to avoid the qualms of other countries that the Protocol would encroach on domestic affairs, the Protocol would only apply where the crime in question was transnational or international in nature.⁵⁶⁰

The second part significantly discusses the victims of trafficking and the protections afforded to them under the Protocol. In this portion, the Protocol treats trafficked persons as victims of the crime than as one of its principals.⁵⁶¹ In Article 6, the Protocol goes at length in mandating the confidentiality of the identities of the victims and in promoting restorative or rehabilitative care to those who suffered physical, psychological, or emotional trauma:

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
 - (a) Information on relevant court and administrative proceedings;
 - (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.
3. Each State Party shall consider implementing measures to provide for the physical, psychological[,] and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

⁵⁵⁶ *Id.*

⁵⁵⁷ Edwards, *supra* note 545, at 14.

⁵⁵⁸ Human Trafficking Protocol, *supra* note 23, art. 3 (b).

⁵⁵⁹ King, *supra* note 546, at 377 (citing Janice G. Raymond, *Guide to the New UN Trafficking Protocol*, 25 WOMEN'S STUD. INT'L F. 491, 491 (2002)).

⁵⁶⁰ Human Trafficking Protocol, *supra* note 23, art. 4.

⁵⁶¹ King, *supra* note 546, at 377 (citing Human Trafficking Protocol, *supra* note 23, art. 6).

- (a) Appropriate housing;
 - (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
 - (c) Medical, psychological[,] and material assistance; and
 - (d) Employment, educational[,] and training opportunities.
4. Each State Party shall take into account, in applying the provisions of this [A]rticle, the age, gender[,] and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education[,] and care.
 5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.
 6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.⁵⁶²

The provision affords assistance to victims that have medical and safety needs and requires the receiving State to extend these services to them. The language of this provision leads to the observation that the obligation is more discretionary than mandatory, that the assistance extended to the victims is merely encouraged.⁵⁶³ Further, the Protocol acknowledges the legal complication on the status of victims of trafficking, whether they have entered the receiving State legally or illegally. Article 7 of the Protocol, aware of the uncertainty of their status, provides that:

1. In addition to taking measures pursuant to [A]rticle 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.
2. In implementing the provision contained in paragraph 1 of this [A]rticle, each State Party shall give appropriate consideration to humanitarian and compassionate factors.⁵⁶⁴

The above-quoted provision was a product of a controversial and contentious deliberation on the issue of unwanted immigration.⁵⁶⁵ The

⁵⁶². Human Trafficking Protocol, *supra* note 23, art. 6.

⁵⁶³. Edwards, *supra* note 545, at 20 (citing Ryszard Piotrowicz, *Irregular Migration Networks: The Challenge Posed by People Traffickers to States and Human Rights*, in *IRREGULAR MIGRATION AND HUMAN RIGHTS: THEORETICAL, EUROPEAN AND INTERNATIONAL PERSPECTIVES* 138 (Barbara Bogusz, et al. eds., 2004) [hereinafter Piotrowicz, *Irregular Migration Networks*]).

⁵⁶⁴. Human Trafficking Protocol, *supra* note 23, art. 7.

⁵⁶⁵. Edwards, *supra* note 545, at 20. (citing Piotrowicz, *Irregular Migration Networks*, *supra* note 563, at 138).

deliberation reveals the prominent dichotomy in international law of balancing the rights and remedy for the trafficked and displaced persons, and the exclusive security and immigration interests of receiving States.⁵⁶⁶ On the one hand, the granting of legal status presents a remedy for those who have been deceived or forced to migrate to the receiving State, a stance particularly adopted by developing States and sending States.⁵⁶⁷ On the other hand, the practice of trafficking may at the same time be an avenue for illegal migration which is perceived as a threat to many nations, a position firmly advocated by developed States.⁵⁶⁸ It is in this light that the Protocol opted for a rather diluted and neutral obligation to “consider” appropriate measures to determine (or grant) the legal status of the victims of trafficking.⁵⁶⁹ This watered down provision essentially and effectively gives the receiving State, which are often developed States, the sole power to determine the fate of the victims. In a sense, both the sending State and the victims of trafficking are at the mercy of the developed receiving State. The Protocol seems to imply therefore that measures in place under the treaty are primarily designed to prevent the path to exploitation. Yet, when the exploitation itself has happened, the remedy to the victims — notwithstanding the provision on medical and legal assistance — is practically absent with respect to determining their future and their legal status. The determination of this legal status is crucial to the victim of trafficking who may have abandoned his or her homeland, exhausted all of his or her resources, and is dearth with opportunities for rehabilitation. The protection offered in this portion of the Protocol seemed have ended abruptly that is likely to be a band-aid solution to an ever-growing problem of human trafficking.

The Protocol then continues to provide for an obligation to repatriate or return a victim to his or her own State of nationality or State of permanent residence. Article 8 details this repatriation:

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.
2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings

⁵⁶⁶. *Id.*

⁵⁶⁷. *Id.*

⁵⁶⁸. *Id.*

⁵⁶⁹. Human Trafficking Protocol, *supra* note 23, art. 7.

related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.
4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.
5. This [A]rticle shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.
6. This [A]rticle shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.⁵⁷⁰

The above-stated provisions, in stark contrast with the language and tone of the previous one, empower receiving States to undertake repatriation or return measures for the victims of human trafficking. The provision makes it categorically possible for the receiving State to return a victim to his or her homeland, whether or not the victim consented to the return.⁵⁷¹ Legal scholar Sarah King aptly observes that this right to return in the Protocol does not take into account the absence or inadequacy of assurances in the victim's homeland to protect him or her from being trafficked again.⁵⁷² She implies that the lack of laws in place or the inadequacy of enforcing domestic laws against human trafficking in the victim's home country is precisely the reason why the victim was subjected to exploitation in the first place.⁵⁷³ The legal ineptitude in one's home country made the victims primarily vulnerable to be trafficked.⁵⁷⁴ What results, therefore, is a symptom of a systemic and vicious cycle of victimization.⁵⁷⁵

The last part of the Protocol details the State-Parties' duty to cooperate with each other in preventing and punishing trafficking in persons. While

⁵⁷⁰. *Id.* art. 8.

⁵⁷¹. King, *supra* note 546, at 378.

⁵⁷². *Id.* at 379-80.

⁵⁷³. *Id.*

⁵⁷⁴. *Id.*

⁵⁷⁵. *Id.* at 379.

the Protocol provides for the general mandate of cooperation among States, it also provided a duty to exchange information, which states:

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:
 - (a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;
 - (b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and
 - (c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.
2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers[,] and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.
3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.⁵⁷⁶

This duty to exchange information was placed to encourage cooperation among States to efficiently and effectively detect and intercept human traffickers. It also enables States to secure their borders and provide access to information vital to the prevention or prosecution in trafficking. Consequently, Article 10 was a manifestation of a direct response to root causes of human trafficking as it encourages cooperation in establishing the nexus between the criminal activities in the origin State and those in the receiving State.⁵⁷⁷ Border control and security measures are likewise strengthened, through inspection and detection of undocumented persons.⁵⁷⁸ Whether the inspection of travel documents and papers may occur during

⁵⁷⁶. Human Trafficking Protocol, *supra* note 23, art. 10.

⁵⁷⁷. King, *supra* note 546, at 379.

⁵⁷⁸. Human Trafficking Protocol, *supra* note 23, art. 11

transit by receiving States is allowed, Protocol remains silent on the matter of boarding and inspection. At best, the Protocol reminded that States must undertake these measures in a manner consistent with the free movement of people.⁵⁷⁹ The Protocol, therefore, left little tangible guidance for States to undertake these “border control measures” and, in turn, gave States a wide discretion on how to interpret this obligation.⁵⁸⁰

In sum, the Human Trafficking Protocol represents convergence of general principles of law and a departure from them. For one thing, it departed from the notion that trafficking in persons is purely a domestic affair. It condemned and outlawed the transnational character of the crime of human trafficking.⁵⁸¹ It acknowledged that human trafficking is a global problem that needs global response.⁵⁸² It also made a bold statement when it defined trafficked persons as victims rather than direct participants in the crime of trafficking.⁵⁸³ It also signified a convergence in the efforts of the international community, States, and non-governmental organizations alike, in preventing and fighting the crime of human trafficking. It made progress in encouraging and mandating cooperation among parties to the Protocol. It attempted to address the root causes of trafficking while respecting the sovereignty of the State over all activities within its territory.⁵⁸⁴ Yet, the Protocol maintained the dominance of the exclusive interests of States over issues on immigration vis-à-vis the status of trafficked persons. It offered no departure from the notion that the State has the absolute prerogative over matters concerning immigration, despite the risk of exposing victims to the same vicious cycle of trafficking. The Protocol, in its current form, represents a firm commitment by States to end human trafficking in a platform that is reluctant in providing guarantees and effective remedies to its victims in the name of perceived threats of national security and unwanted migration.

C. Rights and Obligations Under the Migrant Smuggling Protocol

While the origin of criminalization of human trafficking under international law points to the efforts to eradicate all forms of slavery and forced labor within the greater context of the abolitionist movement, migrant smuggling or people smuggling rather traces its roots from national efforts to combat irregular, unwanted, and undocumented migration to States. Because of the often strict implementation of immigration rules and border control

⁵⁷⁹. *Id.*

⁵⁸⁰. Edwards, *supra* note 545, at 18.

⁵⁸¹. Raymond, *supra* note 559, at 491.

⁵⁸². *Id.*

⁵⁸³. *Id.*

⁵⁸⁴. *Id.*

regulations of countries, limited opportunities for legal entry and migration of people, especially from developing to developed States, “create a demand for and an economic incentive to supply irregular migration services.”⁵⁸⁵ As a result, a market is formed for criminal measures to transport and introduce persons in a country illegally. In 1993, the United Nations General Assembly, in a Resolution, recognized the urgent need to prevent the smuggling of aliens and to encourage cooperation among its Member States to impede the growth of the illegal smuggling industry and to eliminate such practices.⁵⁸⁶ Spearheaded by Italy — a developed nation affected by waves of undocumented and irregular migration in Europe — the first tangible manifestation to formulate a convention to criminalize smuggling of migrants by sea were proposed before the I.M.O.⁵⁸⁷ The Government of Italy was greatly concerned about the loss of human life as migrants are often transported in unseaworthy vessels.⁵⁸⁸ However, the proposal did not materialize into a treaty because the I.M.O. grew reluctant to it, as such proposal was leaning towards international criminal law and not to maritime law.⁵⁸⁹ One month after Italy’s proposal, Austria submitted a letter to the United Nations Secretary-General containing a draft of a convention against the smuggling of illegal migrants,⁵⁹⁰ a move that Italy quickly supported.⁵⁹¹ This was eventually consolidated along with Italy’s proposal for measures relating to the smuggling of migrants by sea into the Austrian proposal.⁵⁹² This proposal of the two developed and receiving States became a powerful

585. GUILFOYLE, *supra* note 8, at 182.

586. Prevention of the Smuggling of Aliens, G.A. Res. 48/102, at 214, U.N. Doc. A/48/49 (Dec. 20, 1993).

587. IMO Legal Committee, Proposed Multilateral Convention to Combat Illegal Migration by Sea, IMO Doc. LEG76/11/1 (Aug. 1, 1997) & Andree Kirchner & Lorenzo Schiano di Pepe, *International Attempts to Conclude a Convention to Combat Illegal Migration*, 10 INT’L J. REFUGEE L. 662, 665 (1998).

588. IMO Legal Committee, *supra* note 587.

589. Kirchner & di Pepe, *supra* note 587, at 665.

590. Letter dated 16 September from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General, U.N. Doc. A/52/357 (Sep. 17, 1997).

591. Andreas Schloenhardt & Kate L. Stacy, *Assistance and Protection of Smuggled Migrants: International Law and Australian Practice*, 35 SYDNEY L. REV. 53, 55-56 (2013) (citing UNODC, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, at 451, U.N. Sales No. E.06.V.5 (2006) [hereinafter UNODC, TRAVAUX PRÉPARATOIRES]).

592. *Id.*

foundation that led to the development of the Migrant Smuggling Protocol in 2000.⁵⁹³

The Migrant Smuggling Protocol aims “to prevent and combat the smuggling of migrants, as well as to promote cooperation among State[] Parties to that end, while protecting the rights of smuggled migrants.”⁵⁹⁴ To achieve this end, the Protocol presents a comprehensive framework which can be divided into three: (1) the criminalization of migrant smuggling under international law; (2) the protection of the rights of smuggled migrants; and (3) the guidelines for international cooperation.⁵⁹⁵

Under the Protocol, migrant smuggling is defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”⁵⁹⁶ Given this definition, an act that involves the combination of the following elements constitutes migrants smuggling under the Protocol: “(1) [e]ither the procurement of an illegal entry or illegal residence of a person; (2) [i]nto or in a country of which that person is not a national or permanent resident; (3) [f]or the purpose of financial or other material benefit.”⁵⁹⁷

Similar to the Human Trafficking Protocol, the Migrant Smuggling Protocol commits to shield migrants from prosecution as criminals.⁵⁹⁸ However, this provision is silent with respect to the application of a State’s immigration law. As such, the provision does not shield per se the victims from prosecution for other violations of the receiving State’s immigration law.⁵⁹⁹ It also has set out aggravating circumstances to the smuggling of migrants, namely: (1) circumstances “that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (2) that entail inhuman or degrading treatment, including for exploitation, of such migrants.”⁶⁰⁰

Notably, the Migrant Smuggling Protocol contains a special portion governing the rules on smuggling by sea. It emphasizes that “States must cooperate to the fullest extent possible to prevent and suppress the smuggling

593. UNODC, TRAVAUX PRÉPARATOIRES, *supra* note 591, at 451.

594. Migrant Smuggling Protocol, *supra* note 24, art. 2.

595. *Id.* art. 7.

596. *Id.* art. 3 (a).

597. UNODC, Issue Paper, *supra* note 43, at 10.

598. Migrant Smuggling Protocol, *supra* note 24, art. 2.

599. Bo Cooper, *A New Approach to Protection and Law Enforcement under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1047 (2002).

600. Migrant Smuggling Protocol, *supra* note 24, art. 6.

of migrants by sea, in accordance with the international law of the sea.”⁶⁰¹ While the States are encouraged to render assistance to another State to detect and prevent those vessels suspected of migrant smuggling, the authorization of the flag State is nonetheless required.⁶⁰² The Protocol likewise grants the coastal State the power to board and search the vessel and examine its papers provided that the flag State has authorized the former to do so.⁶⁰³ The Protocol lays down the need for prior authorization from the flag State as provided:

1. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, *inter alia*:
 - (a) To board the vessel;
 - (b) To search the vessel; and
 - (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.
2. A State Party that has taken any measure in accordance with paragraph 2 of this [A]rticle shall promptly inform the flag State concerned of the results of that measure.
3. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this [A]rticle.⁶⁰⁴

Article 9 serves as a safeguard clause to the measures granted to States in the preceding Article. It sets out the responsibility of the coastal State to protect the vessel, to preserve the safety of its passengers, and to allow for compensation for the damage suffered by the subject vessel by reason of such inspection.⁶⁰⁵ The subsequent Articles also encourage States to exchange information to improve detection and investigation of smugglers,⁶⁰⁶ to

601. *Id.* art. 7.

602. *Id.* art. 8.

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

604. *Id.* art. 8.

605. *Id.* art. 9.

606. Migrant Smuggling Protocol, *supra* note 24, art. 10 (1).

establish appropriate border control measures,⁶⁰⁷ and to ensure the validity of documents through law enforcement collaboration.⁶⁰⁸ These provisions on exchange of information, border control measures, and cooperation guidelines mimic those in the Human Trafficking Protocol.⁶⁰⁹ Moreover, they employ the same ambiguous language of the Trafficking Protocol that would enable States to exercise a wide latitude of discretion in determining what appropriate measures are in the context of migrant smuggling.

In the same vein as the Human Trafficking Protocol, the Migrant Smuggling Protocol provides for protection and assistance to the objects of migrant smuggling. The said Protocol mandates States to take appropriate measures to give assistance — medical, legal, or otherwise — to the migrants according to the particular circumstances of smuggling.⁶¹⁰ In addition to this assistance extended to the victims, the State must also take appropriate measures to protect the migrants from violence inflicted upon their persons by reason of their being object of smuggling.⁶¹¹ The Protocol therefore recognizes that the smuggled migrants themselves may be the object for reprisals by their smugglers or those who run the criminal business. In the context of migrant smuggling by sea, the UNODC notes that mere repelling migrants or leaving them in those ships in the hands of their smugglers might not constitute as an appropriate measure that the Protocol mandates.⁶¹² In fact, the UNODC remarked that these measures might result to attempts to re-enter the territory or might lead to violence inflicted upon the person of the smuggled migrant.⁶¹³ However, the ambiguous language of the Protocol enables States to exercise discretion in determining what “appropriate” means, a problem shared with the Human Trafficking Protocol.⁶¹⁴ Finally, the Migrant Smuggling Protocol culminates in granting receiving States a categorical right to return the illegal migrant to his or her home country.⁶¹⁵

Clearly, the Migrant Smuggling Protocol comes from a different legal tradition, specifically from the prerogative of the State to determine who enters its territory as an aspect of its sovereignty. As would be further discussed, migrant smuggling also differs from human trafficking in their constitutive elements. While consent may be present in migrant smuggling, its similarity with human trafficking lies with the journey by sea and the

607. *Id.* art. 11.

608. *Id.* arts. 12-13.

609. Human Trafficking Protocol, *supra* note 23, arts. 10-11.

610. Migrant Smuggling Protocol, *supra* note 24, art. 16.

611. *Id.* art. 16 (2).

612. UNODC Issue Paper, *supra* note 43, at 47.

613. *Id.*

614. *Id.*

615. Migrant Smuggling Protocol, *supra* note 24, art. 18.

strategies for interception by States remain similar to that of human trafficking. Indeed, while the legal distinction between the two Protocols might not intersect, the practice of interdiction for the two might entail a lot of similarities, with the State enjoying the freedom and discretion of characterizing the said operations.

D. The Migratory Dimension Within the Human Trafficking-Migrant Smuggling Continuum: An Analysis

Historically, the debates on human trafficking and migrant smuggling are rooted in the desire to eliminate all forms of slavery. Human trafficking and smuggling became the central interests of two regimes in international law, namely, International Criminal Law and International Human Rights Law.⁶¹⁶

Moreover, advocates for the criminalization of the said practices under international law had used the terms “trafficking” and “smuggling” interchangeably.⁶¹⁷ While de facto trafficking and smuggling might appear similar, efforts to differentiate the former from the latter became necessary to effectively address the problem within the purview of the law and governmental action.⁶¹⁸ The adoption and the ratification of the Human Trafficking and Migrant Smuggling Protocols as separate treaties signaled the legal distinction between the two. The two conventions outlined the differences between human trafficking and smuggling in law.

1. Legal Distinction Between Human Trafficking and Migrant Smuggling

Generally, the Protocols provide us with four areas of distinction⁶¹⁹ between the phenomena of human trafficking and migrant smuggling: (1) the role of consent; (2) the object of the crimes; (3) the nature of the criminal movement; and (4) the legal status of the victims.⁶²⁰ First, trafficking requires the element of fraud, coercion, or deception⁶²¹ while migrant smuggling presupposes the consent voluntarily given by the person about to be

616. Ryszard Piotrowicz, *The UNHCR's Guidelines on Human Trafficking*, 20 INT'L J. REFUGEE L. 242, 242 (2008).

617. Tom Obokata, *Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law*, 17 INT'L J. REFUGEE L. 394, 396 (2005).

618. *Id.* at 395.

619. Erick Gjerdingen, *Suffocation Inside a Cold Storage Truck and Other Problems with Trafficking as “Exploitation” and Smuggling as “Choice” along the Thai-Burmese Border*, 26 ARIZ. J. INT'L & COMP. L. 699, 714 (2009).

620. *Id.*

621. Human Trafficking Protocol, *supra* note 23, art 3 (a).

smuggled.⁶²² Second, the object of trafficking is exploitation,⁶²³ while the object of smuggling is the successful transportation of the person.⁶²⁴ Third, human trafficking may be committed even without movement across borders; while migrant smuggling implies a movement from one border to another.⁶²⁵ Fourth, trafficked persons may possess the proper legal documents to enter the border of another State while the smuggled migrants always enter the State of destination illegally.⁶²⁶ These distinctions create bifurcated approaches to addressing trafficking and smuggling. On the one hand, in trafficking, States provide assistance to the victims of exploitation as victims of human rights abuse “regardless of whether they crossed a national border illegally.”⁶²⁷ On the other hand, States view smuggled migrants as persons who willfully violated their immigration laws and are thus subjected to detention and deportation.⁶²⁸

In sum, the Protocol succeeded in making these two phenomena legally distinct, and therefore, no longer interchangeable. This makes enforcement and interception by States more cohesive and consistent with respective legal regimes on human trafficking and migrant smuggling. While in theory the distinction is unequivocal, circumstances in practice may still appear convoluted. Whether the distinction in reality is as precise as it is legally remains the recurring question in the trafficking-smuggling continuum.

2. Escaping Complicity: Locating the Trafficking and Smuggling Nexus

As discussed, the Human Trafficking Protocol and Migrant Smuggling Protocol have succeeded in distinguishing the two cross-border phenomena legally. Yet, pragmatically, the distinction is far from being precise. The element of “exploitation” as constitutive of human trafficking transposes the victims of trafficking as victims of human rights abuses.⁶²⁹ Consequently, the Protocol encourages States to create legal assurances to protect and rehabilitate the victims of trafficking.⁶³⁰ In stark contrast, in the Migrant Smuggling Protocol, the smuggled sits in a legal limbo as smuggled migrants are considered neither as perpetrators nor victims of smuggling.⁶³¹ In fact,

622. Migrant Smuggling Protocol, *supra* note 24, art. 3 (a).

623. Obokata, *supra* note 617, at 396-97.

624. *Id.*

625. *Id.*

626. *Id.* at 397.

627. Gjerdingen, *supra* note 619, at 714-15.

628. *Id.*

629. *Id.* at 714.

630. *Id.*

631. *Id.*

the UNODC's Legislative Guide to Migrant Smuggling Protocol characterizes smuggled migrants in this manner —

[t]he major differences [between trafficking and smuggling] lie in the fact that, [on the one hand], in the case of trafficking, offenders recruit or gain control of victims by coercive, deceptive[,] or abusive means and obtain profits as a result of some form of exploitation of the victims after they have been moved, commonly in the form of prostitution or coerced lab[o]r of some kind. In the case of smuggling, on the other hand, migrants are recruited voluntarily and may be to some degree complicit in their own smuggling.⁶³²

What is problematic about this assessment is that smuggled migrants are viewed as conspirators in the illegal act of smuggling. Particularly, the criminalization in the Migrant Smuggling Protocol is directed against smugglers⁶³³ and not against migrants themselves.⁶³⁴ The international community effectively transformed migrant smuggling to a “victimless crime.”⁶³⁵ The central critique, therefore, lies with treating smuggling and trafficking as polar opposites rather than as fundamentally linked in practice. Historically, smuggling and trafficking are part of the seamless discourse on transnational criminal movement of persons.⁶³⁶ It was only when both practices were legally distinguished that varied responses to enforcement mechanisms occurred. At one end of the spectrum, trafficked persons are seen as victims of modern slavery that is reprehensible;⁶³⁷ while at the other end, smuggled migrants are seen as an affront to national sovereignty.⁶³⁸ Despite the reality that trafficking and smuggling share a common history of cross-border criminal activity in limited geographic regions,⁶³⁹ migrant smuggling has fallen prey to the changes of the “securitization” rhetoric in the international community. Quite importantly, enforcement mechanisms against cross-border trafficking should not be divorced from migrant smuggling.

632. UNODC, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, at 340-41, U.N. Sales No. E.0000000 (2004).

633. *Id.*

634. Migrant Smuggling Protocol, *supra* note 24, art. 5.

635. Mary A. Young, *The Smuggling and Trafficking of Refugees and Asylum Seekers: Is the International Community Neglecting The Duty to Protect the Persecuted in the Pursuit of Combatting Transnational Organized Crime?*, 27 SUFFOLK TRANSNAT'L L. REV. 101, 123 (2003).

636. Gjerdingen, *supra* note 619, at 715.

637. *Id.*

638. Hathaway, *supra* note 517, at 6.

639. Gjerdingen, *supra* note 619, at 717.

In fact, this Note posits that the lack of victim identification in the Migrant Smuggling Protocol, coupled with the securitization rhetoric of States with respect to irregular migration, ultimately jeopardizes the rights of trafficked persons, refugees, and asylum-seekers who, out of desperation and lack of protection from the law, are forced to avail the services of smugglers.⁶⁴⁰ This problem is likely to continue as countries deem trafficking and smuggling as illegal migration.⁶⁴¹ Further, the discrete treatment of smuggling and trafficking in international law, if continued, would lead to dangerous consequences such as a State's refusal to afford protection to trafficked or smuggled migrants under the guise of perceived security threats.⁶⁴² international law, therefore, fails to account the migratory aspect of trafficking as affecting migrant smuggling. This failure to treat migrant smuggling and human trafficking within an overlapping continuum results in the difficulty of law enforcement officials to properly identify victims of human trafficking, especially when they are intercepted during transit.⁶⁴³ Law enforcement officials often misidentify trafficked persons as smuggled migrants and vice versa.⁶⁴⁴

There is also limited acknowledgment in the Human Trafficking Protocol that there is a close link between trafficking and smuggling, specifically noting the difficulty of identifying victims in broader migratory flows.⁶⁴⁵ Failing to appreciate the nexus between trafficking and migration can “distort the approaches taken to trafficking [and lead] it to be viewed essentially [as] a criminal justice matter of recruiters, rather than recognizing the migratory aspiration of its victims, even if they are not aware of or do not consent to its abuses.”⁶⁴⁶ Consequently, many enforcement measures neglect the fact that most irregular migrants might initially consent to being smuggled but are subsequently trafficked en route or upon arrival at the destination State.⁶⁴⁷ Smuggled migrants, after crossing the borders of either the destination State or the State of embarkation, are “divested of their means to control their own destiny”⁶⁴⁸ as they are reduced to “profit-

640. *Id.*

641. Young, *supra* note 635, at 120.

642. *Id.* at 122.

643. Samuel Vincent Jones, *Human Trafficking Victim Identification: Should Consent Matter?*, 5 IND. L. REV. 483, 487 (2012).

644. *Id.*

645. Edwards, *supra* note 545, at 18.

646. *Id.*

647. Jacqueline Bhabha & Monette Zard, *Smuggled or Trafficked?*, 25 FORCED MIGRATION REV. 6, 7 (2006).

648. Jones, *supra* note 643, at 494.

generating instruments ... [and] coerced into performing sex or labor.”⁶⁴⁹ Evidence is mounting to prove this phenomenon. For instance, in 2010, a certain Mabelle dela Rosa Dann was convicted of forced labor after smuggling a Peruvian national and subsequently subjecting her to domestic servitude.⁶⁵⁰ In *Zavala v. Wal-Mart Stores, Inc.*,⁶⁵¹ Wal-Mart had to settle for \$11 million after being charged of human smuggling upon the complaint of 250 undocumented migrant workers who were subjected to severe substandard working conditions.⁶⁵² Moreover, many migrants in Europe, whether documented or not, end up in trafficking rings though not initially coerced to do so.⁶⁵³ Because of the disparate structure of the Protocols, there is a strong incentive for States to classify irregular migrants as smuggled migrants than trafficked ones to prevent the application of several State obligations to protect victims of trafficking.⁶⁵⁴

In this regard, interception measures patterned after the Trafficking and Smuggling Protocols are too engrossed in detecting the traffickers and smugglers, than in identifying or protecting the victims.⁶⁵⁵ Viewed within the context of interdiction practices in the high seas,⁶⁵⁶ the “push back” policies, non-entry rules, and summary repatriation of coastal States even tolerate misidentification of victims, and negate the State obligation to prevent trafficking or smuggling, prosecute criminal perpetrators, and protect the victims and objects of such crimes. For instance, in order for claims of protection to be processed on board the interdicting vessel, one must pass the “shout test.”⁶⁵⁷ Under this test, intercepted migrants must scream, jump up and down, wave their hands, and exclaim their grievances to be able to

649. *Id.*

650. U.S. Department of Justice, California Woman Sentenced to Five Years Imprisonment for Forced Labor of Domestic Servant, *available at* <http://www.state.gov/m/ds/rb/140326.htm> (last accessed Aug. 31, 2016).

651. *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 300-01 (D.N.J. 2005) (U.S.).

652. *Id.*

653. WENDY YOUNG, *THE STRUGGLE BETWEEN MIGRATION CONTROL AND VICTIM PROTECTION: THE UK APPROACH TO HUMAN TRAFFICKING 16-17* (Diana Quick ed., 2005).

654. Edwards, *supra* note 545, at 19.

655. Anne T. Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling - A Preliminary Analysis*, 23 HUM. RTS. QTY. 975, 994 (2001).

656. Refer to Part II of this Note.

657. See Bill Frelick, *Denying Haiti's Refugees*, WASH. POST., Mar. 6, 2004, *available at* <http://www.washingtonpost.com/archive/opinions/2004/03/06/denying-haitis-refugees/5c8821a6-a851-417f-b852-99586049be17/> (last accessed Aug. 31, 2016) [hereinafter Frelick, *Denying Haiti*].

qualify for a pre-screening interview on board the interdicting vessel.⁶⁵⁸ Yet, reports say that Coast Guard officials often shackle rowdy migrants on board.⁶⁵⁹ Clearly then, these interdiction measures in the high seas have no regard to the protection of the rights of potential trafficked persons who may initially appear to be smuggled migrants.

3. Criminalization of Migrant Smuggling: An Attempt to Legitimize Interception Practices in the High Seas?

Examining the initial proposals to the Migrant Smuggling Protocol would reveal an attempt by mostly developed States to justify extraterritorial enforcement measures. For example, Italy suggested that the Protocol is to mandate all State Parties “to criminalize in their own laws the breach of any other State Party’s migration control laws.”⁶⁶⁰ Essentially, this would treat all State Parties to be de facto enforcers of each other’s domestic immigration laws.⁶⁶¹ This would likewise lead to numerous claims of jurisdiction over immigration offenses and to suppress illegal migration acts especially in the high seas.⁶⁶² The U.S., then, proposed that all Contracting Parties must facilitate repatriation of their own nationals, without delay, who had been smuggled into another.⁶⁶³ These proposals, of course, did not succeed⁶⁶⁴ but efforts to criminalize smuggling even without specific intent, as well as, to take affirmative actions to facilitate the immediate return of the smuggled migrants made it to the Protocol.⁶⁶⁵

Clearly then, two points may be deduced in these proposals. First, the initial proposal to mutually criminalize immigration laws among State Parties only strengthens this Note’s position that interception measures in the high seas against irregular migration rests on dubious grounds under international law.⁶⁶⁶ The drafting of the Migrant Smuggling Protocol was seen by many developed States as an opportunity to gain legitimacy of their practice of applying their own immigration laws in the high seas. This would also justify

658. *Id.*

659. Frelick, “*Abundantly Clear*,” *supra* note 95, at 246.

660. Hathaway, *supra* note 517, at 28 (citing Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Draft Elements for an International Legal Instrument against Illegal Trafficking and Transport of Migrants (Proposal Submitted by Austria and Italy)*, arts. 2 (2), 3 (a), & 4, U.N. Doc. A/AC.254/4/Add.1 (Dec. 15, 1998)).

661. Hathaway, *supra* note 517, at 28.

662. *Id.*

663. *Id.*

664. *Id.*

665. See Migrant Smuggling Protocol, *supra* note 24, arts. 3 (a) & 18 (4).

666. Refer to Part III of this Note.

the consent of States of embarkation, through a bilateral arrangement, to allow the application of another State's immigration law over the former's vessels. Second, this is strong evidence to support the claim that mere irregular migration is not a crime punishable under international law. Consistent with the principle of *nullum crimen nulla poena sine lege*,⁶⁶⁷ there exists no permissible rule under international law that warrants the exercise of jurisdiction over subject vessels and the interception of migrants in the high seas based on mere irregular migration. Hence, the interdiction of irregular migrants in the high seas has no legal justification under the International Law of the Sea and International Criminal Law.

4. Intensified Border Control Measures in the High Seas as Catalysts to Trafficking and Smuggling

It is this Note's submission that the stringent measures by developed coastal States to combat irregular migration, especially those that are enforced outside of their borders, are likely to intensify the demand for professional smuggling and would complicate victim identification in the context of trafficking and smuggling. The criminalization of trafficking without due regard to its migratory link with smuggling, when coupled with rigid anti-migration policies, drives the demand for professional smuggling.⁶⁶⁸ This is not to say that the blame should rest on strict migration policies alone. Rather, the legal framework on which these policies are based must account for the overlapping of trafficking and smuggling in practice. This is one of the primary contentions of this Note — that interdiction policies of States in the high seas are indifferent with the growing desperation of determined migrants such that they become vulnerable to subsequent exploitation. Eventually, because of the apathy of interdiction policies in the high seas to victim protection and prosecution of criminals — primarily highlighted by the mere push back of the boats — the humanitarian and crime prevention goals of Human Trafficking and Migrant Smuggling are frustrated, if not entirely defeated. What results, therefore, is the amalgamation of policies that abandons the freedom of the seas and the right to navigation in favor of heightened migration control that does not fulfill humanitarian and crime prevention goals, but merely caters to a State's exclusive interest.

V. EXTRATERRITORIAL RESPONSIBILITY — THE OVERREACHING IMPACT OF INTERCEPTION PRACTICES IN THE HIGH SEAS ON REFUGEE PROTECTION AND ON THE RESCUE OF PERSONS IN DISTRESS AT SEA

So far, the discussion of this Note has been limited to the perspectives of the international law of the sea and international criminal law. To a great extent, interdiction practices were subjected to the legal standards under the

667. SHAW, *supra* note 228, at 672.

668. Hathaway, *supra* note 517, at 32.

UNCLOS and to the standards set forth in the Trafficking and Smuggling Protocols. This Note is primarily meant to thresh out the legality of these activities within the context of transnational irregular movement of persons by sea. However, as discussed in Part IV, the distinctions across legal regimes governing irregular migration are often blurred in practice. Certainly, it would be ironic for this Note not to recognize that interception of vessels carrying irregular migrants at sea may also include issues on human rights particularly involving refugees and asylum-seekers. In this light, Part V looks into interception practices vis-à-vis standards of human rights, and search and rescue obligations. While this Note does not cover the merits of each of the claims of all the victims and the full extent of the applicability of their rights, it nonetheless acknowledges that interception measures often undermine human rights obligations. Clearly then, the discussion below is an attempt of this Note to succinctly outline the ramifications of these practices to other branches of international law.

A. Refugee Protection and Non-refoulement in the High Seas

The 1951 Refugee Convention is the foremost instrument articulating the rights of refugees in international law. Article 33 (1) of the Refugee Convention embodies the most widely-accepted definition of *non-refoulement*. It states that, “[n]o Contracting State shall 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 his race, religion, nationality, membership of a particular social group[,] or political opinion.”⁶⁶⁹ Thus, the principle of *non-refoulement* precludes the receiving State from expelling or banishing refugees without just and legal ground under international law.

The status of the principle of *non-refoulement* as a customary norm in international law is very well-entrenched. The 1967 Declaration on Territorial Asylum provides for the non-expulsion and compulsory return of a person seeking asylum from persecution.⁶⁷⁰ The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa also acknowledges that no person shall be subject to return or expulsion where his or her life and liberty is threatened.⁶⁷¹ Similarly in various American nations, an alien cannot be deported if in that country his or her right to life and freedom is in danger.⁶⁷² A version of *non-refoulement* also exists in

669. Refugee Convention, *supra* note 81, art. 33 (1).

670. United Nations Declaration on Territorial Asylum, G.A. Res. 2312 (XIII), art. 3, U.N. Doc. A/RES/2312(XIII) (Dec. 14, 1967).

671. Convention Governing the Specific Aspects of Refugee Problems in Africa art. II (3), *adopted* Sep. 10, 1969, 1001 U.N.T.S. 45.

672. American Convention on Human Rights art. 22 (8), *signed* Nov. 22, 1969, 9 I.L.M. 673.

European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶⁷³ This principle is also applied as a part of the prohibition against torture or cruel, inhuman, and degrading treatment.⁶⁷⁴ The wealth of sources embodying the principle of *non-refoulement* solidifies its customary status. Regardless, all the States concerned in this Note are parties to the Refugee Convention.⁶⁷⁵

In this Note, however, the crucial question is at what point does the principle of *non-refoulement* apply? Does this principle apply in the high seas? Where does the duty to determine one's refugee status arise? Again, the answer to the question of where a particular principle applies depends upon the location of vessels in the seas.

In the territorial sea, where a State's jurisdiction is plenary and where sovereignty is exercised,⁶⁷⁶ the obligations relating to the principle of *non-refoulement* applies.⁶⁷⁷ Though still contested,⁶⁷⁸ the position that responsibility of States to afford protection to refugees applies in the territorial sea enjoys a strong legal support.⁶⁷⁹ Now, beyond the territorial sea where sovereign rights and not sovereignty are exercised, the question of applicability becomes much more complicated.

Beyond the territorial sea, however, legal complications on the extraterritorial application of the said principle arise. There are two conflicting views under international law that relates to the application of *non-refoulement* in the high seas.

The first view adopts a restrictive approach in applying such obligations as first expressed in the case of *Sale*.⁶⁸⁰ The main controversy in *Sale* involves a question on the legality of the Executive Order 12807, which authorizes the interception of vessels in the high seas and the repatriation of everyone on board without any need for refugee screening process.⁶⁸¹ The U.S. Supreme Court ultimately ruled in favor of the validity of the said Executive

673. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, 213 U.N.T.S. 222 (entered into force Sep. 3, 1953).

674. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85.

675. UNHCR, State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, *available at* <http://www.unhcr.org/3b73bod63.html> (last accessed Aug. 31, 2016).

676. GUILFOYLE, *supra* note 8, at 201.

677. Klein, *Assessing Push Back the Boats Policy*, *supra* note 136, at 428.

678. *But see* GUILFOYLE, *supra* note 8, at 226.

679. Fischer-Lescano & Löhr, *supra* note 45, at 1-2.

680. *Sale*, 509 U.S. 155.

681. *Id.* at 158.

Order on the reason that the obligations of the U.S. under Article 33 of the Refugee Convention did not apply in the high seas where the migrants were intercepted.⁶⁸² Adopting the view that the obligations of the U.S. are inseparably linked to its territory, the Supreme Court ratiocinated that

a treaty cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, [the treaty] does not prohibit such actions.⁶⁸³

However, this decision was met with a strong dissent by Justice Blackmun. In his dissenting opinion, Justice Blackmun criticized how the majority's narrow interpretation of the term "return" violated the plain and unambiguous language of Article 33 especially when the term "return" was modified by the phrase "in any manner whatsoever."⁶⁸⁴ Moreover, Justice Blackmun insisted that agents of the U.S. continue to act under the color of American authority even when acting extraterritorially.⁶⁸⁵ At that time, because of *Sale*, the U.S. was the only country to undertake interception as far as in the high seas only to return refugees to their persecutors.⁶⁸⁶ *Sale* continued then to be a powerful precedent for many coastal States such as Italy that cited such as its legal basis for its policy on interdiction in the high seas.⁶⁸⁷

The second view posits that human rights obligations are not limited within the limits of a State's territory but rather extend to activities under its control even though committed elsewhere. In 1997, *Haitian Centre for Human Rights v. United States*,⁶⁸⁸ the Inter-American Commission on Human Rights held that the forcible return to Haiti of Haitian refugees upon capture on the high seas constituted a breach of obligation by the U.S. government with respect to the right to liberty, right to life, right to equality, right to equality before the law, and the right to receive and seek asylum.⁶⁸⁹ Moreover, the U.N.H.C.R. consistently made its position clear in *Sale* that the obligation not to return refugees must be performed regardless

682. *Id.*

683. *Id.* at 183.

684. *Sale*, 509 U.S. at 190 (J. Blackmun, dissenting opinion).

685. *Id.* at 190-93.

686. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, *Sale*, 113 S. Ct. 2459 (No. 92-344), at 11.

687. Mann, *supra* note 69, at 333.

688. *The Haitian Centre for Human Rights, et al. v. United States*, Inter-Am. Ct. H.R., Case 10.675, ¶¶ 183-88 (Mar. 13, 1997).

689. *Id.*

of whether the government is acting within or outside its border.⁶⁹⁰ This second school of thought finds cogent support in many cases decided by international tribunals.

One very important case is *Hirsi Jamaa v. Italy and others*.⁶⁹¹ In *Hirsi*, Italian *Guardia di Finanzia* officials intercepted a vessel from Libya carrying Eritreans and Somalis 35 nautical miles off the coast of the Italian Island of Lampedusa.⁶⁹² The intercepted migrants were detained on board an Italian warship and were forcibly returned to Tripoli despite their objections and claims for international protection.⁶⁹³ Applicants challenged Italy's response of returning them to Libya after being interdicted in the high seas.⁶⁹⁴ The Government of Italy responded that Italian police officers merely cooperated with Libyan authorities by providing training and technical assistance on the maneuvering of ships.⁶⁹⁵ They further claimed that the interception was in fact a rescue operation.⁶⁹⁶ The E. Ct. H.R., unconvinced by Italy's argument, held the latter in violation of the prohibition against ill treatment and in violation of the applicant's right to seek asylum.⁶⁹⁷ Moreover, the Court in holding Italy responsible for its acts in the high seas surmised that "the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction."⁶⁹⁸ The Court further reminded States that

the problems with managing migratory flows cannot justify having recourse to practices which are not compatible with [a] State's obligations under [international law] ... the provisions of treaties must be interpreted in good faith in the light of the object and purpose of the treaty and in accordance with the principle of effectiveness.⁶⁹⁹

Further, Court made an important *dictum* about push back measures; it said,

690. UNHCR Responds to U.S. Supreme Court in *Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993).

691. *Hirsi*, Grand Chamber No. 27765/09.

692. *Id.* at 12.

693. *Id.*

694. *Id.*

695. *Id.* at 19.

696. *Id.* at 73.

697. *Hirsi*, Grand Chamber No. 27765/09, at 57.

698. *Id.* at 49.

699. *Id.*

the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction ... which engages the responsibility of the State in question.⁷⁰⁰

The E. Ct. H.R. made a compelling pronouncement in the field of both human rights law and the international law of the sea. Although primarily an issue of human rights, *Hirsi* acknowledged that a claim of enforcement jurisdiction in the high seas entails a correlative and equivalent responsibility on the part of the enforcing State to respect the protections afforded to persons subject of such enforcement.⁷⁰¹ The complex reality of irregular migration, especially at sea, triggers numerous calls to protect freedoms and rights of human beings. In another instance, the Australian High Court struck down a proposed bilateral agreement with Malaysia allowing Australian ships to intercept migrants in the high seas and to send them to Malaysia for processing.⁷⁰² The Court said that the 8,000 migrants and asylum-seekers that would be sent to Malaysia would have no assurances of protection given that Malaysia is not a party to the Refugee Convention, and the possibility of migrants being criminally charged with the crime of illegal entry.⁷⁰³

At this point, it is quite clear that the second view finds more support in international law. These decisions contain a wealth of cogent legal bases compared to the narrow textual interpretation in *Sale*.

B. Search and Rescue Obligations

The obligation to rescue persons in distress at sea is embodied in Article 98 of the UNCLOS. Under this provision, flag States are mandated to require the master of the ship to “render assistance to any person found at sea in danger of being lost”⁷⁰⁴ and “proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him [or her].”⁷⁰⁵ This obligation to render assistance forms part of the high seas regime in the UNCLOS,⁷⁰⁶ and thus, is enforceable therein. Further, this duty to give assistance to those lost

700. *Id.*

701. *Id.*

702. Plaintiffs M70/2011 and M106/2011 v. Minister for Immigration and Citizenship, [2011] HCA 32, at 148 (Austl.).

703. *Id.* ¶ 30.

704. UNCLOS, *supra* note 14, art. 98, ¶¶ 1 (a) & (b).

705. *Id.* art. 98, ¶ 1 (a).

706. *Id.* art. 87.

or in danger at sea is considered customary⁷⁰⁷ and is embodied in many multilateral treaties such as the International Convention for the Safety of Life at Sea⁷⁰⁸ and the International Convention on Maritime Search and Rescue (S.A.R.).⁷⁰⁹ This obligation to rescue persons in danger extends to all persons regardless race, nationality or status.⁷¹⁰ Thus, such obligation applies equally to vessels carrying irregular migrants.

The issues pertinent to the interception of vessels carrying migrants in the high seas can be summed up into three questions: (1) at what point does the obligation to rescue persons at sea arise? (2) to what extent can the rescuing State assume control over the persons on board? and (3) what are the responsibilities of the State after rescue?

For the first question, when does the obligation to render assistance to persons in distress at sea arise? In the context of irregular migration, when can a State deem a subject vessel to be in distress? Clearly, the answer to this question is factual one. But what makes this relevant to this Note is the reality that migrants and asylum-seekers, whether trafficked, smuggled, or merely in transit, often sail on crowded and unseaworthy vessels.⁷¹¹ In the E.U., the factors considered may include the number of passengers, the size of the vessel relative to the number of passengers, presence of a skilled and qualified crew, and the availability of basic supplies and other safety equipment.⁷¹² After assessing the situation, the rescuing vessel then proceeds to the subject ship in distress.

Turning now to the second question, to what extent should the rescuing State assume control over the rescuees? According to the S.A.R. Convention, such State must attend to the rescuees' basic and medical needs and must deliver them to a place of safety.⁷¹³ This is where the first source of confusion exists. The S.A.R. did not define a "place of safety" nor did it prescribe that the place of safety must be within the territory of the rescuing State. To further place this situation in the context of this Note, can the

707. ANNE T. GALLAGHER & FIONA DAVID, *THE INTERNATIONAL LAW OF MIGRANT SMUGGLING* 84 (2014).

708. International Convention for the Safety of Life at Sea, *opened for signature* Nov. 1, 1974, 1184 U.N.T.S. 278 [hereinafter SOLAS Convention].

709. International Convention on Maritime Search and Rescue, Annex ¶ 2.1.1, *opened for signature* Apr. 27, 1979, 1405 U.N.T.S. 119 [hereinafter SAR Convention].

710. SOLAS Convention, *supra* note 708, at Annex, ch. V, ¶ 33 (1) & SAR Convention, *supra* note 709, at Annex, ch. 2, ¶ 2.2.10.

711. Papastavridis, *Interception of Human Beings on the High Seas*, *supra* note 153, at 204.

712. Council Decision 2010/252, 2010 O.J. (L 111/20), Annex 25, ¶ 1.3 (EC).

713. SAR Convention, *supra* note 709, at Annex, ¶ 1.3.2.

rescuing State validly place them on board a lifeboat and force them to return to their State of embarkation?⁷¹⁴ Again, the numerous international instruments do not offer an answer to post-rescue scenarios other than humanitarian and medical assistance to the rescuees. With this ambiguity, the danger lies with the discretion reposed upon rescuing States to undertake measures that they would deem proper within the situation. As detailed in *Hirsi*,⁷¹⁵ search and rescue obligations of States are likewise used to justify the assumption of control over a vessel in the high seas. Hence, this apparent gap in the law on search and rescue, when coupled with a provision that allows wide discretion to be exercised by the rescuing State, places the irregular migrants on a precarious situation that would empower a State to intercept their vessel under the guise of search and rescue, but only to force them to embark on seaworthy boats for their return to the State of embarkation.

As to the third question, the decision in *Hirsi*⁷¹⁶ serves as a powerful statement that corresponding human rights obligations of States would likewise be applicable in cases where such State acquired jurisdiction over the vessel by virtue of a search and rescue mission.

In sum, Part V demonstrates how interdiction policies relating to irregular migrants in the high seas affect a breadth of legal consequences that transcend the issues on maritime law and criminal law. As shown, States often overlook, if not outright ignore, their obligations to protect and respect the rights of migrants aboard the vessels. Viewed within the greater context of this Note, States establish a pattern of behavior in its interception mechanisms in the high seas — they want to establish more control in the seas but evade all of its corresponding obligations.

VI. THE DIALECTICS OF TRANSNATIONAL MOVEMENT OF PERSONS — A CONCLUSION

This Note initially embarked on an investigation of a rather interesting strategy on crime prevention — interception of migrants in an exceptional arena that is the high seas. It was an innovative response by States in the detection and prevention of transnational crimes involving illegal movement of persons by sea. At this time, the *modus operandi* of smugglers and traffickers of persons have forgone the value of human life as the intentional sabotage of ships carrying migrants became a more viable option. Therefore, the necessity of policing the oceans on humanitarian and security grounds enabled States to craft and enforce novel measures to combat trafficking and smuggling at sea.

⁷¹⁴ Refer to Part II-B of this Note.

⁷¹⁵ *Hirsi*, Grand Chamber No. 27765/09, at 73.

⁷¹⁶ *Id.* at 49.

Policing the high seas often results in a complex and convoluted tension with the preeminent principle of *mare liberum*. Any form of enforcement jurisdiction including interception practices in the high seas is not favored under international law. Unilateral acts, and acts pursuant to the exclusive interest of some States, tend to run afoul to the overreaching rule on maintaining and preserving the common interest in the high seas. However, the law of the sea should not be divorced from other branches of law. Conscious of the accelerated growth and the tragic consequences of human trafficking and migrant smuggling, international law has outlawed transnational trafficking and smuggling, including those committed at sea. Thus, the prevention and punishment of the crimes of human trafficking and migrant smuggling clearly fall within the purview of common interests. Therefore, it is this Note's submission that interception in the high seas, premised on the prevention of transnational crimes, should not be immediately dismissed as a violation of the freedom of the seas and the right to navigation. To readily consider otherwise would reduce the high seas to a haven for criminal activities and a cradle for impunity.

In this light, this Note was aimed at identifying and assessing the legal bases and parameters of a State's exercise of enforcement jurisdiction in the high seas under UNCLOS and Customary International Law. Given the criminalization of human trafficking and migrant smuggling in international law, this Note also looked into the crime prevention powers and obligations of States under the Human Trafficking and Migrant Smuggling Protocols to the UNTOC. Indeed, the curious case of State interdiction in the high seas triggered the question — why would States intercept vessels carrying irregular migrants in an area where power and control should be least exercised? The interception of vessels in the high seas therefore signaled the need to examine the legal justifications of States in carrying out law enforcement measures in the high seas.

In the dialectics between transnational irregular movement and high seas freedom, where do State interception strategies legally stand? To answer this question, this Note looked into specific historical and contemporary interception practices of States, paying significant attention to the evolution of the legal paradigm on high seas interdiction.

These interdiction strategies can be summed up into three classifications: (1) "push back" policies where State officials intercept vessels in the high seas and force them to return to the State of embarkation without need of any process; (2) "non-admission" strategies where law enforcement agents, usually after a rescue mission, refuse to allow irregular migrants to disembark in the closest coastal State without any processing of the latter's claims; and (3) "relocation" measures where migrants are forcibly relocated to a third State for processing, which could also be the State of embarkation. In all three strategies, there is one common goal — irregular migrants must not land onto the shores of the interdicting State nor enter its territorial sea. The

Feet Wet/Feet Dry Distinction policy of the U.S., the Operation Sovereign Borders and Pacific Solution of Australia, and the externalized border operations of E.U. Member States via Frontex, all fall into at least one of the three interception strategies. These enforcement measures are either done unilaterally as in the case of Australia and the U.S. (with respect to Haiti), or through bilateral agreements with the State of embarkation such as the Italy-Albania, Italy-Libya, U.S.-Cuba, and Spain-Mauritania agreements. All of these have for their common goal the eradication of irregular migration. As discussed in this Note, these interdiction measures tend to be liberally enforced so long as the migrants on board are undocumented and possess no legal papers for potential entry to the territory of the interdicting State. Moreover, in the rare event that the migrants are transported to a third location for processing, the experience of migrants in these location are often close to experiencing incarceration, as partner developing States lack adequate medical and sanitary facilities to accommodate the needs of the victims. This Note uncovered the reality of high seas interception by States and their post-interdiction procedures. These strategies are far from the triumphalist language States market them to be. Interception practices in the high seas indicate an approach that is overly concerned in driving migrants away from one's territory than in protecting their needs, and in getting their cooperation for possible prosecution of their smugglers or traffickers. Succinctly stated, the interception practices are not based entirely on transnational crime prevention but on the enforcement of the interdicting State's immigration laws in the high seas.

Armed with the obligation to prevent and punish transnational crimes particularly human trafficking and migrant smuggling, States justify their enforcement jurisdiction in the high seas on the basis of their crime prevention obligations under international law. The law of the sea is the definitive normative legal framework to examine and evaluate the validity of the actions of States across adjacent maritime areas. In order to assess these claims, this Note examined the extent of the rights given and the duties imposed on States in different maritime zones. This Note also makes the following findings:

- (1) *First*, interdiction practices enjoy the strongest legal basis in the territorial sea and within the internal waters of the interdicting State. Since the jurisdiction in this area is plenary, States are empowered to define appropriate measures against the vessel carrying illegal migrants. The regime in the territorial sea is only subject to one limitation — innocent passage. As discussed, passage for the purposes unloading of persons without the proper legal documents to enter another country is not considered as innocent passage. Thus, States like Australia, U.S., Italy, and Spain can rightfully intercept vessels in their territorial waters and subject such into the force of their internal laws.

- (2) *Second*, States are not legally required to wait for vessels to enter into their territorial sea to enforce their immigration laws, subject only to the right of control over the contiguous zone. The contiguous zone is a buffer zone for States to prevent or punish the infringement of a State's immigration laws. Though this view is not without opposing views, the generic but ambiguous language of the UNCLOS affords the State a certain degree of discretion in deciding the proper course of action with respect to a violation of their immigration laws. Hence, the U.S., Australia, Italy, and Spain may rely on this provision for the legality of their actions.

In all of the above-mentioned permissible instances available for States, the course of action is only limited by the reasonable use of force to deter criminal activities in its territorial sea and contiguous zone. Hence, the use of force by States must pass the test of necessity and proportionality under international law.⁷¹⁷

- (3) *Third*, since immigration laws find no application in the E.E.Z., a State's enforcement action must qualify as one of the exceptional circumstances under the UNCLOS. Otherwise, such actions are considered violations of the freedom of the seas and the right to navigation. The legality of the actions depends on the various exceptions invoked by States. This Note evaluates each exception as follows:

- (a) The interception in the high seas against irregular migrants remotely qualifies as a right of visit based on a reasonable suspicion of slave trading. Given the technical meaning of slave trading in other relevant conventions, mere irregular migration is not sufficient to be considered as slave trading. However, this Note finds that the right of visit based on slave trading is one of the key provisions where the ambiguous language of the UNCLOS must be construed to include instances of human trafficking, although, States, at present, cannot use this as a justification for the right of visit based on irregular migration.
- (b) The interdiction of irregular migrants in the high seas finds support in Article 8 of the Migrant Smuggling Protocol. However, States must comply with three

⁷¹⁷States may only use force to an extent which is "proportional" to the criminal activities sought to be deterred, and "necessary to respond to it." These are the so-called tests of necessity and proportionality. See *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 14, 94 (June 27).

procedural safeguards under this right, namely: there must be prior authorization from the flag State; the suspicion for migrant smuggling must be based on reasonable grounds; and the right of visit must be limited to boarding, inspection, and search of the vessel. The current practice of the U.S., Australia, and E.U. Member-States are inconsistent with these procedural safeguards. In the case of Australia and the U.S., interdiction of Indonesian and Haitian vessels respectively violates the exclusive flag State jurisdiction. As for the second safeguard, States hardly comply with the reasonable suspicion requirement as suspicions are not based on concrete intelligence, and if they are, such information is kept secret from the public. Lastly, all the interdicting States have subjected the vessels to the full force of their laws (such as push-back strategies, arrest and detention of migrants, etc.) instead of limiting such actions to boarding and search of the vessel.

- (c) The interdiction of stateless vessels in the high seas is permissible only through the right of visit. The question on whether a State can subject a stateless vessel to the full extent of its jurisdiction in the high seas is unsettled under international law. Given the strict interpretation given to exceptions to freedom of the seas, States cannot and should not justify its push-back, non-entry, and relocation policies on this basis.
 - (d) Enforcement jurisdiction in the high seas is not readily granted by merely procuring the consent of the flag State. The enforcement itself must also be based on a permissible rule under international law. States must establish a jurisdictional nexus over the vessel in the high seas. Notably, mere irregular undocumented migration is not a crime punishable under international law. Furthermore, irregular migration *per se* cannot justify the extension of one's jurisdiction based on the protective principle. Clearly then, absent any permissible rule, the interception practices in the high seas based on mere irregular migration, even with the consent of the flag States, violate the freedom of the high seas.
- (4) *Finally*, the regime of the high seas warrants that no State should exercise sovereignty over such area. The case of *M/V Saiga* is instructive in this respect as the ITLOS declared the unilateral imposition of domestic laws outside of the purposes intended

over specific area as a violation of international law. Clearly then, the practice of States, like the U.S., Australia, Italy, Spain, and other E.U. Member States, that allows for an extension of the applicability of their own domestic migration laws in the high seas, constitutes a creeping jurisdiction in violation of international law.

Anent the legal standards outside of the UNCLOS, State interdiction practices must be also assessed *vis-à-vis* international obligations against transnational crimes under the Human Trafficking Protocol and Migrant Smuggling Protocol. This Note is quick to point out that the distinction between Human Trafficking and Migrant Smuggling usually ends in its legal definition. One of the findings of this Note centers on the observation that it is difficult to assess the compliance of States with their obligations under the Trafficking and Smuggling Protocols because these problems are fundamentally linked in practice. This entails that there is an inherent cross-over from the Trafficking Protocol into the Smuggling Protocol. Notwithstanding this disconnect from the legal framework, the obligations of States relevant to irregular movement of persons by sea under the two Protocols can be divided into three: (1) the duty to cooperate, prevent, and detect trafficking and smuggling; (2) the duty to properly identify and protect the victims of trafficking or the objects of smuggling; and (3) the duty to address root causes of human trafficking and migrant smuggling.

For the first duty, the interdiction policies in the high seas reflect, to some extent, cooperation among State Parties, since bilateral arrangements are in place to address the problem of trafficking and smuggling. But this cooperation often ends on paper since interdicting States fail to follow through with their obligation to respond or reciprocate with the State of embarkation. In interdiction practices, such as in the U.S.-Cuba Agreement, the exchange of information is only one-sided since Cuban officials often criticize the U.S. for failing to report on what has transpired during interception operations. Most States of embarkation are left in the dark as to the intelligence gathering operations of Frontex, since such are done privately without any public oversight. Moreover, prevention and detection measures also include the right of visit. This Note has proved in the previous Parts that this exceptional right of visit was not properly complied with by the interdicting State.

As to the second duty, States are obligated to extend protection to the victims of human trafficking and the objects of migrant smuggling. This Note made it clear that smuggled migrants are not considered "victims" under the Protocol and this presents a complication in victim identification. Since the Migrant Smuggling Protocol failed to account the possibility of smuggled migrants being trafficked persons at the same time, the necessity to protect and process the valid claims of trafficked persons under the Human Trafficking Protocol is absent in the Smuggling Protocol. Transposed in the

context of interdiction practices in the high seas, interdicting States refuse to identify intercepted migrants as potential trafficked victims or even asylum-seekers. Because the contemporary practices of interdiction today include summary repatriation, the interception practices of States violate their duty to identify and protect victims of human trafficking. States, therefore, fail to attend to the needs of potential victims since they continue to be dismissed as illegal migrants. In this sense, the Migrant Smuggling Protocol is being used to circumvent the duties imposed in the Human Trafficking Protocol.

Turning now to the third duty, States are under the obligation to address the root causes of human trafficking and migrant smuggling. Though the language of this provision is ambiguous enough to accommodate a wide array of practices, interdiction practices must be assessed in light of the ordinary meaning of the provision in light of its object and purpose pursuant to Article 31 (1) of the Vienna Convention on the Law of Treaties. Upon close examination of the nature of interdiction practices by the U.S., Australia, and other E.U. Member States, this Note submits that push-back and non-entry policies do not address the root causes of human trafficking and migrant smuggling. If any, these practices merely drive both the perpetrator and the victims away from their responsibility. Without adequate protection to victims who would serve as witnesses and sources of information, smugglers, and traffickers would hardly be arrested and prosecuted. Moreover, a push-back policy only sends a victim of trafficking or smuggling into a cycle of victimization. Clearly then, interdiction practices at sea cannot be said to be consistent with the duty to address root causes of smuggling and trafficking.

Cognizant of the ramifications of interdiction practices in the high seas, on human rights obligations, this Note examines human right issues related to push-backs, non-entry, and relocation policies of coastal States. Interdicting States insist that human rights obligations and other norms under international law do not find application over actions of States in the high seas. This Note was able to uncover the irony behind the practice of interdiction. For instance, as in *Hirsi*, migrants who are refugees or asylum-seekers can rightfully challenge interdicting States for violating their right to *non-refoulement* if they are forced to be repatriated. The weight of legal authority reveals that States' push back policies violate the principle of *non-refoulement* even when committed extraterritorially. Moreover, the duty to render assistance to distress persons at sea must be read in consonance with human rights obligations, to charge interdicting States with the responsibility of allowing vessels and persons in distress to disembark temporarily in their shores. In this sense, the State practice on non-entry violates the customary principles laid down on the duty to search and rescue persons in distress. Hence, it is this Note's submission that a State's claim of enforcement jurisdiction in the high seas entails an equivalent responsibility on their part

to preserve, respect, and protect the human rights of those persons of whom they assumed effective control.

In the course of this Note, the initial legal collision between the regime of freedom of the high seas regime under the UNCLOS and the security and crime prevention imperatives under the Protocols gradually became clearer. Current interdiction practices against vessels carrying irregular migrants at sea serve neither the freedom of the high seas nor their transnational crime prevention obligations. In the process, this Note also uncovered several gaps in the UNCLOS and the Protocols that are abused by States in their interception measures. The ambiguous language of UNCLOS in the right of visit based on slave trading or statelessness does not provide adequate standards on how States should conduct enforcement mechanisms. Succinctly, the UNCLOS provided the grounds without setting the parameters; thus, making enforcement measures in the high seas prone to abuse. For its part, the Protocol lacked particularity in treating smuggling and trafficking outside of a single continuum. In doing so, the protection afforded under one Protocol cannot be extended to the other. Again, its ambiguous and sweeping language is susceptible to abuse.

Ultimately, the different gaps across various international legal regimes served as the perfect platform for States to apply their discretion in formulating their interdiction policies, which initially appear as legal but are, in fact, violative of the provisions of the UNCLOS and the Protocols. Like spokes on a wheel tied to a single hub, several aspects of these interdiction policies were crafted to take advantage of these gaps in the law. The outcome, therefore, is a complex strategy where freedom of the seas is compromised, where crime prevention rhetoric is capitalized, and where State responsibility for human rights is circumvented. Collectively, it was a perfect loophole for the perfect transgression. And when the dust has settled, the situation became clear — these interdiction policies of States, in their current form, serve no interest but their own. Furthermore, they come with an expensive price — the freedom of the seas and the protection of human rights.

Hence, in an era of imagined borders and strict migration controls, the regime of the high seas is slowly being transformed into a legal yin-yang of sorts. On the one hand, States liberally treat the high seas as an anchor on which they exercise extraterritorial jurisdiction. Yet, on the other hand, States make the high seas appear as a legal abyss where human rights and State obligations cease to apply. The result, therefore, is a mockery of the rule of law in the oceans — all the control with the State without any the responsibilities attached therein; the true outlaw of the sea.

VII. RECOMMENDATION

Striking a balance between maintaining a minimum order in the high seas, the prevention of transnational crimes, and protection of human rights requires a multi-level response and cooperation of the international community. In this light, the recommendation of this Note is divided into three stages: (1) clarity; (2) accountability; and (3) operability. All of which are designed to harmonize the inconsistencies across various legal regimes in the context of transnational mobility of persons at sea.

A. On Clarity: Reconsider Slave-Trading Enforcement Regime in the UNCLOS as Applying to Human Trafficking and Migrant Smuggling

As demonstrated in this Note, most of the sources of contentions in international law stem from the lack of a definitive interpretation of particular provisions of a convention or the parameters of a certain norm. It is necessary to seek clarification on the interpretation of the relevant provisions under the UNCLOS, the Human Trafficking Protocol, and the Migrant Smuggling Protocol. In this wise, this Note advocates that the United Nations General Assembly submit a request for an advisory opinion from the I.C.J. on matters relating to the right of visit of States based on reasonable suspicion of slave trading and statelessness under the Article 110 of the UNCLOS and the right of visit under the Article 8 of the Migrant Smuggling Protocol.

In this request, the General Assembly should ask the following questions:

- (1) Does the right of visit based on reasonable suspicion of slave trading under Article 110 of the UNCLOS include “human trafficking” as defined under Article 3 (a) of the Human Trafficking Protocol?;
- (2) What are the parameters of the enforcement jurisdiction granted to coastal States against stateless vessels in the high seas in consonance with the right of visit under Article 110 of the UNCLOS; and
- (3) To what extent are coastal States allowed to exercise enforcement jurisdiction over a vessel reasonably suspected of migrant smuggling under Article 8 of the Migrant Smuggling Protocol?

Moreover, the Philippines should submit a written statement containing its position on the matters raised. For the first question, this Note recommends that the Philippines advocate for the inclusion of “human trafficking” within the term “slave trading.” The purpose of this claim is to enable States combat human trafficking at sea. Given the lack of a right of visit in the Human Trafficking Protocol, the right of visit against vessels

involved in slave trading may used by States as legal basis for interdiction of vessels reasonably suspected of human trafficking. This would address the need for a more potent crime prevention measure against human trafficking with all the protections for its victims attached therein. Currently, the only relevant regime under international law for interdicting vessels suspected for trafficking is the Migrant Smuggling Protocol. It is this Note's submission that the Migrant Smuggling Protocol lacks the victim identification and victim protection safeguards under the Human Trafficking Protocol. Hence, as noted in this Note, States using Migrant Smuggling Protocol as basis for interception of vessels carrying trafficked persons would ultimately overlook or ignore the protections afforded to the victims of trafficking since they are generally labeled as "smuggled migrants." The Philippines may utilize the principle of purposive interpretation based on subsequent practice of States under the Vienna Convention on the Law of Treaties⁷¹⁸ to argue that human trafficking is included in slave trading.

As for the second question, the Philippines should maintain the position argued in this Note with respect to stateless vessels.⁷¹⁹ This Note submits that there is a legal ground for States to interrupt stateless vessels carrying migrants in the high seas, but it is only limited to the procedures in the right of visit. The position, therefore, should be that stateless vessels are only subject to the jurisdiction of the interdicting State insofar as the right of visit under Article 110 permits them to do so. Hence, in the context interception of vessels, and absent any customary jurisdictional nexus, the push-back, non-entry, and relocation interdiction policies constitute a transgression of the right of visit.

For the third question, the Court should be requested to interpret the standards laid down in Article 8 of the Migrant Smuggling Protocol. The Philippines' position on the requirement of "good reason to believe" could reflect this Note's submission that such suspicion must be founded on concrete intelligence that can only be obtained through genuine cooperation and not just based on mere inchoate observation.⁷²⁰ Moreover, as with this Note's position, the Philippines could argue that the extent of the enforcement powers in the right of visit under the Migrant Smuggling Protocol is similar with the right of visit under the UNCLOS. The interception of vessels suspected of migrant smuggling is only limited to boarding, inspection, and search. Finally, the act of interception in the high seas based on this right of visit would trigger the application of the rights of the persons on board, which would mean that the interdicting State is under the obligation to process their claims either as trafficked persons or as refugees.

⁷¹⁸ VCLT, *supra* note 430, art. 31 (3) (b) & (c).

⁷¹⁹ Refer to Part III.

⁷²⁰ *Id.*

This Note recommends a request for an advisory opinion because of its one main advantage — such request may be answered by the I.C.J. without need for the consent of other States as such proceedings do not partake of the nature of a contentious case.⁷²¹ Ultimately, this request for advisory opinion, if granted, would lead to two possibilities: one, the declaration and interpretation of the I.C.J. of the subject treaty provisions could be considered as a preparation by some States for a filing of a contentious case against interdicting States such as Australia, the U.S., Italy, Spain, and others; and two, the declaration by the Court can be used as a legal basis for subsequent actions by international organizations in combatting transnational crimes and in protecting human rights of all the persons on board.

B. On Accountability

1. Engaging State Responsibility in a Dispute Settlement under the UNCLOS

This Note recognizes that measures to engage the responsibility of a State under international law may not be the most practicable or the most convenient for both State Parties, especially when the consent of the other party is required. Yet, if possible, the biggest advantage in contentious cases before the ITLOS is that its decisions are binding upon the parties.⁷²² Parties to the UNCLOS may engage the compulsory dispute settlement mechanism in the treaty itself.⁷²³ According to Article 286 of the UNCLOS, “[s]ubject to [S]ection 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to [S]ection 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”⁷²⁴

In addition to this, a State-Party is free to elect any of the following forums:

- (1) The International Tribunal for the Law of the Sea established in accordance with the UNCLOS;⁷²⁵
- (2) The International Court of Justice;⁷²⁶
- (3) An arbitral tribunal constituted in accordance with the UNCLOS;⁷²⁷ and

721. See BERNAS, *supra* note 253, at 273-74 (citing Statute of the International Court of Justice art. 36, ¶¶ 2 & 3, June 26, 1945, 1 U.N.T.S. 993).

722. UNCLOS, *supra* note 14, art. 296.

723. *Id.* art. 286.

724. *Id.*

725. *Id.* art. 287, ¶ 1 (a).

726. *Id.* art. 287, ¶ 1 (b).

- (4) A special tribunal constituted in accordance with the UNCLOS for one or more of the categories of disputes specified therein.⁷²⁸

However, the UNCLOS provides for limitations and exceptions to such compulsory exercise for jurisdiction.⁷²⁹ One category that falls under this exception is disputes relating to law enforcement activities.⁷³⁰ Applied in the context of this Note, Indonesia, being an injured flag State, may file a request for compulsory settlement of disputes before the ITLOS. However, given Australia's written declaration opting out of disputes involving law enforcement activities,⁷³¹ Indonesia must secure first the consent of Australia for the compulsory jurisdiction of the ITLOS to set in.

2. Vigilance over E.U.'s Request for Authorization before the Security Council

The UNSC is an organ of the United Nations primarily responsible for "the maintenance of international peace and security."⁷³² With respect to issues relating to international peace and security, the UNSC may authorize permissible use of force to achieve its peace and security goals.⁷³³ The decisions of the UNSC in peace and security matters are considered binding upon the Member States of the United Nations.⁷³⁴

Currently, the E.U. is seeking authorization from the UNSC in order to intensify its efforts in combatting human trafficking and migrant smuggling.⁷³⁵ The proposal includes E.U.'s ambitious plan to intercept and attack vessels used for human trafficking and migrant smuggling in the territorial waters of Libya,⁷³⁶ despite the latter's vehement protests.⁷³⁷ In this

727. *Id.* art. 287, ¶ 1 (c).

728. UNCLOS, *supra* note 14, art. 287, ¶ 1 (d).

729. *Id.* art. 298 (b).

730. *Id.*

731. International Tribunal on the Law of the Sea (ITLOS), *Declarations of States Parties Relating to Settlement of Disputes in Accordance with Article 298 (Optional Exceptions to the Applicability of Part XV, Section 2, of the Convention)*, available at https://www.itlos.org/fileadmin/itlos/documents/basic_texts/298_declarations_June_2011_english.pdf (last accessed Aug. 31, 2016).

732. U.N. Charter art. 24.

733. *Id.* arts. 41 & 42.

734. *Id.* art. 25.

735. Alasdair Sandford, Mogherini asks UN Security Council to back EU migrants plan, available at <http://www.euronews.com/2015/05/11/mogherini-asks-un-security-council-to-back-eu-migrants-plan> (last accessed Aug. 31, 2016).

736. Ian Traynor, EU draws up plans for military attacks on Libya targets to stop migrant boats, available at <https://www.theguardian.com/world/2015/may/>

light, this Note recommends that United Nations Member States be vigilant in protecting common interests over ocean space and in the protection of human rights. The E.U. capitalizes on the link between irregular migration and security risks, paying particular attention to the operation's nexus with terrorist networks.⁷³⁸ This Note admits that most decisions in the international community are more political than legal. And this recommendation would likely qualify as a political one. Yet, this Note urges a legal discourse against the request for authorization of the E.U. as it will likely lead to negative consequences not just in the maintenance of peace in the Mediterranean but also, in the protection of the rights of the migrants as they will be the ones who will be caught in the crossfire.

C. On Operability

This Note encourages the international community to seek proactive measures to improve on the standard of practice of States when carrying out obligations on matters relating to maritime safety and navigation, including ensuring the safety and protection of those aboard vessels at sea. At this point, this Note proposes the setting of key areas on maritime safety that would lead to recommendations that would guide coastal and maritime States in the conduct of their duties under relevant conventions. It is this Note's submission that the leadership of the I.M.O. is key to promulgating uniform rules of conduct both in rescue missions and in the disembarkation of rescued persons at a place of safety. As the primary body tasked to "[facilitate] the general adoption of the highest practicable standards in matters concerning the maritime safety [and] efficiency of navigation,"⁷³⁹ the I.M.O. is empowered to "[p]rovide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to [g]overnments and to intergovernmental organizations, and to convene such conferences as may be necessary[.]"⁷⁴⁰

This Note takes note of the recent I.M.O. meeting with high-level United Nations agencies aimed at addressing unsafe migration by sea.⁷⁴¹

10/eu-considers-military-attacks-on-targets-in-libya-to-stop-migrant-boats (last accessed Aug. 31, 2016).

737. BBC News, Mediterranean migrants: Libya rejects EU military plans, *available at* <http://www.bbc.com/news/world-africa-32686579> (last accessed Aug. 31, 2016).

738. Traynor, *supra* note 736.

739. Convention on the International Maritime Organization art. 1 (a), *adopted* Mar. 6, 1948, 29 U.N.T.S. 3 (entered into force Mar. 17, 1958).

740. *Id.* art. 3 (b).

741. International Maritime Organization (IMO), UN agencies meet to address unsafe mixed migration by sea, *available at* <http://www.imo.org/en/>

Given I.M.O.'s limited jurisdiction with respect to maritime safety and navigational matters, the meeting acknowledged an inter-agency approach in creating relevant alternative responses to unsafe irregular migration at sea. This Note, therefore, outlines points for agenda relevant to each agency:

- (1) For the Legal Committee of the I.M.O., the UNODC, and the United Nations Division for Ocean Affairs and the Law of the Sea to issue guidelines on the proper procedure on visits for stateless unsafe vessels reasonably suspected of trafficking or smuggling.
- (2) For the UNODC, to gather statistics and reports on the best practices of States in victim identification and victim protection, especially in situations involving trafficked persons, who are initially intercepted during smuggling. In the absence of the available data, UNODC may issue guidelines for law enforcement officials to report its intelligence-gathering strategies for interception.
- (3) For the Maritime Safety Committee of the I.M.O., in conjunction with U.N.H.C.R., to issue more definite standards in defining the term "place of safety" within the context of search and rescue of irregular migrants at sea. The said agencies must revisit the *Guidelines on the Treatment of Persons Rescued at Sea*.⁷⁴² This Note further submits to change the "ad hoc" standards for place of safety as to mandate the nearest coastal State as the State of primary responsibility for the disembarkation of rescued persons, especially in cases where there is imminent danger to the lives of the rescued persons. Moreover, the term "imminent danger" must necessarily include "well-founded fear of persecution" or "reprisals of traffickers and smugglers against migrants."
- (4) For the Maritime Safety Committee, Office of the United Nations High Commissioner for Human Rights, and the UNODC to issue standard operating procedures that prohibit rescuing States from requiring initial assessment on the legal documents of rescued persons before allowing to disembark. Pre-screening and initial assessments are only allowed for the purposes of identifying humanitarian and medical assistance needed by rescued persons.

MediaCentre/PressBriefings/Pages/04-unsafemigrationbyseaopening.aspx (last accessed Aug. 31, 2016).

742. IMO Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea*, MSC 78/26/Add.2 (May 20, 2004).

- (5) For the UNODC, to issue policy guidelines for interview and process of potential victims of trafficking. This process is vital in detecting victims of trafficking who might initially appear as smuggled migrants. Forced repatriation, without process, must not be allowed.

The measures enumerated above are designed to protect trafficked persons, economic migrants, and asylum-seekers from undue delay and unjustified refusal by the interdicting State in rendering adequate humanitarian, medical, and legal assistance.